Patricia Siu Won Ng
Down and out and denied in London: Appropriate and inappropriate dispute processes for homeless applicants
PhD

Abstract

The principal question addressed in this thesis is: how do the vulnerable homeless people in London fare when they experience problems with their homeless applications?

Legal and other discourses on alternative dispute resolution have hitherto given very little attention to the issue of access to justice for homeless people. In addition, the idea of 'appropriate' dispute processing in relation to homeless applicants is a neglected area in the literature and in practice. The present study shows that in London homeless applicants do not fare well when they attempt to claim their potential emergency housing entitlement through the civil justice system for three main reasons. First, the homeless application process itself is complex, and often difficult for people to cope without advice, guidance and sometimes representation. Secondly, the first stage appeal internal review is not an appropriate dispute process for homeless applicants with an unsatisfactory homelessness decision. Thirdly, the use of homelessness mediation by local authorities is potentially a homeless application containment device.

The methodology adopted for this study includes the collection and analysis of case studies, the carrying out and assessment of in-depth interviews, an examination of relevant strands of literature, as well as corpus of laws.

Not all problems transform into a dispute between homeless applicants and housing authorities. There are several reasons for this, including various problems that accompany homelessness. It would be helpful if the homelessness legislation were to be simplified. Housing law practitioners are only one type of professional from whom homeless applicants seek help. With the deplorable state of legal aid, applicants would be in a better position if they were able to seek redress with minimum advice and guidance and without the help of a representative. Homelessness mediation might enable homeless people to gain greater access to justice provided mediation is made available to all potentially homeless people. However, the core processes of facilitative mediation, as well as the principles of mediation (confidentiality, voluntary participation, fair process, impartiality) would need to be respected in a manner in which they are not at present. This study argues, however, that the interrogatory approach of the ombudsperson in an enhanced scheme as an external reviewer to replace the internal review is the most appropriate match for applicants wishing to review unsatisfactory homelessness decisions.

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Down and Out and Denied in London:

Appropriate and Inappropriate Dispute Processes for Homeless Applicants

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Thesis submitted for the Degree of Doctor of Philosophy

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ABSTRACT

This study examines certain aspects of the circumstances and problems of the most vulnerable homeless people in contemporary British society, especially those living in London. An additional and related purpose of this research is to provide an examination of the concept of "access to housing justice" in the context of the more general discourses on dispute resolution and civil procedure reform. 'Housing justice' concerns access to housing on both substantive and procedural levels; this dissertation focuses primarily on the procedural aspects of this issue.

The core empirical question the present study addresses is: how do the most vulnerable homeless people in London fare when they make their homeless applications? This research describes, and demonstrates the manner in which, in many instances homeless people do not engage in a continuing dialogue or negotiations with the local authority in asserting their legal rights to be considered for emergency housing assistance. The unfortunate fact is that, a limited supply of public housing means that many vulnerable people remain homeless. However, dispute resolution processes should match the dispute. In the case of the first stage appeal process for homeless applicants, the 'forum' does not match 'the fuss.'

A major concern of many writers on dispute processes is imbalances of power between disputing parties. The problems caused by such imbalances were an important aspect of some of the principal arguments applied against the greater use of informal dispute processes in the 1980s in the Anglo-American common law world. This thesis therefore considers the continued relevance of such critiques in the current context of access to housing justice in London, and in so doing it offers a jurisprudential contribution to dispute resolution studies.

The homeless in London are often in a severely disadvantaged position, and the thesis considers the extent to which it is therefore appropriate to extend alternative dispute resolution methods to this particular area of social life. The most important substantive area of legislation is the *Housing Act 1996,* as amended by the *Homelessness Act 2002.* This establishes the process that a homeless person must go through in order to be considered for immediate temporary housing. The legislation is meant to provide a safety net for the more vulnerable among the homeless. However, the main remedy available for perceived grievances concerning administrative decisions made under the Act is rooted within a litigation framework. This dissertation argues that the most appropriate dispute resolution process should be one that is matched to the homeless applicants' dispute with the local authority. The thesis demonstrates that litigation is not always an appropriate framework within which to attempt to resolve such disputes. In support of this contention, the present study assesses the behaviour of potential disputants within the "naming, blaming, and claiming" analytical paradigm provided by Feltstiner, Abel and Sarat.

Legal and other discourses on alternative dispute resolution have hitherto given the issue of access to justice for homeless people very little attention. This thesis, in examining

the legal and institutional frameworks within which the vulnerable homeless in London seek access to housing, therefore fills a significant gap in the literature. The 1999 changes in England and Wales in civil procedure, legal aid, and the *Human Rights Act 1998* form the backdrop in the assessment of the processes by which the homeless seek access to housing justice. Finally, the thesis concludes with an analysis of the relevance of its findings for wider debates within the discourses of "alternative dispute resolution."

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ABBREVIATIONS

General

ADR	Alternative dispute resolution
CAB	Citizens Advice Bureau
CLACs	Community Legal Advice Centres
CLANs	Community Legal Advice Networks
CLS	Community Legal Service
CPA	Comprehensive Performance Assessment
CPR	Civil Procedure Rules
DCA	Department for Constitutional Affairs
DCLG	Department for Communities and Local Government
DETR	Department of Environment, Transport and the Regions
DTLR	Department for Transport, Local Government and the Regions
DV	Domestic violence
EEA	European Economic Area
EU	European Union
GLA	Greater London Authority
HD	Housing Department
HOC	Housing Options Centre
HLP	Housing law practitioner(s)
HPA	Homeless application
HPU	Homeless Persons Unit
IH	Intentional homelessness
LAB	Legal Aid Board
LAG	Legal Action Group
LA	Local authority
LB	London Borough
LGO	Local Government Ombudsman
LSC	Legal Services Commission
NASS	National Asylum Support Service
NFP	Not-for-Profit sector
ODPM	Office of the Deputy Prime Minister
OOH	Out of hours
PN	Priority need
SS(A/D)	Social Services (Authority/Department)
TA	Temporary accommodation

Legislation

CA89	Children Act 1989
HA96	Housing Act 1996
NAA48	National Assistance Act 1948
NHSCCA90	NHS and Community Care Act 1990

International Treaties

ECHR	European Convention on Human Rights
ICESR	International Covenant on Economic, Social and Cultural Rights

TABLE OF CONTENTS

Page

Declaration 002
Abstract and Acknowledgements 003
Table of Abbreviations 006

Part A. Introductory

1. Introduction

A. Introductory 011
B. Structure of Thesis 014
C. Context and Background 015
D. Methodological Considerations 021
E. Theoretical Perspectives 025

Part B. Down and Out in London

2. Homelessness in London: (1) Research Findings

A. Introduction 041
B. Definition of Homelessness 043
C. Substantive Problems Arising in the Case Studies 046
D. The Case Studies in Context 047
E. Causes and Consequences of Homelessness 051
F. Conclusion 061

Page

3. Homelessness in London: (II) Social Vulnerability

A. Introduction 063

B. Government Policy and Homelessness 065

C. The Homelessness Legislation 068

D. Legal Definition of 'Vulnerability' 074

E. The Existing 'Priority Need' Categories 080

F. The 'New' Priority Need Categories 084

G. Conclusion 089

Part C. Frameworks for Dealing with Homelessness

4. Institutional and Legal Frameworks for Dealing with Homelessness

A. Introduction 091

B. Sources of Law 093

Part I: Institutional Frameworks

C. The Civil Court System 096

Part II: Legal Frameworks

D. The Homelessness Legislation 101

E. Emergency Housing Assistance under Other Legislation where there are Community Care Issues 108

F. *Human Rights Act 1998* and the Impact of International Law 114

G. Conclusion 117

Page

Part D. Access to Justice Issues

5. Access to Justice Problems Experienced by Vulnerable Homeless Applicants: (I) The Non-emergence of Disputes. Research Findings

A. Introduction 119

B. Barriers to Taking Appropriate Steps to Addressing Disputes 121

C. The Access to Justice Issues 133

D. Conclusion 139

6. Access to Justice Problems Experienced by Vulnerable Homeless Applicants: (I) Legal Services

A. Introduction 141

B. Experiences of Clients in Seeking Assistance from Services: Three Cases 142

C. The Changing Landscape of Legal Services 152

D. Conclusion 162

Part E. Decision Making Processes

7. Adjudication

A. Introduction 164

B. Administrative Decision-making Process 165

Page

C. Existing Methods of Resolving Homelessness Decision Disputes 173

D. Civil Justice System: Twenty First Century Vision 181

E. Conclusion 188

8. Mediation and Homeless Applicants

A. Introduction 189

B. Homelessness Prevention Work and Homelessness Mediation 192

C. Homelessness Mediation 205

D. Analysis and Recommendations 223

E. Conclusion 228

9. 'Alternative' Processes and Ways Forward for Homeless Applicants Who Need Access to Justice

A. Introduction 231

B. Use of 'Alternative' Processes and Disputes Involving Public Bodies 233

C. The Issue of Power Imbalance 242

D. Ways Forward 247

E. Conclusion 251

Part F. Conclusions

10. Conclusions 253

Bibliography 266

Appendices 288

Chapter One
Introduction

A. Introductory

This dissertation examines the position of the most vulnerable homeless in contemporary British society in terms of access to housing justice. The study focuses on homeless people in London who need to gain emergency housing assistance from their local authorities. The principal question to be addressed is: how do the vulnerable homeless people in London fare when they make their homeless applications?

The present work is intended primarily for lawyers, but is also relevant for housing policy makers as well as sociologists. As the dissertation focuses on the accessibility of housing justice in terms of access to local authority emergency housing assistance, this study will be of particular interest to lawyers for two reasons. First, because it provides an analysis of the homelessness legislation placed within a social context. This particular area of analysis should also be useful for housing policy makers and sociologists, who are interested in the homelessness legislation, the manner in which it operates and its social dimensions. Secondly, the homeless in London are often in a severely disadvantaged position, and this thesis considers to what degree it is appropriate to extend alternative dispute resolution (ADR) methods to this particular area of social life.

This study is timely, in the sense that the 1999 Woolf civil justice reforms in England and Wales recognise the value of resolving disputes through non-judicial methods. The research findings of the Woolf civil justice enquiry centred on the use of ADR techniques as a time and money saving device for both courts and litigants. Lord Woolf identified principles that he believes the civil justice system should meet to ensure access to justice. One of the principles identified is that people should start court proceedings to resolve disputes only as a last resort (Woolf 1996:4). This principle was eventually included in the Civil Procedural Rules as well as the Pre-

Action Protocol for Judicial Review.[1] Disputants would be encouraged to use other "more appropriate means" when these became available. However, the emphasis of the use of litigation only as a last resort cannot necessarily be regarded as really offering broader choice to litigants, if a particular dispute is best resolved by litigation.[2] This study believes that the matching of the most appropriate dispute resolution technique to the legal conflict in hand is extremely important if the problem is to be resolved satisfactorily, especially from the point of view of the parties in disagreement with each other.

This present work is also motivated by the conviction that the civil justice law reforms in England and Wales have taken place in the context of a lack of "solid empirical foundation" (Genn 1999:1). Cranston, the academic consultant appointed to assist Lord Woolf in his access to justice enquiry, admitted that "not a great deal of social research" had been undertaken in the civil justice area (1995:33). In recognition of the lack of available social research material on civil justice, every effort has been made in this study to understand the difficulty that homeless people experience in gaining help with grievances and problems in attempting to gain emergency housing assistance by the local authority. If homeless people do not engage in the dispute resolution processes themselves, it can be argued that established processes or procedures are not accessible to such people. Hazel Genn's *Paths to Justice* research focused on the behaviour of people when dealing with "non-trivial justiciable" civil problems. One of the research findings was that over half of those members of the public who took no action in order to try to resolve their problems were on a low income of less than £10,000 per year. This group of people who 'lumped' or did nothing about their problem were found to be more likely to be living in rented accommodation than those who took action (Genn 1999:69). For homeless people, whose possessions and proof of identity and income – essential in the application for legal aid – may be stored in different locations, the problems are

[1] Pre-Action Protocols are designed to encourage the early exchange of information about a claim. The hope was that such information exchange would enable the parties to agree to a settlement before the issue of proceedings, and to ensure that parties will be able to meet the time limits if court proceedings are issued. The court might impose sanctions for non-compliance with the protocols. See www.justice.gov.uk

[2] The government does, however, recognise that particular cases can only resolved by adjudication – see Government Pledge in 2001 that Public Bodies would resolve disputes by ADR whenever appropriate (www.justice.co.uk, see also Chapter Nine of this dissertation).

magnified. A major difficulty for housing law practitioners assisting the homeless to access housing justice is encouraging the homeless applicant to engage with the necessary processes until a final decision is reached.

The notion of 'housing justice' is not one that has been explored so far either in housing law discourse or the access to justice literature. An aim of the thesis is to address this gap in the literature by examining the idea of 'housing justice.' The present study focuses more specifically on the procedural aspects of housing justice. This work considers the most appropriate dispute resolution process that would engage aggrieved homeless applicants, as well as give them a fair decision. The reason why this dissertation focuses on procedural dimensions is because the resolution of homeless applicants' disputes with local authorities have hitherto not been considered in the context of alternative dispute processes and discourses. Housing justice cannot guarantee housing for everybody in need and the discussion in this area necessarily concentrates on the dispute resolution process involved. It is accepted that overall, a fair and just decision without accommodation may seem like a meaningless decision to a homelessness applicant. However, in many cases, the dispute resolution processes used in the context of homeless application disputes does have a significant impact on the substantive outcome, and it is this aspect of homelessness that the dissertation examines.

It is hoped that this study throws light on the difficult position of the vulnerable homeless in London in accessing housing justice, a group of people hitherto not considered within the access to justice and related literature. Further, it is hoped that an examination of ADR techniques within the context of access to justice literature will enable readers to have a greater appreciation of the value of ADR techniques when used appropriately.

This work covers a wide range of themes in the context of the housing and homelessness as well as dispute resolution and access to justice literature. The thematic analysis stretches from an examination of vulnerability, to the difficulties homeless people face in trying to access housing justice in substantive, and procedural terms. The statutory homelessness process itself is a cause for concern, as is the existing first stage appeal process. Finally, homelessness and how the problem

of homelessness should be dealt with, is a matter of global concern – even if the issue of procedural access remains a regional or domestic matter. Qualified legal practitioners have mainly written about housing and homelessness, and the emphasis has been on available legal remedies, procedural advice, or legal interpretative points. In contrast, the empirical data gathered for this study has been collected from the perspective of an unqualified practitioner, working on the 'frontline' with people at different stages of homelessness. If homeless people do seek advice, they are more likely to approach the local authority or an independent advice agency first. It is the advisors who have to diagnose problems in order to assess what assistance the client needs. This may result in a referral to a solicitor or the advice agency taking on the case. Often, people prefer the advice agency to work on their case. People might also make a decision not to pursue their case or abandon their case at a later stage, sometimes not having made a conscious decision to do so. However, other problems in people's lives, in addition to the homelessness, might discourage them from continuing with their case.

B. Structure of Thesis

This introductory chapter is intended to set the thesis in its contexts: theoretical, empirical and methodological. In particular, this chapter gives an overview of the discourses on the problem of homelessness, access to justice, dispute processes and resolution – considered in greater detail later in the dissertation. Many of the chapters evaluate information gained from case studies gathered for this study, as well as twenty in-depth interviews which were carried out with five housing law practitioners, five community mediators and ten people with housing and housing related problems. Chapter Two provides background information on homelessness in London, while Chapter Three discusses the meaning of 'social vulnerability' – an important concept in the law, legal processes and legal discourse surrounding homelessness. Chapter Four focuses on the institutional and legal frameworks for dealing with homelessness. Chapter Five begins with a discussion on the transformation process in the early stages of a dispute, and the possibility that a problem might not develop into a dispute, especially for homeless applicants. The discussion then widens out into the more general access to justice issues. Chapter Six of the dissertation starts with a more narrowly focused examination concerning the

range of professionals, including housing law practitioners that clients seek help from, and ends with an assessment on the issue of access to legal services. Within this study, a discussion in relation to the increasing difficulties people face in gaining legal assistance will be a more limited one. This is because this thesis focuses more specifically on appropriate dispute processes that homeless applicants feel confident using without the need to resort to a representative. Chapter Seven concentrates on the existing methods of resolving homeless application disputes – by internal review and statutory appeal. Chapter Eight discusses the misuse of mediation as a homelessness prevention tool by local authorities in relation to potential homeless applicants, while Chapter Nine evaluates the Law Commission's *Housing: Proportionate Dispute Resolution* project, and its relevance to this study. This particular chapter also examines potential ways forward for the vulnerable homeless in society to ensure that dispute resolution becomes a meaningful process to homeless applicants who are not satisfied with their decision. This is followed by the conclusion, which explores the theoretical significance of the study's findings.

C. Context and Background

Before we proceed to the methodological considerations, an overview of the homelessness legislation, process and government policy on homelessness has been provided for the reader who is unfamiliar with such areas.

The Homelessness Legislation and Homelessness Policy

The legislation that has the greatest impact on this study is the *Housing Act 1996* Part VII, as amended by the *Homelessness Act 2002*. It is the 1996 Act that contains the potential 'housing rights' of specific groups of homeless people (homeless applicants) in 'priority need' for emergency housing assistance. Even the groups of people that the homelessness legislation has been constructed to assist do not have an automatic entitlement to emergency accommodation. This is because authorities have discretion in the decision-making process throughout the different stages of the enquiry. The stages of enquiry include homelessness, in terms of whether the applicant has accommodation that he or she could reasonably be expected to occupy along with any members of the household. In assessing 'priority need,' for example, only families in which the children are dependent and are living or are expected to

live with the family would be considered to be in priority need for emergency housing assistance. In carrying out their assessments of homeless applications, local authority officers must have regard to the Homelessness Code of Guidance, which contains much more information to assist officers in their assessment duty.

After the early 1970s, local housing authorities had a reactive duty placed on them to assist homeless people in need of housing. Local housing authorities were expected to provide emergency accommodation only if a legal duty was owed. The 2002 Act, which was implemented on 31 July 2002, placed a new duty on local authorities to deal with local homelessness problems on a strategic level. Since 2002, the prevention of homelessness has been a key matter for local authorities to address, and social services departments have a clear duty to take into account the homelessness strategy in their work. Further, social services departments are expected to assist the housing authority in both the homelessness review and strategy process.

Under the current corpus of laws (legislation and case law) governing homelessness and potential housing rights, the duty on local authorities to provide emergency housing assistance is generally not extended to those who are 'vulnerable' in a lay person's understanding. Only specific groups of people who are in 'priority need' for local authority emergency accommodation are assisted – outlined in the main legislation[3]. Single applicants who are considered to be 'vulnerable' in legal terms form one of the 'in priority' need groups for emergency housing assistance. Even so, the legislation gives local authorities discretion to decide, within their local area, the particular definition of 'vulnerability' under the 1996 Act, as amended by the 2002 Act. As a result, local authorities are failing to assist those who are not strictly provided for by the legislation. In particular, in London, where there is a severe shortage of social housing, many single homeless people with multiple problems,

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[3] Section 189 of the *Housing Act 1996*, listed four categories of people as having a 'priority need' for emergency accommodation provided by the local housing authority. Chapter Three of this dissertation contains a detailed discussion of the priority need groups, which include pregnant women and families with dependent children. Single people would need to demonstrate 'vulnerability' in legal terms. Local authorities are expected to accommodate family members along with the applicant who is in 'priority need' The secretary of State has power to add these categories (section 189(2)) and this power was exercised in 2002 with the *Homelessness (Priority Need for Accommodation)(England) Order 2002*, which provides that six further categories of applicants have priority need. See Section F of Chapter Three for a detailed discussion of the newer 'priority need' groups.

which might include physical health problems, as well as undiagnosed psychiatric problems, fall through the net.[4] The 2002 Act[5] introduced, through statutory instrument, some amendments to the priority need categories, which have been extended to include homeless sixteen and seventeen year olds. Disappointingly, single people fleeing violence or threats of violence, as well as single homeless persons who formerly served in the armed forces, are not automatically deemed to be vulnerable. Such groups of people need to demonstrate vulnerability.

It is difficult for the legislation to keep up-to-date with the changes in need and use of public resources stemming from changing social problems. The existing legislation allows for a narrow interpretation of the homelessness legislation by local authorities, assuming they take the law into account at all (Loveland 1995). This is a problem which many people face when approaching a local authority in London for emergency housing assistance. Social changes should have an impact on official perceptions of what constitutes a vulnerable person. However, especially in the London boroughs, where there are vast housing shortages, local authority duty homelessness officers have a dual role of assessor and 'gatekeeper' of the local authority's resources. The consequence of the severe housing shortages is that it is difficult for local authority officers to take into account the changing perception of 'vulnerable people.' As a result, there are vulnerable persons who are not effectively provided for within the homelessness legislation, or who are not given a fair assessment.

The 2002 Act imposes a new duty on local authorities to be pro-active and strategic in managing the local homeless situation. Local authorities have a duty to construct homelessness strategies on a five-yearly basis to deal with homelessness on a local basis. Authorities completed their first homelessness strategies 31 July 2003, and the second reviews and strategies were completed in July 2008. The strategies are informed by a comprehensive review of the current homelessness situation, and include an estimate of the likely future levels of homelessness. At the same time, the level of available resources must be reviewed. However, as will be seen in Chapter

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[4] Empirical evidence to support this contention is provided, *inter alia*, by analysis of a number of case studies – reported in Appendix 2 of this thesis.
[5] The majority of the 2002 Act was implemented on 31 July 2002, apart from sections 13–16 (changes to allocations) and minor consequential amendments.

Eight of this study, since 2002, the government has produced a series of policy and guidance papers for local authorities, which focuses more on homelessness prevention work. In theory such an aim is appropriate and could enable some homeless people to help themselves. However, in reality the policy direction of the government in concentrating on prevention work has encouraged authorities to develop 'gatekeeping' practices, or the prevention of the making of homeless applications. As a result, the policy direction of the government has created tension between the local authority reactive duties under the 1996 Act to individual homeless households, and the more strategic homelessness prevention duty arising from the 2002 Act. The Department for Communities and Local Government (2006b) Homelessness Prevention Good Practice Guide discusses homelessness prevention tools that local authorities could use in order to prevent homelessness. Family mediation is listed as a homelessness prevention tool particularly to be used to assist young people. The DCLG sees homelessness mediation as assisting potentially homeless people to remain in their current accommodation, if possible. However, based on the types of mediation model that local authorities in London have adopted, this study will demonstrate that local authorities misuse mediation in relation to potentially homeless as well as actually homeless people. Such schemes are explored in Chapter Eight of this dissertation.

The Homelessness Process

It is useful, at this stage to discuss the statutory homelessness process an applicant goes through when attempting to gain assistance for his or her urgent and immediate housing need.

A person, who is in need of accommodation on an urgent basis in London, needs to approach his or her local authority for practical assistance. There are thirty-three local authority areas in London. In general, local authority staff usually direct anybody who is in housing need to the 'Housing Options Centre,' hereafter 'HOC.' Where local authorities do not operate an HOC, potentially homeless people are directed to the homeless persons unit (HPU), or the authority's housing advice centre or even to special teams. Clients have sometimes reported to me that when they tell the local authority staff at reception about their homelessness situation, they are sometimes informed that there is nothing the council can do to help or are told to

return to the HOC at a later date. Some London authorities apparently still operate a system where potential homeless applicants can talk directly to a member of staff at the HPU. Some authorities have established a team especially to work with single homeless people.

Where people do attend an HOC, staff need to gain an understanding of the person's housing or homelessness situation before assessing then informing and advising the person of his or her entire range of potential housing options. The officer might well direct a potentially homeless applicant to private rented accommodation by emphasising the advantages of living in the private rented sector. Potential homeless applicants who would otherwise be owed a homelessness duty by the authority in that situation would be offered a rent deposit to enable him or her to rent private accommodation. The officer at the HOC might, at the same time, emphasise the disadvantages of making a homelessness application.[6] The officer would stress the lengthy process an application takes, and the poor quality of temporary accommodation an applicant would very likely have to endure. I have worked with clients who have informed me of the very poor condition of accommodation they have been offered by the local authority – usually bed and breakfast hotel accommodation with very low hygiene standards, and accommodation where homeless people do not feel safe; this is partly because homeless people are sharing accommodation with other vulnerable people. The types of people sharing accommodation together could range from pregnant women or families with children, sharing communal facilities with vulnerable people who have diagnosed mental health issues, including those with drugs or alcohol problems.

Fairly recently (September 2007) one of my clients, Mr A, approached a local authority based in east London for housing assistance. Initially, Mr A was given advice and assistance to prevent him becoming homeless from his existing home. Mr A was due to be evicted by bailiffs from his private rented accommodation. However, when it became clear that it would not be possible for this client to apply to court to suspend the bailiffs warrant, the housing options officer gave my client the name and address of a local lettings agency. Mr A did approach the lettings

[6] I have attended a meeting with housing options staff at which this was openly discussed.

agency but could not afford to pay the deposit, which was the equivalent sum of seven week's rent, in order to secure further private accommodation. When I contacted the housing options officer about Mr A's situation, I was told that the only other assistance the officer could provide was to give my client a list of landlords (over fifty) who had accommodation to rent. The officer informed me that practical assistance would be given to my client to contact these landlords. Mr A's first language was not English, and he had had several strokes, which left him with a speech defect. Verbal communication with my client would require patience, and I told the housing options officer about this. It was not until I wrote an extremely detailed letter, which in effect was Mr A's homeless application, that my client was referred to, and hence gained access to, the Assessment Team. My letter triggered the duty of the local authority to carry out a homelessness assessment. The Assessment Team has sole responsible for carrying out enquiries in relation to homelessness applications. In an earlier telephone conversation I had with the housing options officer, she had informed me that having interviewed my client three times, there was nothing in Mr A's situation that convinced her my client could be assisted by the homelessness legislation. The housing options officer cited this as the reason for not referring my client to the Assessment Team. However, my intervention – the sending of the letter and medical reports to the HOC – put pressure on the housing options officer to ask my client to attend the Assessment Team so that he could be assessed as a homeless applicant.

This particular local authority operates a multi-tiered system in which the authority encourages people who need to make a homeless application to contact the council, at the local service centre, first by phone or a visit. The local service centre is the office nearest to where the person lived. Staff at the local service centre only refer the applicant to the Assessment Team if it appears that he or she is homeless, eligible for assistance and in priority need under Part VII of the *Housing Act 1996*. The local authority officer then books an appointment for the homeless applicant to return with supporting documentation and to attend the homeless persons section for an

interview. As a result of my intervention, Mr A was offered interim accommodation while the authority continued to assess his application.[7]

Having provided an overview of the homelessness policy and legislative framework, the methodological considerations will now be discussed.

D. Methodological Considerations

London has been selected for study because the extreme shortage of affordable housing and the high percentage of people on low income losing their homes means that in this city, the homelessness legislation is put to a severe test. The availability of social housing has decreased over the years due to the "right to buy" scheme enabling local authority tenants to buy their own homes with a considerable discount.[8] The maximum discounts available to purchase under this scheme were finally reduced in a number of local authorities (twenty-seven in London) in January 2003 (ODPM 2003c). Unfortunately, many of the acute housing shortage areas will not benefit greatly from this belated move by the government to prevent the sale of local authority property. Within London, where there is a greater pressure on public resources, particularly in terms of social housing, the local authorities have become adept at 'gatekeeping' these resources. This has led to homeless people to claim that they have been prevented from gaining emergency housing assistance from the local authority. In areas of acute housing shortage, local authority staff are likely to follow unlawful practice, probably at a greater scale in comparison to areas where there is less severe housing shortage. London was also selected for study for a very practical reason. My twelve years' experience as a housing advisor and caseworker has been

[7] Once an authority takes a homeless application, at the point the authority is satisfied that the applicant is homeless, in priority need and is eligible for assistance, interim accommodation must be offered to the applicant until a decision has been made (section 188 *Housing Act 1996* as amended by the *Homelessness Act 2002*).

[8] The *Housing Act 1985* enables secure tenants – within the public sector – to acquire the freehold or leasehold of their home depending upon whether the landlord owns the freehold or leasehold of the property. A secure tenant can only exercise his or her right to buy the property provided he or she has lived in that property from between two to five years. The property is sold subject to the value of the dwelling at the time of purchase. Tenants are given a discount of the sale value depending upon length of stay in the property prior to exercising his or her right to buy – the longer the stay in the property prior to purchase the greater the discount up to a set maximum amount. Changes to the right to buy scheme came into effect on 22 September 2008 after the *Housing and Regeneration Act 2008* received Royal Assent on 22 July 2008. See www.communities.gov.uk/housing/buyingselling/ownershipschemes/righttobuy/.

in the voluntary sector based in London. Being part of the phenomenon of working with the homeless in London has given me important insights into the issue of homelessness.

Two main sources of empirical data were gathered for this dissertation. First, selected empirical data from a professional journal of 'case studies' gathered from January 2001 until September 2002, while I worked as a housing advisor and caseworker. Secondly, a total of twenty-one in-depth interviews were carried out. Forty of the case studies from the journal can be found in Appendix 2 of this dissertation.[9] The names of all the clients who were interviewed as well as the case studies have been changed to protect their privacy. The cases were gathered in the course of the advice giving process. As the advice was often given over the telephone, it was not always possible to verify the facts in particular cases. The method of case studies selection was to "collect data that was rich and interesting, rather than vigorous" (Buchanan and Boddy 1983:33).

The case studies are not an account of the entire experience of all homeless people although they are representative of the particular client groups focused on in this study. The cases are typical of the range of homelessness experience I encountered in my daily work as a housing advisor. It is acknowledged that a drawback to this method of case collection is that selection of case studies is based on subjective rather than objective criteria. The cases provide qualitative data and are not to be treated as statistics per se. Although the case studies were gathered in the early part of this decade, the circumstances as outlined in those case studies, are still relevant today. The types of homelessness rarely change. The nature and complexity of problems that people experience, which leads to their homelessness captured in those cases are still experienced by people today.

The data gathered for the thesis addresses the need for information that provides 'pictures' of people's homelessness experience in London from the perspective of a housing advisor. The data assists in providing a greater understanding of homeless people's circumstances, and explains why some people do not seek help for their

[9] These case studies will also be referred to when appropriate within different chapters of the dissertation.

problems. The aim is to let the case studies "do the talking." The information specifically gathered for the present study should be seen as an extension of the work already done in the data gathering of such information (LB Camden and Centre for the Analysis of Social Exclusion 2000, Alexander 1998, Alexander and Ruggieri 1999 and Lemos 2000). Broadly speaking, this information supports the research findings of those earlier reports.

In addition, twenty in-depth interviews were carried out from August 2004 to July 2005, in order to consider in greater detail issues that came to light during the initial phase of data collection. These interviews were based on semi-structured questionnaires.[10] The aim of the interviews was to gather formal responses from both clients and practitioners in relation to issues that I was already aware of. Five of the interviews were with housing law practitioners (HLP) – apart from one caseworker with supervisory responsibility whose role was partly to provide advice and support to women fleeing from domestic violence. The selection of HLP was based on the fact that they worked within the voluntary sector – the setting I worked in – and all, apart from one worked for national organisations. In this study, the term HLP has been used to include paralegals that give advice, as well as solicitors. Five mediators, who were community mediators, were also interviewed.[11] My interest in interviewing mediators from a particular community organisation arose because that organisation had been involved in a project with a local authority in providing mediation to young people who became homeless as a result of conflict at home with their parents or carers. The project ran from September 2004 until March 2005. The responses of the two mediators who co-ordinated the homelessness mediation project will be discussed in Chapter Eight of this study. All practitioners were asked whether they had any clients (people who experienced housing and housing related problems) who were willing to be interviewed. Among the ten clients who were interviewed, six were experiencing or had experienced problems related to their homeless applications. Findings from these in-depth interviews are referred to when appropriate within different chapters of the dissertation.

[10] See Appendices 4, 5, 6 and 7.

[11] In September 2009, I carried out an interview with a former local authority officer, MedLA, who provided mediation to young people at a London council. A client, Ada (not her real name) who was forced to accept mediation carried out by an officer at another London council also contributed to this study. I was not able to interview Ada myself, but managed to put some questions to her through her housing advisor who worked for a voluntary organisation.

The client interviews focused on clients' attitudes to their problems, with a series of sixteen questions which aimed to draw out the issues that the Felstiner et al (1980-1) "naming, blaming, claiming" model concentrates on. In terms of the information needed for the dissertation it was important to distinguish between what action the client intended to take as well what action, in reality, he or she did take. In addition, if the client had sought advice about his or her problem, then it was useful to establish whether the client's course of action changed as a result of seeking the advice. Of interest to the research was the result that the client had hoped to achieve following the advice he or she had received and the actual result that he or she managed to achieve.

Other sources of information consulted include newspaper reports, and *Legal Action*, a journal for social welfare law practitioners. Finally, homelessness and related legislation at domestic, regional and international levels have also been consulted and referred to within this study.

Newspaper articles covering the period from, in particular 2001 until 2003 – when I also kept the journal of 'case studies' – were examined. It cannot be underestimated how important the views in these reports have been in shaping, public opinion and attitudes to the homeless in England. The articles reveal just how slowly legislation works in responding to the changing needs in society. Liddiard points out that homelessness is a "particularly media-friendly topic, offering – or more often than not being induced to offer – lurid tales of sex, drugs and violence which are common currency of the press" (1999:74). He poses two important questions and the issues raised by those questions are pertinent to this study, although the issue of the portrayal of homelessness by the media will not specifically be addressed within this thesis. First, despite the growing importance agencies attach to media coverage, what impact, if any, does this have on public attitudes towards homelessness? Secondly, what kind of influence, if any, does this media coverage have on policymaking? One point of importance here is that neither the media nor the press are homogeneous and, as it is generally known, there is an obvious distinction between the tabloids and the broadsheets. The latter containing detailed political coverage and comments are more likely to be read by policy makers.

The legislation that has greatest impact on this study is the *Housing Act 1996* Part VII, as amended by the *Homelessness Act 2002*. It is the 1996 Act that contains the potential 'housing rights' of specific groups of the homeless people in 'priority need.' Relevant case law generated by the Act has also been examined. The priority need groups contained in Part VII have been analysed with the most recent Homelessness *Code of Guidance*[12] issued by the Department of Communities and Local Government in July 2006. In addition, corresponding legislation, on community care, civil procedural reforms and the *Human Rights Act 1998*, have been considered. Further, significant legal reform reports such as the Woolf (1996) *Access to Justice. Final Report*, and the various Lord Chancellor's Department (as it then was) consultation documents and papers for legal aid reforms have informed this study.[13] Whenever necessary, and in order to bring greater clarity to the original intention of the legislation, Parliamentary debates have been referred to. Relevant European human rights case law has been considered. In addition, the international instrument of greatest relevance, the International Covenant on Economic, Social and Cultural Rights, including appropriate General Comments have been deliberated upon within the study. However, the regional and international dimensions have only been mentioned briefly because this dissertation focuses specifically on procedural access for certain categories of people in relation to English homelessness legislation. A discussion on the more general right to housing does not fall within the scope of this study.

E. Theoretical Perspectives

Having considered the methodology, the discussion will now concentrate on the theoretical issues that will be raised. The main objective of the study is to examine appropriate and inappropriate dispute processing in the context of the statutory homeless application procedures. The general theoretical framework adopted is that of dispute processing within the wider ADR discourse. However, because the discussion on dispute processes focuses on homeless people, the conversation

[12] In carrying out their assessments of homeless applications, local authority officers must have regard to guidance from the Code.
[13] See LCD (1998) and (1999b) for example.

necessarily takes place within strands of other areas of literature, including the following discourses: housing and homelessness, access to justice, civil justice, more specifically administrative justice. The significant discussions within the ADR discourse are first, the matching of dispute processes to cases, an idea originally put forward by Sander at the 1976 National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (the Pound Conference).[14] Secondly, mediation, and the relevance of mediation in homeless people's lives. Thirdly, the possibility of ADR in enabling greater access to justice for people with disputes in the context of the civil justice reforms within the English legal system and the use of court adjudication as a last resort.

The original idea of matching dispute processes to cases or "fitting the forum to the fuss" has been refined over the years. The manner in which disputes and dispute processes are to be matched is not an easy task. The question of 'appropriate' dispute processing is a continuing concern for commentators within the dispute resolution discourse. Sander and Rozdeiczer assert that to date there have been "at least four principal attempts to develop a taxonomy for deciding which process is best for a dispute" (2006:7), which includes the model that Sander and Goldberg (1994) designed.[15] There are three key factors, which the authors consider would affect the choice of process: goals, facilitating features, and impediments. Sander and Rozdeiczer identify 'facilitating features' as aspects of the case and parties that would assist in reaching an effective solution. Examples of particular aspects include good relationship between the parties or lawyers, or that the case is or the parties are amenable to problem solving. The appropriate dispute resolution mechanism would be the one that would enable successful dispute processing, making best use of the 'facilitating' features of the case or parties (2006:20). The authors suggest that 'impediments' would include issues such as non-communication, the need to express emotions, different views of facts or law, and so on. The 'right' match to the case or dispute would be the process that would deal with and overcome the impediments.

[14] See Moffitt 2006 for a summary of Sander's contribution within the ADR field.

[15] The other attempts were by Dauer (1994) who focussed on specific issues parties needed to address, but did not consider processes. The International Institute for Conflict Prevention and Resolution (2004) concentrated on business disputes. Niemic and colleagues (2001) considered all major court-annexed ADR. Sander and Rozdeiczer (2006) developed their model by building on Sander and Goldberg's 1994 analysis.

The following steps can be taken in an attempt to "fit the forum to the fuss": first, assume that mediation is the best process to start with. Secondly, consider when mediation could be inappropriate. In the third step, if mediation were considered to be an appropriate process then the parties will need to decide from a whole range of mediation processes. However, if mediation were considered to be inappropriate, then the parties would need to follow the three-step analysis of assessing the goals. Such an assessment includes the need to gain an understanding of what individual parties' goals are in terms of what they want to achieve, the relevance, if any, of other goals, such as fairness in process and fairness in outcome (Sander and Rozdeiczer 2006:17). The goals would also need to be prioritised and determined against the values attached to each goal. The goals of the other party would also need to be factored into the assessment process (2006:32–40).

Sander and Rozdeiczer argue that mediation is almost always a superior starting process (2006:32) unless it is considered inappropriate or insufficient for certain types of disputes (2006:36). Examples that Sander and Rozdeiczer give where mediation might be considered inappropriate include the situation where "a party's need to attain a goal that only a court or an arbitrator can provide." The authors give three examples in this situation: (a) where only adjudication can settle the dispute because a legal precedent – judgement – is required; (b) one of the parties might need to maximise or minimise the recovery or (c) because only public vindication will suffice. In addition, where the case depends on a matter of principle, mediation would not be appropriate, nor would the circumstances where there is a wholly frivolous claim, or because of the 'jackpot syndrome' (2006:36–37). The authors explain that a 'jackpot' syndrome is a situation, "when a party expects to achieve a very high payoff if there is no settlement (e.g. through litigation), and another party believes that this is very unlikely" (2006:note 73, see also Sander and Goldberg 1994:59).

Although Sander and Rozdeiczer advocate mediation as an appropriate starting process, they recognise that power imbalance could be an issue in relation to process selection, which they go on to address (2006:29). The authors concede that power balance is potentially problematic where parties decide to mediate the interests of the parties via facilitative mediation. In this situation, the more powerful party has an

opportunity to exploit such an approach. The question is whether a facilitative mediator could or should address the power imbalance between the parties. Should a mediator decide to tackle this matter, what steps ought to be taken? Alternatively, a rights-based approach process, such as adjudication, should probably be used instead. Sander and Rozdeiczer warn that in selecting the 'right' process or processes, it is important to investigate the source of power imbalance. The authors appear to suggest that the starting process of mediation could assist the parties to select the most appropriate process or series of processes that takes into account the power imbalances and addresses the issue.

The issue of power imbalance is explored within this study in assessing whether mediation might be an appropriate dispute processing mechanism for homeless applicants who have been issued with an unsatisfactory homelessness decision. Prima facie, we may have some reservations about using mediation where the dispute is between the state and citizen, as there is clearly power imbalance between the parties. In this study, the challenge by private individuals of unsatisfactory homelessness decisions is against the public authority. Some commentators can see the benefits in such a situation (Boyron 2006), while others are more sceptical (Ashton, Collier and Halford 2002). There may be some benefits in using mediation as a starting process, as suggested by Sander and Rozdeiczer. Thus "mediation would avoid the need for a judge, and at worst, the facts will have been established and the grounds sorted and clarified – thus in both cases saving judicial time and cutting costs" (Boyron 2006:326). Mediation would certainly introduce some flexibility and could help parties to remain open-minded for longer in terms of the solution sought. Byron reminds us that mediation enables a wider range of solutions to be available to the parties, and it is a point that Dyson LJ makes in the case of *Halsey* (2006:327).

However, I would still argue that appropriateness in the dispute process should be a key consideration in deciding whether mediation should or should not be used in a particular case, that is, unless mediation is used as a starting process. In the case of *Cowl* (a judicial review case), when the case was heard on appeal, the court was forceful in directing the parties, and was directly involved in planning the mediation process for the parties. Yet, Byron queries whether *Cowl* was an appropriate case to be mediated, bearing in mind the claimants were residents of a care home, and one

died during the course of the proceedings. In addition, the claimants had raised legal issues, which needed to be addressed and determined by the court. However, *Cowl* was decided during a period when courts penalised parties if refusal of ADR was considered to be unreasonable (Boyron 2006:337),[16] and it is therefore possible that today the approach of the court might be less forceful in encouraging mediation.

Is the best way forward to begin with mediation in all cases except in situations where mediation is clearly inappropriate? An argument can be made that in starting with mediation, parties might at least begin to communicate with each other and to look at the dispute differently. Mediation in this situation then would be used as a communication or information gathering tool, rather than a means to assist in the resolution of the dispute. Mediation can also assist in the venting of emotions if needed. Mediation might well be appropriate in the situation where there is a problem between homeless people who need to use services when these 'formal' relationships break down. Examples of services include day centres[17] or services providing practical support when these 'formal' relationships breakdown. The relationship might be between the support worker and a homeless or potentially homeless person, which then breaks down or between a service user and staff member. In the situation where the homeless person is staying in temporary accommodation – a landlord tenant situation – provided the problem is about the relationship between the landlord and tenant (or licensee), mediation would be appropriate.

This brings us on to the wider discussion within the ADR literature of the 'forms' or types of mediation, and whether mediation other than the classical facilitative type could be considered to be mediation or whether they are really hybrid or mixed processes. As Sander and Rozdeiczer put it, there is a "whole range of mediation processes" to choose from if mediation is accepted as being appropriate (2006:39). The authors do not consider mediation to be "a simple, pre-determined single

[16] See Chapter Nine for a further discussion.
[17] A day centre is a place for people who are homeless or at risk of homelessness, which provides a safe, welcoming and accepting environment. People at the day centre can meet other people, and are provided with basic services, such as food, shelter and washing facilities. There might be key workers (workers assigned to work with a particular person) on site to provide practical assistance. A range of services, such as medical care, and activities might also be provided. See http://handbooks.homeless.org.uk/daycentres/theory/terminology.

process, but a range of processes" and they list what they consider to be the most important kinds of mediation. The list includes evaluative, transformative and court-related mediation. However, there are problems with Sander and Rozdeiczer's characterisation of evaluative mediation. Riskin asserts that "the mediator who evaluates assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement – based on law, industry practice or technology – and that she is qualified to give such guidance by virtue of her training, experience, and objectivity" (1996:24). Riskin's view of evaluative mediation has been criticised by Love (1997), Kovach and Love (1998), Stulberg (1997) among others, who would probably see evaluative mediation as a mixed process. As Roberts and Palmer comment "if the process is to be mixed, then better to label it so, in order to enhance integrity of processes, disputant satisfaction and uniformity of practice" (2005:187). This is a position this study supports.

Since the implementation of the *Homelessness Act 2002*, the government has advocated a homelessness prevention approach to assist people in need of emergency accommodation. The prevention tools that the government suggest local authorities could use include family mediation. In assessing whether mediation, as a homelessness prevention tool, enables homeless applicants greater access to justice, this study concludes that in many instances, the models of mediation used by local authorities have been adopted in order to contain the number of homeless applications being made. In addition, it will be shown that the Relate[18] model of mediation with a counsellor is a mixed process – the intertwined processes of mediation and counselling – that affects the integrity of the mediation process (Roberts and Palmer 2005:187, also Roberts 2008:21–27). Mediation and family therapy "differ essentially in terms of their objectives, process and method, and theoretical assumptions" (Roberts 2008:21).

This brings us to the homeless person's position and what could sometimes happen to anybody experiencing any problem. Just as people could experience difficulties in matching dispute processes to the dispute, some people are not able to take action in

[18] Relate is a voluntary organisation, which provides relationship support services. Relate has a network of over 600 services across England, Wales and Northern Ireland. Relate became involved in homelessness work in 2002.

relation to their grievance. The issue of barriers to people taking appropriate steps to addressing disputes has been explored in this study, in relation to homeless applicants or people with housing problems. The "naming, blaming, claiming" paradigm that Feltstiner, Abel and Sarat constructed has been used as an analytical tool to assess such a phenomenon. The "naming, blaming, claiming" concept is a framework for the studying of processes by which injurious experiences may be perceived (naming), which may become grievances (blaming), and ultimately may be transformed into disputes (claiming). There have been some criticisms of the "naming, blaming, claiming" idea. It is worth bearing in mind at this stage, that the "perceived injurious experience" some people have may not necessarily pass through all the transformation stages into the 'blaming' phase or result in a claim. See for instance, Genn (1999:10) who argues that "one of the difficulties of theorising about disputing behaviour in the access to justice context has been the failure to recognise the dissimilarity of problems for which legal remedies exist and the responses to those problems." Genn goes on to explain that not everyone who potentially has a legal remedy would necessarily feel a sense of grievance. Neither would everyone blame another. In addition, Genn suggests that those who claim may not blame, and conversely, that those who blame may not claim. Finally. Genn argues that not everyone is interested in the remedy that is provided by law. However, just because someone does not blame or claim does not mean that that person would 'lump it' or avoid the dispute. He or she might well resort to self-help in order to obtain a remedy that would produce an outcome that is more acceptable.[19] Examination of the "naming, blaming claiming" paradigm in Chapter Five of this study highlights issues that arise in the 'gestation' period of dispute processing.

Returning to the process matching discussion, a further question that arises is: which factors need to be taken into account in deciding what processes to use? Barendrecht and de Vries (2005) warn of the barriers that could cause problems on the parties agreeing to a procedure: "barriers to solving the dispute itself... may have analogous effects on negotiations regarding a procedure to resolve a dispute" (2005:83). The three barriers to conflict resolution that Barendreht and de Vries identify and address

[19] See also Lloyd-Bostock (1984), Merry (1990:92), Cowan and Halliday et al (2003:4), also (2003:156–158). In addition, Lloyd-Bostock and Mulcahy set up an additional theoretical model for understanding complaining behaviour, which they called the 'account' model, in which the initial complaint is better to be regarded as an event in and of itself (1994:141).

are psychological barriers, strategic and tactical barriers, and finally institutional and structural barriers. Sander and Rozdeiczer assert that most parties try to settle, "for they often perceive settlement as more beneficial than binding decision of a third party" (2006:27). The authors go on to advise that in considering impediments to resolution, the focus of counsel and parties should be mainly on impediments to settlement and especially on the capacity of different procedures to overcome such impediments.

Sander and Rozdeiczer suggest that, "matching processes may be just the first step of the process choice, after which the parties should modify their preferred procedure to suit the particular needs of their dispute" (2006:4). Up to now, there has been no definitive answer as to how the parties could match a forum to the dispute. Sander himself acknowledges in a conversation in March 2008 with Crespo that research is still ongoing in relation to the "fitting the forum to the fuss" idea.[20] Sander and Rozdeiczer do admit though that finding the most appropriate dispute process is more art than science (2006:41)

Observations have been made within the wider discourse on dispute processing, including contributions from the British government that people are not aware of the full panoply of dispute mechanisms (Barendrecht and de Vries 2002, Department for Constitutional Affairs 2004). However, an issue of concern within the dispute resolution literature is why people do not resort to making full use of the disputing processes. Barendrecht and de Vries (2005) consider the psychological and related barriers that prevent people from utilising non-adjudication type processes. The authors argue that the default of adjudication is always the safest option for disputants. This is because the natural inclination is for parties not to take action (2005:93–94). Sander and Rozdeiczer's counter argument would be that parties in the vast majority of cases do settle, and most parties try to settle, "for they often perceive settlement as more beneficial than the binding decision of a third party" (2006:27). A neutral third party's assistance could well assist the parties to identify and match processes to disputes.

[20] See Sander and Crespo (2008).

Barendrecht and de Vries suggest a system in which a neutral evaluator hears the parties first. This evaluator could then assist the parties in identifying which type of dispute resolution system is 'optimal' to the parties (2005:116). Barendrecht and de Vries also considered case management within the court system as a mechanism to assist the parties with selection from the entire range of dispute processing services. The authors do not make it clear in their article of the manner in which such a suggestion could work within the context of the court system. However, their suggestion would appear to be limited to cases that would have reached the case management stage in the litigation process. Barendrecht and de Vries dismiss the idea of the multi-door courthouse, on the ground that the use of such an institution without a default option as 'far off' (2005:115). The authors do not elaborate on their reasoning, and it is therefore difficult to respond to this comment. Sander and Rozdeiczer consider that parties need to decide whether to opt for a third party neutral (2006:5) – presumably to assist in the process selection and matching to the dispute. Sander and Goldberg (1994) do not address the issue of who should assist parties to match processes to cases. However, Sander does refer to the assistance a screening clerk could give parties attending a dispute resolution centre, in directing them to the process (or sequence of processes) most appropriate to the case (1979:84).

Although Sander's idea of a multi-door courthouse is rooted in the conversation where "the court still remains the pivot around which discussion proceeds" (Roberts and Palmer 2005:46), this study suggests that the multi-door courthouse model could be the most appropriate solution to assist in transforming attitudes to dispute processing within the English civil legal system. Sander first mentioned the idea of a "Multi-door Dispute Resolution Center" at the Pound Conference, which took place in 1976 in response to worries about lack of access to civil justice in the United States (Sander 1976, Ray and Clare 1985). Such a centre would have 'sophisticated and sensitive intake services along with an array of dispute resolution services under one roof. A screening unit at the centre would 'diagnose' citizen disputes then refer the disputants to the appropriate 'door' for handling the case" (Ray and Clare 1985:9). During the 1980s and 1990s in the United States, multi-door courthouses were set up, piloted, and in some instances provided services for a period of time (see for example Stedman 1996, Finkelstein 1985). Schemes appear to have been set

up and continue to provide a service in some countries, such as Nigeria and Singapore. In a conversation with Crespo in March 2008, Sander noted that not all the pilot projects that had been set up in fact survived (presumably he meant those schemes within the United States), although the Washington DC multi-door courthouse continues to provide a very active service.[21]

In its Issues Paper, the Law Commission (2006a) in England proposed a similar model for dealing with housing problems. Known as 'triage plus,' the Law Commission explains that the concept of triage was adopted from the medical model, a process where a qualified medical practitioner would make an initial assessment of the patient's problems. The practitioner would then decide whether further treatment and examination are required, and who should carry out such tasks. The Law Commission proposed that the triage plus provider would fully explore the issues with the clients. In consultation with the client, triage plus would decide the most appropriate method or combination of methods to deal with the problem (2006a:43). The Law Commission envisages Triage Plus to be proactive in making people aware of its service, and delivering public education on housing rights. An additional role envisaged for Triage Plus is that of overseeing the dispute resolution mechanisms being used. This would involve Triage Plus collecting data to reassure funding bodies that "their investment is soundly used" (Law Commission 2006a:47).

We now look at the situation of the homeless applicant in relation to the question, which forum matches the fuss for an applicant who has been issued with an unsatisfactory decision. In addressing this question, the assessment that Cowan, Halliday and colleagues carried out in relation to the internal review, law, administrative justice and the non-emergence of disputes concerning homeless applicants has been helpful. Cowan, Halliday and colleagues' study identified that the internal review is not a "simple administrative check," particularly when an applicant has a legal representative. The implication from the authors of the aforementioned finding is that the quality of the review decision could depend upon whether or not an applicant has representation. In such a situation, "it [the review] shifts towards the adjudicative realm and becomes a dress rehearsal for full-blown

[21] See above at footnote 20.

external review in the courts" (2003:197). In addition, the 2003 study found that officers, who were tempted to make an initial poor quality decision, were tempted to do so because they believed the internal review would give the authority a further opportunity to make a better quality decision. In fact, the officers erred in believing that the existence of a right to review would give them a further opportunity within which to make a better quality decision: the premise that the 'rational aggrieved' applicant will pursue all options for redress is a fallacy (2003:208–209). The Cowan, Halliday and colleagues' study demonstrated how in many instances the internal review is not an appropriate dispute processing mechanism for homeless applicants with an unsatisfactory homelessness decision. This was the case where applicants lack an awareness of the right to a review. Applicants might not receive their decision letter, and therefore will not be aware of the existence of such a right, or the applicant does receive a decision letter, but does not read the entire letter or does not read the letter at all. This could be because the negative decision was communicated to the applicant at an interview, or the applicant could have been overwhelmed by the number of letters received from 'welfare bureaucracies' (2003:113–114). English might not be the applicant's first language. In addition, the complex and legalised language might cause confusion to the applicant who might rely upon family or friends to translate. Further, the applicant could be sceptical about the 'integrity' of the review process (2003:118), or could be experiencing 'applicant fatigue' (2003:138–139).[22]

The present study does not consider the internal review to be an appropriate disputing process for homeless applicants for these reasons. This study provides empirical data, which show that there are difficulties with the homeless application process itself. Cowan, Halliday and colleagues gathered data in relation to whether homeless applicants took action following the issue of a negative homelessness decision, and if not, why no action was taken. The data gathered by Cowan, Halliday and colleagues (2003) and in the present study laid the foundations to enable the matching of an appropriate dispute resolution process for homeless applicants with unsatisfactory homelessness decisions – the next logical step that this study takes.

[22] The applicant fails to take up or follow through their right to an internal review because of fatigue. The fatigue could have resulted from a number of factors, which could include events taking place in the applicant's life, which is linked to the homelessness.

This thesis assesses the first stage appeal process: the internal review, and sets out to identify a more appropriate dispute process to replace the first stage appeal process. The suggestion that an enhanced Local Government Ombuds service (LGO) could be the solution is then tested against Sander and Rozdeiczer's model of matching cases and dispute resolution procedures.

A related discussion within this study is the issue of access to justice and its significance to homeless applicants. For the poor, the focus of access to justice changes from rights to outcomes (Moorhead 2007:14).[23] Such group could include ethnic minorities, women and homeless applicants or people with housing problems. This can be observed in the comments homeless applicants and people with housing problems made within Chapter Six of this study. In the situation of the homeless applicant then, rather than relying on "the ability of lawyers and legal processes to deliver substantial benefits," other approaches might be more appropriate, such as income redistribution or better education (Moorhead 2007:14). The targeting of legal aid for specific groups of people, with the retreat from universal access to targeted access to justice (Moorhead and Pleasance 2003) might well result in 'empty' outcomes if, despite the ability of lawyers and the effective use of processes, a successful outcome for the homeless applicant is not gained. However, changing the focus of attention from rights to outcomes requires further examination in a separate study. The present study focuses on the possibility of greater access to justice for homeless applicants through appropriate dispute processing. The proposed solution of the enhanced LGO service would hopefully not require legal aid funding. An advantage of testing the possibility of replacing the internal review mechanism with referral of negative decisions to the LGO could well assist in keeping the litigation culture in the background yet ensuring that homeless applicants have greater access to justice at the same time.[24]

The access to justice literature discusses two other points that are relevant to this study, which are: how access to justice should be delivered, and the matter of

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[23] For Samuel, who had endured about ten years of racial harassment, he looked to the council, his landlord for a solution. Markus could see the benefits of the media exposing cases of injustice.

[24] This suggestion bears in mind the concern within the access to justice literature of legal aid feeding into the adversarial culture (Moorhead 2007:16, Moorhead and Pleasance 2003:3, Goriely and Paterson 1996:28). Goriely and Paterson argue that much work needs to be done to ensure alternatives to litigation are available, and that they work, if the cost of litigation is to be limited (1996:28).

institutional design (Moorhead 2007:17, Moorhead and Pleasance 2003:9). The housing law practitioners that were interviewed commented that the homelessness legislation is complex, and both the homelessness process and laws are difficult for lay people to understand. The re-designing and implementation of legal rules to ensure that both substantive and procedural law are more accessible might well ensure greater access to justice for homeless applicants. Almost forty years ago, Cappelletti and Garth envisaged "modifications in the substantive law designed to avoid disputes or to facilitate their resolution" (1978:52) as enabling greater access to justice.

Another related area explored in this study is the manner in which current homeless application disputes are dealt with within the wider civil justice system, and in particular, the administrative justice system. As discussed above, a convincing argument can be made that the internal review process is not a dispute process that homeless applicants would consider using with great confidence (see for example, Cowan and Fionda 1998, Cowan, Halliday and colleagues 2003). The statutory review process has been criticised as being little more than a cheap way of denying justice (Cowan and Fionda 1998:186). A question that immediately arises is what would be the most appropriate, meaningful, and practical solution for homeless applicants who need access to justice? In a situation where a person might not necessarily blame, and might not realise it is possible to make a claim (challenge a negative homelessness decision), extra care needs to taken with the design of the system that a complainant could use to challenge decisions.

The then Department for Constitutional Affairs (DCA) appeared to be taking steps to address concerns about systems design. It suggested that a range of policies and services should be developed to help people to avoid disputes and legal problems. However, where it is not possible, 'tailored solutions' ought to be provided to resolve the disputes as quickly and cost effectively as possible – an idea that resonates with the views of Sander (1976), Sander and Goldberg (1994) and Sander and Rozdeiczer (2006). The DCA calls the quick dispute resolution and cost effective approach "proportionate dispute resolution" (DCA 2004, paragraph 2.2). There are merits and concerns to this flexible approach of dispute processing. There are concerns because the DCA was addressing disputes in relation to the 'state' and the 'citizen.' A

question that arises in relation to this report is, who will assist the complainant to decide the outcome he or she wants from the 'dispute'? Additional concerns about the DCA's approach to dispute processing include the issue of justice, "people may not know what they want and in any case, what they want may have little to do with justice" (Adler 2008:312). It is argued in this dissertation that in giving complainants a choice, it is important to ensure that complainants are given sufficient information and assistance so that an informed decision can be made when navigating the whole panoply of options. As part of the assistance, people need to be advised of the implications of making certain choices. I agree that there are potential problems with justice, if, for example, a complainant decides that an apology from an official in terms of how he or she was treated is considered to be more important than requesting a review of a negative decision. In the end, many people are faced with having to make decisions in circumstances that are probably not ideal for them to have to make a decision. Hence, every opportunity ought to be given to the complainant to ensure that a considered decision can be made. A risk to having options in dispute processing is that disputants themselves could choose an option that does not give them a just outcome, which is why assistance with making the decision is important.

A question that concerns access to justice in relation to homeless applicants is what access to legal services mean for vulnerable homeless applicants in London. Access to legal services is certainly an important issue in relation to clients who require the assistance of a legal advocate when experiencing problems with making a homeless application or possibly challenging a negative decision. For those who need legal assistance, the communication skills, experience of the practitioner is important to the person needing help, as is the level of assistance offered. Trust is also an important issue for the homeless applicant who might find it difficult to trust people in general because, for example, he or she might feel let down by a professional in the past. A brief discussion based on the empirical data gathered on the client-practitioner relationship takes place in this study (Chapter Six). The discussion necessarily has been short because a key focal point of the present study in terms of legal services is the possibility of an appropriate dispute process in the first stage appeal of the homelessness decision that applicants themselves feel confident using.

However, public legal education, in raising the public's knowledge about legal rights and remedies, as a legal service would be appropriate.

The view of Alfieri (1991) is helpful in gaining a perspective of the lawyer-client relationship. Alfieri discusses the interpretative practices of the lawyer-client relationship in an impoverished urban community. Alfieri asserts that in traditional practice, when a client sees a lawyer, both engage in an 'interpretive struggle.' The struggle ensues because "the poverty lawyer's interpretive practices are predicated on his pre-understanding of the client's world" (1991:2123). The lawyer interprets the client's story with his 'pre-understanding,' by naming the client as dependent, and portraying the client as such. Alfieri considers that the lawyer's pre-understanding and interpretative 'violence,' in his or her exposition of the client's story is practice of subordination, of marginalisation, and discipline that has distorted the story that the client really wants to tell. Alfieri believes that the story the client really wants to tell is the reason why the lawyer is retained in the first place. Finally, Alfieri suggests a model to enable a re-construction of the lawyer's narrative meanings that connects with the images of the client's world.

The power imbalance between lawyer and client – the lawyer as expert and the client's treatment as recipient of this expertise – leads the lawyer to make key decisions for the client. In contrast, the ideal position would be that options are presented to the client to explore and choose between. A drawback to needing representation is that, "the lawyer does not demystify the legal puzzle, but rather takes the puzzle out of the client's hands, so that at the end of the process the client is still uninformed as to how the maze fits together" (Mosher 1992). As early as 1970, Stephen Wexler (1970:1061) described, "the lawyer's game [as] a trap; it is a way to feel useful and not be useful." While the poverty law scholarship was useful in enabling the reader to gain an understanding of the lawyer-client relationship, it has attracted criticism. One complaint is that this scholarship focuses too narrowly on the lawyer-client relationship, "to the exclusion of a larger legal structure in which client and lawyer both struggle, and which hampers efforts to change the relationship" (Zalik 2000:157).

Zalik's (2000) essay attempts to widen the discourse by considering the manner in which legal services for street homeless young people ought to be provided. In her preparations for that article, she organised and held focus group sessions with homeless young people in order to engage such people in discussions about legal provision for that particular client group. She concludes that it is important to involve "street [homeless] youth" in the design, planning and delivery of legal services that should be provided to assist them. She argues that not only would the street youth welcome this involvement, but that their involvement could positively transform legal services. However, Abbott (1997:310) argues that pragmatically:

> *one who spends his or her time attempting merely to survive, in the most fundamental sense, is unlikely to be ready for relatively sophisticated group process. Only after the basic needs are met can a homeless person be ready for consciousness-raising. Hunger and the absence of opportunities to perform even the most basic functions of personal life render more intellectual pursuits unrealistic, at best, and impossible, at worst.*

Having considered the theoretical issues, we now examine the causes and effects of homelessness in London.

Chapter Two
Homelessness in London: (I) Research Findings

A. Introduction

The aim of this chapter is to provide a 'picture' of the causes and effects of homelessness, as well as to develop a profile of the homeless population in London. Popular perception, in London, of the homeless is that they are highly visible street homeless people who have complex social problems, which include alcohol or drug abuse, and who may beg for money.[1] But the social reality is somewhat different and this chapter gives particular attention to the question: why do people become homeless in London?

Important issues such as the reasons why people become homeless, whether they are single people, or part of a family have been considered in the literature.[2] However, it is vital for the purposes of this study to include data gathered from the perspective of a housing advisor and caseworker with daily experience of working with people who are homeless. Part of the reason why it has been necessary to gather such data is because the existing literature does not include this information. The details of the cases for this particular study were gathered almost exclusively from my telephone advice giving sessions. The case studies gathered over the period January 2001 until May 2002 were from a professional journal while I worked as a housing advisor and caseworker. Full details of the cases have been included in Appendix 2 of this dissertation. The forty cases inform this study with different strands of qualitative data that not only support existing literature on the causes of homelessness, but also provide a further source of knowledge on the effects of homelessness. Although the case studies were gathered in

[1] Loveland (1995) outlines the *Vagrancy Act 1824*, which was increasingly used in the 1990s to prosecute homeless people. Some of the offences listed within the 1824 Act included begging, fortune telling and sleeping rough. On 7 March 2003, *The Independent* reported information leaked to it, on a White Paper, which proposes that begging be made a recordable offence, with fixed penalty fines – the convictions would form part of a criminal record, and persistent offenders can be finger printed. After three convictions, courts will be able to impose a 'community penalty' such as drug treatment or work in the community.

[2] See for example, Alexander and Ruggieri (1999), London Borough of Camden and CASE (2000), Hawes (1999) and Moore et al (1995).

the early part of this decade, the circumstances as outlined in those case studies, are still relevant today. The types of homelessness rarely change. Complex problems that people experience, which leads to their homelessness are still experienced by people in 2009. In addition, the methods people adopt in order to gain help for their problems have not changed greatly.

As will be shown, many homeless people, as well as those who are imminently homeless, resort to seeking housing advice and assistance by telephone. The reasons why people choose to access assistance by this method are varied. However, some of the reasons offered by many of the callers, in the course of our discussion, were either that they could not gain a timely appointment with their local advice agency, or they did not know where to go for help locally. For some who did not have any money to travel to their local advice centre for help, a free telephone advice service enables them to gain timely and informed advice. Others preferred the anonymity that a telephone call could provide.

The empirical data gathered from my professional work provide a basis for qualitative analysis of the social dimensions of homelessness in London. The analysis is not meant to provide information that is exhaustive. It is meant to sensitise the reader to the types of people that make up the homeless population in London, as well as problems they encounter which cause their homelessness. This helps us to understand better the perceptions that homeless people themselves might have of issues of access to housing justice.

It is difficult to separate the types of people that become homeless from the types of problem that can trigger homelessness. A combination of events that has taken place over a period of time, which in turn could lead to the development of complex problems, combined with short term 'triggers' often leads to homelessness.[3] Certain factors could determine whether someone might become homeless in the first place or remain so on a

[3] Examples of 'triggers' include unemployment, conflict within the family, mental health problems and addictions.

long-term basis. Factors could include attitudes to solving problems, ability and willingness to seek assistance, as well as capability to move on from the problems. It is not possible to distinguish a particular type of person that might have a propensity to be homeless. The documented experience of two rough sleepers explains the situation:

> *For a person to end up homeless, it's a series of circumstances that just deteriorates. You have a problem and you say I can sort this out and before you can get that problem sorted out something else happens. Then you've got two problems and the next thing before you realise it, you're in a situation where you can't cope with being an equal member of society and you give up wanting to be a part of this system. You just say to yourself, fuck it, I've had enough. I don't want to pay a mortgage anymore (Richard, aged forty one)* (Alexander & Ruggieri 1999:5).

> *I've met people who are ex-school teachers, lawyers – all sleeping rough. They've had problems with gambling, divorced, lost their job, their house got repossessed. There's so many different reasons, it's frightening because it could happen to anybody (Mark, aged twenty-seven)* (Alexander & Ruggieri 1999:5).

B. Definition of Homelessness

The case studies reported in this chapter demonstrate different forms of homelessness. Hence, it is useful at this juncture to discuss the manner in which the term is used in this thesis. In general, popular understanding of homelessness is that of people who are roofless and who sleep on the streets. However, 'rough sleeping' or 'street homelessness' – the most visible and extreme form of homelessness – is only one manifestation of homelessness. Further, in accordance with the working definition of the then Department of the Environment, Transport and the Regions, a rough sleeper would only be assisted if he or she is sleeping or bedded down in the open air. Streets, doorways, parks or bus shelters are places that are considered to be in the open air. Other places considered to be in the open air include buildings or other places not designed for habitation, such as barns, sheds, car parks, cars, derelict boats, stations or 'bashers' (also known as 'benders') – which are makeshift shelters for use out in the open (see Ruggieri 1998:4).

The legal definition of homelessness in England and Wales is fairly broad, and includes people who are threatened with homelessness, or those who have accommodation, but the accommodation is not available for that person to occupy.[4] In addition, a person who does not have a legal right to occupy the accommodation, or those who have been asked to leave accommodation by family or friends are considered to be homeless. The inability to secure entry to accommodation is a further factor of homelessness, as is accommodation consisting of a moveable structure. Finally, if it is not reasonable for someone to occupy accommodation because of domestic violence or other forms of violence, then that person would be considered to be homeless (see DCLG 2006a:Chapter 8). In reality, the homeless applicant must pass through many 'obstacles' or 'hurdles' in the assessment process before a local authority will assist him or her (see Chapter One for an outline of the application process).

This dissertation has adopted the broadest and most flexible use of the term 'homelessness.' As Harrison has noted:

> *If homelessness means a lack of a home in a reasonably full sense of that term, then our concern cannot be only for those who have no shelter. We must also consider people who suffer severe involuntary sharing and overcrowding, who lack control over their accommodation, or who are insecure or threatened. A home is a dwelling that provides opportunities for independent living, serves social functions, and ideally is bound up with or facilitates productive serial relationships. Consequently, people who are involuntarily dependent on refuge or hostel space, or living temporarily with friends, may be acknowledged as homeless alongside others who are without even temporary fixed abode* (Harrison 1999:102).

To the above list, must be added the following types of insecure accommodation: any form of temporary housing provided by the local authority, which includes bed and

[4] The legal definition of homelessness remained largely the same until the *Housing Act 1996*. Under the *Housing (Homeless Persons) Act 1977*, as well as the *Housing Act 1985*, local authorities could only consider whether a homeless applicant had accommodation in England, Wales or Scotland. However, the phrase 'or elsewhere' was inserted into section 175 of the 1996 Act. Local Authorities may now consider whether the homeless applicant has property anywhere in the world, which might be available to him or her.

breakfast hotel accommodation,[5] as well as poor and unfit housing or housing that is expensive (Diaz 2001:6).

Many of the case studies that are reported in Appendix 2 of this thesis are cases of 'concealed' or 'hidden' homelessness.[6] Moore and colleagues, whose study focused on the homeless in London, defined the hidden homeless in their research which identified the number and variety of people who are homeless in London, and included an examination of the conditions in which homeless people live. Moore and colleagues considered the 'hidden homeless' to consist of those who were not living in hostels, hotels, squats or on the street, but existed by staying with friends or relatives "when this has ceased to be a practical or welcome arrangement" (Moore et al 1995:37). The hidden homeless could include the 'chronically homeless,' meaning those "who have existed in night shelters, hostels and friends' homes for years and have chosen these transitional locations as their permanent mode of living" (Hawes 1999:192). Some of the case studies certainly included people who were 'chronically homeless' per se. However, there are just as many who have been forced to remain 'hidden homeless' because of the difficulties experienced by people in this group in securing their own accommodation. Moore et al identified the difficulty of quantifying this category of homeless people – a view that is supported by the government (DTLR 2002:6).

The research that Moore and colleagues started in the late 1980s identified "six distinct subgroups ... with varied qualities and problems" that assist in unravelling the many different strands of homelessness in London (Moore et al 1995:31). It is useful for these categories to be listed at this stage, since they reflect the types of homelessness reported in the case studies within this dissertation. In addition, the categories aid in the illustration of the fluidity of the definition of homelessness. Moore and colleagues assert

[5] The *Homelessness (Suitability of Accommodation)(England) Order 2003* (SI 2003 No 3326) came into force on 1 April 2004. This statutory instrument provides that bed and breakfast accommodation will not be considered to be suitable for a homeless applicant with 'family commitments,' i.e. pregnant women or dependent children **unless** there is no other accommodation available, **and** occupation of the bed and breakfast accommodation is for no longer than six weeks. Bed and breakfast accommodation is defined as accommodation (whether or not breakfast is provided) which is not separate and self-contained and where toilet, or personal washing facilities, or cooking facilities have to be shared by more than one household.
[6] See Beigulenko 1999:236; Pleace, Burrows and Quilgars 1997:7 and Moore et al 1995:37.

that the groups they identified in their study "make up a fluid interchange of people between settings and from homelessness to a more settled way of life." The groups are first, people living 'rough,' on the streets or 'skippering' – the case studies, within this thesis, include those who slept in the communal areas in blocks of flats, vans, bus stops, a warehouse, a bus depot, as well as a garage. The second category of people – identified by Moore and colleagues – live in hostels and night shelters, while the third group are those who stay in bed and breakfast hotels. Bed and breakfast hotels tend to be unsuitable accommodation offered by the local authority, as a last resort, to homeless applicants as temporary accommodation – see for instance Department for Communities and Local Government (2006a) and the acknowledgement that the government has now given to the unsuitability of such accommodation. The next group of people, identified by Moore and colleagues in their 1995 research, stay in squats, while the fifth group of homeless people are of no fixed abode. The final group identified is the hidden homeless, of which the case studies gathered for this dissertation include many in this last category.

C. Substantive Problems Arising in the Case Studies

Many of the cases gathered for this study demonstrate the complexities of homelessness, and more importantly, support the view that the traditional structure of families with its support networks has been eroded. There are cases of older street homeless people, from ages fifty up to seventy-five with physical medical difficulties or with addiction problems, or who suffer from both. There are many cases of sixteen and seventeen year olds, including younger children, who have had to sleep rough. Some of the young people have become homeless after a relationship breakdown with their parents, mother or father, stepparents or parent with co-habiting partner. Some young people have been looked after from a very young age by a relative because their own parents could not look after them. There are also cases where children have been neglected, either because the parent has a dependency problem, psychiatric difficulty, or inability to parent. In some cases there has been a role reversal where the child has to care for his or her parent. Where there are single parent families, the single parent is not necessarily

female, nor do the children always remain with one parent. It seems that more women have become homeless as a result of becoming pregnant at a fairly young age, such as aged sixteen.

There are many instances of families who have become homeless through debt. Some as a result of experiencing extremely long delays in the processing of their housing benefit claim, and some of these callers have also become street homeless. Unfortunately, in the course of my work, I have received calls from many who became homeless through fleeing violence, whether it is from their parents, partner, former partner, parent's co-habiting partner, sibling or relatives. The lack of satisfactory joint working between the housing department and social services appears to be a persistent problem. Families or single people, in need of assistance, are often 'boomeranged' between the two departments.

Among the homeless population, there are those with literacy problems, those that do not know how to get help – either for housing or for welfare benefits – as well as those who do not know how to manage their tenancy. Further, people being discharged from hospital or released from prison have also become street homeless. Finally, for those whose first language is not English, it is often a struggle to understand how best to get help, and to understand the relevant processes involved in getting help, once initial help of some sort has been accessed. There are many cases of former asylum seekers who were dispersed out of London, now with leave from the Home Office to remain in the UK, returning to London and becoming – then remaining – street homeless.

D. The Case Studies in Context

As the case studies were gathered over the period 4 January 2001 until 25 May 2002, the amendments of the *Housing Act 1996* brought about by the *Homelessness Act 2002* does not apply to those cases. In relation to the case studies, the most significant change linked to the implementation of the 2002 Act is The *Homelessness (Priority Need for Accommodation) (England) Order 2002*. This Order extended the priority need

categories to include homeless sixteen and seventeen year-olds, young people leaving care, vulnerable homeless former service people, as well as vulnerable ex-offenders. Local authorities should also assist vulnerable people who become homeless as a result of violence or harassment.

As can be seen from the case studies reported in Appendix 2 this study, many of the cases involve local authorities that have issued homelessness decisions. These decisions have theoretically been made in line with the homelessness legislation in place at the time, the 1996 Act. The 2002 Act was implemented on 31 July 2002.

The case studies reported reveal that social services departments lacked willingness to assist families with accommodation, that a housing department had considered to have made themselves intentionally homeless, that is, families assessed by the housing department to have become homeless through their own fault. As many of these homeless families were on low income, the outcome of a section 17, *Children Act 1989* (1989 Act) assessment, as to whether their children might have been "children in need" was vital. It meant the difference between the families gaining time limited temporary accommodation assistance from social services as a family, or having to resolve their immediate homelessness problem by themselves. Should a child be considered "a child in need" in accordance with the spirit of the 1989 Act, social services would have had an enabling role to assist families to stay together, in order to safeguard the welfare of the child. Unfortunately, around the time I gathered the case studies, a series of cases heard in the Court of Appeal resulted in unfavourable decisions, which consequently affected the nature of assistance that a "child in need" with his or her family could expect. Section 17 of the 1989 Act gave rise to a power, and therefore discretion for local authorities to give assistance in kind or cash to a "child in need" but the local authority is not under a duty to do so (*R (G) v Barnet LBC*). In *A v Lambeth LBC* [2001] EWCA Civ 1624, [2001] 2FLR 120, [2002] Fam Law 179, it was decided that section 17 of the 1989 Act is not directed towards the provision of accommodation. Nor does section 17 create an enforceable duty in relation to any individual child: it is a target duty to children in general.

The unfortunate effect of the case law at that time meant that it became lawful for local authorities to separate families that needed assistance from social services. As a result, social services threatened to take children into its care when homeless families approached this service for assistance. As happened to many families at that time, children were taken into the care of social services while the remaining family members had to resolve their homelessness problem themselves. As can be seen in Case 28, social services offered to take the children into care leaving the parents to make their own arrangements for accommodation. In Case 29, Sarah became street homeless after her children were taken into care. Whereas, in Case 39, Keith had great difficulties in gaining any type of assistance from social services, when the family first became homeless. When his four children were assessed by social services, none of the children were considered to be "a child in need." At the time that Keith sought assistance from the telephone advice line, he told me that his family of six had already been sleeping in a car for eight months, and three of the children had not been attending school because of the family's homelessness situation.

Fortunately, *R (W) v Lambeth LBC* [2002] EWCA Civ 613, [2002] 2 FLR 327, [2002] Fam Law 592 reversed the *A v Lambeth LBC* decision. The *Adoption and Children Act 2002* also amended section 17 of the 1989 Act. Further, the 1989 Act has now been amended to enable local authorities to provide accommodation to children in need with their families.

Although post 31 July 2002 case studies are not available for this dissertation, when some sections of the 2002 Act were implemented, I was aware that there were still problems with some local authorities accepting a duty to homeless applicants in relation to the new priority need categories. As expected, up to a year, if not for longer, after the 2002 Act was implemented, many local authorities still did not accept, without a challenge, that they owed a housing duty to sixteen or seventeen year-olds, and ex-offenders who were vulnerable.[7] Below, Table 2.1 categorises the cases reported in

[7] I was able to update my knowledge because at the time the 2002 Act was enforced, I worked as a member of a team in London, which assisted local authorities across London to implement the

Section F of this chapter in relation to the causations of homelessness and attitudes to seeking help.

Table 2.1

Causations of Homelessness & Attitudes to Seeking Help	Case Number	Case Number	Case Number	Case Number	Case Number	Case Number	Case Number
Changing family structure	Sandra Case 1	Doug Case 2*	Ben Case 3*	Tilye Case 4			
People facing multiple problems	Claire Case 5*	Tom Case 6	Yolanda Case 7	David Case 8*	Alex Case 9	Steven Case 10	Craig Case 11
Responses to homelessness	Cressida Case 12	Lucy Case 13	Natalie Case 14	Simon Case 15	Victor Case 16	Linda Case 17	Maria Case 18
Access to services	John Case 19	Mariam Case 20*	Hector Case 21*	Jennifer Case 22	Anna Case 23	Margaret Case 24	
Those assisted by local authorities	Jackie Case 25	Maureen Case 26	Kay Case 27	Hawa Case 28	Sandra Case 29		
Most visible homeless in London	Tim Case 30*	Peter Case 31	Angelina Case 32	Jodie Case 33	Adam Case 34		
Self help	Adele Case 35	Dan Case 36*	Jack Case 37	Laura Case 38	Keith Case 39	Martin Case 40	

*Denotes that the case has been analysed in Section E of this Chapter

Homelessness Act 2002. As a result, I was also able to discuss with caseworkers the issue of whether there had been any change in the attitude of local authority officers in terms of assessing homeless applications against the new priority need categories. In addition, I carried out in-depth interviews with clients and housing law practitioners from August 2004 until July 2005.

E. Causes and Consequences of Homelessness

The reasons why people become homeless are many and varied. In order to gain a deeper understanding of the causes of homelessness, it is important to examine this issue initially from two levels: structural factors and personal factors. Social and economic circumstances affect and interconnect with both factors. Neale explains that a structural explanation of homelessness goes beyond the individual circumstances and considers broader social and economic factors, such as the role of housing systems and markets as well as the availability of housing (1997:36). Diaz explains as follows:

> *Homeless people are not a single or homogenous group, and the reasons for becoming homeless differ between each household. There are, however, a number of common factors, including the availability of housing and its cost. Economic factors, such as incomes and unemployment levels and access to benefits also affect whether people can stay in their homes, or find housing if they currently have nowhere to live. Social factors such as increasing relationship breakdown and families splitting up, drugs and alcohol misuse may all lead to people losing their homes. Poverty, as a result of very low wages and lack of access to benefits, can also leave people at risk of homelessness. The threat of homelessness is greatest for those affected by any combination of these factors. In particular, those living in areas of highest demand for housing face the greatest risk of becoming homeless as their alternative housing options are much reduced* (Diaz 2001: 6).

In terms of structural causes of homelessness, the main cause has been cited as the lack of accommodation, which is a problem of great significance in London.[8] The lack of accommodation causes other problems, such as affordability, quality and structuring of the housing tenure, which is bound to discriminate against those on low income. The London Housing Statement 2002, acknowledged that "the capital's economic dynamism, its position as a world city and demographic growth has not been adequately matched by an increase in the supply of homes" (Government Office for London and Housing

[8] See for example Diaz 2001, DTLR 2002:11, Hughes and Lowe 1995, Watson 1999, Government Office for London and Housing Corporation 2002.

Corporation 2002: 4).[9] Unfortunately, the right to buy policy for council housing has over the years reduced greatly the supply of social housing, particularly in London where the demand is highest. In addition, the competing demands of London local authorities for vacancies in bed and breakfast hotels in order to provide temporary accommodation, has highlighted the problem of quality as well as suitability for this type of temporary accommodation. Further, housing benefit administration problems resulting in long delays in rent being paid to landlords have caused many people to fall into rent arrears. Not only have evictions occurred in the social rented sector, as a result of the housing benefit administration problems, private landlords are reluctant to rent accommodation to people on low income who need rental assistance from housing benefit.

The highest levels of homelessness continue to occur in London.[10] When the London Housing Statement 2002 was made, the then Office of the Deputy Prime Minister ('ODPM') statistics for the last quarter of 2002 show that 8,190 homeless households were placed in bed and breakfast accommodation by the London local authorities in comparison to 12,670 for the rest of England. Part of the strategic plan to tackle homelessness problems in London can be found in the London Housing Statement 2002,

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[9] In its policy paper, London Councils' (2008) vision for London was three-fold. First, LC wanted to make homeownership more affordable, secondly, to develop mixed and sustainable communities – social housing is to be a part. Finally, LC wanted to tackle homelessness more effectively. In the 2008 paper, LC stated that there is an estimated annual demand to build 35,400 homes, in London, over a ten-year period. However, only 28,300 homes were completed in London in 2005/06 financial year. London Councils – formerly the Association of London Government (ALG) – is a cross-party organisation, funded and run by its member authorities to work on behalf of them, regardless of political persuasion. The LC's work consists of lobbying the government and others on behalf if its member councils for a fair share of the resources, and to protect and enhance council powers to enable them to do the best possible job for their residents and local businesses. See www.londoncouncils.gov.uk.

[10] The Department of Communities and Local Government statistics indicate that the data available for Quarter 1 in 2009 (from January until March) sets the total number of local authority homelessness acceptances at 11,350. In London alone, there were 2,730 acceptances. The London figure can be compared to the other regional acceptances as follows: North East: 710, North West: 1,160, Yorkshire and the Humberside: 1,220, East Midlands: 770, West Midlands: 1,900, East: 1,070, and the South East at 1,030. The local authority homelessness acceptances figure consists of households found to be eligible for assistance, unintentionally homeless, and falling into a priority need group, and hence owed a main homelessness duty. The financial year homelessness figures for London are as follows: 2006/7: 15,390, and for 2007/8: 13,800. See www.communities.gov.uk/housing/housingresearch/housingstatisticsby/housingstatistics/livetables/.

which identifies key housing issues in London and proposes action to address them.[11] Additionally, each of the thirty-three London local authorities, along with the other local authorities in England had formulated a localised homelessness strategy by 31July 2003. Each of the local five-year homelessness strategy must include an action plan to demonstrate to the government how the local homelessness problems would be resolved over this period of time. These strategic documents must address the housing needs of all homeless people in each of the local authority areas. As a result of the great deficit of affordable accommodation in London, local authorities in London are not only trying to increase the level of local housing, but are also encouraging people to move to other areas in England where there is greater supply of accommodation. Further, the use of homelessness prevention schemes is intended to keep people in their accommodation for as long a period as possible. The plan is that schemes would eventually lead to a decrease in the number of homelessness applicants in need of local authority emergency housing assistance.[12]

Hughes and Lowe have asserted that as structural factors, changing law and policy have probably been more influential in affecting patterns of change, particularly to family life, than social scientists are prepared to acknowledge (1995:207). The social reality is that, through choice, people now tend to live in smaller households. Part of the reason for this phenomenon could be that at a social level the greater availability of education, employment and housing possibilities, along with women's and gay liberation movements have shifted social attitudes (Watson 1999:89). Fewer people marry at an early age, and more people are choosing to live alone or cohabit, with or without children. At the same time, when relationships break down, there are fewer stigmas associated with divorce.

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[11] In March 2005, the then ODPM published a five-year strategy for tackling homelessness: *Sustainable Communities: Settled Homes, Changing Lives*.

[12] Many local authorities have adopted schemes, such as floating support or tenancy sustainment, in order to give vulnerable people practical support in their accommodation so that homelessness might be prevented. The use of mediation to prevent homelessness among those being asked to leave the accommodation of family or friends has proved to be an extremely popular scheme with local authorities. See Association of London Government (2003), for further homelessness prevention schemes. Chapter Eight of this dissertation also discusses homelessness mediation.

A perspective of the changing family structure over the past few centuries, which could be attributed to social development having a significant impact on family structure, can be found in the study by Taylor and others (1995:244).[13] The industrial revolution, which began in Britain around the middle of the eighteenth century, certainly had a major impact. Prior to the industrial revolution, families worked closely together in agriculture and small cottage industries. The industrial revolution shifted the workforce to industrial employment and manufactured goods were produced in factories. The manufacturing industry was then mechanised, and powered machinery was used to mass-produce goods. Over this period, there was a falling death rate, combined with a population explosion. Towns and cities grew in size and the majority of the population concentrated in large urban areas rather than small villages. There has always been interdependency between the so-called private nuclear family (husband and wife and two to three children) and the extended network of family. More recently, the private nuclear family with its extended family network has experienced the development of the "modified extended family" – a term coined by the sociologist, Eugene Litwork. The modified extended family is often geographically dispersed, but does continue to provide support for family members to come together for important family events. Contact between the extended families over long distances are assisted with better communication and transportation, such as telephones, cars and public transport. The typical family is not the private nuclear family promoted in advertisements or most famously by the Conservative Party in the 1990s. Increasingly, married couples are divorcing, and there are many more single parent families. At the same time, there are re-marriages and families now consist of lone parents remarrying to form new two parent families. Many couples that remarry also wish to have children in the new marriage. The 'reconstituted family' or family created by members of former families, is another family type which is increasingly common in Britain.

However, new problems arise with the new family structures, and the extended family networks of the past have become much more complex. As one writer has put it, "the

[13] However, Anderson's research findings do not support the popular view as presented by Taylor and colleagues. He argues that the 'new' or 'modern' structure of families is not too dissimilar to the family

significance of re-marriage is that these new relationships and families are, by definition, not bound by traditional structures and customs. Those were blown away by the divorce and so new forms of conviviality need to be negotiated" (Lemos 2000:4). The economic changes that have taken place over the past forty years or so have in turn transformed the traditional gender roles within the supportive family. The women in the family are now more likely to go out and work. As noted earlier, there are an increasing number of one-person households. There is more co-habitation and fewer marriages. At the same time divorce and re-marriage are increasing.

At a structural level, economic and social factors are two causes of homelessness (Robson and Poustie 1996). The economic factor could be seen as having a negative causal effect on homelessness in terms of difficulty in accessing housing, lack of security in housing, as well as the poor condition of housing, along with the decline of the private rented sector. Additionally, poverty, in terms of low wages and unemployment are the main characteristics of families staying in temporary accommodation. In order to understand the underlying causes of homelessness, social factors must be considered along with economic factors. Robson and Poustie argue that assessment of the personal circumstances of the homeless person is not an easy task to undertake. The authors provide an example of a main cause of homelessness (1996:30-31). Robson and Poustie suggest that domestic disputes might arise because of inadequate housing, which has forced more than one household to share the inadequate accommodation has caused 'unrecognised' or 'hidden' homelessness (see also Harrison 1999:113). However, domestic disputes commonly take two forms: family breakdown and the unwillingness or inability of relatives or friends to continue to provide accommodation. Closely linked to the problem of domestic disputes is the increased tendency of single people to set up home of their own rather than to share accommodation with parents, relatives or friends. Robson and Poustie assert that this social trend has largely been a matter of personal preference. But at the same time, this social trend has led to increased pressure on both public and private housing stock, already in decline in terms of availability over the years. And the government response

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structure of the past (Anderson 1994).

in 1986 to remove social security benefit from the sixteen to eighteen year-old age group in most circumstances had the effect of creating more acute problems of homelessness among young people.

The homelessness quarterly statistics produced by the then ODPM, and collected from local authorities across England, for the periods January to March 2003, noted the major three causes of homelessness – the recorded reasons for loss of the last settled home for households, accepted by local authorities as being in priority need for accommodation, and homeless through no fault of the household. Thirty-six per cent or 12,470 of all homelessness acceptances by local authorities were households who had been asked to leave by parents, relatives or friends, either because they were unable or unwilling to provide accommodation. The second highest cause of homelessness was noted as relationship breakdown, which resulted in twenty per cent or 6,570 of all local homelessness acceptances. Domestic violence was cited in two thirds of the cases as being the main factor, which caused the relationship breakdown. Finally, thirteen per cent or 4,580 households, whose assured shorthold tenancy had come to an end, was the third largest group of homelessness accepted by local authorities (ODPM 2003a:3). My own findings from the data I had gathered for this study match the statistics from the then ODPM, in terms of the three main causes of homelessness.

At a simplistic level, some of the personal causes of homelessness – the last settled base – recorded in the case studies in this thesis can be listed as follows:

(1) *Those asked to leave by parents.* In Case 1, Sandra attempted to make a homeless application at the borough where she last stayed – with her cousin for a few days. However, Sandra had originally stayed with her aunt until she was aged seventeen, she then stayed with family friends for four months before becoming homeless. In Case 2, Doug was staying temporarily with his aunt. He originally left his mother and stepfather's home because his stepfather had mentally and physically abused him. Further, Doug's parents were drug users and Doug himself had a drug dependency problem.

(2) *Relationship breakdown as a result of violence.* In Case 3, Ben left his parents' home that he shared with his mother and stepfather because his stepfather had been violent to him. In contrast, in Case 4, Tilye and her aunt had slept rough for one night because it was not safe for Tilye to remain at home due to Tilye's father physically abusing her. In Case 7, Yolanda was street homeless. Yolanda originally had a joint tenancy with her husband but then left the accommodation because her husband had physically abused her.
(3) *Where an assured shorthold tenancy had come to an end.* In Case 12, Cassandra and her children were living in accommodation where the tenancy agreement had expired and the landlord did not renew the agreement. However, Cassandra could not really afford to pay the amount of rent her landlord demanded. [14]

It is important to bear in mind that the recording of only the immediate cause of homelessness does not explain the original causes of homelessness, nor triggers that led to the original homelessness. In a 2007 policy report on homelessness, Shelter asserts that the immediate reasons why homeless households approach local housing authorities for assistance are often confused with the causes of homelessness. In that report, Shelter reminds us that councils record their statistics against pre-set categories for the reason why a homeless applicant has lost his or her last settled accommodation (Shelter 2007:18). The following case studies demonstrate that homelessness might only be one problem among multiple problems that the more vulnerable people in society experience – particularly in London. How someone is or is not able to work through the various problems he or she is experiencing determines whether that person manages his or her homelessness problem. If the homeless person were in different circumstances he or she might not have become homeless in the first place.

Eight of the case studies were selected from the forty case studies reported in this dissertation. I considered these eight case studies to demonstrate the need to examine the causes of homelessness at different levels in order to understand better the problems

experienced by homeless people. The eight cases selected were of homeless people experiencing a range of multiple problems. The cases are presented first with just the immediate cause of homelessness:

Case 36 Dan	Unlawful exclusion from private rented accommodation
Case 8 David	Exclusion by friend
Case 20 Mariam	Exclusion by friend
Case 5 Claire	Unreasonable to remain in inadequate accommodation
Case 30 Tim	Chronically homeless
Case 3 Ben	Exclusion by parents
Case 2 Doug	Voluntarily left the home of mother and step-father
Case 21 Hector	Exclusion by friend

Understanding the immediate cause of homelessness does not explain the underlying causes of homelessness. Hence, it is necessary to examine at a deeper level, well beyond the immediate cause in order to understand effectively how best to tackle homelessness. The government requires local authorities to record the immediate cause of the homeless applicant's lack of accommodation, but does not examine the underlying reasons for homelessness. Robson and Poustie assert that the notion of causes of homelessness cannot be explained adequately in terms of a straightforward cause and effect (1996:26-31). Indeed, the interaction of both structural and personal factors, which causes homelessness have an intertwining motion, and the underlying causes of homelessness interact with this intertwining motion. While it is important to understand the structural reasons, which cause homelessness separately from the personal factors, it is necessary to grasp the interconnectedness or the intertwining of all three different levels of causal factors.[15]

[14] It is useful to read the full case studies, which can be found in Appendix 2 of this study. The case studies provide the full details, and therefore the full complexity of the client's homelessness situation, which a recording of the immediate cause of homelessness would not record.

[15] Two studies attempt to understand the underlying causes of homelessness. The Scottish Homes Discussion Paper (Johnson et al 1991) has had support as well as criticism (see Robson and Poustie 1996:32-33 and Neale 1997:36). However, the London Borough of Camden and CASE (2000) study, is yet to make an impact on assessments into understanding the underlying causes of homelessness. The purpose of the latter study is to identify how people could be diverted from a crisis or homelessness before

The same eight case studies are now shown in the table below with the structural, personal and underlying factors:[16]

either takes place, as well as to determine the types of intervention needed in an to attempt to prevent homelessness.

[16] Case 2 has been analysed in greater detail in order to demonstrate the interconnectedness of all three different levels of causal factors. As stated earlier, the immediate cause of homelessness only tells us that Doug had accommodation, but that he voluntarily left his mother's and stepfather's home. The lack of information might then lead us to speculate as to the reason why he left home. A reason could be that Doug might have had a difficult relationship with his stepfather, or he might have left home because he wanted to live on his own.

The structural factors in isolation do not reveal any more information about Doug's circumstances than that he has remained homeless since leaving home although there is an indication that he needs help. However, the personal and underlying factors contextualises his decision to leave home. The cause of homelessness is now clearer. Both Doug's parents have an addiction problem, and he states that he has been mentally and physically abused from a young age. However, Doug also has addiction problems of his own, which might have evolved through living with his parents because they take drugs. There appears to be an issue in relation to the parenting skills of Doug's parents. Apart from the mental and physical abuse and the drug addiction, Doug's aunt explained that relatives had looked after him and his sisters from a young age, and that social services had worked with the family. At the time that Doug and his aunt contacted the telephone line, Doug was aged eighteen, and was neither in education, training, nor was he employed. Moreover, he lacked self-confidence to speak for himself and preferred his aunt to be his advocate.

It would seem that the underlying reason for leaving home for Doug was that he needed to start a new life. He has already tried to deal with his drug addiction with help from one of his sisters, and is now in need of accommodation, which would provide practical assistance to help him to move on in his life.

Case Number	Structural Factors	Personal and Underlying Factors
Case 36 Dan	Lack of tenancy relations support Lack of affordable accommodation	Problem with HPA process Strain on friendship because accommodation is overcrowded Low income or jobless?
Case 8 David	Inadequate support from local authority Failure of care system Lack of affordable accommodation – decline of social sector	Learning difficulty and dyslexia Mental health problem and personality disorder Self-esteem or self-confidence problems? Alcohol abuse Money management problems In care of SS from aged 12-16 David felt unsafe in own flat Job readiness problems
Case 20 Mariam	Failure of asylum system and inadequate support Lack of affordable accommodation Lack of practical support	Lack of interpretation assistance at crucial moments Relationship breakdown with friend – overcrowding? HPU failure to provide relevant info and not taking HPA Mariam own lack of understanding of HPA Process
Case 5 Claire	Inadequate protection from legal system Inadequate support for women fleeing violence Lack of affordable accommodation	Two former violent partners Inadequate and support and understanding from Housing Officer
Case 30 Tim	Lack of affordable accommodation Lack of practical support Failure of health system	Mental health problems Self-esteem problems?
Case 3 Ben	Failure of care system Lack of practical support Lack of affordable accommodation	Inadequate life skills Self-esteem or self-confidence problems Drug addiction Ex-offender Jobless Mental health problem Violence from stepfather and brother Parenting issues Difficulty obtaining help from the medical profession
Case 2 Doug	Lack of affordable accommodation Lack of practical support	Mother and father with addiction problem Mental abuse and violence Doug's own drug problem Close family network cannot accommodate Doug jobless or not in education Parenting issues Self-esteem or self-confidence difficulties
Case 21 Hector	Failure of asylum system and inadequate support Lack of affordable accommodation Lack of practical support Lack of appropriate voluntary agency support	Lack of interpretation assistance at crucial moments HPU failure to provide relevant info and offering temporary accommodation Hector's own lack of understanding of HPA process Mobility problems, mental health and physical medical difficulties Lack of support network

Key: *HPU* – Homeless Persons Unit; *HPA* – Homeless Persons application; SS – Social Services

F. Conclusion

An obvious difference between the homelessness situation in London and the rest of England is that there is a greater shortage of housing in London. In general, the causes of homelessness are many and varied, and significant causes of such problems include the lack of available and affordable housing, particularly in London. Difficult personal economic and social circumstances have a greater impact on people affected by homelessness. The difficulties experienced by families in London are greatly compounded by this shortage of accommodation, which leads to an erosion of the quality of family life. The shortage of housing might eventually lead to further struggles, including the splitting up of families. As the difficulties intensify, and family members attempt to cope with the problems in their own way, some families become even more dysfunctional.

Where families experience multiple problems, the government's new method of tackling homelessness by prevention through the provision of practical support could assist in avoiding 'repeat' homelessness. However, there is a need for the government to take into account the causes of homelessness, not only at the point that the homeless applicant presents him or herself at the HPU, but over the period of time that applicant has been without housing. An in-depth enquiry into 'triggers' that can and do cause homelessness, such as the research carried out by the Centre for Analysis of Social Exclusion on behalf of London Borough of Camden in 2000, is such an example.

This chapter has analysed the causes and affects of homelessness – important analytical tools to understanding the reasons why people become homeless. However, people are not automatic entitled to emergency housing assistance. The common notion of social vulnerability, which would appear to describe many of the people without homes in the case studies, differs from the legal definition of 'vulnerability.' In order for a person who lacks accommodation to be able to gain housing assistance, one of the steps in the application process is for the homeless person to demonstrate that he or she either falls

within a statutory prescribed 'priority need' group or to demonstrate 'vulnerability.' The next chapter discusses the legal concept of 'vulnerability,' an important notion in relation to homeless people in urgent need of housing assistance from the local authority.

Chapter Three
Homelessness in London (II): Social Vulnerability

A. Introduction

Popular notions of the expression 'social vulnerability,' are that it refers to people who – innately or by circumstances – are less capable of fending for themselves when faced with problems. This chapter focuses on the problem of 'social vulnerability' as it relates to local authorities' duties to assist the homeless. The duty imposed on local authorities to provide emergency accommodation only extends to those that are provided for by the homelessness legislation – those in 'priority need' for accommodation or the 'vulnerable' homeless. Commonly accepted understanding of 'social vulnerability' includes people who are street homeless because of difficulty in protecting oneself. However, as will be shown in this chapter, 'vulnerability' as a concept in law, legal processes and legal discourse surrounding homelessness has a specific meaning. 'Vulnerability' is limited to and linked to the homelessness circumstances of the person to which this term is applied. The need to discuss the meaning of 'social vulnerability' fairly early on in this thesis will become self-evident in due course, as the later chapters begin to focus on the meaning of access to housing justice. The discussion on 'social vulnerability' sets the scene for answering the principal question in this thesis: how do vulnerable homeless people in London fare when they make their homeless applications?

Thus, in exploring the answer to the overarching question, this chapter specifically addresses the question of how does English homelessness law define 'social vulnerability.' The original legislation, the *Housing (Homeless Persons) Act 1977* (1977 Act) was drafted in such a manner as to provide local authorities with significant discretion in applying the law. The Code of Guidance issued by the then Department of Environment 'fleshed out' the 1977 Act, but is not legally enforceable. The intention behind the 'vague' drafting of the Act was to assist a greater number of people in the sense that it was originally envisaged that single people would also be assisted by the 1977 Act. However, since the implementation of the 1977 Act, local authorities have

lacked financial resources, and court decisions have kept to a restrictive definition of 'vulnerability' so that it is assessed in housing terms. This has significantly limited the number of people who are in fact able to gain assistance from the homelessness law. Finally, local authorities have discretion in the decision-making process to determine which applicants ought to be assisted. This means that a homeless person who appears to be vulnerable is not automatically assisted, since there are stages in the enquiry process that the applicant would need to pass through (see Chapter One).

This chapter begins with a discussion on the background to government policy on homelessness so that the present day emergency housing assistance given to vulnerable homeless people can be seen in context. This is followed by sections that discuss the main homelessness legislation, beginning with the *Housing (Homeless Persons) Act 1977* the original legislation drawn up to assist vulnerable homeless people. After eight years, the 1977 Act was consolidated into Part III of the *Housing Act 1985* (1985 Act). Part III of the 1985 Act in turn was consolidated into Part VII of the *Housing Act 1996* (1996 Act) when substantive changes were also made. Part VII of the 1996 Act itself was amended by the *Homelessness Act 2002* (2002 Act) when further substantial amendments were made to the 1996 Act. This chapter will only address the sections of the law relevant to social vulnerability. A more general analysis on the institutions and legal frameworks for dealing with homelessness can be found in the next chapter.

The Code of Guidance (the Code), a central government circular, currently issued by the Department for Communities and Local Government, 'fleshes out' the local authorities' duties to assist homeless people. Unfortunately, it does not have legal force, and local authorities only have to demonstrate that they have considered the Code. Having taken into account the Code in their enquiries, authorities can then choose to depart from it. Other than the Code, case law provides further clarification for interpreting the concepts of 'vulnerability' and 'priority need.'

The emergency housing duty imposed on local authorities is meant to have immediate effect (section 188, 1996 Act). If a local authority has reason to believe that a person is

homeless, eligible for assistance – not prevented by immigration law to have recourse to public funds – as well as being in 'priority need' then interim accommodation ought to be provided while the local authority investigation continues. Despite commonly held understanding of 'social vulnerability,' the analysis in this chapter of homelessness law will demonstrate how difficult it is for a vulnerable person to gain emergency housing assistance from the local authority. If a socially vulnerable person does not automatically qualify as a 'priority need' homeless applicant, he or she would have to prove 'vulnerability' in housing terms.

In this chapter, the term 'housing authority' is used interchangeably with 'local authority.'

B. Government Policy and Homelessness

The original welfare reforms attributed to Sir William Beveridge in 1948 have been characterised by Jones and Lowe as "a mix of universal and comprehensive policies through which government became more positively responsible for the promotion of individual welfare" (2002:6). Jones and Lowe asserted that the 'mix' contained 'core' policies, which have been equated with the "five giants on the road to reconstruction" identified in the Beveridge report as want, disease, ignorance, squalor and idleness. Housing was a core policy.

The Elizabethan Poor Law – extensively modified over the years – had continued to remain the basis of welfare provision until it was abolished by the *National Assistance Act 1948* (Hughes et al 2000:298). The 1948 Act required the National Assistance Board to be responsible for the wandering homeless, while local authority welfare departments would be responsible for housing the rest of the homeless. Section 21(1)(b) of the 1948 Act imposed a duty on local authorities to provide:

> *temporary accommodation for persons who are in urgent need thereof, being need arising in circumstances which could not reasonably have been*

foreseen or in such other circumstances as the authority may in any particular case determine.

Robson and Poustie assert that the difficulties that arose in enforcing the 1948 Act did so for two main reasons. First, there was an inadequate response from the government to the issue of homelessness. Secondly, the belief that the solution to the housing problem was simply to build sufficient houses to meet general housing needs was misplaced (1996:37). Robson and Poustie further argue that a central flaw in the policy of the 1948 Act was the failure to allocate primary responsibility for the homeless to the local authority housing departments rather than the welfare departments. Hence, homelessness became perceived as a welfare issue, rather than a housing problem. The social welfare departments had little accommodation to offer and the responsibility for accommodating homeless people became a financial burden for welfare departments.

The 1948 Act statutory duty was explicit in directing that temporary accommodation be provided to persons in urgent need, and this need had to arise out of circumstances that could not reasonably be foreseen. However, the 1948 Act failed to provide guidance about what constituted 'urgent need,' 'unforeseen circumstances' or 'temporary accommodation.' As a result, local authority practices varied greatly. It was not until 1974 that guidance was issued in a joint Circular identifying priority groups who were to be regarded as having an urgent need for accommodation.[1] These priority groups included families with dependent children either living with parents or in care, as well as adult families or people living alone who had become homeless in an emergency. Fire or flooding was considered to be emergency situations. Priority groups also included those who are vulnerable because of old age, disability, pregnancy or other special reasons. The term 'unforeseen circumstances' was interpreted narrowly by local authorities. This restrictive approach to interpreting 'unforeseen circumstances' was supported by the Court of Appeal in *Southwark LBC v Williams* [1971] Ch 734.

[1] The Department of Environment joint Circular 18/74, *Homelessness* (Department of Health and Social Security (DHSS)) Circular No 4/74, Welsh Circular No 34/74, paragraphs 8–12.

Some guidance on the interpretation of the term 'temporary accommodation' was given to authorities years later after litigation in the higher courts. In *Roberts v Dorset County Council* [1976] 75 LGR 462; [1976] Times, 2 August (CA), it was held that the obligation imposed upon local authorities under section 21(1)(b) was merely to provide accommodation on a temporary basis. The obligation on local authorities was not to provide accommodation for as long as an urgent need for accommodation persisted. It was further decided that it was not unlawful for authorities to formulate guidelines to determine when the provision of temporary accommodation should cease. However, it was subsequently held in *Bristol Corporation v Stockford* [2] that Bristol Corporation's blanket policy of providing homeless families with accommodation for a fixed period of twenty-eight days was unlawful. The blanket policy indicated that this particular local authority had fettered its discretion by imposing the fixed period of stay. In determining the length of time for which temporary accommodation must be provided, authorities must take into account the actual or potential needs of accommodation by the homeless families.

Another factor, which did much to undermine the policy of the 1948 Act, was local authority practice. The problem was that many authorities interpreted the section 21(1)(b) duty placed on them to provide temporary accommodation to assist persons in urgent need, to apply exclusively to mothers and children of homeless families. This resulted in the single homeless and homeless fathers not being assisted under the Act.

Further confusion arose when local government was re-organised under the *Local Government Act 1972* (1972 Act). Section 195 and Schedule 23 of the 1972 Act redefined into discretion the duty under section 21(1)(b) of the 1948 Act, although power was reserved to the Secretary of State to re-impose this duty. The 1972 Act also restructured the local government sector, creating a two-tier system. This meant that in most parts of the country, social services provision became a county council responsibility, while district authorities managed housing. On 1 February 1974, the

[2] The case is not reported but has been reproduced in Carnworth, R (1978) *A Guide to the Housing (Homeless Persons) Act 1977*, page 129, cited in Robson and Poustie 1996:41.

Secretary of State for the Social Services issued a DHSS Local Authority Circular 13/74 re-imposing the duty on social services authorities to provide temporary accommodation. However, the Department of Environment then issued a joint Circular 18/74 with the Department of Health and Social Security. This stated that, "suitable accommodation for the homeless should in future be undertaken as an integral part of the statutory responsibility of housing authorities." Furthermore, Circular 18/74 advised county councils to transfer their housing stock to the relevant district council.

In the late 1960s and early 1970s, a number of influential committees recommended that primary responsibility for the homeless should be transferred from local authority social services departments to housing departments. The reasoning was that the housing departments had resources and skills not possessed by the former. The Committees that backed such recommendations included the Seebohm Committee on local authority and allied services, the Cullingworth Committee on council house allocation policies, the Greve Report on homelessness in London, the Finer Committee on one-parent families and the Morris Committee on links between housing and social work (see Robson and Poustie 1996:42).

C. The Homelessness Legislation

The Housing (Homeless Persons) Act 1977

Background information on the 1977 Act can be found in Thompson (1988), Hughes and Lowe (1995), Robson and Proustie (1996) as well as Loveland (1995). The following account of the events leading to the conception of the 1977 Act is based primarily on the above sources of information.

When the 1977 Act was drafted, the Labour administration was in a parliamentary minority, but retained power through a coalition with the Liberals. The 1977 Act started its life as a Private Members' bill, introduced by the Liberal MP, Stephen Ross. The original intention of Ross was to impose upon local authorities an absolute duty to house homeless families within the area in which they lived. During the Bill's Second Stage

Reading, the Department of Environment (DoE) Bill replaced Ross' draft bill. The DoE Bill had been drafted following the 1974 homelessness policy review but was held in abeyance until resurrected. The Ross – DoE bill did not advocate universal 'rights' to public housing. Instead it was envisaged that only certain 'priority need' groups would be entitled for assistance. The 'priority need' groups included the elderly and the infirm, two groups already being assisted under the *National Assistance Act 1948*. In addition, pregnant women, whether living alone or as part of a couple would be assisted. The Bill was conceived mainly to assist families whose children were taken into the care of social services because parents could not afford adequate housing. Single people and childless couples below retirement age would have no 'right' to long term accommodation unless they were severely ill or disabled.

The main purpose of the Bill was to compel local authorities in England and Wales to implement the DoE Circular 18/74: responsibilities for housing homeless persons would be transferred from social services departments to housing departments. A further aim of the Bill was to replace the limited duty of providing homeless persons with temporary accommodation with a range of more extensive and comprehensive duties. However, while the Bill was in debate, the Conservatives expressed fears that there were many "idle, dishonest men and women eagerly waiting for council housing" (Loveland 1995:70). The Opposition's concern was to deny re-housing entitlements to the "self induced homeless." Hugh Rossi, Conservative MP, who had been a Department of Environment Minister when Circular 18/74 was drafted, argued that granting the homeless a right to housing would disadvantage thousands of inadequately housed people who were waiting to be re-housed into local authority accommodation. He further suggested that awareness of such 'rights' would result in problems, such as 'queue-jumping.' The reasoning was that such a problem could lead to a complete breakdown of waiting-list allocation, as everyone would contrive to become homeless and so be eligible for immediate re-housing.

As mentioned earlier, Ross and the DoE intended that only those applicants in 'priority need' would be eligible for permanent re-housing. The 1977 Act test was satisfied in one

of four ways. The test would be satisfied if the applicant (or a person with whom he or she might reasonably be expected to reside) was pregnant, had dependent children, was 'vulnerable,' or was homeless through emergency, such as fire or flood (section 59(1)). The definition of 'priority groups' was originally intended to be non-statutory. However, arguments were made by Labour MPs to the effect that the term had to be given a statutory basis. A failure to do so could lead to an undermining of the legislative policy by administrative decision-making. This led to the 'priority need' category being statutorily defined. Even so, some of the priority status categories, such as pregnancy, proved to be controversial. There were concerns of teenage girls deliberately becoming pregnant in order to be allocated council housing. Some Conservatives suggested that the legal rights to housing granted during the pregnancy stage would produce a large increase in single-parent families.

'Vulnerability' was the most discretion-laden component of priority need. Section 59(1)(c) was imprecise and its definition of 'vulnerability' embraced old age, physical or mental illness or handicap, or some "other special reason" (Loveland 1995:76). The imprecision would enable local authorities to decide upon their own definition.

The Code of Guidance – a ministerial advisory document – suggested that councils should accord priority need to women fleeing domestic violence, and to teenagers whose homelessness might expose them to financial or sexual exploitation. The Code's interpretation of vulnerability was not particularly restrictive. However, local authorities were not bound by the DoE's interpretation. At that time, *R v Waveney District Council, ex parte Bowers* [1983] QB 238, 3 All ER 727, indicated that vulnerability must be interpreted in terms of the applicants' capacity to compete for accommodation in the private sector.

Much of the debate over priority need centred on the exclusion of single non-vulnerable homeless people from re-housing entitlement. Ross maintained that there were inadequate resources to extend the priority need category. The factual situation was that the Act would not increase public expenditure, but merely transfer resources from

county councils' social service budgets to district councils' housing departments. Hence, it would be unlikely that the bill would cover the single homeless. The eventual legal interpretation of priority need by courts seems to accord with Ross' original intentions and Circular 18/74's priority categories have gained (albeit imprecise) statutory force. However, section 59(2) did empower the Secretary of State to expand the priority need categories. Labour MPs who had accepted the bill's exclusion of the single homeless had expected that economic improvements would soon permit progress towards a universal right to housing (HCD, 18 February, 1977, column 901; Loveland 1995:78).

Part III of the Housing Act 1985

The 1977 Act was consolidated into Part III of the *Housing Act 1985* and came into force on 1 April 1986. The consolidation contained very few substantive amendments (Hunter and McGrath 1986:33-34, also Hughes et al 2000:299). Considerable guidance on the implementation of Part III of the 1985 Act was contained in the third edition of the Code of Guidance issued in 1991. The Code was further revised in 1994 in order to take into account the *Asylum and Immigration Appeals Act 1993*.

Part VII of the Housing Act 1996 with Homelessness Act 2002 Amendments and the Homelessness (Priority Need for Accommodation)(England) Order 2002

Part III of the 1985 Act was re-enacted as Part VII of the 1996 Act, but with substantive changes, which included an alteration from a permanent re-housing duty by the local authority to a two-year temporary duty. The 1996 Act was further amended by the *Homelessness Act 2002*. One of the changes made by the 2002 Act was a restoration of the permanent re-housing duty of the local authority in place of the two-year duty originally imposed by the 1996 Act.[3] The priority need categories were extended by secondary legislation at the same time by the *Homelessness (Priority Need for Accommodation) (England) Order 2002* (SI No 2051) (Priority Need Order 2002).

[3] Section 6 of the *Homelessness Act 2002* amends section 193 of the *Housing Act 1996*, which was limited to two years under that Act. A new duty is now imposed on housing authorities to secure accommodation until any of the circumstances prescribed cause the duty to cease. The prescribed circumstances can be found in section 193(6)-(8) of the 1996 Act as amended by section 7 of the 2002 Act. In brief, the local authorities' homelessness duty will cease if an applicant accepts a 'qualifying offer' of accommodation or the applicant has been allocated accommodation from the local authority's own housing stock.

Discussion of the changes brought about by the 1996 Act can be found in Chapter Four of this thesis, which concentrates on the institutional and legal frameworks for dealing with homelessness. The following sections concentrate in the main on the existing and new priority need categories.

'Vulnerability' is a concept that is defined by section 189(1)[4] Part VII of the 1996 Act. The 'priority need' categories, extended by secondary legislation, had effect from 31 July 2002. The Priority Need Order 2002 provides that six further categories of applicants have a priority need. An assessment made within section 189 of the 1996 Act will determine whether a homeless applicant could be in priority need for emergency accommodation. If a duty is owed to the homeless applicant at this stage of the homeless application then the local authority must "secure that accommodation is available for his occupation pending a decision as to the duty (if any) owed to him."[5]

Much of the litigation concerning the meaning of 'vulnerability' has resulted in the construction of a narrow definition. Availability of financial resources to local authorities, as an issue, should not arise when an authority officer assesses homeless applications. However, the 'gatekeeping' of such resources has lead to a strict interpretation of the definitions 'vulnerability' and 'priority need.' This has particularly been the case in London.

Issues of accessing justice in the context of homelessness arise from when a homeless person attempts to make an application under Part VII of the 1996 Act.[6] In addition to problems with making a homeless application, particularly if an applicant is single, acquiring interim accommodation is often difficult. Authorities are expected to provide interim accommodation once it is satisfied with the lower threshold of having reason to believe that an applicant is homeless, eligible for assistance and in priority need for accommodation. As Chapter Four of this thesis analyses in greater detail the institutional

[4] Section 189 of the *Housing Act 1996* lists those who have a priority need for accommodation.
[5] Section 188(1) of the *Housing Act 1996*.

and legal frameworks for dealing with homelessness, only the most relevant legislative changes have been included in this section. The legislative changes discussed in this chapter provide the context within which the issue of social vulnerability is assessed. If the homeless applicant is fortunate enough to be given a written decision and is dissatisfied with the decision,[7] he or she has a right, and will need, to request an internal review of the decision within twenty-one days of the issue of the decision.[8] If the applicant continues to engage with the process, it is unlikely that a lawyer will be instructed, as this is still an early stage of the appeal process. Indeed, if a homeless applicant who is eligible for public assistance with his or her legal costs wishes to challenge a local authority's negative homelessness decision, retention of a lawyer is not possible, unless this is permitted by legal aid. Many vulnerable homeless persons do not proceed with a review.[9] The situation for the dissatisfied homeless applicant is made more difficult if they are not offered interim housing assistance at the initial stage. The 1996 Act does not make provision for prescribed information – for example, suggesting that the applicant may want to seek legal advice – to be included in the written decision.

One difficulty that homeless people often encounter, in addition to having to decide whether or not to take action on a negative decision, is maintaining contact with their advisor or solicitor if they have no stable accommodation.[10] As was shown in some of the case studies in Appendix Two of this study, the possibility of a street homeless single person in London finding some sort of shelter or emergency accommodation is

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[6] Initial assessments might well be undertaken by an officer not qualified in making these assessments, whose main role may be to 'gatekeep' resources. Chapter One provides information on what happens when a homeless application is made.

[7] Section 184(3) imposes a requirement that "on completing their enquiries the authority shall notify the applicant of their decision." While section 184(6) requires that "notice required to be given to a person under this section shall be given in writing."

[8] Section 202 of the *Housing Act 1996*.

[9] See Cowan and Halliday et al (2003).

[10] See Zalik (2000: 161)

> *Homeless people are transitory, and this makes it more difficult for them to keep appointments relating to legal, or other matters...The struggle for survival is more intense for the homeless than it is for other poor people because the homeless must search not only for food, but also shelter, on a regular basis. They are likely to suffer from fatigue due to the conditions in which they sleep. They have almost no privacy, and must use public facilities for all their personal hygiene needs.*

extremely limited, and this may pose serious problems for maintaining communication with his or her advisor.[11]

D. Legal Definition of 'Vulnerability'

Emergency access to housing provided by the local authority is restricted to those applicants that fall within the relevant criteria.[12] Under the emergency housing provisions, the housing authorities are only obligated to assist those persons deemed to fall within one of the 'priority need' groups[13] identified under section 189(1) of the 1996 Act. As will be seen in the later sections of this chapter, detailed guidance has been issued by central government in conjunction with the amended 1996 Act. In contrast to the situation when the *National Assistance Act 1948* was implemented, local authorities at that time would have benefited greatly from such detailed guidance.

The existing four categories of people in the 1996 Act identified as having priority need for accommodation stemming from the 1948 Act are pregnant women,[14] and those with

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[11] In the course of my work as a housing advisor and caseworker, I have tried to find an emergency hostel vacancy for single people who were turned away by the local authority when they or I (on their behalf) tried to secure interim accommodation after having made a homeless application. Many emergency hostels are run by the voluntary sector. The main problem has been a huge lack of vacancies.

[12] Provision under Part VII of the *Housing Act 1996* can be divided into two parts. The first part relates to the section 188 duty. If a local housing authority has reason to believe that an applicant may be homeless, eligible for assistance, and have a priority need, the authority shall secure that accommodation is available for occupation for the applicant and his or her household, pending a decision as to the duty (if any) owed to the applicant. The second part arises under section 193, where a local housing authority is satisfied that an applicant is homeless, eligible for assistance and has a priority need, and are not satisfied that he became homeless intentionally.

The second part of the duty begins once a decision under section 184 has been made. Eligibility for assistance relates to public funds. Section 185(1) of the *Housing Act 1996* provides that "a person is not eligible for assistance… if he is a person from abroad who is ineligible for housing assistance." Section 185(2) clarifies that "a person who is subject to immigration control within the meaning of the *Asylum and Immigration Act 1996* is not eligible for housing assistance unless he is of a class prescribed by regulations made by the Secretary of State."

[13] The notion of 'priority group' first arose in connection to responsibilities under section 21 of the *National Assistance Act 1948* in the provision of emergency and short-term accommodation to people made homeless by unforeseen circumstances. The then Department of Environment Circular 18/74 paragraph 10, urged housing authorities to re-house 'priority groups.' The groups were defined as families with dependent children living with them or in care; and adult families or people living alone who either become homeless in an emergency such as fire or flooding or are vulnerable because of old age, disability or other special reasons (Loveland 1995:64-5).

[14] Section 189(1)(a).

whom dependent children reside or might reasonably be expected to reside.[15] The third category comprises those who are vulnerable as a result of "old age, mental illness or handicap or physical disability or any other special reason."[16] For the above three categories, the person with whom the homeless applicant resides with or might reasonably be expected to reside, should be included in the homeless application. The fourth category of priority need homeless applicants is persons who are homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster.[17] Guidance from the Code is in general, slightly clearer in relation to the specifically identified priority need categories of people listed in the 1996 Act.

Out of all four of the existing priority need categories, only three categories of homeless people are automatically accommodated once evidence of the priority need status has been provided. Those who might be vulnerable as a result of old age, mental illness or handicap or physical illness or any other special reason must demonstrate vulnerability before they are assisted with emergency accommodation.[18] The following discussion will focus on the concept 'vulnerability,' while the priority need categories themselves are analysed in sections E and F of this chapter.

In general, there is a need to ensure that local authorities do have flexibility to decide when homeless people might be vulnerable as a result of "old age, mental illness or handicap or physical illness or any other special reason." However, bearing in mind that local authorities are more likely to err on the less generous side when deciding whether someone might be vulnerable, greater guidance in this area of interpretation of the statute is welcome. In terms of the test to be applied, the correct test is confirmed in the late 1990s case *Pereira* (see below), but it is interesting to see what criteria courts have used previously. *R v Waveney DC ex parte Bowers* [1982] 3WLR 661; [1983] QB 238; [1982] 3 All ER 727; [1982] 4HLR 118; [1982] 80 LGR 721 (CA) confirmed that multiple health problems could indicate vulnerability. Mr Bowers, who was a fifty-nine

[15] Section 189(1)(b).
[16] Section 189(1)(c).
[17] Section 189(1)(d).

year old alcoholic, suffered from severe head injuries, which left him in a disorientated and confused state. He applied to the council for accommodation after discharge from hospital. A social services officer stated that although he was able to fend for himself, he was vulnerable at certain times, and needed some supervision. In addition, because he was vulnerable to accidents, he should be in sheltered accommodation with a warden. The council decided that he was not in priority need. The Court of Appeal held that, although his alcoholism would not ordinarily have given him priority need, his brain injury had increased his vulnerability to such an extent that he had priority need.

On the other hand, *R v Westminster CC, ex parte Ortiz* [1995] 27 HLR 264 (CA) demonstrated the circumstances where an applicant could be prevented from being vulnerable. In this case, Ms Ortiz had both drink and alcohol addiction problems, in addition, to having multiple health problems. However, the availability of accommodation in the local authority area, and the fact that the applicant would not be disadvantaged in obtaining accommodation meant that Ms Ortiz was not considered to be vulnerable.

A similarly harsh decision – although decided many years earlier – can be found in *R v Reigate and Banstead BC ex parte Di Dominico* [1988] 20 HLR 153 (QBD). Ms Di Dominico suffered a head injury, which then caused epilepsy. She had recurrent fits, which had been brought under control by tablets. The council decided that she was not vulnerable. A further medical report was obtained, which stated that she had also lost bladder control, sometimes fell down and that she would need to be under medical supervision for the rest of her life. The council did consider the further medical report but did not change the decision made earlier. The judge was not prepared to quash the decision of the council, since the council had secured an opinion from its medical advisors in addition to having considered other medical reports. The applicants sought to distinguish *R v Wandsworth BC ex parte Banbury* (see below) because the epileptic fits in that case were frequent and caused continual distress. The judge was satisfied that the

[18] In terms of the full enquiries that local authorities must then carry out, guidance on the use of medical advisors by an authority can be found in *Shala v Birmingham CC* [2007] EWCA Civ 624.

authority's decision – that this medical condition did not render the applicant vulnerable in a housing context – was not perverse.

In considering whether a homeless applicant might be vulnerable, the vulnerability test has been linked to ability to find and keep accommodation. *R v Lambeth LBC ex parte Carroll* [1988] 20 HLR 142 (QBD) confirmed that 'vulnerable' means less able to fend for oneself when homeless or in finding and keeping accommodation. In that case, it was decided that although it was proper for a local authority to consider medical opinion, the question of whether or not someone is vulnerable for "other special reason" is to be answered by the housing authority itself, not by the medical advisor. Hence, the council must consider any other evidence available and make whatever appropriate enquiries are necessary beyond obtaining the medical officer's opinion.

R v Wandsworth LBC ex parte Banbury [1987] 19 HLR 76 (QBD) decided that whether the applicant was vulnerable was a question of fact and degree. On the totality of evidence, the court decided that the housing authority's conclusion was one to which a reasonable authority could arrive at. Inference could not be drawn that the authority had simply rubber stamped the medical officer's decision. In this case, Mr Banbury, who was a single man aged forty-seven suffered from grand mal epilepsy. He handed to the local authority two letters from doctors confirming his condition. The council's medical officer considered the letters but decided that Mr Banbury was not vulnerable. The medical officer considered the case twice, and took into account a consultant's report obtained by Mr Banbury. The consultant's report stated that the attacks were unpredictable, that they did not occur very frequently, but that he had over the years continued to have occasional seizures. On that basis, the consultant concluded that he was vulnerable because he was still susceptible to them. The local authority did not change its decision.

As mentioned above, the correct test in current law that the housing authority should apply when assessing whether someone is vulnerable has been confirmed by *R v Camden LBC ex parte Pereira* [1998] 31 HLR 317 (CA), see also 1998 (July) *Legal*

Action 12. The assessment is in two parts: the first part involves the question of whether the homeless applicant can find and keep accommodation; the second part asks whether the applicant is less able to fend for him or herself in coping with his or her state of homelessness. *Thorne v Winchester CC* (2000), 2002 (April) *Legal Action* 32 (CA) confirmed that the *Pereira* test was the correct test. In that case, the court assessed whether the council had correctly directed itself to the approach to vulnerability.

The 'Pereira test' is contained in the 2006 Code of Guidance (paragraph 10.13). The test is whether the applicant is less able to fend for himself or herself in comparison to a less vulnerable person. Hence, a person is not 'vulnerable' if his or her only weakness is a particular inability to find suitable housing (Hughes et al 2000:334). A homeless applicant must prove that he or she will likely suffer physical detriment or injury while homeless.[19]

Further guidance in terms of 'proving' vulnerability in relation to section 189(1)(b) of the 1996 Act can be found in paragraphs 10.1 to 10.18 of the 2006 Code. The guidance in the 2006 Code in relation to those with a mental illness, learning or physical disability is more robust in comparison to the revised 1996 Code. In the 1996 Code, paragraph 14.8 suggests that those discharged from psychiatric hospitals and local authority hostels for people with mental health problems ***may*** be vulnerable. The 2002 and 2006 Codes urge that such people ***are likely*** to be vulnerable (paragraph 8.16 and paragraph 10.17 respectively). The 2006 Code reminds local authorities that it is a matter of judgement whether the applicant's circumstances make him or her vulnerable.

In terms of demonstrating vulnerability for those with other special reasons, generally, the relevant sections of the Code[20] provide more explicit and a greater amount of guidance. Neither the 1948 Act nor the 1977 Act could have foreseen the need to consider extending emergency housing assistance to those fleeing harassment, former asylum seekers, chronically sick people including people with HIV and AIDS, as well as

[19] Guidance on a number of principles that could be applied when assessing vulnerability is set out by Auld LJ in *Osmani v Camden LBC* [2004] EWCA Civ 1706; [2005] HLR 22.

young people.[21] Hence, guidance in relation to these four 'special reasons' categories is particularly welcomed. The Code cautiously adds – but is emphatic at the same time – that the "legislation envisages that vulnerability can arise because of factors that are not expressly provided for in statute." The paragraph ends with examples of "other special reasons" which might include the situation, " where applicants have a need for support but have no family or friends on whom they can depend they may be vulnerable as a result of any other special reason." Housing authorities are reminded that they must keep an open mind and should avoid blanket policies that assume that particular groups of applicants might, or might not be vulnerable because of other special reasons. Further, if an applicant is considered to be vulnerable, it is necessary to assess in depth the circumstances of the case.

Local authorities have been directed to consider that in addition to people with AIDS, who might find it difficult to search for and maintain suitable accommodation, people with HIV might experience similar problems.

In relation to young people, particular guidance has been given to those under the age of twenty-five who might be forced to leave the parental home, or who cannot remain because they are being subjected to violence or sexual abuse, and might lack a 'back-up network.' Hence, this group of young people might be less able, in comparison to others to establish and maintain a home for themselves. Moreover, local authority staff are reminded by the Code that young people who end up sleeping on the streets without adequate financial resources to live independently might be at risk of abuse or prostitution.

In relation to people fleeing harassment,[22] the 2006 Code reminds local authorities that in some cases, severe harassment may not necessarily result in actual violence or threats

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[20] Paragraphs 10.30 to 10.35 of the 2006 Code.
[21] These are young people who do not fall under the 2002 Priority Need Order (see Section F of this chapter) who may nevertheless be homeless and vulnerable in certain circumstances.
[22] Paragraph 10.34 of the 2006 Code covers people fleeing harassment. The new category of people fleeing harassment is in fact a consolidated category including victims of violence or abuse or sexual and/

of violence. In addition, applicants who have fled their home because of non-violent forms of harassment, such as verbal or psychological abuse or damage to property should be considered carefully in case they might be vulnerable. For the first time guidance has been included in the 2002 Code and, local housing authorities are asked to consider carefully applicants who might be at risk of witness intimidation, particularly where witnesses may have to give up their home for the duration of the trial or may feel unable to return to their home after the trial.

E. The Existing 'Priority Need' Categories

As noted earlier in this chapter, the existing 'priority need' categories stem from the *National Assistance Act 1948.* The guidance contained within the 2006 Code in relation to dependent children in particular, reflects a greater sensitivity in approach to dealing with the changing traditional family structures.

Pregnant Women

The 2006 Code of Guidance, as did the 2002 Code, provides advice in greater detail for the existing priority need categories. In terms of the situation where a pregnant woman suffers a miscarriage or terminates her pregnancy during the assessment process, authorities are asked to consider whether she might continue to have a priority because of some other reason. The 2006 Code suggests that vulnerability might arise "as a result of some other factor" (paragraph 10.5).

Dependent Children

In relation to homeless applicants with dependent children, much greater guidance has been given.[23] The advice is explicit in stating that the dependent children must actually be resident with the homeless applicant. If the children are not already resident, there must be a reasonable expectation of residence, with some degree of permanence "or

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or racial harassment. However, the 2006 Code provides more coherent advice in comparison to paragraph 14.17 of the 1996 Code.

[23] See paragraphs 10.6 to 10.11 of the 2006 Code of Guidance.

regularity, rather than a temporary arrangement whereby the children are merely staying with the applicant for a limited period." The Code assists with the definition of 'dependent children' suggesting that even though children over the age of sixteen are in full-time employment and are financially independent of their parents, it should not be presumed that all children of this age might be independent. Such guidance is in line with *Miah v Newham LBC* [2001] EWCA Civ 487; 2001 (June) *Legal Action* 25 (CA) when the court decided that the council had misdirected itself on the meaning of the 1996 Code. In that case, the council had interpreted advice that housing authorities may wish to treat as dependent all children aged sixteen to eighteen who are in, or are about to begin, full-time education or training, and so on, by limiting the advice to apply to children up to their eighteenth birthday.

The 2002 and 2006 Codes suggest to local authorities that where dependants are not the applicant's own children, there must be some form of parent and child relationship. Hence, a man with a sixteen or seventeen year-old wife would not have a priority need under this section. This particular example has probably been added to the Codes as a result of *Hackney LBC v Ekinci* [2001] EWCA Civ 776; [2002] HLR 2; [2001] 24 Times July (CA). In this case, Mr Ekinci made a homeless application to the council. At the time of the council's decision, his wife was aged seventeen, in full-time education and dependent upon him. Mr Ekinci claimed that he was in priority need because his wife was "a person with whom dependent children reside or might reasonably be expected to reside" (1996 Act, section 189(1)(b)). At first instance, the judge[24] agreed that the wife was both a 'child' and a 'dependent.' On appeal, the council argued that section 189(1)(b) concerned the relationship between a parent and child and not the relationship between spouses. The Court of Appeal accepted the council's argument. The court, in assessing priority need in the context of the 1996 Act, considered that the priority created in section 189(1)(b) was that based on a parent-child relationship. Hence, Mr Ekinci's wife was capable of being a dependent child in relation to her parents or someone in the parental position, but she could not be a dependent child in relation to

[24]The judge referred to paragraph 14.2 of the then most current Code of the Guidance, which was revised in 1996.

her husband. As she was his wife, such a relationship was outside the category of persons envisaged by section 189(1)(b).

In situations where parents are separated, local authorities are explicitly reminded that in many cases, parents might come to an agreement themselves as to which of them will have care of the child.[25] In such circumstances, a court order will neither be made nor required. Over the years courts have debated the question as to what constitutes a 'dependent child.' In *R v Lambeth LBC ex parte Vaglivello* [1990] 22 HLR 392 the court held that the first limb of the then current law, section 59(1)(b) *Housing Act 1985* test, is satisfied simply where there is at least one dependent child who lives with the applicant. The court held that the test does not require that the child wholly and exclusively depend on and reside with the applicant. In this case, Mr Vaglivello and the mother of his son agreed to share the care of their son equally. They were not married, and lived separately. The son spent three and a half days each week living with each parent. This arrangement had lasted for four years before Mr Vaglivello approached the council for housing assistance. Again, in *R v Kingswood BC ex parte Smith-Morse* [1995] 2FLR 137; [1994] Times 8 December (QBD) the council failed to deal with the second limb of section 59(1)(b) of the 1985 Act – whether the child might reasonably be expected to reside with the applicant in future. The court further decided that the reference to 'main' residence represented a misdirection of law. In the opinion of the court, the question a housing authority should ask is whether the son resided with the applicant and not whether he mainly resided with the applicant. In addition, if the first question was answered in the negative, and his son was found not to reside with him, then the council must consider whether his son, in future, would reside with him. Further, it was for the council and not the applicant to raise and consider the possible relevance of the second limb of the test.

The issue of 'greater dependency' is a factor that some local authorities have used to decide whether a single applicant – usually the father – has a dependent child, and therefore be in priority need. This was the case in *R v Leeds CC ex parte Collier* [1988]

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[25] See paragraph 10.9 of the 2006 Code.

1998 (June) *Legal Action* 14 (QBD) when the Deputy Judge quashed the council's decision that Mr Collier was not in priority need because the council considered that his former partner had greater residence responsibility for the children. The judge decided that the test to be applied under section 59(1)(b) was whether dependent children resided with the applicant, not whether there was any 'greater residence' with another adult. *R v Westminster CC ex parte Bishop* [1997] 29 HLR 546 (QBD) decided that section 59(1)(b) of the 1995 Act was satisfied only where the children were, at least in some part, dependent on the applicant. This means that a claim would fail if an argument were made on the basis that there is priority need because the children would also reside with the applicant but in fact, had not done so prior to the homelessness application being made.

The Code alerts local authorities to the fact that there must be some regularity of arrangement. The Code suggests that if the child is not currently residing with the applicant, then that housing authority will need to decide whether it would be reasonable for the child to do so. The Code further suggests that it should not be presumed that it would be reasonable for the child to reside with the parents making the homeless application in two circumstances. First, where there is an agreement between the child's parents. Secondly, where a joint residence order issued by a court exists. Thus, housing authorities are urged to consider the need in each case individually. Local authorities are further reminded that where parents separate, it would often be in the best interests of the child to maintain a relationship with both parents.

Homelessness as a Result of an Emergency such as Flood, Fire or Other Disaster

The final category under the existing priority need categories is the group of people who are homeless, or threatened with homelessness, as a result of an emergency such as flood, fire or other disaster. Paragraph 8.42 of the 2002 Code provided slightly more guidance in comparison to the 1996 Code, and mention is made of the volcanic activity on the island of Monserrat as an example of 'other disaster.' This part of the guidance has not been included in the 2006 Code. The 2002 and 2006 Codes advise that in order to qualify as priority need under the 'other disaster' category, "the disaster must be in

the nature of flood or fire, and involve some form of physical damage or threat of damage." Thus, the case of *Telesford v Ealing LBC* [2000] 2000 (August) *Legal Action* 26, 3 May 2000 (Brentford County Court) is taken into account, but not the situation where a person is made homeless by an unlawful eviction. In *R v Bristol CC ex parte Bradic* [1995] 27 HLR 484; [1995] 94 LGR 257 (CA) the council decided that an applicant who had been made homeless as a result of an illegal eviction, was a situation that did not amount to a 'disaster.' In judicial proceedings, the council argued that the emergency provision only covered forms of emergency similar to fire, flood or other natural disaster. The council expanded upon the meaning of forms of emergency to mean those situations, which were 'communal' in nature in that they were experienced by more than one household. The Court of Appeal came to the same conclusion as the council, but added that the emergencies giving rise to priority need are not limited to those with 'natural' causes. Fires or floods caused by humans can give rise to priority need, but there must be some physical damage, which results in the accommodation being uninhabitable. Hence, in Case 6 of the case studies, the local authority would not assist Tom. In that case, Tom argued that he was homeless following an 'unlawful' eviction, when he claimed that he was "scared into leaving" by his landlord.

F. The 'New' Priority Need Categories

The Secretary of State has power to add to the priority need categories (Section 189(2) of the 1996 Act). This power was not exercised until the 1996 Act was amended by the *Homelessness Act 2002*. The Priority Need Order 2002 adds a further six categories to the existing four priority need categories. Significantly, only three of the new priority need groups – the 'young people' groups – are automatically considered for emergency accommodation once homelessness and eligibility for assistance have been established. The homeless applicants that fall within the remaining categories, former armed forces staff, those from an institutional background, and those fleeing violence or threats of violence, must demonstrate vulnerability as previously discussed.

In terms of the three 'young people' groups, the first group are those aged sixteen to seventeen. This group does not include sixteen and seventeen year olds considered to be a 'relevant child'[26] or a 'child in need'[27] to whom a local authority owes a duty under section 20 of the *Children Act 1989.* The second group of young people that has been accorded priority need status is young people who are under the age of twenty-one who were, but are no longer, "looked after, accommodated or fostered"[28] between the ages of sixteen and eighteen. Those who are considered to be a "relevant student do not fall into this category."[29] Further information in relation to the second group can be found in the 2006 Code, paragraphs 10.40–10.41. The final group is those aged twenty-one or over who are vulnerable as a result of having been looked after, or accommodated by social services or fostered. The exception to this category being a person who is a 'relevant student.' Further information in relation to the third group can be found in the 2006 Code, paragraphs 10.19–10.20.

Sixteen and Seventeen Year-olds

Responsibility for providing suitable accommodation for a 'relevant child' or a "child in need" to whom a local authority owes a duty under section 20 of the *Children Act 1989* rests with social services. In all cases of uncertainty as to whether a sixteen or seventeen

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[26] A 'relevant child' is defined as a child aged sixteen and seventeen who has been looked after by a local authority for at least thirteen weeks since the age of fourteen. He or she must also have been looked after at some time while aged sixteen or seventeen and who is not currently being looked after. However, a child may also be a 'relevant child' if he or she would have qualified but for the fact that on his or her sixteenth birthday any of the three following situations arose. First, he or she was detained through the criminal justice system. Secondly, the 'relevant child' was in hospital, or thirdly, he or she has returned home on family placement and that has broken down. See section 23A of the *Children Act 1989* and paragraph 8.35 of the *Children (Leaving Care) Regulations 2001.* See also paragraphs 10.37 to 10.39 and paragraphs 12.3 to12.6 of the 2006 Code.

[27] A "child in need" who is owed a duty under section 20 of the *Children Act 1989* is provided for by paragraphs 10.37 to 10.39 of the 2006 Code. Section 20(3) of the *Children Act 1989* places a duty on social services to provide accommodation for a child in need who is aged sixteen or over, whose welfare is likely to be seriously prejudiced if accommodation is not provided. In addition, section 21(1) places a duty on social services to provide accommodation for children in need in certain circumstances.

[28] The words "looked after, accommodated or fostered" have the same meaning as in section 24(2) *Children Act 1989* (as amended by the *Children Leaving Care Act 2000*). See paragraph 10.2 and paragraphs 10.40 to 10.41 of the 2006 Code of Guidance.

[29] A 'relevant student' is defined as a care leaver under aged twenty-four to whom section 24B(3) of the *Children Act 1989* applies, and who is in full time further or higher education and whose term time accommodation is not available to him or her during a vacation. Under section 24B(5), where social services is satisfied that a person is someone to whom section 24B(3) applies and needs accommodation

year old applicant may be a 'relevant child' or a "child in need," the housing authority should contact the relevant social services authority. The Code recommends that a framework for joint assessment of sixteen and seventeen year olds be established by housing and social services to facilitate the "seamless discharge of duties and appropriate services to this client group."

The 2002 Act provided for sixteen and seventeen year-olds who are now clearly in priority need. The 2002 Code provides advice about the possibility of reconciliation between the homeless young person and his or her parent, and whether there is 'genuine' homelessness. Paragraph 8.38 of the 2002 Code reminds local authorities that some sixteen and seventeen year-olds "may have left home because of a temporary breakdown in their relationship with their family." If that is the case, and generally with cases involving sixteen and seventeen year-olds, the 2002 Code suggests that local authorities may be able to effect a reconciliation with the family. The guidance is cautious in two types of cases. First, where relationships might have broken down irretrievably. Secondly, where it would neither be safe nor desirable for the applicant to return to the family home, particularly where there may be violence or sexual abuse. In the immediately aforementioned situations, the Code suggests that any mediation or reconciliation will need careful brokering. Recommendation is made that the assistance of social services is to be sought in all such cases.

The 2002 Code then goes on to advise that the process of reconciliation might take time and housing authorities may need to provide interim accommodation under section 188 of the 1996 Act in the meantime. The Code further suggests that the normal thirty-three working days target for completing inquiries may not be appropriate and may need to be extended. Anecdotal evidence suggests that local authorities are keen to provide mediation for this category of homeless applicants. In many circumstances, young people are directed to the mediation scheme before the local authority accepts a homeless application from the young person. In general, section 188 accommodation has

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during vacation social services must provide accommodation or the means to enable it to be secured. See paragraph 10.19 of the 2006 Code of Guidance.

not been offered to the young person while the outcome of the mediation result is pending. Chapter Eight of this dissertation discusses the misuse of mediation by local authorities in relation to potential homeless applicants.

Paragraph 8.3.9 of the 2002 Code warns local authorities of possible collusion between some parents and children in need of emergency housing assistance from the local authority. The Code suggests that section 191(3) of the 1996 Act (intentional homelessness) will apply in cases where there is no genuine basis for homelessness. The situation described in the Code, is where parents have colluded with a child and "fabricated an arrangement under which the child has been asked to leave the family home." An additional chapter – Chapter 12 – was inserted into the 2006 Code, which included the situation described in the 2002 Code, focusing specifically on 16 and 17 year-olds. Further, paragraph12.14 of the 2006 Code reminds housing authorities that bed and breakfast accommodation is unlikely to be suitable accommodation, and ought to be used as a last resort for 16 and 17 year-olds who are in need of support. Bed and breakfast accommodation should also be used for the shortest time possible for this age group, and local authorities need to ensure that appropriate support is provided to 16 and 17 year-olds where appropriate. In paragraph 12.15, authorities are urged to have arrangements in place for joint housing and social services assessments of these young people's needs. Finally, paragraph 12.6 of the 2006 Code acknowledges, for the first time, of the need for authorities to provide suitable accommodation with support for lone parents who are under 18 years-old, a key part of the Government's Teenage Pregnancy Strategy, aimed to decrease the number of teenage pregnancies.

Members of Armed Forces

As previously mentioned, homeless people who fall into this new priority need category of homeless people does not automatically qualify for emergency housing. A homeless applicant who falls within this category would still need to demonstrate that he or she is 'vulnerable' before assistance is granted. The 2006 Code suggests that in considering whether former members of the armed forces are vulnerable as a result of their time spent in the forces, a housing authority might wish to take into account at least six

factors. First, the length of time the applicant has spent in the forces. Secondly, the type of service the applicant was engaged in, with a reminder that those in active service might find it more difficult to cope with civilian life. Thirdly, whether the applicant has spent any time in a military hospital, which could be a serious indicator of a serious health problem or of post-traumatic stress. Fourthly, whether HM Forces' medical and welfare advisors have assessed an individual to be particularly vulnerable in their view, and have issued a Medical Release Form outlining a summary of the circumstances causing that vulnerability. Fifthly, the length of time since the applicant left the armed forces might be considered, and whether he or she had been able to obtain and/ or maintain accommodation during that time. Finally, whether the applicant has any existing support networks, particularly family or friends.

Institutional Backgrounds

For those who have been in custody or detention, paragraphs 10.24 – 10.27 provide guidance that housing authorities might want to consider. Paragraph 10.25 of the 2006 Code gives guidance on factors that authorities might wish to take into account when authorities consider whether an applicant might be vulnerable. Factors include the length of time the applicant served in custody or detention, and whether an applicant is receiving supervision from a criminal justice agency. The final factors are the length of time since the applicant was released from custody or detention, and the extent to which the applicant had been able to obtain and, or maintain accommodation during that time.

Fleeing Violence or Threats of Violence

Guidance on the final newly extended priority need group, those who have left accommodation because of violence, is contained in paragraphs 10.28 and 10.29 of the 2006 Code. The violence from another person does not have to be actual violence, and can also be threats that are likely to be carried out. All forms of violence, including racially motivated violence or threats of violence likely to be carried out are included. Housing authorities are explicitly instructed that enquiries about the perpetrators of violence should not be made. Local authorities are further advised that in assessing whether it is likely that threats of violence are likely to be carried out, the following

factors should be considered. Account should only be taken of the probability of violence, but not in relation to actions, which the applicant could take against the perpetrators, which he or she does not intend to take. The possibility of obtaining injunctions against perpetrators is given as an example.

Significantly, the advice contained in paragraph 14.17 of the 1996 Code requesting that local authorities specifically consider whether men and women without children are vulnerable as a result of violence or threats of violence has not been included in the 2002 Code. However, the situation of an applicant who experiences severe harassment, which falls short of actual violence or threats of violence likely to be carried out, has been included in the 2006 Code (paragraph 8.34).

G. Conclusion

The original homelessness legislation, which aspired to give greater assistance to the vulnerable homeless, has over the years been transformed into an 'obstacle' course. Vulnerable people have had, and continue to need to overcome significant hurdles before they are assisted. Thus, in addressing the question posed at the beginning of this chapter about how English homelessness law defines 'social vulnerability,' the simple answer is a restrictive and narrow definition. The legal definition of 'vulnerability' has acquired a narrow meaning over the years, and, as a result, only a select group within the wider vulnerable homeless group are assisted. Even so, the select group of vulnerable homeless people may need the assistance of a non-legal advocate or a legal advocate in order to be able to make a successful homeless application, as will be discussed in Chapter Six. There are already indications within this chapter of the difficulties vulnerable homeless people face when attempting to access the substantive benefits from the homelessness legislation.

It is encouraging that the priority need categories were extended in 2002 by secondary legislation. However, the discretionary power, delegated to local authorities in order for them to determine how to assess and decide homeless applications, gives authorities

greater control over whom they accept as homeless. Moreover, provided the Code of Guidance has been considered, having taken into account the guidance, authorities can choose to depart from the Code.

The attitude of the Poor Law days that the 'undeserving poor' are to be blamed for their misfortune has certainly changed. Local authorities continue to assist homeless people within a climate of financial constraint though, having to manage its work within the amount of funding allocated to it by central government. This has caused London local authorities, in particular to develop a culture of gatekeeping of financial resources. It therefore remains to be seen whether local authorities will get better at issuing homelessness decisions, and as a result, become more effective and efficient in assisting fewer people in relation to its reactive duty.

Chapter Four
Institutional and Legal Frameworks for Dealing with Homelessness

A. Introduction

This chapter focuses on the institutional and legal frameworks within which the vulnerable homeless seek access to housing justice, and builds on the discussion on the homelessness issues connected with social vulnerability. In drawing out the relevant points for discussion, the question of whether the existing institutional and legal frameworks are adequate for dealing with homelessness problems experienced by people living in London is explored. The recent civil justice reforms have taken into account the need to improve institutional and legal frameworks for dealing with access to justice issues. However, the changes brought about by the civil justice reforms made to date have not been far-reaching, and so serious problems remain for people who need to access justice, and thereby resolve their homelessness issue.

The duties imposed by legislation on local authorities to assist the homeless can be found in different sources. The current and main legislation that has been enacted specifically to assist the vulnerable homeless is Part VII of the *Housing Act 1996* (1996 Act). The *Homelessness Act 2002* (2002 Act) amends the sections on allocation of social housing (Part VI), as well as Part VII of the 1996 Act. Most of the 2002 Act came into force on 31 July 2002.[1] An important change brought about by the 2002 Act, as discussed previously, is the addition to the classes of applicant in priority need. In

[1] A full explanation of the amendments and its effects made by the 2002 Act can be found in Part II (the legal framework) of this chapter. However, it would be useful at this stage to bear in mind some of the changes that took place prior to the enforcement of most of the Act, as well as changes that did not take place until towards the end of 2002. On 26 February 2002, section 8 (suitability reviews) and Schedule 1 paragraphs 3 and 7 (effect of immigration status) came into force. The following remaining amendments came into force towards the end of September and beginning of October 2002: section12 (co-operation in children cases), section 11 (appeals against refusal to accommodate pending a *Housing Act 1996* section 204 appeal), Schedule 1 paragraph 17 (power of county court to extend time limits for a section 204 appeal), Schedule 1 paragraphs 14 and 14 (a) (information for applicants). The changes made to Part VI (allocations provisions) of the *Housing Act 1996* came into force in England on 31 January 2003.

addition, the new *Homelessness Code of Guidance for Local Authorities* issued under section 182 of the 1996 Act came into force on 31 July 2006.

The Department for the Environment was responsible for government policy on housing between 1970 and 1997. In the governmental restructuring process, this department became the Department of Environment, Transport and the Regions, and then the Department for Transport, Local Government and the Regions. In June 2002, the DTLR was wound up. On 13 June 2003, Lord Rooker was appointed the Minister of State for Regeneration and Regional Development at the Office of the Deputy Prime Minster (ODPM), with responsibility for taking the lead on homelessness issues. The ODPM took the lead on housing policy as well as 'supported' housing policy, and local government issues. The ODPM was restructured yet again in 2006. On 5 May 2006, the Department for Communities and Local Government (DCLG) was created under the leadership of Ruth Kelly. On its website, the DCLG describes its role as "to build the capacity of communities to shape and protect their own future." The DCLG has responsibility for leading on homelessness and housing issues.

Other than the *Housing Act 1996*, as amended by the 2002 Act, where the main local authority homelessness duty is to be found, assistance might be gained from three other Acts, depending upon the applicant's circumstances. The *NHS and Community Care Act 1990 applies* where issues of community care[2] arise. Where families cannot gain assistance from the 1996 Act, or where there is a "child in need," applicants may apply to the *Children Act 1989* for an assessment of need. Finally, single people in need of "care and attention" who, again, cannot gain assistance from the 1996 Act might try to acquire emergency housing assistance from the *National Assistance Act 1948.* However,

[2] See Clements (2000) and (2004) Historically 'community care' has meant the provision by the state, of care services for the ill, elderly and disabled people. This included anybody else in need of care and attention, "which is not otherwise available" (section 21 of the *National Assistance Act 1948*). Community care services are still provided by social services departments. This usually means the provision of personal care services, although disabled people may be provided with cash by a direct payment, and on occasions will involve the provision of general nursing. Community care is not primarily concerned with the provision of housing or education services, but there are obligations in both these areas. The core services for community care is the provision of accommodation in residential care homes and the provision "in the community' of home helps, adaptations, day centres and meals on wheels. The NHS also has community care responsibilities.

the 'safety–net' legislation is not an easily accessible route for those in need of the provision of immediate housing assistance.

The final section of this chapter discusses any impact that the *Human Rights Act 1998*, implemented on 2 October 2000, might have on homelessness legislation. To ensure that the position of homeless people within the English legal system is understood in the context of the international legal dimension, the relevant international instrument, the *International Covenant on Social, Economic and Cultural Rights* will also be assessed.

This chapter begins with a discussion of the sources of law. The institutional and legal frameworks as related to homeless applicants will then be examined.

B. Sources of Law

There are three separate sources of homelessness law: statutes, the Code of Guidance (which is 'law' in the sense explained below) and case law.

As statutes are the most authoritative source of law in the United Kingdom, local housing authorities cannot ignore the provisions of relevant Acts, formulated to assist vulnerable people who are homeless. The primary source of homelessness law in England and Wales from 31 July 2002 was the *Housing Act 1996* as amended by the *Homelessness Act 2002*. However, Part VII of the 1996 Act (the homelessness provisions) does not provide a detailed set of rules but only a legal framework of a general nature.

In line with previously enacted homelessness legislation, the 1996 Act provides that in the exercise of their functions, housing authorities shall have regard to such guidance as may from time to time be given by the Secretary of State.[3]

[3] See section169 of the *Housing Act 1996*. In April 2000, the then Secretary of State for the Environment, Transport and Regions issued revised guidelines in relation to homeless sixteen and seventeen year olds. The original guidance advised that the vulnerability of young people should not be judged on age alone. Local authorities were required also to consider the extent to which a young person is at risk and therefore vulnerable. The revised guidelines contained much stronger wording, explaining that the Secretary of

In England, the most recent Code of Guidance (the Code) was issued on 31 July 2006. The Code is designed to secure fair, consistent and good practice among housing authorities (Robson and Poustie 1996:2). However, it does not have statutory force, and hence is not enforceable in a court. As Hughes and Lowe explain, the Code is not law as such but, rather, advice on how law should be implemented (1995:248). The 2006 Code itself states that the Code gives guidance on how local authorities should discharge their functions and apply the various statutory criteria in practice. Housing authorities can depart from the guidance contained in the Code but must have regard to the guidance. Failure to do so may provide grounds for challenging the legality of a housing authority's decision.[4] In addition, under section 182(1) of the 1996 Act, social services authorities are required to have regard to the Code in exercising their functions in relation to homelessness and the prevention of homelessness.

Disputes arising out of uncertainty as to the interpretation of the statute or administration of the statute can only be resolved by litigation. As a result, a body of case law has developed in relation to the homelessness legislation. The 1996 Act enables a dissatisfied applicant to have her or his homelessness decision reviewed – internally by the local authority that issued the decision – by way of a statutory review. An applicant issued with a disappointing review decision may challenge this decision by appealing to the county court. However, this is only possible where a point of law arises.[5] Previous to the 1996 Act, an aggrieved person would only have been able to challenge a decision of the local authority in the High Court by way of judicial review or seek damages for breach of statutory duty.[6]

State "would generally expect local authorities to find homeless care-leavers and 16-17 year olds to be vulnerable and hence in priority need for accommodation by virtue of s 189(1)(c)."

[4] See *Kelly v Monklands District Council* [1986] Scots Law Times 169; *R v Newham London Borough, ex parte Ugbo* (1993) [QBD] 26 HLR 263.

[5] The distinction between a "point of law" and 'fact' is neither clear nor straightforward. However a "point of law" has been described as "not only matters of legal interpretation but of an application to the High Court for judicial review, such as procedural error and questions of *vires*, to which I add, also of irrationality and (in)adequacy of reasons." *Begum v Tower Hamlets LBC* (1999) 32 HLR 445, per Auld LJ at 452.

Any action taken before the courts in relation to homelessness decisions involve the use of the civil legal system. Two points in relation to the English legal system must be borne in mind: first, as the system is based on the fundamental principle that there must be certainty in the law means that there is a hierarchy of courts. Secondly, the courts at the lower levels in the hierarchy are required to follow and apply the decisions of the superior courts, known as the rules of precedent. The operation of such rules is supposed to provide the certainty and consistency in the law.

PART I: INSTITUTIONAL FRAMEWORKS

In order to address the question as to whether the existing institutional framework is adequate for dealing with problems in relation to homeless applications experienced by people living in London, it is useful to review the existing arrangements. Hence a brief description of the legal institutional structure is provided below. Although information on the European Court of Justice has been provided in this section, the jurisdiction of this Court does not have much relevance for homelessness problems in London.

Where an applicant considers that he or she has suffered maladministration on the part of the authority, which results in injustice to the applicant, a complaint can be made to the Local Government Ombudsperson (LGO). Although the work of the LGO is not usually included in the description of institutional frameworks, I take note that Lord Woolf recommends in his civil justice inquiry, that it be formally recognised that the LGO's discretion to investigate issues involving maladministration should be seen as an alternative to litigation. Yet, when the ombuds service was first conceived in the public sector, it was not intended to be an alternative dispute resolution mechanism to the courts (Seneviratne 2002:55). There are some weaknesses of the ombuds system, however, that need to be taken into account at this stage. First, a dispute of a point of law or statutory interpretation is exclusively a matter for the courts. Secondly, the court's rulings are binding and enforceable, while the ombudsperson make recommendations, which are not binding, nor do they have enforcement powers. However,

[6] Further discussion of the two-stage appeal process can be found in Chapter Seven.

recommendations are almost always accepted in full by local authorities, and the ombudsperson often recommends a financial remedy. Finally, there is no right of appeal against an ombudsperson's decision, although such decisions are subject to judicial review (Seneviratne 2002:314).

C. The Civil Court System

Within the English legal system, the doctrine of precedent operates inside the hierarchy of the courts; the lower or 'inferior' courts, for example, the county court, are bound by decisions of a court above itself in the hierarchy, and is usually bound by a court of equivalent standing. Such doctrine has the advantage of ensuring that cases are decided by courts within a framework of certainty, precision and flexibility.[7] Ward argues that certainty is gained in theory, if the legal problem raised has been solved before, because the judge is bound to adopt that solution. Precision is arrived at, due to the extensive volume of reported cases containing solutions to numerous factual situations arising in any particular branch of the law. Flexibility is gained "by the possibility of decisions being overruled and by the possibility of distinguishing and confining the operation of decisions, which appear unsound, the latter process being of particular importance" (Ward 1998:63).

The United Kingdom is a member of the European Community, as well as a member state of the European Convention on Human Rights. This means that the decisions made by the European Court of Justice, as well as the European Court of Human Rights are binding on the English courts.

County Court

Within England and Wales, the present county courts were established by the *County Courts Act 1846*, which set up an effective local court system to deal with minor cases, particularly the recovery of small debts. Since the 1999 civil justice reforms, the county

[7] See Ward (1998: 62).

courts hear small claims and fast track cases while the multi-track cases are heard by the High Court.

The county courts have jurisdiction in almost the whole range of civil proceedings, including the Rent Acts, Landlord and Tenant matters, and housing, as well as appeals from local housing authorities homelessness decisions under section 204 of the *Housing Act 1996*.[8]

High Court of Justice

The High Court was created as part of the reorganisation of the superior courts under the *Supreme Court of Judicature Acts 1873-75*. There are now three administrative divisions: the Court of Chancery, the Queen's Bench Division, and the Family Division. Each of these divisions is a part of the same court.[9] However, in practice, the different divisions act as though they were separate courts.

Following the review by Sir Jeffrey Bowman of the Crown Court Office List, new rules came into force on 2 October 2000 to coincide with the implementation of the *Human Rights Act 1998*. The Crown Office List had hitherto functioned as a specialised court, as part of the High Court, to deal with public law and administrative law cases. Grounds of appeal for homelessness cases, including applications for interim relief, which could be an injunction to force the local authority to provide interim accommodation to the homeless applicant, were issued at the Crown Office. The Crown Office List was renamed the 'Administrative Court' in order to emphasise that this is the principal work of the Crown Office List. The average waiting time for a decision on an application for permission to apply for judicial review at the Administrative Court was eight weeks from lodging to decision (Kay 2003).

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[8] In its consultation paper, the Law Commission (2007) had made a provisional proposal that the section 204 appeals, currently heard in the county court should be transferred to the Upper Tribunal. In its final recommendations, the Commission (2008) decided not to make such a final recommendation. However, the Commission could see the advantage in the government establishing a pilot in certain areas of the country to test the transfer of such appeals from the county court to the Upper Tribunal (paragraph 5.99).
[9] See Practice Direction (High Court Divisions)[1973] 2 All ER 233.

Appeals from decisions made by a judge in one of the three High Court Divisions go to the Appeal Court (Civil Division) unless the 'leapfrog' procedure is initiated and a case is appealed directly to the House of Lords.[10] For an applicant to succeed in a direct appeal to the House of Lords the trial judge must grant a "certificate of satisfaction." The Lords must give leave to appeal, and a point of law of general public importance must be involved. The point of law could either be concerned with a matter of statutory interpretation or an issue in which the trial judge is bound by a precedent of the Court of Appeal or House of Lords.

Court of Appeal (Civil Division)

The Court of Appeal was established as part of the Supreme Court by the *Supreme Court of Judicature Acts 1873* and *1875*. The Court of Appeal is served by senior judges and hears appeals from the three divisions of the High Court, the divisional courts, the county courts, the Employment Appeal Tribunal, the Lands Tribunal,[11] and the Transport Tribunal.[12] In cases of great urgency, this court is often the final court of appeal; this means that a party may act in reliance on its decision without waiting for the outcome of any possible appeal to the House of Lords.

House of Lords

Appeals from the Court of Appeal to the Appellate Committee of the House of Lords are heard by Law Lords. Cases are heard in relative informality in a committee room in the Palace of Westminster.

Decisions of the House of Lords are binding upon all other courts. Up until 1966, the Lords regarded itself as strictly bound by its earlier decisions. In 1966 Lord Gardiner LC, in a Practice Statement, announced that in future the Lords would depart from their

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[10] Sections 12–15 of the *Administration of Justice Act 1969*.

[11] The Lands Tribunal transferred to the Upper Tribunal on 1 June 2009, and as from that date became the Lands Chamber of the Upper Tribunal. It is an independent body and specialist judicial body, set up to resolve certain disputes concerning land Its functions have not been changed, and at present is still known as the Lands Tribunal. See www.landstribunal.gov.uk/index.htm.

[12] The Transport Tribunal's work moved into the Upper Tribunal (Administrative Appeals Chamber – Transport) in September 2009. See www.transporttribunal.gov.uk/index.htm.

own earlier decision "when it appears right to do so."[13] However, in practice, the House of Lords rarely departs from its earlier decisions. Even so, there are three basic methods by which it may "lose its authority" (Ward 1998:74). First, the House of Lords may be overruled by statute or a decision from the European Court of Justice. Secondly, a previous decision may be distinguished from the case it is considering before it. Finally, it is possible for a House of Lords decision to be rejected by itself, if the decision had been reached *per incuriam* (through lack of care). If such a decision had been reached, most likely it will mean that some relevant statutory provision or precedent, which would have affected the decision, was not brought to the attention of the court, although the principle is not necessarily confined to such cases.

From 1 October 2009, a separate court, the Supreme Court, will become the highest appeal court, and the House of Lords will no longer decide, as the final court, on points of law within the UK.[14]

European Court of Justice

The European Court of Justice is a court of reference; the ruling of the court is only preliminary. Once a decision has been made, the case is then remitted to the national court for it to apply the law to the facts. The Court has jurisdiction which can be classified under four main areas: first, applications for preliminary rulings under Article 177/EC in the course of proceedings in a national court or tribunal, secondly, direct action against Member States or Community institutions, thirdly, staff cases, and fourthly, opinions.

The Court ensures that national and European laws, as well as international agreements being considered by the European Union (EU), meet the terms and the spirit of the treaties. In addition, the court ensures that the EU law is equally, fairly, and consistently applied throughout the member states (McCormick 2002:109). The Court gives opinions to national courts where there are questions about the meaning of EU law.

[13] The Practice Direction is reported at [1966] 3 All ER 77; [1966] 1WLR 1234.
[14] See the *Constitutional Reform Act 2005*.

EU law takes precedence over the national law of member states where the two come into conflict, but only in areas where the member states have ceded powers to the EU.

During the 1970s and 1980s the volume of work for the Court grew. At that time, it took the Court up to two years to reach a decision on more complex cases. As a result, an agreement was reached in 1989 to create a subsidiary Court of First Instance. The Court of First Instance makes decisions on less complicated cases. The parties involved in cases decided by the Court of First Instance may appeal to the Court of Justice.

The Court of Justice has fifteen judges, and each is appointed for a six-year renewable term of office. So that cases can be decided much sooner, the Court is further divided into chambers of between three and six judges. The judges in chambers make the final decisions on cases unless a member state or an institution asks for a hearing before a full Court. Changes brought about by the Treaty of Nice in 2000 meant that full hearings before the full Court will be replaced by hearings before a Grand Chamber of thirteen judges.

PART II: LEGAL FRAMEWORKS

A brief history of the homelessness legislation, particularly on the *Housing (Homeless Persons) Act 1977*, and Part VII of the *Housing Act 1996* can be found in Chapter Three of this thesis. This section begins with a brief restatement of the earlier homelessness legislation before the amendments to the 1996 Act, brought about by the *Homelessness Act 2002*. This is then followed by an assessment of 'safety–net' legislation, of which the main purpose of the legislation is not formulated to provide accommodation to assist homeless people, but which could include such a duty provided the person in need fulfils other criteria of the relevant statute. As the focus of the thesis is on the main homelessness legislation, the information on the 'safety–net' legislation has been provided for the sake of completeness in order to assist in understanding the availability

of other assistance for a vulnerable homeless person who needs support in addition to emergency housing.

D. The Homelessness Legislation

The emergency housing duties that fall on the local authority under the homelessness legislation has changed over the years.[15] The current homelessness legislation stems from the *Housing (Homeless Persons) Act 1977* (1977 Act).[16] Despite the re-enactment and consolidation of this Act into other legislation over the years, the basic process that housing authority officers should follow when conducting their enquiries is as follows. At the start of the enquiry process, it must be determined whether the homeless applicant is homeless or threatened with homelessness (within twenty-eight days of making the application). The applicant is then assessed in order to determine whether he or she is in 'priority need' for accommodation – one of the categories of applicants listed under the legislation and in accordance with the Code prioritised for accommodation when in such urgent need. If a duty is owed, immediate temporary or 'interim' accommodation, pending the homelessness decision, should be offered. Thereafter, further enquiries are undertaken, so that the applicants continue through a filtering process before a decision is made as to whether a full housing duty is owed. During the assessment stage, any applicant found to be intentionally homeless would not be entitled for full housing assistance. This meant that if the applicant deliberately took action, or failed to take necessary action, which then caused him or her to lose accommodation, which would otherwise be available for the applicant to legally occupy then he or she would be considered to be intentionally homeless. Finally, the housing authority applied to for assistance, would only be duty bound to assist if the applicant had a 'local connection' with that authority. The applicant would have to have lived or worked in the area for six out for the past twelve months, or three out of the past five years, or there are special reasons connecting the applicant to that particular area. The 1996 Act incorporated a

[15] Appendix 1 of this dissertation contains a table of the homelessness statutes developed over the years.
[16] See Loveland 1995, Thompson 1988.

further stage to the enquiry process, and local authority officers are now under a duty to ascertain whether the homeless applicant is 'eligible' for assistance. The enquiry in relation to this issue is whether the homeless applicant is permitted by public funds to be assisted under the emergency housing legislation.[17] This stage of the enquiry must be completed before the homeless applicant's 'priority need'[18] status for emergency housing can be assessed.

The 1977 Act was re-enacted in Part III of the *Housing Act 1985* (1985 Act). Although the 1977 Act placed housing duties directly on the local authority housing department, by the mid 1990s it was considered that homeless applicants were "in a situation comparable to that of 1972–77. Once again there are overlapping jurisdictions, and the potential for applicants to be shuttled between local authority departments" (Hughes & Lowe 1995:241).

Under Part III of the 1985 Act,[19] provided an applicant was found to be homeless, in priority need, and not intentionally homeless, the authority was required to provide accommodation for an indefinite period. The government was concerned that, under the 1985 Act, homeless people could "jump the housing queue" by being given priority for accommodation by the local authority. This problem was felt to be a particularly contentious matter at a time when the local authority housing stock was diminishing. Part III of the 1985 Act was subsequently amended to reflect the Government's belief that allocation of accommodation should be through a single housing register.

By 1995, local authorities owed a housing duty or had power to assist those in need under four other statutes: section 21(1)(a) of the *National Assistance Act 1948*, section 67(2) of the *National Health Service and Community Care Act 1990*, section 20(1) of the *Children Act 1989*, and Schedule 5 of the *Supplementary Benefits Act 1976* (as substituted by the *Social Security Act 1980*).

[17] Under Part VII of the *Housing Act 1996*, sections 185 to 186, certain groups of persons are denied eligibility for housing assistance. The groups of persons are identified in Chapter Nine of the 2006 Code of Guidance.
[18] See Chapter Three of this thesis for a full discussion on social vulnerability.

A major change brought about by Part VII of the *Housing Act 1996* restricted the provision of accommodation to a maximum period of two years (sections 193–194, also sections 206–207). Housing authorities are given a power to continue providing accommodation over and above the maximum two-year duty period provided that a review is undertaken. The local authority may continue to secure that accommodation is available to the homeless applicant to occupy provided that three situations are satisfied. The homeless applicant must still in priority need; there is no other suitable accommodation available for him within the local authority district; and the homeless applicant wants the local authority to continue to ensure that accommodation is available for his occupation.

The *Homelessness Act 2002*, which amended the homelessness duties of the local authorities under Part VII of the 1996 Act, reinstated the permanent housing duty owed by the housing authority to homeless applicants. It remains to be seen exactly how the 2002 Act will shape the landscape of housing reforms, but a major change brought about by the 2002 Act has been the onus placed on local authorities to pro-actively manage the housing crisis in their areas. Instead of authorities responding only to the emergency housing circumstances of 'priority need' unintentionally homeless applicants, authorities are expected to devise a strategic approach to manage all homelessness within the area for which they have responsibility.

Housing Act 1996, Part VII

The 1996 Act provides the legal framework within which the vulnerable homeless are currently assessed. It was amended on 31 July 2002 by the implementation of the *Homelessness Act 2002*. We will start by discussing the main structural and substantive changes brought about by the 1996 Act when it was first enforced.[20]

[19] See Hunter and McGrath 1986, Hughes et al 2000.

[20] The discussion on changes to the homelessness legislation brought about by the 1996 Act can be found in Cowan et al (1996), among other books of this nature.

Under section 185 certain categories of persons 'from abroad' became ineligible for housing assistance.

Sections 177-178 of the 1996 Act give 'domestic violence' a different definition and make almost new provision for domestic violence. Within these sections, it is considered to be unreasonable for an applicant to continue to occupy accommodation, if it is 'probable' that occupation of that accommodation will lead to violence or threats of violence, which is likely to be carried out. The threats of violence could be against the applicant, or against any person who normally resides with the applicant, or against any person who might reasonable be expected to reside with the applicant.

Section 179 of the 1996 Act states that housing authorities are required to set up advice and information services for the prevention of homelessness. However, the extent of the duty on local authorities to provide advice is left to the authorities' discretion. Within this section, local authorities have a duty to secure that advice and information about homelessness and its prevention is available, free of charge, to anyone residing in their area. Authorities also have a power to assist anyone who discharges that duty on their behalf, by way of grant, loan, use of premises, furniture or other goods, and even the services of staff.

Limited duties only arise if there is other suitable accommodation available in the area (section 197, 1996 Act).

The 1996 Act provides aggrieved applicants with the right to have their homelessness decision reviewed by the housing authority (section 202, 1996 Act). This is the first time that homeless applicants have been granted such a right.[21] A strict time limit of twenty-one days is imposed starting from the date of the section 184 decision, during which the applicant must exercise the right to have this determination reviewed.

[21] Section C of Chapter Seven provides further information in relation to the types of decisions that can be reviewed.

If an applicant is dissatisfied with the decision of the review, or does not receive notification of that decision within the appropriate time, the applicant may appeal to the county court on a point of law (section 204,1996 Act). There is a time limit of twenty-one days from the date of the negative review decision, during which period the applicant must make the appeal. The right of appeal to the county court on a point of law is a significant change to the enforcement of homelessness rights. However, the right of appeal can only be exercised after an application for review of the homelessness decision under section 202 of the 1996 Act has been considered. Under section 203(3), the courts have powers to make an order, which confirms, quashes or varies the decision. This appears to imply that where there is an appeal against a local authority's failure to conform to the time requirement in relation to the review decision, the court would only order the local authority to make the decision. The court would not, under those circumstances, reach a decision itself. Further the power of the court to vary the decision, to confirm or quash it, is, in some degree, wider than is usually available on judicial review. The Administrative Court will usually do no more than quash a decision. Finally, it is important to bear in mind that the appeal to the county court is only on a point of law, and is not for a rehearing of the facts of the case.

Current Approach to Dealing with Homelessness: Homelessness Act 2002 and Amendments to the Housing Act 1996

The 2002 Act amends the 1996 Act, and to an extent, does begin to acknowledge the difficulties homeless people face when attempting to access procedural justice. In terms of procedural access, a change brought about by the 2002 Act was the amendments to section 204 of the 1996 Act, which was the right to appeal to the county court on a point of law. Section 204 of the 1996 Act gives the local authority discretion to decide whether or not to extend interim accommodation during the appeal stage. Prior to the 2002 Act amendments, the only method for homeless applicants to challenge the non-extension of interim accommodation pending the appeal decision was by way of judicial review in the High Court. The amendments brought about by section 11 of the 2002 Act means that applicants could now challenge such a decision at the local county court level. Unfortunately, if an applicant wishes to challenge a housing authority's decision

not to continue to provide interim accommodation pending the outcome of the section 202 internal review, any such challenge continues to be by way of judicial review proceedings in the High Court, heard by the Administrative Court.[22] Further, Schedule 1, paragraph 17 of the 2002 Act amends section 204(2) of the 1996 Act by granting the county court power to extend the twenty-one day time period within which an appeal must be brought. Permission to bring an appeal outside the time limit can be sought either before or after the twenty-one days has expired. However, in deciding whether to grant permission, the county court must be satisfied that there is good reason for the delay.

A major change brought about by the 2002 Act, which must be mentioned, has been the duty imposed on local authorities to review the local homelessness situation, and to formulate a strategy to manage that situation. This is a major change to the way local authorities manage local homelessness situations: from a crisis driven approach to one where early intervention ought to prevent homelessness. For the first time ever, local housing authorities, in co-operation with social services authorities, as well as voluntary sector agencies must work together in reviewing the local homelessness situation before formulating a homelessness strategy.

Other substantive amendments include a new discretionary power granted to housing authorities to secure that accommodation is available for homeless applicants who are considered not to be in priority need by the housing authority, and who are not homeless intentionally (section 195, 1996 Act).

Section 6 of the 2002 Act amends section 193 of the 1996 Act (duty to persons with priority need for accommodation who are not homeless intentionally) and revokes the two-year limit on the main housing duty. A new duty is imposed on housing authorities

[22] The Law Commission (2008) had noted that applicants who need to seek interim relief still had to go to the Administrative Court in London to do so. In its *Housing Proportionate Dispute Resolution* paper, the Commission recommended that whichever forum, whether it continues to be the county court or the Upper Tribunal, that exercises the jurisdiction under section 204 of the *Housing Act 1996,* should also have full power to issue the associated interim relief. However, the Commission's suggestion was rejected in an

to secure accommodation until any of the prescribed circumstances cause the duty to end. In a related amendment, section 194 (power to continue to secure accommodation after the maximum two-year period of duty under section 193) is revoked because there is no longer any time limit on the duty to provide accommodation. Hence there is no longer any requirement for the local authority to consider continuing to secure accommodation after the two years have elapsed.

Upon the 2002 Act receiving Royal Assent on 26 February 2002, section 8 enabled a homeless applicant, who is offered a property under the main homelessness duty, to request a review of the suitability of that accommodation. The request for review of accommodation is possible regardless of whether the applicant has accepted the accommodation. This section overturns the Court of Appeal's decision in *Alghile v City of Westminster* [2001] EWCA Civ 363; 33HLR 57. The main homelessness duty cannot be brought to an end unless the applicant has been informed of his or her right to request the review.

The 2002 Act strengthened slightly the local authority duty towards those who suffer or are threatened with domestic violence.[23] Section 198 of the 1996 Act – referral of case to another local housing authority – is also amended. The situation now is that a local housing authority will not be able to refer an applicant to another authority, if the applicant, or anyone who might reasonably be expected to live him or her, has suffered violence in that authority's area, and it is probable that he or she will do so again if he or she returns.

Finally, section 12 of the 2002 Act inserts a new section – section 213A – into the 1996 Act which concerns co-operation between a local housing authority and a social services authority in cases involving children. In cases where families cannot obtain emergency housing assistance from the local authority because they have been found to be ineligible for assistance, intentionally homeless or threatened with homelessness intentionally, the

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announcement made by Bridget Prentice, the Parliamentary Under-Secretary of State, Ministry of Justice on 16 July 2009. See www.justice.go.uk/news/announcement170607b.htm.

local authority must first seek consent from the applicant for referral to social services for assistance. Following the grant of such consent, the local housing authority must refer the family's case to social services. The local housing authority must then inform the social services authority of its subsequent decision in relation to the family. Similarly, if a social services authority discovers that an applicant is ineligible for assistance, becomes homeless intentionally or becomes threatened with homelessness intentionally, it can ask the local housing authority to provide advice and assistance in the course of providing assistance under Part III of the *Children Act 1989.*

E. Emergency Housing Assistance under Other Legislation where there are Community Care Issues

As indicated earlier in this chapter, the main legislation for assisting the homeless is the *Housing Act 1996* as amended by the *Homelessness Act 2002*. However, for the sake of completeness, information on other relevant Acts has been provided below.

Where it is not possible for the vulnerable homeless to gain emergency housing assistance under the 1996 Act from the housing department, if services in addition to housing is required, it may be possible to apply to social service department for aid. Assistance may be gained under section 21 of the *National Assistance Act 1948*, the *NHS and Community Care Act 1990*, or the *Children Act 1989*, depending upon the circumstances of the applicants.

The *National Assistance Act 1948*, section 21(1) as amended by the *NHS & Community Care Act 1990*, and subject to the approval of the Secretary of State, enables a local authority in certain circumstances to make arrangements to provide residential accommodation for persons "in urgent need." The assistance is for persons aged eighteen and over who may by reason of age, illness, disability or any other circumstances, which includes destitution, renders them to be in need of care and attention which is not otherwise available to them. Assistance is available to expectant

[23] See Section F, Chapter Three for a discussion.

and nursing mothers regardless of age. Assistance is also available to those who are subject to immigration control[24] but not to asylum seekers,[25] nor certain categories of other people – see Schedule 3 of the *Nationality,* Asylum *and Immigration Act 2002* as amended by the *Asylum and Immigration (Treatment of Claimants, etc) Act 2004.* An application should be made to the social services department for assistance.

Section 47 of the *NHS and Community Care Act 1990* itself, creates an obligation on the local authority to carry out an assessment of an individual's needs for community care services, including housing, even where an individual has not made a request for the assessment. There is an obligation on social services authorities to collaborate with housing authorities in the community care planning and assessment process. Where during the assessment process a housing need is disclosed, the assessing authority must notify the housing authority, and at the same time should specify what assistance that authority must provide in order to facilitate the assessment. The housing authority is not under a duty to respond or co-operate where the assessing authority notifies the housing authorities of a need for housing, but separate parallel duties under the *Housing Act 1996* may be triggered (Clements, 2004:448). The housing authority will then be under a duty

[24] It is important to mention at this point, that any person with a time limited stay in the UK who has to resort to seeking assistance from the social services department may well jeopardise their chance of continued and longer term stay in the UK.

[25] Housing and other support to asylum seekers is a complex area that has seen much legislative changes over the past years. The *Asylum and Immigration Act 1996* and the *Immigration and Asylum Act 1999* and supporting statutory instruments significantly reduced the rights of asylum seekers to social housing, assistance under homelessness legislation and access to welfare benefits. The *Nationality, Immigration and Asylum Act 2002* introduced, among other variations, further, more restrictive, changes in relation to the provision and support to asylum seekers. The *Asylum and Immigration (Treatment of Claimants, etc) Act 2004* altered the local connection provisions for asylum seekers with children who fail to take reasonable steps to leave the country. The *Immigration, Asylum and Nationality Act 2006* became law on 30 March 2006. The 2006 Act gives local authorities new powers to provide accommodation on behalf of the National Asylum Support Service (NASS), e.g. section 4 accommodation – a special form of support for people whose asylum applications have been refused. NASS is intended as a replacement for welfare benefits, social services support and local authority housing for people claiming asylum in the UK. The system is administered by NASS, a specially created government department, introduced under Part VI of the *Immigration and Asylum Act 1999.* All asylum seekers who applied for asylum in the UK on or after 3 April 2000 are the responsibility of NASS, provided they pass the eligibility criteria. On 8 January 2003, section 55 of the *Nationality, Immigration and Asylum Act 2002* came into force, limiting access to NASS support for in-country asylum applicants. Within that provision, the Home Secretary may deny housing and support to any asylum seeker who fails to claim asylum "as soon as reasonably practicable" after arriving in the UK, unless his or her human rights would be breached. Asylum seekers arriving on or after 17 December 2003 who can give a credible explanation of how they arrived in the UK within three days

to receive applications and to make enquiries under section 184 of the *Housing Act 1996* in cases of homelessness, and where the authority may have reason to believe that priority need is a factor. Cowan et al (1996:178) have made criticisms about the *Children Act 1989* and the *NHS & Community Care Act 1990* as having caused real problems in terms of interaction between social services and housing authorities.

Section 20 of the *Children Act 1989* stipulates that a local social services authority must provide accommodation for a "child in need" in their area under three circumstances. First, where there is no person who has parental responsibility for him or her. Or secondly, if the child is lost or has been abandoned. Thirdly, where a person, who has been caring for him or her, has been prevented (whether permanently or not, and for whatever reason) from providing him or her with suitable accommodation. Section 17 of the *Children Act 1989* requires social services authorities to safeguard and promote the welfare of children in need in their area. The safeguarding and promotion of the welfare of children in need include the provision of an almost unlimited range of services, which might include accommodation, in a care home or ordinary rented dwelling, the giving of assistance in kind, or in exceptional circumstances, in cash.

The provision of services listed within section 17, in particular, has been the subject of much debate by the courts, with some of the cases reaching the House of Lords. The main issue has been whether the services described under section 17 are general or specific duties. Three Court of Appeal cases enabled social services departments to severely reduce the assistance given to families in need of assistance under the *Children Act 1989*: *R (on the application of G) v Barnet LBC* (2001); *A v Lambeth LBC* (2001) CA, 2 FLR 120 and *W v Lambeth LBC* (2002) 2 FLR 327.

In the case of *G*, the Court decided that the local authority had not acted unlawfully, under section 20, in deciding to provide accommodation for the son but not for the mother. In this case, the mother of G was not eligible for assistance under Part VII of the

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of their arrival will be considered to have made their claim " as soon as reasonably practicable" under section 55.

Housing Act 1996, a housing department responsibility. The authority decided that G would not be a "child in need" – social services responsibility – if the family returned to Holland where benefits were available. The authority offered accommodation for the son only under section 20 of the 1989 Act. The authority offered the mother fares to return to Holland or to accommodate her son alone. G's mother did not accept either of the offers of assistance. In this case, the Court of Appeal did not consider the authority to have acted unlawfully in refusing to help house the mother and son together.

In the case of *A*, the Court of Appeal decided that section 17 services did not include accommodation at all, and that section 20 could only apply to children, and was not to be used to accommodate the family. In this case, the mother lived with her three children in a two-bedroom council flat. Two of the children were disabled and had special needs. The children did not have outdoor play area. The mother applied for a transfer, and in September 1988 the council granted the mother 'overriding priority' for a transfer to a four-bedroom ground floor or low-level flat with a garden or other play area. By June 2000, no offer of accommodation had been made, and the council was unable to indicate when an offer might be made. It is likely that the family would have to wait "a long time" before any suitable offer of accommodation might be made (Campbell 2002:25). Social services carried out a *Children Act 1989* assessment in 2000, which found that the children were living in overcrowded, damp, unhygienic and dangerous conditions. In addition, recommendation was made that the family should be re-housed in appropriate accommodation with a garden. Social services and the housing department liaised with each other, but were not able to offer the family any suitable property. The mother initiated judicial review proceedings, arguing that the council had failed to comply with section 17 of the 1989 Act, in that it had not met the children's assessed needs. The application was dismissed. Scott Baker J held that section 17 did not give rise to a specifically enforceable duty owed to any particular child. It only set out a target duty, which is not enforceable by judicial review. Section 17 is distinguishable from section 20, which gave rise to a specific duty to accommodate children in narrowly defined circumstances. The council had to carry out an assessment of need, and also had power under section 17(3) and (6) to meet children's needs by providing accommodation for

the whole family. It was, however, under no duty to provide the family with alternative accommodation. The claimant appealed to the Court of Appeal, but her appeal was dismissed, and she was refused permission to appeal to the House of Lords. The court held that section 17 did not impose a duty, which was specifically enforceable on an individual basis. The majority of the court considered that the provision of accommodation was not within the scope of section 17. A construction of the section, which imposed a specific duty on a housing authority to accommodate, would undermine the careful arrangements for access to housing set out in Parts VI and VII of the *Housing Act 1996*.

In the final case, *W v Lambeth LBC* (2002), W and her two children were evicted from their home. The family had been found intentionally homeless as a result of rent arrears. W's two children were aged sixteen and seven respectively. W applied to the social services department for assistance in obtaining private sector accommodation. Lambeth social services assessed the children's needs under section 17 of the *Children Act 1989*. The social worker, relying upon the case of *A*, informed W that should the need arise, provision could be made for the children alone to be accommodated under section 20 of the *Children Act 1989*. In the case of *W*, the Court of Appeal held that section 17 of the 1989 Act imposed only a 'target' or general duty to safeguard and promote the welfare of children in their area. The section 17 duty does not extend to the provision of accommodation, although the section does confer on authorities a power to provide children and their families with accommodation. Whether the authority chooses to exercise that power was a matter for their discretion, and it was entitled to restrict such assistance to extreme cases. The court further held that Article 8(1) of the European Convention on Human Rights did not affect the position because the article does not confer a right to a home.

Although each of these three cases had very different facts, they all raised the same two legal issues. All three of the cases were subsequently heard in the House of Lords, and judgements were given on 24 October 2003. The questions raised were first, what is the nature of duty imposed on local authorities by section 17 of the *Children Act 1989*?

Secondly, may a local authority insist on providing accommodation for a child alone, as distinct from a child and his or her parents, when the child is in need of accommodation, and it would cost no more to provide accommodation for the family together? Unfortunately, a majority of their Lordships held that section 17(1) of the 1989 Act imposed a general duty to maintain a level and a range of services for the benefit of children in need in the authority's area. Section 17 also introduced other, more specific duties and powers, which had to be performed in accordance with the overriding principles contained in section 17(1). However, their Lordships considered that section 17(1) did not impose a mandatory duty on the local authority to take specific steps to satisfy the assessed needs of a "child in need."

On 7 November 2002, the *Adoption and Children Act 2002* amended the *Children Act 1989* which effectively confirmed the position generally understood to have applied before the judgement in *A v Lambeth LBC.* The Department of Health Local Authority Circular outlined the position as follows: section 17 of the 1989 Act includes the power for local authorities to provide accommodation for families and children. The provision of accommodation in this way does not mean that the local authority looks after a child.[26] The Circular assumes that the power to provide accommodation under section 17 "will almost always concern children needing to be accommodated with their families." Disappointingly, it appears that the House of Lords cases have weakened the argument that there is a duty on a social services authority to provide accommodation under section 17 of the 1989 Act to a "child in need" and his or her parents. The authority has the power, but not a specific duty. It seems that the local authority has every right to decide that it will provide accommodation for a child only, under section 20, and not for the parents or other family members. As will become clearer in the following section of this chapter, it might be possible to make the following argument in terms of human rights law. Where children are accommodated by the local authority, but the parents are not, the separation of parents from the children is in breach of Article 8 of the European Convention on Human Rights – the right to respect for private and family life.

[26] Department of Health (2003) Local Authority Circular: LAC (2003) 13.

F. *Human Rights Act 1998* and the Impact of International Law

The UK has been bound by the terms of the European Convention on Human Rights (European Convention) since it came into force in 1953. However, it was not until 1997 that work began on incorporating the European Convention into English law. On October 2000, after forty-three years, the *Human Rights Act 1998* (1998 Act) was implemented, which meant that finally, cases, which involved allegations of human rights abuses, could be resolved in the British courts. The European Convention's rights and fundamental freedoms are now enshrined in the 1998 Act. However, any court or tribunal determining a question, which has arisen under the 1998 Act in terms of a Convention right, must take into account opinion that is relevant, any judgement, decision or advisory opinion of the European Court of Human Rights. This includes certain opinions and decisions of the European Commission of Human Rights, and decisions of the Committee of Ministers taken under Article 46 (Section 21 (1) of the *Human Rights Act 1998*).

The European Convention has been held not to include the right to a home: *Chapman v UK* (2001) (E Ct HR) 10 BHRC 48.

> *It is important to recall that article 8 (right to respect for private and family life) does not in terms give a right to be provided with a home. Nor does any of the jurisprudence of the court acknowledge such a right. While it is clearly desirable that every human being has a place where he or she can live in dignity and which he or she can call a home, there are unfortunately in the contracting states many persons who have no home. Whether the state provides funds to enable everyone to have a home is a matter for political not judicial decision* (Paragraph 99).

However, many of the rights contained within the European Convention have implications of a social and economic nature. Further, a number of European Convention rights have direct relevance to housing matters, although it is important to be aware of the limits to which the Convention rights have been applied. The following articles are of great relevance to housing cases: Article 8 (right to respect for private and

family life), Article 1 of the First Protocol (peaceful enjoyment of possessions), Article 6 (entitlement to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law), and Article 14 (discrimination) supports substantive and procedural rights.

Marzari v Italy (1999) (E Ct HR) 28 EHRR CD 175 is an example of the recognition of a positive obligation to provide housing assistance at the same time as the limitation is identified. In this case, the European Court of Human Rights considered the admissibility of a claim from an applicant who suffered from severe disability. The Court stated that Article 8 does not guarantee the right "to have one's housing problems solved by the authorities." However,

> *a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in some circumstances raise an issue under article 8 of the Convention because of the impact of such a refusal on the private life of the individual.*

The Court held that eviction of the applicant was justified in the circumstances, and that it would not interfere with decisions on the suitability of accommodation. The Court asserted that no positive obligation on the local authorities can be inferred from Article 8 to provide the applicant with a specific apartment.

The Limitations of International Human Rights Law: The 'Right' to Housing

The right to housing is contained in Article 11 of the International Covenant on Economic, Social, and Cultural Rights. Article 11(1) focuses on the right to an adequate standard of living for "himself and his family." The right to an adequate standard of living includes adequate food, clothing and housing, and to the continuous improvements of living conditions. State Parties must take appropriate steps to ensure the realization of this right. The rights contained in Article 11 should be implemented in accordance with the provisions of Article 2(1), which states that:

> *[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available*

> *resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*

The realization of these rights, are dependent upon resources, and the realization of these rights are done so in a progressive manner.

The UN Committee on Economic, Social and Cultural Rights (the Committee), has so far devoted more attention to the right of housing than to any other right. The right to adequate housing "has its broadest and clearest recognition in the covenant." It is a component (like food) of the right to an adequate standard of living and is "integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised" (Craven 1996:330).

Even though everyone has a right to housing, the States are not under an obligation to eliminate homelessness immediately. However, the Committee considers that States have an obligation to undertake immediately appropriate monitoring and policy formulation. In guidelines, the Committee has attempted to outline obligations in detail. Information is requested about the housing situation of those groups in society that are vulnerable and disadvantaged. The guidelines also require information about the number of homeless individuals and families, as well as the number of individuals and families adequately housed. In addition, information is required about the number of persons living in 'illegal' settlements, the number of persons evicted in the last five years (and those currently lacking protection against arbitrary eviction), the number of persons on waiting lists for accommodation and the number of persons in different types of housing tenure.[27]

In terms of the monitoring information gathered, States are expected to develop a policy based on such information, which concentrates on the relief of those in the most disadvantaged position.

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[27] Committee on Economic, Social and Cultural Rights, Reporting Guidelines. UN Doc. E/1991/23, Annex IV.

G. Conclusion

The existing legal frameworks only provide emergency housing assistance to limited categories of people. The original intention of the *Housing (Homeless Persons) Act 1977* which aspired to give assistance to a greater number of vulnerable homeless people, and defined the emergency housing duties of local housing authorities has been obscured.

The implementation of Part VII of the *Housing Act 1996*, which enabled homeless applicants with unsatisfactory decisions to appeal on a point of law to the county court (section 204) does seem to indicate that active consideration has been given to the vulnerable homeless in terms of easier access to courts. However, as will be discussed in later chapters, the two-stage appeal process is not entirely an appropriate dispute resolution mechanism to deal with unsatisfactory homelessness decisions.

In terms of how much a legal impact the European and international laws have on human rights within English law, society has indeed changed since the various European and international treaties were first drawn up. In any case, the civil and political rights are considered to be more crucial by signatory Member States, and as a result, States focus on those very rights. Housing, falling within the category of a social, economic and cultural right, and therefore a right to aspire to, as opposed to a positive right, continues to take second place. The European and international treaties affect domestic laws to a certain extent, and do have something of a positive effect. Treaties only have limited domestic impact on assisting the vulnerable homeless because social rights, such as access to housing, can only be asserted provided states have sufficient financial resources. Although the domestic situation within England is not satisfactory in terms of homeless people trying to access social housing, England itself "is highly unusual in providing for some homeless groups, a legally enforceable right to 'suitable' accommodation which usually lasts till 'settled' housing can be found. In practice, this settled housing is almost always secured by the local authority which has accepted legal responsibility for the homeless household" (DCLG 2006c). Baker, Carter and Hunter did

acknowledge, as early as 2001 that the homelessness legislation provides protection for homeless people, which goes beyond the requirement of the European Convention on Human Rights. In addition, the homelessness legislation implemented in England provides greater substantive rights than any other European states (2001:84).

While this chapter has focused on the institutional and legal frameworks for dealing with homelessness, the following chapter discusses the barriers that homeless applicants potentially experience in taking appropriate steps to addressing disputes. Such barriers could cause problems for the homeless applicant who needs to access justice.

Chapter Five

Access to Justice Problems Experienced by Vulnerable Homeless Applicants: (I) The Non-emergence of Disputes. Research Findings

A. Introduction

Since Lord Woolf's civil justice reforms, the government's idea of accessing justice has been the resolution of disputes that is proportional to the claim. The government has been keen to move away from resolving disputes in courts, although not necessarily by adjudication. Instead, tribunals have been the favoured forum for resolving disputes. The White Paper on transforming public services in relation to complaints, redress and tribunals (Department for Constitutional Affairs 2004) contributes to such a discussion. Nevertheless, adjudication must now be the last resort for people with justiciable problems.[1] However, it appears that the construction of the civil justice system has been based on the assumption that people with justiciable problems will find their way into the system. The act of a government official denying an applicant a basic need, in this case, emergency housing, does not logically lead to those that have been denied help, to taking necessary action to challenge the denial of assistance. The case studies in Appendix 2 demonstrate such a problem.

Perhaps part of the problem lies in the fact that the homelessness legislation confers discretion on local authorities in relation to the application decision-making process. The discretion that authorities have, could lead some applicants to believe that local authorities would have arrived at a correct decision, regardless of whether the decision is positive or negative (see Cowan, Halliday and colleagues 2003:131–134). In Case 18, Maria had received a non-priority need decision and did not request a review of that decision because a local authority officer had told her she did not have a strong case. However, as we will see in Section B of this chapter, for some applicants, the problem of

[1] See Genn 1999:12 for the meaning of 'justiciable event.'

For the purposes of the study a justiciable event was defined as a matter experienced by a respondent which raised legal issues, whether or not it was recognised by the respondent as being "legal" and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system.

being issued with a negative homelessness decision, and therefore a denial of emergency housing assistance, does not transform into a grievance for such applicants. Feltstiner, Abel and Sarat's (1980–1) "naming, blaming, claiming" paradigm will be examined within this chapter, in order to help us to understand better the circumstances of when someone might not recognise that there is a problem. For clients whose problem does transform into a dispute, and who do seek help to challenge an unsatisfactory homelessness decision, what does the access to justice landscape look like?

What would a homeless applicant expect from the justice system when confronted with a potentially justiciable problem in relation to their homeless application, and requires access to justice? In order to begin to address this question in the context of the homelessness decision dispute, it is first necessary to understand the types of people who need emergency housing assistance from the local authority. Earlier in this study, examples were given of some of the problems vulnerable homeless people experienced in attempting to secure emergency housing assistance (Chapter Two). Some homeless people have sufficient understanding about "how the system works" and are articulate enough to help themselves in the homeless application process after seeking advice, certainly up to the point when a decision is made. Others find it difficult to make a homeless application. The particular problems, characterised as 'justiciable events' (Genn 1999:12), that a vulnerable homeless person might experience can be distinguished from problems that people who are not homeless experience. There is now recognition that people who experience justiciable events also experience clusters of problems. For example, people who reported long-term health problems or disability were more likely to report problems relating to rented housing, and also problems relating to homelessness (Pleasance, Balmer and Buck 2006:47–48).

Once someone is in a position of finding it difficult to ask for help, to that person, access to justice might well be a meaningless concept. A question that is of central importance to those that are homeless, which needs to be addressed is: how can justice be more accessible to the vulnerable homeless applicant? The traditional notion of access to justice as a universal right has moved on, and we are now in the age of 'rationed' justice

where selective groups of people are able to access justice (see Cappelletti and Garth 1978, Moorhead and Pleasance 2003 and Moorhead 2007. See also Hannah 2006a). It would appear that the government is searching for more pragmatic and cheap solutions given that its budget for civil legal aid is not likely to increase. For people who need access to legal services, the impact of the so-called 'cost-effective' or 'cost-benefit' proposals by the government for lawyers, has meant that lawyers are forced to see a greater number of clients without benefiting from an increase in remuneration. Only those clients who are in receipt of state benefits or on low income qualify for full or subsidised legal help. Housing cases is an area that has remained a priority for the Legal Services Commission in relation to the provision of funding. However, for somebody who does not understand how the system works, and for those that accept the local government officer's word as final, legal education, which could be included in the school curriculum, is necessary.[2]

Section C of this chapter gives an overview of the access to justice issues. We will start be examining the transformation process in the early stages of disputes. This would assist us in gaining a greater understanding of the issues that the homeless experience, and why many homeless people do not take steps to address problems with homeless applications.

B. Barriers to Taking Appropriate Steps to Addressing Disputes

Felstiner, Abel and Sarat's seminal 1980 article still provides a helpful paradigm within which to understand the transformation process of disputes. Feltstiner and colleagues' explanation, including the framework they constructed to aid in the understanding of the early stages of dispute behaviour, of the non-emergence of disputes is still influential.

[2] Genn reminds us that, "the error emerging from many of the early studies of legal needs was the tendency to focus on the kinds of people who use legal services" (Genn 1999:6). However, I believe that information could also be gained from understanding the types of people who do not use legal services. Genn goes on to suggest that focus ought to be given on the kind of problems that are taken to lawyers. I would support this argument. However, my experience from working with homeless people is that the kind of problems that homeless people do not take to lawyers provides important information on legal needs that are not addressed. In addition, should more work be done at a more fundamental level in ensuring that people are given legal education for example, then more people would be able to make an informed decision about whether legal assistance is needed. See Ardhill 2004a:9.

However, there have been some criticisms.[3] The ten clients, who were interviewed in-depth for this study, were asked specific questions relating to the dispute transformation process. Relevant comments made by interviewees have been incorporated into this section. When I worked as a housing advisor and caseworker, I was concerned that, first, there were issues in relation to the client's ability or lack of ability to manage the various processes involved with gaining help with their problems. Some clients needed to maintain regular contact and sought guidance regularly from advisors, for reassurance in approaching the council for emergency housing assistance. Once at the council building, and as soon as the homeless person is faced with a barrier, such as not being listened to or being told that he or she could not be assisted, some will always contact the telephone advice line again. Of course, there are many who give up at that point or who seek help from more local advice organisations on a face-to face basis. Some might try to find their own solution. Cases 35–40 (in Appendix 2) are cases of clients who became 'invisible' or were 'hidden homeless.' In Cases 35 and 36, both clients and their families managed to stay with their respective family or friends, while in Cases 37 and 38, the clients ended up staying in abandoned cars. In Case 39, Keith and his family of six stayed in their own car, while in Case 40, at the time Martin rang the telephone advice line, he had been sleeping in his van for a period of time before sleeping rough at bus stops for a week.

Some clients found it difficult accessing 'legal' help, whether the assistance is from a solicitor or from a non-qualified housing law practitioner. With this in mind, the "naming, blaming, claiming" transformation paradigm has been used as a basis for gaining a greater understanding of the processes that a client might experience when there is a problem. The "naming, blaming, claiming" paradigm is a framework for the studying of processes by which injurious experiences may be perceived (naming), which may become grievances (blaming), and ultimately may be transformed into disputes (claiming). The study of the emergence and transformation of disputes means the examination of a social process, the analysis of the conditions under which injuries are unperceived or go unnoticed, and how people respond to the experience of injustice and

[3] See Chapter One for a discussion of some of the criticisms.

conflict. At this stage, it is also useful for the typologies of response (Roberts and Palmer 2005:81-85) to be examined in conjunction with the naming, blaming, claiming paradigm for a full appreciation of the value of the latter paradigm.

At one end of the spectrum of the typologies of response, or "responses to trouble," is the passive end. In relation to perceived wrong, the reaction is avoidance of disputes, or to do nothing, to 'lump it.' At the other end of the spectrum is self-help. In between the two extremes are several "settlement – directed talking" responses, such as negotiation, mediation and umpiring (Roberts and Palmer 2005:81-85). Negotiation can be characterised on a simple level as communication processes, which involve the exchange of information and, potentially leading to common understanding, as well as joint decision-making (Palmer and Robert 1998:18). Mediation is negotiation, which is carried out with the assistance of a third party (Palmer and Roberts 1998:101). Umpiring involves the transfer of power for the outcome to a third party decision-maker. This could be a judge or arbitrator. Of course, in order for a response to be made, injurious experience must first be perceived.

In terms of the Felstiner et al paradigm, in order for disputes to emerge and remedial action to be taken, an "unperceived injurious experience"(unPIE) must be transformed into a "perceived injurious experience" (PIE). Interestingly, whether someone is able to recognise when he or she experiences a problem is a greater problem than is universally recognised (see Genn 1999, also Cowan and Halliday and colleagues 2003 in their study of the non-emergence of disputes in relation to homeless applicants and the internal review process – to be discussed in Chapter Seven of this study). Lesley's case (Case F) provides an illustration of this phenomenon. Lesley explained to me that her neighbours, Pat and Rose, had an on-going argument with the neighbours on the other side of her house. The problem was about dogs barking, and the argument continued for a couple of years. Pat and Rose asked Lesley for help; the request was that Lesley writes a letter to the council to "tell them that the dogs were bothering me as well." However, Lesley did not want to write a letter because she did not want to get involved in the dispute. Lesley explained to me that the dogs were not bothering her, that she was out for most of the

day, and did not hear them. As far as Lesley was concerned, "it was just one old lady with a couple of dogs." Yet, the problem continued for about three years, and eventually the matter went to court, and

> *the old lady was evicted from her house with the dogs [for noise nuisance]. Everybody on the street thought it was totally unfair. I didn't stop talking to my neighbours because of this. I think they just got a bit funny with me when I refused to write letters to the council and all this kind of thing. They got a little distant, didn't speak so much to each other as before. And we were very unfriendly because I used to work with the wife. I worked with her for fifteen years.*

Lesley explained that before the elderly neighbour was evicted, the elderly neighbour's daughter, Kim and her boyfriend, went to Lesley's neighbour's property "to have a go at my neighbour, and were banging on the door and "kicking it in." However, Kim and her boyfriend targeted the wrong door. In fact, it was Lesley's door. At the time Lesley was with another friend across the road. The misunderstanding was cleared, and Lesley told me that Kim's boyfriend apologised to her and explained that he did not mean to damage her door, and was "after the neighbour." Lesley needed a new front door though, which did cause her "a bit of a problem" because the locks were broken. Nevertheless, Lesley did not see that potentially, there was a problem between Kim's boyfriend and her when he caused damage to her door. Later that evening, Lesley knocked on Pat and Rose's door, to warn Pat that "this man said he was looking for him." Lesley told me that she did not get a reaction she expected from her neighbour in response to her trying to be helpful. "I don't know why, but my neighbour took exception to that. He said no, he wasn't looking for me, he was looking for you." Lesley's neighbour did not accept her explanation and her warning. "My neighbour just went in and shut the door. And it was from then on they stopped speaking to me."

Lesley explained that in the beginning, she continued to greet her neighbours whenever she saw them. But was being ignored, and eventually gave up when they continued to ignore her. At the same time, Lesley continued to speak to the elderly tenant "because she hadn't done anything wrong to me. I had no argument with her and her daughter."

Lesley was adamant that she was not aware there was a problem until a community mediator contacted her. Lesley felt that the fact that Pat and Rose were not talking to her and had withdrawn their friendship to her was her neighbour's problem, particularly because Lesley believed that Pat and Rose had alienated themselves from the rest of the neighbours by making complaints against an elderly tenant about noise. At the height of the problems, Lesley told me that she was friendly towards the elderly tenant's daughter. However, Lesley did admit that she was lonely and missed Rose's friendship, particularly because Rose and Lesley used to work together. In addition, Pat and Rose used to invite Lesley over to their garden in the evenings or at the weekends. However, Lesley did not perceive the withdrawal of Pat and Rose's friendship to her as an injurious experience.

Feltstiner et al (1980-81:633) would call Lesley's experience an unPIE or unperceived injurious experience. Lesley did not realise or did not perceive the withdrawal of Pat and Rose's friendship as an injurious experience. Feltstiner and colleagues pointed out that an unPIE must be transformed into a PIE or perceived injurious experience in order for disputes to emerge and remedial action to be taken. Clearly, this had not taken place in Lesley's case. Feltstiner, Abel and Sarat admit that there are conceptual and methodological difficulties in studying this transformation. The conceptual difficulty can be easily identified since someone's definition of what is injurious would have to be chosen. An injurious experience is any experience that is disvalued by the person to whom it occurs, and such feelings are never universal.

Feltstiner and co-authors define the key methodological obstacle as the difficulty of establishing who in a given population has experienced an unPIE. The first transformation is naming – saying to oneself that a particular experience has been injurious. Naming may be the critical transformation. In terms of the first transformation stage, sometimes, a homeless applicant might not realise that he or she is experiencing an injurious experience, such as when a council officer puts barriers in his or her way to making a homeless application. In trying to get help, an applicant is usually asked to

present documentary evidence before an application is accepted. Even then, I have come across many cases where the authority still did not provide interim accommodation when it could be argued that the council had sufficient evidence to make that earlier decision.[4] In Case 9, Alex had told us that he had been street homeless after being discharged from a psychiatric hospital. Alex had problems with alcohol, and had recently been detoxified, he also suffered from clinical depression, and needed to take three types of medication. He suffered from bladder failure, and had a catheter attached from his stomach leading to a bag attached to his leg. Yet, when Alex attempted to make a homeless application, he was asked to provide documentary evidence in support of his medical conditions. Alex was more concerned about being able to obtain these documents, which at the time of the telephone conversation were kept in his brother's house. However, Alex told us that his brother was away, and because his brother would not allow him back into his home to pick up the documents Alex continued to sleep rough.

Hence, it would seem that on a superficial level, and at the beginning stage of the application process, homeless applicants might not perceive they have had an injurious experience. Factually, the act of someone actively seeking assistance from an authority, only for that person to be denied an assessment or assistance would catapult that potential applicant to the PIE stage. However, on a superficial level, because the focus is on the perception of whether someone had or had not had a PIE, speculation can only be made that someone who had anticipated assistance but did not get it, could be said to have perceived an injurious experience. However, someone who did not expect to be helped by the local authority or did not realise that he or she had a right to make a homeless application, and an assessment ought then to be carried out by the authority, might not have had a PIE.

One of the housing law practitioners I interviewed for this study, CW4, explained that, "some clients are not able to articulate their problems, while some have difficulty understanding the system for assisting people who are homeless or in housing need."

[4] See Chapter One for an explanation of the homeless application process.

Although CW4 emphasised that different complications arise when English is not the client's first language to communicate: "nuances of language are not taken into account, and there is misunderstanding on the client's part, particularly where local authorities set traps because of their gatekeeping role. This also means that interpreters are not always used." For some homeless applicants or people with housing problems, they remain at the unPIE stage for various reasons until propelled forward to the PIE and naming stage, prompted by friends or relatives, professional or advisor.

The next step of the "naming, blaming, claiming" paradigm is the transformation of a perceived injurious experience into blaming. This occurs when a person attributes an injury to the fault of another individual or social entity. Feltstiner and colleagues argue that by including fault within the definition of grievance, the concept is limited to injurious experience that is viewed both as violations of norms and as remedial. Such definition takes the grievant's perspective: the injured person must feel wronged and believes that something might be done in response to the injury, however politically or socially improbable such a response might be. In the situation of the homeless applicant, many would usually not be attributing fault. The focus of the applicant is in acquiring emergency accommodation. In Case A, Nicole did not use the word 'fault' although during the homelessness assessment process, Nicole was concerned about how she was treated by the homelessness officer. The officer's attitude had caused Nicole to worry about whether her family would be accommodated in the long-term. Nicole told me that her homelessness caseworker would always "get me crying every time." When I asked Nicole whether it was because she had to recount her traumatic experience of why she had to flee her country of origin, Nicole told me it was because the caseworker shouted at her, and told her that he believed Nicole was lying when Nicole tried to give details of a very traumatic experience. Nicole added that she was scared when she had to attend the office for interviews. She would bring all her letters as supporting evidence. Those documents needed to he translated, but Nicole told me that the homelessness officer would never take them into consideration.

The third transformation occurs when someone with a grievance – who blames – voices it to the person or entity believed to be responsible and asks for some remedy. This communication is called claiming. In Case H, on a practical level, there were problems from perception stage to gaining a response to the claiming stage. Christa's problems began when she made a homeless application. Christa explained that she had an ordeal with her housing benefit claim, and she perceived that there was a problem because "they fill in [the housing benefit form] for you, they manage the information and what [to] write down." Christa's problem was that when she moved into a self-contained flat, she had to pay council tax. However, the officer that had completed the combined housing benefit and council tax benefit form did not tick the box that indicated Christa wanted to apply for council tax benefit as well. This meant that only part of the form was completed, and Christa was not assessed for council tax benefit. An additional problem was that the council officer "kept giving conflicting information" to Christa in relation to the jobseeker's allowance claim her partner had made. Christa told me that she felt it was difficult to make complaints, and in any case, to her apologies were meaningless. Christa had made a homeless application while she was still working on a full-time basis, and prior to going on maternity leave. Christa's partner was seeking work, and as a consequence, was in receipt of jobseekers' allowance. Christa fell into rent arrears when she was staying in interim accommodation because there was a delay in her housing benefit claim being determined. There was an added complication of the income situation with Christa working full-time while her partner was seeking work. The fact that Christa had to complete a housing benefit application with a local authority officer at the same time as accepting interim accommodation after her homeless application was taken also caused complications with her housing benefit claim. Because of the timing of the housing benefit claim being processed, information available at the time, and the documentary evidence required in support of the housing benefit claim, Christa was given conflicting advice by different local authority officers. However, the onus was on Christa herself to seek advice, and to maintain close contact with the housing benefit officers in order to prevent her rent arrears from accruing.

When Christa did make a complaint about how difficult it was to sort out the housing benefit problem even with her constantly attending the local authority office, she felt that the manager made her empty promises. A problem was that different local authority officers assisted Christa each time she attended the office. Christa believed that there was a breakdown in the complaints system, and that apologies were too readily given but meaningless. "You just get tired but you don't get any response, even if you make a complaint in person. They just apologise or fob you off and say 'I'm sorry, they shouldn't have done that.' Then next week you could go there and they'll do the same thing. So nothing's been done on the complaints. They all have an attitude when you go there, so it's hard." Christa told me that she only found out about the Housing Ombudsman when she signed a tenancy agreement for her temporary accommodation.

In her article, Mulcahy (1999:66) raises an important question: should the principles governing complaints procedures reflect those developed by the courts in the guise of natural justice or should the principles be different? Mulcahy (1999:68) suggests that the term complaint is not ideal, "Many people use complaints procedures in order to make comments or to give or receive information rather than to express a grievance or obtain a financial remedy and all those working in the field have struggled with distinctions between grumbles, moans, complaints and grievances in an attempt to distinguish between more or less serious cases." In Christa's case, she clearly does not fall within the situation that Mulcahy describes. Christa had wanted the system to be improved, and a consistency of service to be provided. However, it would seem that the treatment she received from the manager and local authority officers would fall into the area that Mulcahy (1999:69) describes as 'low level' grievances or "relatively informal service level redress mechanisms." In such context, 'low level' "can best be understood as immediate," and unfortunately at such a level are processed in bulk. It is natural then for Christa to feel frustrated with how ineffectively her complaints are treated by officers of a public service. Mulcahy suggests that these low level grievances are not treated seriously because the low level procedures exist to process small claims quickly, efficiently (however this is defined) and cheaply (1999:70). Thus, courts are not overwhelmed with having to deal with an overflow of 'unimportant' cases, leading some

to conclude that the application of the rules of natural justice should be confined to those cases where judicial decisions are to be made (Mulcahy 1999:71). Such an argument, however, has been criticised by Mulcahy as being against expanding access to justice; the legal system and services should be extended to new clients and new types of disputes. Ultimately, the manner in which complaints systems function is an indication of "how justice is achieved and how conflict is managed in contemporary society."

The act of making a complaint to a local authority officer is a cause of anxiety for some clients who believed that such a process would hinder rather than assist them with the statutory homelessness process. In Case A, Nicole believed that if a complaint is made "you end up without [help with your housing]." Hence, Nicole did not complain when the local authority officer offered her family accommodation on the top floor of the building, even though Nicole was pregnant, and struggled with climbing the stairs.

A claim is transformed into a dispute when it is rejected in whole or in part. Feltstiner, Abel and Sarat argue that transformations reflect social structural variables, as well as personal traits. People do, or do not, perceive an experience as an injury, blame someone else, claim redress, or get their claims accepted because of their social position as well as their individual characteristics. In terms of problems that homeless applicants might experience, it is sometimes difficult to neatly compartmentalise these problems and decide whether from the naming stage, if an applicant does even reach this stage, the matter then transforms to blaming and thence claiming.

PIEs, grievances and disputes have been suggested by Feltstiner et al to have the following characteristics: they are subjective, unstable, reactive, complicated, and incomplete. The term, 'subjective' means that transformations need not be accompanied by any observable behaviour. A disputant discusses his or her problem with a lawyer and consequently reappraises the behaviour of the opposing party. Transformations may be nothing more than changes in feelings, and feelings may change repeatedly, hence the process is unstable. Since a dispute is a claim and a rejection, disputes are reactive by

definition. The characteristic of instability is visible when parties engage in bargaining or litigation.

> *[A]ttention to transformations also reveals reactivity at the earlier stages, as individuals define and redefine their perceptions of experience and the nature of their grievances in response to the communications, behaviour and expectations of a range of people, including opponents, agents, authority figures, companions, and intimates* (Feltstiner, Abel & Sarat 1980-81:638).

Feltstiner and his colleagues remind us that even in ordinary, everyday understanding, disputing is a complicated process involving ambiguous behaviour, faulty recall, uncertain norms, conflicting objectives, inconsistent values and complex institutions. Further complications arise when attention is paid to changes in disputant feelings and objectives over time.

Feltstiner and his co-authors also discuss the subjects and agents of transformation. Of the subject and agents that the authors mention, particular attention is given to representatives and officials,[5] of which the lawyer is acknowledged to be the most

[5] In relation to the observations made by the housing law practitioners about the nature of personal problems clients experienced, CW4 commented on the failure of existing statutory services, such as social services (SS) in assisting families in need of help: "There is a problem in that SS are reluctant to take a client's problem and situation seriously. The problem is particularly evident in the statutory response relating to children. SS will take responsibility for the children, but will not pay for the mother to be accommodated with her children, and the mother of the children thinks that SS will take her children into care." CW4 felt strongly that SS should intervene at an early stage during a family breakdown. However CW4 pragmatically observed that, "in effect, charities are performing local government services, hence the need for effective joint working with organisations set up to assist people in need."

In general, practitioners acknowledged the difficulty that people living in London experienced when they need to seek advice about their housing and housing related problems. CW5 pointed out that "[the decreasing availability of services] compounds clients' problems, which means that they may not deal with all their problems," while CW1 stated that it is the desperation of people who are going to be homeless that prompts some to seek advice. CW1 went on to state that unfortunately, "some clients just take the officials at their word." The incident of the client just taking the official at his or her word can be illustrated by Christa's case, who was aged twenty-one, well educated and who had worked as a manager of a retail company prior to going on maternity leave (as discussed from pages 128–129). Christa commented that when she tried to seek advice from an independent advice agency, the organisation was closed on the day that she sought assistance. Although Christa had not returned to the agency at the time that I interviewed her, she told me that she was determined to sort out her benefit problems even though she was pregnant and working at the time.

The danger of people with problems not seeking help from professionals can be summed up by CW4: "The informal advice of family and friends 'foisted' on people is often wrong, based on misinformation, but followed to the person's detriment, such as someone being offered accommodation,

important agent of transformation. The lawyer was long ago characterised by Talcott Parsons as a gatekeeper to legal institutions and facilitator of a wide range of personal and economic transactions in American society (Parsons 1962). Chapter Six will focus on the interaction between professionals, including lawyers with the client.[6] However, it is worth mentioning at this stage that as Feltstiner and colleagues stress, lawyers exercise considerable power over their clients. Lawyers maintain control over the course of litigation and discourage clients from seeking a second opinion or taking their business elsewhere. Further, there is evidence that lawyers often shape disputes to fit their own interests rather than those of their clients. Additionally, sometimes, lawyers systematically 'cool out' clients with legitimate grievances, such as divorce lawyers recommending litigation, for which a substantial fee can be charged. More positively though, lawyers produce transformations by providing information about choices and consequences unknown to clients: offer a forum for testing the reality of the client's perspective, help clients identify, explore, organise and negotiate their problems, and give emotional and social support to clients who are unsure of themselves and of their objectives (Mnookin and Kornhauser 1979:985).

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which is refused, following advice from friends or family, which leads to cyclical homelessness." It cannot be underestimated the impact of the advice friends and family give as an agent of transformation.

[6] The shortage of housing solicitors has caused difficulties for clients in need of timely assistance from a solicitor. CW2 remarked that, "one caseworker had to ring fifteen firms of solicitors before she was able to get a solicitor to take on her case. However, the difficulty in making referrals appears to be cyclical. It could be the fact that inner London local authorities are more difficult to deal with unless threats of legal action are made." CW1 observed that "there are two difficulties in referring clients to solicitors: (1) the client must be entitled to assistance with legal aid, and (2) he or she must be able to find a solicitor. This has been a great difficulty because solicitors often have huge caseloads, and there are not enough solicitors and there is much local authority bad practice." CW1 observed that when a client is able to retain a solicitor, it is sometimes difficult to convince the client to continue with his or her case until its conclusion, "Once a client gets accommodation, he or she is not keen to continue with the case, 'I want to get on with my life now.' There is a need for an organisation to assist clients with their case, and a need for clients to get and pursue help, and there is a need for lawyers to threaten judicial review in certain situations before the local authority would house."

C. The Access to Justice Issues

In the previous section we observed the manner in which problems do not necessarily transform into disputes in relation to the Feltstiner, Abel and Sarat "naming, blaming, claiming" paradigm. Yet, there are those with problems who do seek advice from a professional and whose problems do transform into disputes. So, what issues do such clients face when trying to access justice? This section gives an overview of the access to justice issues that concerns homeless applicants, while Chapter Six focuses on access to legal services.

The idea that everybody should have equal access to justice has come under increasing strain (Moorhead and Pleasance 2003:1, Moorhead 2007, also Blake 2000a). Yet, Legal Action Group[7] convincingly argues that equal access to justice and fair treatment by the justice system are "fundamental rights within a democratic society" (Hannah 2006a:6–7). LAG's proposals in their policy statement, *Access to Justice: Agenda for Action* is underpinned by five principles: sustainable legal services, empowerment through legal literacy, accountability through the civil courts, justice beyond the courts, and fair and impartial criminal justice. Historically, access to justice has mainly been linked to access to courts.[8]

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[7] The Legal Action Group (LAG) is a charity, which promotes equal access to justice for members of society who are socially, economically or otherwise disadvantaged. Other than the provision of support to the practice of lawyers and advisors, LAG campaigns in order to promote improvements to the law and administration of justice.

[8] Cappelletti and Garth described access to the courts through the reform of legal aid to the poor, to enable them to acquire representation to court, as the first wave of the access to justice movement. The judicare system of legal aid for the poor has seen changes over the years ranging from the state paying private lawyers to give legal advice to those who cannot afford it, to a franchise system of legal aid. Since the late 1990s, not-for-profit organisations in England – in many cases, those organisations that offer advice and casework assistance by non-legally qualified caseworkers – have been involved in the legal aid franchise scheme. The emergence of law centres, described by Cappelletti and Garth (1978: 31) as supplementing the established judicare schemes in the 1970s was considered to be notable at the time. However, over the years, law centres have struggled to survive cuts in funding from local authorities, and are now in the main only assisting clients who are eligible for assistance by legal aid.

The second wave – of less relevance to this study – resulted in the representation of 'diffuse' collective interests, through such mechanisms as class actions, public interest lawyers, and the granting of standing to sue to consumer and environmental groups. Cappelletti and Garth explained the third wave as follows:

Against the backdrop of the civil justice reform and change in government policy leading to a more restrictive approach in assisting homeless people, the Community Legal Services (CLS), is providing a decreasingly effective service to people in need of legal representation. Over the years, since its inauguration in 2000 with the implementation of the *Access to Justice Act 1999*, the CLS' legal aid reforms have not only affected the quality of assistance housing law providers are able to give, but have also resulted in a decline in the number of vulnerable people who are able to access legal services, and more specifically to housing solicitors. A more detailed discussion of access to legal services takes place in Chapter Six of this study. At this stage, it needs to be stated though that adequate funding for civil legal aid is needed to ensure access to justice. It is also necessary to protect the existing civil legal aid budget by ring fencing from criminal legal aid the government expenditure available for civil legal aid, and, as argued by Legal Action Group "must also be part of the social justice promise" (2004 [December] *Legal Action* 3).

Not only is adequate funding for those who need such assistance to access legal services necessary, but ADR processes should only be engaged if such mechanisms are the most appropriate in resolving the matter in contention. Legal Action Group has already articulated the concern of many practitioners by stating, "one of the consistent themes that emerges is the fear that a separate justice system is effectively being created for the poor, while the rich will still be free to use the courts as before" (Ardill 2004b:13).

> *First, as we have noted, this approach encourages the exploration of a wide variety of reforms, including changes in forms of procedure, changes in the structure of courts or the creation of new courts, the use of lay persons and paraprofessionals both in the bench and in the bar, modifications in the substantive law designed to avoid disputes or to facilitate their resolution, and the use of private or informal dispute resolution mechanisms. This approach ... is not afraid of comprehensive, radical innovations, which go much beyond the sphere of legal representation.*
>
> *Further, this approach recognizes the need to relate and adapt the civil process to the type of dispute* (Cappelletti and Garth 1978:52).

Even in the late 1970s, there was a perceived need to change in the methods of delivery of legal services. It was accepted that legal assistance meant more than representation in court (Cappelletti and Garth 1978:108). Legal assistance implied help in making people aware of their rights in order to plan their important transactions, and the use of paralegals wherever possible, rather than lawyers, was seen as an effort to improve access to justice (Cappelletti and Garth 1978:110).

Ardill's comment was made in relation to the CLS' consultation paper: *A New Focus for Civil Legal Aid*, and in the context of diverting CLS funding away from litigation to the early resolution of cases, including the use of ADR processes. Yet, our concern is that this fear is being realised anyway because grievants can only access court adjudication as a last resort, with parties having to consider ADR processes before court adjudication. A system where the most appropriate dispute process is matched to the dispute would have a different emphasis because in this situation court adjudication would be one of the many processes considered by the party.

With a decreasing number of housing solicitors in the legal profession carrying out legal aid work, it is possible that lawyers are acting as gatekeepers to legal representation for people attempting to access justice (see Chapter Six). The pressure experienced by solicitors in relation to their increasingly burdensome workload, inadequate financial remuneration from the CLS, among some of the factors, might cause solicitors only to choose cases, which do not require an enormous amount of work. This could mean that the clients who are less articulate, whose first language is not English or those who lead very chaotic lifestyles or have complex multiple problems, might not be able to acquire legal assistance. Ironically, as a result of the changes to legal aid, the most vulnerable people in society might well not assisted.

The principles that Lord Woolf outlined in his final *Access to Justice* Report of the civil justice enquiry findings are worth restating. Hence, in ensuring access to justice, the civil justice system should:

> *(a) [b]e just in the results it delivers; (b) be fair in the way it treats litigants; (c) offer appropriate procedures at a reasonable cost; (d) deal with cases with reasonable speed; (e) be understandable to those who use it; (f) be responsive to the needs of those who use it; (g) provide as much certainty as the nature of particular cases allows; and (h) be effective: adequately resourced and organised* (Woolf 1996:2).

However, one of the flaws of the enquiry is that the main focus was on access or restriction to the courts.[9] Lord Woolf wanted litigants to make use of the ADR techniques. Yet, at the same time, it appears that Lord Woolf envisaged ADR processes should be used as a means to exert pressure on litigants to an early settlement. Zander, commenting on Lord Woolf's *Access to Justice Interim Report* at the time suggests "the [interim] Report is basically a call for judicial case management to cure the ills of the litigation process" (1995:80).[10] Zander, who was critical of the findings of Lord Woolf's civil justice enquiry, remains convinced that the reforms made "a bad situation worse rather than better" (2009:367). Zander admitted though that Lord Woolf did help to change the adversary culture of litigation, although he remains sceptical in relation to the real benefits to the parties brought about by the integration of ADR processes into the English civil justice system (2009:368). We agree with Zander's views in the main, however, in relation to the ADR developments, this study argues that only time will tell whether such processes will benefit parties. We are of course keen for a discussion on 'appropriate' dispute processing to take place.

Hence, in relation to the Woolf reforms, enabling greater access to justice meant the avoidance of litigation whenever possible, and court proceedings should be used to resolve disputes only as a last resort, "and after using more appropriate means when these are available (Woolf 1996:4). Lord Woolf's interpretation of 'appropriate,' arguably, can be used in the sense of forced settlement, as has been seen in the case of

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[9] The Final Report, which was published in July1996, restricted the comments on homelessness issues to four paragraphs within Chapter 16 – paragraphs 73–76 – by asking whether it should be possible for housing cases, dealt with by way of judicial review, to be heard outside of London, and whether there should be a right of appeal to an independent tribunal or a county court. It was considered by respondents that county courts would provide the most appropriate forum, and specialist Circuit judges who had the opportunity to build up some expertise in housing matters should hear homelessness cases appealed to the county court. As a result, Lord Woolf recommended that appeals in relation to homelessness cases should be heard in the county court on "judicial review principles" against local authorities' decisions on homelessness. Zander criticises the suggestions that Lord Woolf made in his interim report as not being well thought out. Zander asserts that the implementation of the Report will make the civil justice situation worse, rather than better. Also, that Lord Woolf got it 'fundamentally wrong' because "there is no solid evidence that there is a problem justifying a radical solution" by reforming the civil justice system in relation to management if court cases by judges (1995:80, 94–95). See also Zander 1997.

[10] See also Roberts and Palmer's view of the courts presenting themselves as 'sponsors' of negotiated settlement (2005:283–285). In a separate article, Roberts points out that 'case management' endorses "what had been long established practice – the use of 'litigation' as a vehicle for lawyer negotiations" (2002:21).

Cowley.[11] 'Appropriate' to Lord Woolf does not mean enabling greater access to justice in relation to 'appropriate' dispute processing (Sander 1976, Sander and Goldberg 1994 and Sander and Rozdeiczer 2006). The latter meaning of 'appropriate' is used in the sense of matching appropriate dispute processes to the case, which includes an assessment on an equal basis of court adjudication. Lord Woolf's vision of the use of ADR processes in settling disputes, with court proceedings being used as a last resort to resolve disputes has certainly been borne out (see Chapter Nine). Yet, courts do have their place in resolving disputes, and it must not be forgotten the role that adjudicators can play, for "courts also act as an educative process about the nature, resources and remedies for the conflict, which beset them" (Cappelletti and Garth 1978:85).

The principle of "proportionate dispute resolution" continues to dominate the manner in which the government is reforming the civil justice system. The publication of the then Department for Constitutional Affairs' White Paper, *Transforming Public Services: Complaints, Redress and Tribunals* in 2004, is an example. The paper's stated aim is to develop a series of policies and services that attempts to avoid problems and administrative disputes in the first place. Failing that, the secondary aim of the White Paper is to suggest 'tailored solutions' to resolve disputes as quickly and cost-effectively as possible (paragraph 2.2). The paper examines the position of "what people want in terms of the processes they go through" (paragraph 2.7) and includes the resolution of such disputes by ADR processes. Chapter Seven of this study continues the proportionate dispute resolution discussion.

ADR mechanisms as a means of lightening the workload of the courthouse is a key focus of the Woolf civil justice reforms. Yet, the pathway to the use of ADR has not been smooth, and inevitably has led to

> *the question who needs ADR? Do the LSC and Treasury need it to save money? Do judges need it to save court time and reduce caseloads? Or do parties need it to resolve conflicts more satisfactorily? Can all these needs*

[11] See also Chapter Nine.

be met without sacrificing quality of deision-making and access to justice to other expediences? (Bondy 2004:6)

Bondy (2004:6–7) argues that there is tension between the demands of the courts and Treasury for a cost-effective alternative to expensive court proceedings, and acknowledged that competent and experienced mediators are not cheap. The 2001 Government Pledge was an undertaking by the government for government departments and agencies to take practical steps to resolve disputes by ADR whenever possible. The Pledge specifically excluded public law and human rights disputes as such cases were considered to be unsuitable for settlement by ADR. Nevertheless, Lord Woolf CJ (as he then was) still managed to forcefully direct, and was directly involved in planning the mediation process for the parties in the case of *Cowl v Plymouth City Council* [2001] EWCA Civ 1935. (See Chapter Eight of this study for a further discussion of the *Cowl* decision, also Boyron 2006). In her article, Reid explores the question of whether "diverting cases away from the courts and into ADR means that, in some cases, we may be denying, delaying or selling justice" (Reid 2004:8). Our view is that this might well be the case, especially if an ADR mechanism has been inappropriately matched to a dispute (Sander 1976, Sander and Goldberg 1994, Sander and Rozdeiczer 2006). At the same time, bearing in mind the fact that some clients have difficulties viewing their problem as a potential dispute, the grievant would benefit from assistance in identifying appropriate dispute processes to match his or her dispute.

To truly focus on matching appropriate dispute processes to the case, we consider the best solution to be Professor Sander's vision of a multi-door dispute resolution centre (1979:84). The more commonly known multi-door courthouse is a scheme for properly linking cases to appropriate forums for settlement. The ideal model envisaged was that of a centre "offering sophisticated and sensitive intake services along with an array of dispute resolution services under one roof. A screening unit at the center would 'diagnose' citizen disputes, then refer the disputants to the appropriate 'door' for handling the case" (Ray and Clare 1985:9). This model would ensure the availability of a whole range of dispute resolution mechanisms, including arbitration, mediation, conciliation, and adjudication. This particular method of dispute 'processing' views the

available dispute resolution mechanisms in a different light, and moves the entire debate forward from an adjudication-centric approach to one where a greater understanding of the nature of dispute being resolved is required (see Epstein Stedman 1996).

One final point needs to be made, and this is in relation to Legal Action Group's policy statement, *Access to Justice: Agenda for Action*, that public legal education should be a right. The simple fact is that people would not know what to do nor where to go or how to go about seeking legal advice and assistance if awareness is not raised of individual rights and "processes that are available to effect them" (Ardill 2004:9). Hence, LAG argues that public legal education ought to be a right because a diverse approach to delivering public legal education would include: written material on legal topics (to include leaflets and self-help packs and books aimed at lay users), interactive learning through websites or face-to-face group work. To this end, LAG, the Advice Services Alliance and the Citizenship Foundation produced a discussion paper making a case for a national strategy for public legal education. In 2006, the then Department for Constitutional Affairs supported the independent Public and Legal Education Task Force, chaired by Professor Dame Hazel Genn, to develop proposals for the promotion, co-ordination and improvement of legal education (2006 [October] *Legal Action* 5). The Ministry of Justice continued the public education work when it was created in May 2007.

D. Conclusion

Feltstiner, Abel and Sarat's "transformation of disputes" model, along with Robert and Palmer's typology of responses to disputes, enabled us to analyse the experiences of the vulnerable homeless, to understand if problems are perceived by vulnerable homeless applicants, as well as why problems might not develop into claims. This is a useful start in gaining an understanding of the meaning of effective access to justice in relation to homeless applicants and people who have housing problems.

Legal Action Group believes that, "access to justice requires policies which deploy every possible means towards attaining their goal including reform of substantive law,

procedure, education, information and legal services"(Smith1997:5). The vulnerable homeless applicants' awareness, in relation to potentially legally enforceable rights needs to be raised, in order to ensure greater access to such rights. Greater collaboration between the LSC and the Ministry of Justice in the provision of public legal education would certainly assist. In addition, simplifying the homelessness legislation, so that the application process is more straightforward would enable greater access to justice for homeless applicants. Moreover, the notion access to justice could benefit from a re-examination in terms of appropriate dispute processing.

In this chapter, we have focussed on the research findings in relation to the experiences of homeless applicants and people with housing problems in terms of the barriers that could prevent people from taking steps to address their problems. A discussion outlining the access to justice issues ended the chapter. Chapter Six concentrates on the experience of clients when they attempt to seek assistance in relation to their problems. In addition, issues pertaining to accessing legal services will be examined.

Chapter Six
Access to Justice Problems Experienced by Vulnerable Homeless Applicants: (II) Legal Services

A. Introduction

This chapter continues to explore the meaning of access to justice in terms of access to legal services for the vulnerable homeless applicants in London. We observed in Chapter Five how homeless applicants might find it difficult to take steps in addressing disputes. Chapter Six will now examine the nature of contact that people with problems have, with a range of professionals, including housing law practitioners. The term "housing law practitioner" or HLP is used within this chapter to include advice-giving professionals or paralegals, as well as qualified lawyers. This is because this study considers that a more generic term is needed that takes into account the changing landscape of legal services provision.[1] In the first section of this chapter after the introduction, Section B discusses the range of services that people with problems, including homeless applicants, approach for assistance. The HLP may not necessarily be the first professional that someone with problems approaches for assistance. The three cases discussed within that section is particularly illuminating in terms of the manner in which people seek assistance from professionals.

The assessment of the three cases is followed by an examination of the changes to the provision of government-funded legal advice scheme since the Woolf civil justice reforms, which also coincided with a change in the administration of legal aid. The *Access to Justice Act 1999* brought with it a change in the way civil legal aid is administered, which has irrevocably transformed the advice-giving landscape. The legal aid reforms have also generated problems. More recent criticisms are linked to the decreasing number of solicitors delivering a legal aid service, which has led to the creation of advice-giving 'deserts' – a problem that is greater outside London. In addition, whereas in the past, legal aid was associated only with the provision of legal advice and casework conducted by qualified lawyers, the landscape now

[1] The landscape of legal services has changed from when legal aid first became available, as the government has become increasingly concerned over the cost of its contribution to legal services: legal profession through legal aid, the Crown Prosecution Service, the court service and the Government Legal Service. See for example Legal Action Group 1995:7.

incorporates the not for profit (NFP) sector of advice-giving organisations delivered, in the main by paralegals. It is solicitors in private practice that is now an ever-shrinking sector consisting of those private practice solicitor firms that are willing to or can afford to provide a service to clients in need of government funding to pay their legal fees. From Cappelletti and Garth's point of view, in their groundbreaking worldwide access to justice project completed in the late 1980s, the use of the NFP sector in advice-giving would be a natural move in the "third wave of the access to justice movement," the "access to justice approach."[2]

B. Experience of Clients in Seeking Assistance from Services: Three Cases

The following three cases demonstrate that people who have problems are assisted by a range of professionals, including HLP. Since the late 1990s, unqualified legal advisors in the NFP sector[3] have been funded by the Legal Services Commission, and been involved in giving an advice and casework service to people with problems.[4]

The clients that I interviewed specifically for this study were asked a series of questions about their interaction with professionals who gave them advice.[5] The questions I asked attempted to elicit information about how people sought advice in relation to their problems, and whether the advice changed the course of action the client took. Clients were also asked which person he or she would most likely approach for help in future. The examples I gave clients in the questionnaire included

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[2] *First, as we have noted, this approach encourages the exploration of a wide variety of reforms, including changes in forms of procedure, changes in the structure of courts or the creation of new courts, the use of lay persons and paraprofessionals both in the bench and in the bar, modifications in the substantive law designed to avoid disputes or to facilitate their resolution, and the use of private or informal dispute resolution mechanisms. This approach... is not afraid of comprehensive, radical innovations, which go much beyond the sphere of legal representation.*

Further, this approach recognizes the need to relate and adapt the civil process to the type of dispute (Cappelletti and Garth 1978:52).

[3] Many of the voluntary organisations might not employ qualified lawyers directly. However, such organisations could well have access to a legal support service, if they have a Legal Services Commission contract. Alternatively organisations might belong to a membership organisation that provides a support service for guidance on more complex cases.

[4] Section C provides further information about the work of the LSC.

[5] The semi-structured questionnaire used to interview clients can be found in Appendix 5 of this dissertation.

local advice agency, council officer, solicitor or any other person. Clients were also asked why they approached that particular person for advice. Clients were then asked whether they had help from a lawyer before and the interaction the client had had with his or her lawyer.

My in-depth interviews with clients revealed that some experienced specific problems that affected their personal circumstances, which might or might not have impacted upon their ability to manage their problems. In some cases, the client's expectation was low in terms of the quality of help he or she could hope to attain. The issue of trust is a recurring theme. In the case of A, Nicole's inability to trust professionals to help her family was a major problem because of events in her life that took place in her country of origin caused her to flee from that country. Among the incidents that took place Nicole had been raped by a police officer who then harassed her and her family. Nicole did not trust officers from a North London local authority when she had to make a homeless application at that borough. Based on the information I had gathered from Nicole during her interview with me, it appeared that it was only after workers from a voluntary organisation had given her and her family much practical assistance that Nicole started to trust these workers. The situation was similar in relation to the solicitor that Nicole was referred to. It was not until the solicitor started achieving good outcomes for Nicole was she convinced that she could trust the solicitor.

It was fortunate for Nicole that she and her family were referred to a family support centre that worked with her in a holistic manner.[6] The family centre provided funding for the family to stay overnight in a bed and breakfast hotel after the HPU the family had initially approached did not accommodate them. In addition, the same centre provided practical assistance, such as food and transport and small sums of money. The centre also ran a counselling service where Nicole was able to receive regular counselling to help her to work through the powerful emotions that remained after the traumatic events she experienced. Nicole was originally referred by a church-based organisation to this family centre. However, it was unclear how Nicole

[6] The family support centre provided practical assistance to families with children, such as crèche facilities, and activities were organised for children. In addition, to the counselling service, there was an advice and casework service that provided assistance to families in social welfare law.

came into contact with the church-based organisation in the first place. During the interview, it was difficult for Nicole to focus on my questions about advice seeking. It was also difficult for me to gain a sequential understanding of the interaction Nicole had had with her advisors as well as thoughts she had about what she had hoped to gain from her advisors. During our interview, Nicole's emotions surfaced when she told me about the problems she had experienced, from her country of origin to arrival in London, and then her struggle with attempting to gain emergency housing assistance from different local authorities. Nicole was extremely clear though about the manner of the holistic help she had received from the family centre, which helped her to start trusting the workers as well as the solicitor who worked on her homelessness case.

Trust was also an issue for Agnes, as was the value of being kept informed of work that an advisor carried out on her behalf, and the process involved. The trust that developed over time between the advisor and client relationship gave Agnes, a refugee whose first language was not English, more confidence to ask questions. At the time that I interviewed her, Agnes still found it difficult to talk about the events that had taken place in her life. At the same time, she wanted to share her experience with me because she did not want people to have to undergo the struggles that she had. For Agnes, her problems became all consuming at one time in her life, and the housing problems affected her health greatly. As Agnes had a long-term illness, she thought it was a straightforward process for her to acquire emergency housing assistance from the local authority. "When I was put in the B&B, the first place, I think I was so sure that I would be given property. I didn't know they would go through their own processes, checking and medical report and stuff like that. I didn't know what goes on." At the time, Agnes did not think of talking to anybody or seeking advice about the homelessness process. Eventually, Agnes was evicted from the bed and breakfast hotel she was staying in at the time. At that point, in an attempt to get help for her situation, she contacted the hospital that was treating her for her long-term illness. A hospital staff gave her the name of a social worker.

> *When I phoned him, he came down and he just asked me what had happened, and I told him I was evicted because they don't think I'm in priority need and stuff like that, and all he told me was ok, go and see the housing advisor. Go to ... council and see the housing advisor. But I*

said the housing advisor has got nothing to do with my situation right now. The housing advisor sees you when you just go there for the first time, and he or she will advise you on what to do. Not when you've been given a refusal.... That's what he told me. I just thought to myself this wasn't the right person to talk to. He wasn't willing to listen, he wasn't interested in knowing what was happening. So I just left it. I just left it.

Agnes did not tell anybody at the hospital about the conversation she had had with the social worker. She had thought that the social worker was in a better position to assist her to acquire further help, and she had believed it was the duty of the social worker to do just that. However, she decided not to persist in getting help from the social worker, and "just decided to leave it." Agnes' experience in trying to gain help from a social worker affected her view in terms of how much assistance she would get from any advisor. Eventually, Agnes did approach an advisor for assistance, and believed that "he was my only hope because I didn't know any way out… and there was no any other person that I could talk to at that time." However, she also added, "at the back of mind I was saying: this person, I don't think he will do that much. I think he won't help." Agnes was pleased when she contacted him. "When I went there, and I spoke to him, and I could see how he was speaking, and really wanted to help me, and trying to find this. Then I was positive, I know I would get something from this man."

Agnes' expectations in relation to the nature of assistance she could acquire had already been tainted with a bad experience with the National Asylum Support Service when she was made homeless by the agency itself at a time she should have been assisted. The statutory agency was responsible at that time for assisting her with her housing needs while she was an asylum seeker. Agnes had also experienced difficulties with her immigration solicitor, and had found it difficult to trust this solicitor.

Agnes: And the day I went for the interview, she wasn't even there. Normally what used to happen when you go for the Home Office interview, you're supposed to be with your lawyer all the time. And then she told me she was going to be there at nine o'clock, and I went there at eight thirty, and my interview was at ten o'clock. I waited, and she was nowhere to be seen. I went in that room all by myself, and I thought: what? I didn't see her, you know. It was so disappointing.
Me: Did she explain why she wasn't there?

Agnes: No, she just said I'm sorry I couldn't make it. That's all she told me.
Me: Was that an important interview?
Agnes: Very important. Very important interview. She was someone I had seen for some time, and she's the only person that I, somehow was a bit close to. So, it could have made me feel better if she was present at that day. See, instead of me being enclosed in a room with strangers. It even made me more nervous, you know. I was so disappointed anyway. But again, who was I going to tell? Nobody. I just left it, just like that.

However, Agnes told me that she knew that the housing advisor did work hard on her case even though he did not achieve the outcome she wanted in relation to her homeless application. Her experience with a solicitor who worked for a voluntary sector organisation was more positive.

It has been more positive in the way that when I met K. At that time I was homeless, totally homeless. And then when I started speaking to her, I told her about my problems, what I've gone through, and stuff like that. And she listened, and she's somebody who could listen. And you know when you're talking to somebody, and the person is listening, and willing to listen, and willing to help... She really could see, and she really wanted to help me, asking me how far things have gone, and what are we going to do about this, and this is what has to come up, and so we're going to do this about that. We're going to court, and your barrister is this and that. You know... She would tell me to ask her anything I wanted, you know, that kind of things, like, feel free, ask me whatever you want. If I could help I'll tell you I'll be able to help. It gives courage to someone.

Martha's case illustrates a client's ability to gain assistance, having become homeless after enduring a period of abuse and violence within the home. I interviewed Martha in the presence of her domestic violence caseworker. Martha broke down during the interview, when she told me about a particularly violent episode she had experienced.

Martha explained that she had endured about twelve months of physical and mental abuse, and only left her partner's accommodation after her partner threatened to take her life. Martha suffered psychologically and emotionally as is common with women who experience domestic violence. Martha admitted that she had low self-esteem and was depressed. In addition, she experienced a difficult pregnancy throughout the

time she lived with her partner. Martha was isolated from her community who were mainly from her country of origin, also her relatives because she became pregnant out of marriage, and with a man from another community. However, Martha's partner also wanted her to be isolated, "He didn't want me to get friends or someone getting close to me, and I noticed he didn't want me to get more information about the laws in this country. So I know nothing." Martha explained that when she was thirty-eight weeks pregnant, her partner became violent to her in front of the district nurses. "So they took me out of the house because he was very aggressive. He feel like killing me. So he wants them to take me out, and they did take me out. Went to the social services and according to them, I don't have any child with me, so they cannot give me any help." It was the first time that the nurse was assisting a patient – in this case, Martha – who was experiencing domestic violence, "so she didn't know where to go. It was one of the workers that directed her to where we went to see the social [services] because she didn't know where to go." The social services then referred Martha to the HPU, although they did give her a leaflet publicising the domestic violence helpline before referring her. However, when an HPU officer interviewed Martha, "they said, well, because I have overstayed the visa, they cannot also help me. If I've got anyone to live with, I should. And the one that attend to me, he gave me a card to call him so that he could get me a solicitor." However, Martha did not call him. When she returned to her partner's home, he apologised to both Martha and the nurse. "So I did listen because I wasn't having money. I don't know who to turn to, the confidence wasn't there for me to leave because there was no one there for me to turn to. I don't have money, so when he apologised, I did accept his apology."

Only one friend ever knew about the domestic violence that Martha had experienced, because "she has seen it. She has seen him abusing me. She's very scared." When Martha attended a clinic, and a nurse tried to talk to her about her domestic situation, Martha "didn't have the confidence to tell them what I'm going through. Even my relative, I couldn't tell anyone because they didn't support the relationship from the very beginning because he's coming from another country, and I'm also coming from another country."

Other than the initial help Martha received from the nurses, and the telephone number of a charity that a stranger on the street gave to her on a chance encounter, Martha did not seek help from anyone else at that time. Martha told me that she found out about the charity when she started talking to a stranger at a market. "I was very, so depressed, so down. I didn't know who to speak to. So, at a market place, we just noticed we were speaking the same language. And it's happened when you speak the same language, you want to know each other." The telephone number the stranger gave her was of a national charity that supports people with HIV. Martha was not HIV positive, but took the telephone number because she believed there was a possibility she could be helped anyway.

At the time that she thought she might die because her partner had picked up a knife after beating her, Martha did not think to call the police. Instead, she called her brother who did not live in the UK. "I called him that this is what is going on. I thought something may happen, I may die, just in case of something." Martha did eventually ring the national domestic violence helpline, and was given the telephone number of a London branch of a refuge. Martha also contacted the national charity that supports people with HIV – the telephone number that a stranger from a market had given her. When she rang this number, she was given a telephone number of a London based agency. Martha recalled that at first nobody answered the phone. However, Martha told me that the Director of that London based organisation did eventually help her by calling the police, and helped her to leave her partner's home. The same charity also paid for private rented accommodation for Martha to stay there for about three months.

The police arrived at the property, that night her partner had been particularly physically abusive to her. Martha told me that not only did the police exert pressure on her to press charges against her former partner, an officer asked her in her partner's presence, whether she wanted the police to arrest her partner. That was the first time Martha had had a bad experience with the police. In addition, Martha explained to me that the police misinformed her about the nature of legal assistance she was entitled to.

He asked me: are you working? And I said no, and he said to me: well if you're not working then you can't press charges because you need money to get a solicitor. But there is another option, which is an injunction. As to that, you can just go to any solicitor, and they would just write a letter to him, not to phone you, not to come to you wherever you are. When he do that he can be arrested or you can press charges if you want to. That's the first time to hear the word 'injunction.' I don't know what he meant.

After their initial telephone conversation, Martha felt able to contact the director of the HIV charity who had originally assisted her. She felt confident enough to admit to the director that she did not know what to do and was not clear about the information the police officer had given her. Martha was also concerned about the attitude of the police officers who believed in Martha's partner's version of events, and who wanted Martha to prove that her former partner had physically abused her. As Martha was a non-EEA national, her immigration status rather than the fact that she was the victim of domestic violence became the focus of the police officers' concern. Martha told me that the police accepted her partner's story when he claimed that Martha was making allegations of domestic violence so that she could continue to stay in the country. The fact that Martha had overstayed in the UK, affected how the police treated her. At one point, Martha thought her child would be taken into the care of social services as one of the police officers wanted to arrest her for overstaying. However, Martha was released because another officer knew that Martha's child was born in the UK, and decided to focus on that fact rather than the fact that Martha had overstayed. Even so, a police officer wrongly directed her to see immigration officers. "He said you have to see this Family Unit. They can deal with immigration issue because you've got immigration problem. They can deal with that." When Martha arrived at the office, as directed by the police officer,

They asked me to take a ticket and wait. And when it got to my turn, to be honest, I saw 'deportation,' so I noticed this was something to do with deportation... So when it came to my turn, the lady asked for letters from the Home Office, passport, and I told her I was just given direction. This is what the police officer has written at the back of the direction, and she said, well, why did they ask you? So I was just telling her what happened, the DV, and the lady said, let me speak to my senior officer. And she came back later, and said, well, we don't know why the police asked you to come to this place, but if you want to go to Home Office, that's the place you have to go but not to us. But she advised me. Before you go to the Home Office, if you've got a solicitor, get in touch

with your solicitor before you go there. So this time, I asked her: who are you? What do you do because I don't know where I am. And she said we were immigration officers, and I said 'thank you.' I left the building and went to see my solicitor. I phoned my solicitor, and I told him what happened, where the police have asked me to go, and he asked, 'why did he ask you?' And I said, 'Well, when they asked me to report, they just asked me to go to this place, and I went, and they said the only place I have to go is the Home Office, but before I do that I have to speak to you.' And he said, 'If you go there they will detain you. I wouldn't advise you to go...'

After Martha left her partner's accommodation, and was staying in the private rented accommodation, she maintained contact with workers at a local refuge who gave her support. One of the refuges eventually helped Martha to retain an immigration solicitor, as well as a family solicitor. Unfortunately, four different solicitors ended up overseeing Martha's case in one immigration law firm because each solicitor would leave the firm, and a new solicitor would take over the case. At one stage, Martha's file was lost as well, and the fourth solicitor within the firm made a mistake in relation to Martha's application to continue to stay in the UK. After the immigration law firm took on Martha's case, she found out about the existence of a local citizens advice bureau (CAB) through a statutory agency that worked with children and parents, because the latter agency shared a building with the CAB. However, when Martha did contact the CAB, she was told to return to her solicitor because her solicitor had already submitted an application to the Home Office for her to continue to stay in the UK. When I asked Martha what prompted her to contact the CAB, she explained that, "I wasn't hearing anything from the immigration. So it's like, I was stuck somewhere. No help is coming. And the pressure from the charity because they said, no, we can't sponsor you for so long [to continue to stay in the private rented accommodation]. That's when I got to see the CAB. Telling them what I've been through." Eventually, the refuge gave Martha the contact details of another firm of immigration solicitors,

Because the first people were just messing up everything. So this new one – the one that started was ok, but unfortunately, she left. So another person has taken over. But the one that left, she sent a letter to the Home Office, and what she made me understand was, because the first application was refused. So it's like I've still got an application [the first firm of solicitors had submitted two applications on Martha's behalf to the Home Office], so she wrote to the Home Office... Before

she left, she wrote two letters, but the Home Office did not respond to the two letters while she was still there… The new solicitor has also written to them… that was why I haven't received any letter, and she wants to know, and they've not responded to it.

Martha's immigration status added complication to the nature of emergency housing assistance that she was able to gain. In Martha's case, she was fortunate to be assisted by a women's refuge. However, it was very clear in Martha's situation that access to appropriate and accurate information was crucial to her, along with the need to have one consistent caseworker, who would make progress on her case and keep her informed. Initially, Martha had returned to her partner after he apologised because she had nowhere to stay. She did not have any friends to assist her and neither did she have any money. In many cases, including women who are UK nationals, particularly if women's refuges did not have any vacancies and there are problems with the client's homeless application, the client is left to depend upon the goodwill and assistance of relatives, if there are any, or friends or community members. If Martha had not taken the opportunity to ask a stranger she met at a market, for information about how to get help, Martha might have died. In Martha's own words, when she thought back to the period when she was still with her partner,

I don't know how to describe that, but it was very terrible. It was terrible, in the sense, I wasn't having a normal pregnancy because of pregnancy with health issue, and at the same time I was suffering from the violence. I don't know how to describe it, and at times I'm surprised to come this far because it got to a time when I thought I was going to die.

The three clients were assisted by a range of people, the HLP being only one of the professionals to provide aid in terms of some of the complex problems the clients experienced. Apart from Martha, both Nicole and Agnes were happy with the help they received from their HLP.[7] Having discussed the experience of clients when attempting to acquire assistance, we will now examine the current state of government funded legal services. The following discussion will enable us to gain a better understanding of the difficulties client could experience in attempting to gain legal assistance.

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[7] See Section E, Chapter One for a discussion of the lawyer-client relationship.

C. The Changing Landscape of Legal Services

Access to Legal Services

This section considers how the landscape of legal services has changed since 2000, with the implementation of the *Access to Justice Act 1999* (1999 Act), which radically changed the system of government aid to legal services. The aim of the Act was to ensure that those with certain legal matters, characterised in the reform as falling in the realms of 'social welfare' law, would be prioritised in terms of funding. However, the changes have been criticised by the Law Society as being introduced in a rushed, piecemeal and uncoordinated manner (2004 *Legal Action* [January] 4). A significant problem with the legal aid reforms over the years has been that the very client group that was meant to benefit from the changes to legal aid has experienced increasing difficulty in accessing assistance.

The 1999 Act legal aid changes took place against a backdrop of the reform of civil court procedures arising from the 1994-1996 Woolf Civil Justice Enquiry, which has incorporated the use of alternative dispute resolution processes.[8] Disputants are only able to use court litigation now as a last resort. Discussions on major reforms to housing tenure, with some changes to homelessness legislation, as well as the implementation and impact of the *Human Rights Act 1998* also took place. This section of the chapter begins with a summary of the development and provision of legal aid, and ends with a review of the recent legal aid reforms.

The history of the development of legal aid may be divided into three distinctive periods (Legal Action Group 1992). The 'foundation' period began in 1945 with the

[8] See Stutt (2001). At the time the article was published, Stutt was the Legal Policy Development Manager at the Legal Services Commission (LSC). Stutt reminded readers that the *Access to Justice Act 1999* does not give general encouragement to litigation through the courts. Section 4(4)(c) of the 1999 Act instead, requires every person who are exercising functions as part of the Community Legal Service, to have regard to the desirability of exercising it, so far as reasonably practicable, to "achieve the swift and fair resolution of disputes without unnecessary or unduly protracted proceedings in court." Stutt suggests that mediation and other forms of ADR processes can be funded through disbursements under LSC contracts or certificates, and that all forms of ADR processes can, in principle be supported by CLS funding. Stutt asserts, however, that the difficulty would be in persuading suppliers of legal assistance to try mediation in appropriate cases when they are so used to litigation. See also Ardill (2004b:13) about the CLS' 2005 consultation paper on the diversion of CLS funding from litigation to the use of ADR processes in the early resolution of cases.

publication of the Report of the Rushcliffe Committee on Legal Aid and Legal Advice. During this period, the first legal aid scheme was established by the *Legal Aid and Legal Advice Act 1949*. Legal aid work was only carried out by solicitors working in private practice with a focus on divorce and matrimonial problems. The period extended until 17 July 1970 with the formal opening date of the country's first law centre in North Kensington, London, which aimed to provide,

> *... a first class solicitor's service for the people of the North Kensington community; a service which is easily accessible, not intimidating, to which they can turn for guidance as they would to their family doctor, or as someone who can afford it would turn to his family solicitor*
> (Smith 1997:16).

The Law Centres Federation website explains that law centres were established because the legal aid scheme had failed to address the legal needs of the poor and disadvantaged (see www.lawcentres.org.uk).

The second period, known as the 'expansion' period, can be characterised as one in which legal aid increased in scope and cost, law centres emerged, and the advice sector re-established itself. This period began in 1970 and ended in 1986. The third, 'stagflation,' period began in 1986 and continues into the 1990s and beyond. It is one where the major challenge to the government and legal advice sector is to fundamentally re-structure the publicly funded legal services. During this period, there has been increasing public expenditure on legal aid, an absence of planned provision,[9] and restriction in eligibility criteria for those in need of civil legal assistance. Only now has it been acknowledged that there had been a lack of information about legal aid and legal services to the public at the time. A significant fault with the legal aid system was the lack of provision in relation to social welfare law.

The Access to Justice Act 1999 Legal Aid Reforms and Beyond

The 1999 Act replaced the legal aid system with two new schemes. The Act enabled a new body, the Legal Services Commission (LSC), to oversee the two new schemes: Community Legal Service (CLS), which administers the Community Legal Fund

[9] See for example, the Editorial in 2000 (June) *Legal Action* 3.

through contracts in accordance to the Funding Code. The Code classifies areas of work to be prioritised. The CLS also works in partnership with local authorities and funders of legal services through the Community Legal Service Partnerships in each local authority area. The other scheme that the LSC oversees is the Criminal Defence Service, the aim of which was to replace the criminal legal aid scheme. Any private firm of solicitors or Not-for-Profit advice organisation, which wants to undertake legal aid work, now would need to have a contract with the CLS.

Observations have been made that the legal aid strategy around the world has arrived the 'third phase' of development, that is, a retreat from universality of access to an emphasis on targeting services to those most in need (Glennerster et al 2000).[10] Efforts are being made to find innovative ways of delivering legal services[11] because the aim of the government is to keep civil legal aid spending down, while prioritising criminal legal aid.[12]

There have been concerns of an over dependence by the government on private practice firms to deliver a legal service that is no longer profitable for these firms. Issues of concern are about the level of remuneration that the legal profession will receive for being a provider of social welfare legal services. Small firms have found it difficult staying afloat, and it is not known whether the funding available would sustain larger firms. Further, questions arise over the quality of work being done by legal practitioners and how the work should be monitored, and the accessibility to legal services by those who need it most. In addition, it has been observed that it is the legal profession that has been resistant to change if the remuneration decreased. Zuckerman (1999:44) asserts that it is the economic interest of the legal profession, which makes a substantial contribution to both high costs and excessive delays in the litigation process that is the underlying problem. Zuckerman further notes that in every country, where efforts have been made to expedite the process in ways that threaten lawyers' economic interests, the legal profession has strongly resisted

[10] See Moorhead and Pleasance (2003), also Moorhead (2007).

[11] See 2003 (March) *Legal Action* 6–7.

[12] See 2001 (May) *Legal Action* 4, with the news that the Legal Services Commission's second corporate plan, which covered the period 2001– 04. The estimates for the Community Legal Service fund expenditure have been reduced by £26 million, while the Criminal Defence Fund has increased by £32 million.

reform attempts – mostly managing to defeat the proposals. However, the situation in relation to private firms of solicitors, which assist clients with social welfare legal problems,[13] has been somewhat different as will be seen later on in this section.

Linked to the above concern is that the access to justice issue is as much to do with accessibility of services, as it is to do with the accessibility of practitioners who offer the legal services.[14] Some of the concerns raised include the approachability of the legal advisor. Consumer Association research into the manner in which consumers, particularly the vulnerable groups identified for the research, gain access to legal services and advice is important here (McAteer 2000:9-10). Preliminary research carried out in 1999 was based on four groups of vulnerable consumers: people with poor knowledge of English; people with disadvantages, including physical and sensory disabilities and mental health problems; older people with other disadvantages, and young people. The research identified six pathways that people generally use for seeking help. The pathways identified were family, friends, local advice and law centres and support groups, citizens advice bureaux, major charities and solicitors – as we saw in the first part of this chapter. A significant finding was that respondents saw legal aid as a 'second-rate' service, but that at least legal aid did provide access for consumers on low income. However, the findings showed that there was an overwhelming sense that solicitors were not interested in legal aid cases, and that few respondents wanted to repeat the experience of using a solicitor.

As far back as 1999,[15] there were already serious concerns that the contract system proposed by the government and administered by the Legal Aid Board at the time, would in practice, make access to legal aid more difficult. The research carried out by the Consumer's Association, concluded that vulnerable consumers face barriers in the legal system, which is specific to their unique circumstances. Among recommendations made by the Consumer's Association is that resources must be committed to fund comprehensive research to identify the level of demand for legal

[13] Social welfare law spans a wide area of social issues, such as welfare rights, disability rights, immigration and asylum issues, housing and homelessness, employment rights, community care and all forms of discrimination.

[14] See Alfieri (1991) and the discussion in Section E, Chapter One.

[15] See *R v (1) Legal Aid Board (2) Lord Chancellor's Department ex parte (1) Ian Duncan (2) Nicola Mackintosh (trading as Mackintosh Duncan Solicitors)* [2000], QBD (Divisional Court) EWHC Admin 294 (16 February).

services, consumers' needs and the necessary solutions. It was emphasised that the actual solutions that work best are resource intensive. Some of the challenges identified by the research echo concerns raised by the Legal Action Group in the early 1990s: the need to ensure that the new contracting system does not make access to legal services more difficult; the need to set and monitor targets for improving consumers' awareness of their rights, undertaking regular publicity campaigns to educate and inform consumers about community legal service.

Since the implementation of the *Access to Justice Act 1999*, and the inauguration of the Legal Services Commission, it has been a particularly challenging period for providers of social welfare law legal aid services, as well as for clients who need access to such services. There have been concerns around the work of the Community Legal Service Partnerships[16] (CLSP) and Regional Legal Service Committees (RLSC).

While discussions were taking place in relation to the concerns about how effectively or not the CLSP and RLSC were working, Sir David Clementi carried out his review. The Clementi review[17] assessed how legal services should be regulated and delivered, and eventually resulted in the *Legal Services Act 2007*. Although the reforms in relation to the regulation and the treatment of complaints against solicitors and barristers were eventually welcomed, there were major concerns at the time about the implications of the Alternative Business Structures for clients who needed

[16] See for example, Ardill's comment in relation to the CLSPs, which have responsibility for producing strategic plans for local services, based on assessment of local legal need. "However, the impact of their role [of CLSP] is unclear, especially as final responsibility for letting contracts lies with regional directors in consultation with regional committees" (Ardill 2003:6–7). See also, Griffith (2003) and (2004).

[17] Sir David Clementi assessed the regulatory framework for legal services in England and Wales. Clementi's review was triggered by the March 2001 Office of Fair Trading report, *Competition in Professions*. The 2001 report arose as a result of the concerns of consumer groups about restrictive practices and the number and intricacies of the regulatory bodies of the legal profession. In July 2003, the then Department for Constitutional Affairs (DCA) appointed Sir David Clementi to investigate and make recommendations. The review was published in December 2004, and in 2005, the then DCA published its White Paper, *The Future of Legal Services: Putting Consumers First* "aimed to modernise legal services and make them more responsive to the demands of the market place and of consumers" (2005 *Legal Action* 5). The ensuing debates through the bill's passage in parliament resulted in the Legal Services Bill in 2006. The bill eventually received Royal Assent on 30 October 2007 when it became the *Legal Services Act 2007*.

In July 2004, the Legal Services Commission published yet another consultation paper, *A New Focus for Civil Legal Aid*. In line with the Woolf civil procedural changes, the CLS proposed to divert claimants, wherever possible away from litigation. In addition, the availability of funding is decreased for when litigation is pursued (see Ricca 2004).

to access justice and legal aid firms (see for example the editorials in the 2007 [March] *Legal Action* and 2007 [December] *Legal Action*). Even while the legal profession and NFP sector advice providers debated about the impact of the Clementi review and the then Department for Constitutional Affairs White Paper following Clementi's recommendations, Lord Carter began his review and consultation of the procurement of criminal and civil legal aid services in July 2005. Lord Carter's final report, *Legal Aid: A Market-Based Approach to Reform* was published in July 2006. That report was issued with a joint consultation paper from the Legal Services Commission and the then DCA, *Legal Aid: A Sustainable Future*. The LSC and DCA paper set out detailed proposals for civil, family and immigration services based on Lord Carter's independent review into legal aid procurement.

The latter part of the seven years since the CLS took over the day-to-day running of the legal aid scheme, have been marked by an increasingly difficult relationship between the CLS and legal aid service providers who have been compelled to campaign against the CLS' proposals for legal aid changes. The campaign group, Access to Justice Alliance, was established in 2006 after the Carter paper was published. The legal profession and advice service providers agreed that Lord Carter's proposals to restructure legal aid would damage the quality and supply of services for clients.[18] The proposed move to a fixed-fee regime would cut the rate of remuneration to legal aid service providers so that many would be forced to discontinue the provision of these legal aid services. However, for those remaining, providers would not be able to deliver a service of sufficient standard of quality for the fees proposed. Another campaign group was formed late in 2006, comprising of the Legal Aid Practitioners Group, the Criminal Law Solicitors' Association and the London Criminal Courts Solicitors' Association. This campaign group joined with the Law Society in a battle to ensure that the Carter reforms do not "threaten access to justice across the country."[19] The opposition, which stemmed from concerns by the legal and NFP advice service providers about the public's decreasing access to legal services, as well as an impact on the quality of work, has been backed by MPs,

[18] See for example the editorial in 2006 (November) *Legal Action*. See also McNeil (2006) and Pierce (2006).

[19] 2006 (November) *Legal Action* 4.

with the then Constitutional Affairs Committee[20] openly voicing its concerns. Towards the end of 2006, the Committee announced that it would carry out an enquiry early in 2007 into the implementation of the Carter proposals.[21]

Opposition by the legal profession and legal aid service providers to the proposed legal aid changes has led to legal action being brought against the LSC in two separate claims in relation to different proposals. Perhaps the case brought by a firm of solicitors against the Legal Aid Board in the late 1990s was a sign of how far the legal profession has been willing to go to convince the government of its concern about the decrease in access to justice for people who really need legal advice and assistance. In December 1999, a south London firm of solicitors applied for permission to bring proceedings for judicial review against the then Legal Aid Board (LAB) and the then Lord Chancellor's Department. The matter in dispute was the legality of the new arrangements for contracted publicly funded legal advice and assistance, on the basis that the scheme would have a detrimental effect on vulnerable clients (Blake 2000:6-7). The challenge focused particularly on the arrangements for representation before mental health review tribunals. The Law Society supported the application. The case *R v (1) Legal Aid Board (2) Lord Chancellor's Department ex parte (1) Ian Duncan (2) Nicola Mackintosh (trading as Mackintosh Duncan Solicitors, a firm* [2000], QBD (Divisional Court) EWHC Admin 294 (16 February) raised issues that the Divisional Court believed were of great importance, although the applicants lost the case. The applicants were concerned that the new legal aid contracting system, then due to come into force on 1 January 2000 would "restrict access to quality legal advice and assistance for the most vulnerable section of society." In addition, the applicants were worried that any contract offer by the then LAB would be inadequate because it is likely to be subject to restrictions in the number of cases that may be undertaken and by an overall cash limit. The applicants argued that the LAB had a responsibility to ensure that vulnerable people have equal access to justice on the same footing as those able to

[20] The Constitutional Affairs Select Committee was appointed by the House of Commons to examine the expenditure, policy and administration of the then Department for Constitutional Affairs. As of 9 May 2007, the responsibilities of the DCA were transferred to the newly created Ministry of Justice. From 6 November 2007, the Constitutional Affairs Select Committee was renamed the Justice Select Committee.

[21] 2006 (November) *Legal Action* 6–7. See also 2007 (February) *Legal Action* 4.

pay for legal services, and that the new scheme would have a disproportionate adverse effect on small and specialised practitioners in mental health law.[22] Blake commented that conflict of interest between lawyers and clients within the new legal aid contracting system might result in a limited amount of case work: lawyers would have to take business decisions about the merits of the case and weigh up about taking weak claims. Thus heralded the major shift in legal aid from a rights-based form of welfare provision to a discretionary scheme of controlled application (Blake 2000a: 6–8).

In January 2006, the then LSC informed providers of specialist support services that it was terminating all of the contracts because it considered that the money would be better spent on providing services directly to the public. The CLS had decided that such specialist support services were unnecessary since agencies with Specialist Quality Mark[23] were expected to provide advice themselves (Haley 2006a:4). The contracts were due to end in 2007, and in an LSC consultation paper published in 2005, *Making Rights a Reality*, the LSC had commented that the specialist support service was one of the CLS' successes to date. The then Constitutional Affairs Committee believed that the LSC decision to cut such services was flawed, and as a result, might put vulnerable people at risk. Concerned with the lack of any proper

[22] The specific arguments put forward by the applicants were as follows: (1) The arguments made by the Legal Aid Board were an infringement of the common law right of access to the court; (2) Section 32 of the *Legal Aid Act 1998* – then in force – provides that a person may select the lawyer to act for him or her from among those willing to provide advice, assistance or representation under the Act; (3) The new schemes were irrational because they did not identify specialist firms who operated in one area of what could otherwise be characterised as family laws. In any case, the policy of the Lord Chancellor was to prioritise social welfare law, which meant that it was insufficient to treat community care law and mental health law as 'add-ons' to existing categories. In the context of that reasoning, family law would be given far too high a priority. In addition, there was a lack of transparency in the criteria adopted by the LAB for granting contracts and for taking account of additional case demands, which worked against the policy aims of the Lord Chancellor.

The court found the first argument compelling but incorrect; there is a common law right of access to the courts but it is not absolute or unlimited. It may be limited by statute, although primary legislation is required to limit that right. Any such limitation might have been tested under Article 6 (right to a fair trial) of the *European Convention on Human Rights*, which itself recognised that there could be limitations in the right. The right to choose a lawyer is equally not absolute. If the client cannot afford a lawyer there is no absolute obligation on the state to ensure that legal aid is available.

In relation to section 32 of the *Legal Aid Act 1998*, the court responded that only those who had an established right to receive public support in their litigation (or to be advised and assisted in ways falling short of litigation) had a right to select their legal representative, not those who might be eligible to be assisted under legal aid schemes, including franchising and contracting schemes.

[23] 'Quality Mark' is a name given to a set of quality assurance standard for legal service providers. The standards are designed to ensure that a service is well run, and the information or advice provided is quality controlled. See www.legalservices.gov.uk/civil/qm/quality_mark.asp for further information.

consultation with the legal and advice services, the nineteen providers, led by the Public Law Project (PLP) decided to challenge the LSC decision. The challenge proposed by the PLP was "a twin-track approach involving litigation and campaigning" (Haley 2006b:5). PLP and the other providers initiated judicial review proceedings on 7 March 2006 against the LSC in *PLP and Others v LSC*, CO/2040/2006. Calvert Smith HHJ granted PLP and the joint applicants to the action interim relief on 10 March 2006, which extended the funding of the Specialist Support Service until October 2006. In March 2006, the LSC announced that it had reversed its decision. This meant that the termination notices would be withdrawn, and a proper consultation process would take place before any decision is made in relation to the service.

The third case is linked to the opposition of practitioners against the Carter fixed fees regime, and unified contracts for private solicitors firms and the NFP sector advice services.[24] The Law Society initiated judicial review proceedings against the LSC on the legality of the LSC's ability unilaterally to amend the unified contract. In an earlier decision, the court had decided that the Commission was in breach only in relation to technical amendments. However, the Court of Appeal decided against the Legal Services Commission in *R v (Law Society) v Legal Services Commission and Lord Chancellor and Secretary of State for Justice (Interested Party); Dexter Montague & Partners (A Firm) v Legal Services Commission* [2007] EWCA Civ 1269 (29 November). Hence, the decision questions the legality of the unified contract, which solicitor firms and NFP organisations signed in October 2007. The Law Society's solicitors wrote a letter to the LSC in December 2007 arguing that in order for the LSC to comply with the court judgement, the LSC needed to end the civil fixed fee scheme, which started in October 2007 and to revert to the original scheme.[25]

[24] The final Carter report recommended that wherever possible, "remuneration for civil controlled work carried out by solicitors' firms and NFP agencies should move to standard fees – either fixed or graduated fees, depending on the category of law – and away from tailored fixed fees" (Hannah 2006b:6–7). The proposed longer-term plan suggests a move towards block contracting, with output and performance targets, and a fixed fee per case – a move away from hourly rates. In addition, a key proposal is to replace the current general contract, which would start in April 2007. The unified contracts would end the different contracting provisions for the two sectors.

[25] See 2008 (January) *Legal Action* 4.

The reality is that the legal aid changes, which have come about primarily because of government concern over public expenditure on civil legal aid, has resulted in difficult partnership working with the LSC. In 2006, the Law Centres Federation complained that it had not been consulted when the LSC decided to cut the Federation's funding, after twenty years.[26] The Legal Services Commission's Strategy for the Community Legal Service 2006–2011, entitled *Making Rights a Reality*, which outlined the creation of Community Legal Advice Centres (CLACs) and Community Legal Advice Networks (CLANs)[27] from existing funding confirms the fact that civil legal aid expenditure will not increase. The LSC's 2006–2011 Strategy states that it might reduce or not renew some of their social welfare contracts from April 2007.[28] In addition, Lord Falconer, the Lord Chancellor, had stated that there would be no extra money for legal aid.[29]

Creative and innovative solutions in order to provide access to legal services for clients are desirable. However, it appears that the altruism of the social welfare legal service providers have been taken for granted in the Carter reform proposals. Even though there was widespread opposition to the original proposals from service providers, only minor changes were made.[30] McNeil (2006) points out that from 2003 until 2006, the LSC had published, "no less than 19 consultation papers concerning the sector… the only constant has been change and the incremental development of control mechanisms by the LSC." The business approach that the government has resorted to, in relation to the procurement of legal aid, is causing small high street firms providing a legal aid service to close down. It has been a well-known fact that these high street practices subsidize legal aid work from the private work it takes on. The government might well be a winner in the war of keeping public expenditure on civil legal aid under control, but it is at the expense of the legal

[26] See 2006 (April) *Legal Action* 3–4.

[27] The main difference between CLACs and CLANs is that CLACs are single providers delivering a service, while CLANs consist of a variety of providers in a group that delivers a service to clients.

[28] See Hansen (2006) and Hynes (2007) for some of the concerns about the establishment of CLACs and CLANs.

[29] See 2006 (December) *Legal Action*. See also 2006 (July) *Legal Action* 5, when Legal Action Group reported that Vera Baird QC, MP and the then Minister for Legal Aid at the Department for Constitutional Affairs, in a public meeting which the Access to Justice Alliance organised, stated that the government had taken steps to rebalance legal aid spending to protect the funds available for social welfare problems.

[30] See 2007 (January) *Legal Action* 4.

aid service providers who are finding it more and more difficult to assist clients in such a climate. Newly qualified solicitors do not see themselves as having a future in legal aid work.[31] The ultimate loser is society, as members of the public, especially the more vulnerable,[32] who need to access legal services find it more difficult to gain assistance to resolve their legal problems.

D. Conclusion

Over the years, since the government first decided to establish the legal aid scheme in 1949, the landscape of legal services has changed. A large number of advice service providers, mainly in the NFP sector, are now able to hold legal aid contracts in addition to the solicitor firms. Criticisms have been made against the legal profession for looking after their own interests first, which is a natural reaction. However, it would appear that many legal firms that provide a legal aid service in relation to social welfare law do, in reality, subsidize the legal aid service they provide by taking on private work. The legal aid changes have meant that providers of legal aid services are spending a decreasing amount of time with their clients, which also impact on the amount of time that can be spent on casework. It seems that the government, which needs to keep the costs of its legal aid expenditure down, requires lawyers and advice services to assist more people for what really amounts to a decreasing amount of remuneration. The government appears to expect that such providers are able and are willing to continue to subsidize this valuable service for members of the public who are in need of legal assistance. As much as the current legal aid situation is unsatisfactory, access to legal services ought to mean more than somebody with a legal problem being able to acquire advice and assistance as well as representation. The aim for equal access to justice that the Legal Action Group advocates includes methods in reaching out to people who need help to access information, as well as access to advice and assistance. Such a combined approach in

[31] See or example Janes (2007) who noted that new lawyers could not envisage working in the legal aid sector in five years' time because of the current reforms.

[32] The Advice Services Alliance believes that potential clients from Black Minority Ethnic communities would not benefit from the Carter proposals (2007 [August] *Legal Action* 4). In its editorial, within the same issue, Legal Action Group reported that the Black Solicitors Network and the Society of Asian Lawyers initiated, but then withdrew a joint application for judicial review in July 2007 on the ground that the race impact assessment of the Carter reform proposals was inadequate.

assisting people with 'justiciable' problems would certainly help more vulnerable homeless applicants to acquire greater access to justice. For homeless people who are able to gain assistance, whether it is from HLP or other professionals, with the deplorable state of legal aid, it would be helpful if the redress system were simpler, so that clients could seek remedy with the minimum of advice and guidance, and without requiring the help of legal representatives.

Chapter Seven
Adjudication

A. Introduction

Chapter Seven focuses on the existing methods of resolving homelessness decision disputes, by internal review and statutory appeal in the county court. This chapter begins with an analysis of case studies in Section B, which indicates that there are problems with the homeless application administrative decision-making process itself.[1] The case studies also demonstrate that there could well be difficulties with failed homeless applicants realising they might have a grievance with the local authority that issued the adverse decision. This was a problem that was initially identified in Chapter Five of this study. Proper administrative decision-making could prevent problems arising in relation to homeless applications in the first place. Yet, at the same time, it could be argued that the administrative decision-making process itself serves its purpose, which is, the screening out of most applicants. The aim would be to enable only the few extremely vulnerable homeless applicants who compete with each other to acquire the limited emergency housing assistance available. Section B also highlights the bad practices in the decision-making process adopted by many local authority officers in assessing homeless applications.[2]

The housing law practitioners (HLP) who were interviewed, were asked a specific question about the appeal mechanisms available to dissatisfied homeless applicants, and whether such mechanisms were effective processes for applicants to resolve their homelessness decision disputes with the local authority. The current dispute resolution processes, the internal review and appeal processes, will be discussed and analysed in greater detail within Section C. Finally, Section D discusses the Woolf civil justice reforms in relation to the idea of 'proportionate' dispute processing, a term that was adopted by the then Department for Constitutional Affairs in its White Paper,

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[1] Appendix 3 contains an analysis of the interviews I carried out in relation to some of the problems homeless applicants experienced when making an application.

[2] See for example Loveland (1995), Cowan, Halliday and colleagues (2003).

Transforming Public Services: Complaints, Redress and Tribunals and also the Law Commission in its work on resolving housing disputes proportionally.

B. Administrative Decision-making Process

This section begins with an analysis of the most relevant cases from the forty case studies collected to provide qualitative data for this thesis (see Appendix 2). A selection of case studies, which focus on applicants experiencing problems with the homeless application administrative decision-making process, is reported in Table 7.1 below. There are examples in many of the cases of homelessness officers carrying out inadequate enquiries or enquiries were not carried out at all. In many instances, the council officer appears to have acted unlawfully, by placing the burden on the homeless applicant to prove his or her circumstances. At the very initial stage of the homeless application process, in determining whether a duty is triggered for the local authority to provide interim accommodation prior to competing enquiries, the threshold is lower in terms of the nature of information that would be accepted (section 188(1), *Housing Act 1996*). An outline of the enquiry process that local authorities must undertake when approached by a homeless applicant can be found above in Chapters One and Four of this thesis. To recap, if a local authority has reason to believe that a person may be homeless or threatened with homelessness, the authority shall make enquiries in order to establish whether the homeless applicant is eligible for assistance.[3] If the answer is in the affirmative, the local authority must then establish what duty, if any, is owed to the homeless applicant.[4] The problem is that many local authority officials place the burden on homeless applicants to prove their circumstances, whereas in fact, the duty falls on local authorities to carry out enquiries: *R v Brent LBC ex parte Babaloa* (1995) 28 HLR 196, QBD; *Ujomah v Haringey LBC* (2001) 27 April (Mayor & City of London County Court), 2001 (July) *Legal Action*. If the authority's enquiries lead to doubt or

[3] The enquiries will centre on public funds, and the question the authority will ask is whether the applicant is barred by immigration legislation from accessing this type of local authority assistance.

[4] The duty under section 188 of the 1996 Act arises regardless of the possibility of the applicant's case being referred to another local housing authority (section 188(2)). The duty only ceases when the authority's decision is notified to the applicant (section 188(3)).

uncertainty, the issue should be resolved in the applicant's favour: *R v Thurrock BC ex parte Williams* (1981) 1 HLR 129, QBD.

On completing its enquiries, the authority has a duty to notify the applicant of its decision in writing, and the applicant should be informed of any issue, including the reason, that has been decided against his or her interests (section 184 (3), 1996 Act). Written decisions by the authority must inform the applicant of his or her right to request a review of the decision, and the time limit for doing so (section 184(5), 1996 Act).

It is important to note that authorities cannot require applications to be made in any particular form. In *R v Chiltern DC ex parte Roberts* (1991) 23 HLR 387, QBD: a letter from the applicant's solicitor was held to constitute an application. Further, a general waiting list application, which disclosed an urgent housing need was held to be sufficient to constitute a homeless application: *R v Northavon DC ex parte Palmer* (1994) 26 HLR 572, QBD.

Table 7.1 Problems experienced by homeless applicants in relation to the administrative decision-making process

Case	Details[5]	Problems experienced by applicant with author's analysis
Case 1 (Sandra's Case)	Aged 17 female with no income. Taken out of care of her mother by aunt when aged 13. Sandra's mother had neglected her, and Sandra had to take time out of school to look after her brother. She also had to pick up drugs for her mother. The relationship between Sandra and her aunt broke down. Sandra stayed with a friend for four months before being asked to leave.	LA did not carry out adequate enquiries. The officer was obstructive, and did not listen to Sandra. When Sandra made a complaint to the HPU manager, the manager supported the duty officer's version of events. Sandra was not issued with a written decision, but was told verbally that the local authority did not consider her to be in priority need.
Case 2 (Doug's Case)	Aged 18 male who left his mother and stepfather's home because they were both drug users. Doug's stepfather had also been violent to Doug and Doug had been mentally abused from an early age. Doug also had a drug problem and needed support in overcoming his drug problem.	LA did not carry out adequate enquiries before Doug was given a non-priority verbal decision. When Doug's aunt intervened, Doug was offered an interview in a week's time, but Doug was firmly told that he would be unlikely to be accommodated when interviewed.
Case 8 (David's Case)	Aged 28 male who had been staying with his friend until asked to leave. David's friend was forced to call the police when David would not leave. David has had alcohol problems since aged 19. David also had a personality disorder and was awaiting a mental health assessment. David used to have a secure tenancy, but fell into rent arrears. A local housing advice agency assisted David and managed to obtain a total of ten suspended possession orders, but David became confused easily and was forgetful, and therefore did not keep to rent arrears agreements made. From infants stage, David attended a special needs school. He was dyslexic and had learning difficulties. David was also in care from the ages of 12-16.	When David made a homeless application he was not accommodated. Instead, the duty homelessness officer told David that he would be found to be intentionally homeless (and therefore would not be owed a housing duty). David was offered an interview one week later. David was eventually issued with a non-priority need decision.
Case 9 (Alex's Case)	Alex became street homeless following discharge from a psychiatric hospital. He suffered from clinical depression, and had to use a colostomy bag. Alex had problems with alcohol although he had been detoxified. Alex told me that he had lived with his brother for eight years, but Alex's brother was also an alcoholic.	Alex was not accommodated when he made a homeless application because he was unable to provide documentary evidence in support of his homelessness and medical conditions. Alex told me that his brother would not allow him to collect the documents from his home. Alex slept rough on the nights that he was not accommodated by the local authority.

[5] See also Appendix 2 of this study where the details of the case studies can be found.

Case 10 (Steven's Case)	Steven became street homeless for five months following a relationship breakdown. He suffered from depression and a heart condition. Steven had had three heart attacks and there were blood clots in his heart, lung, and leg. Steven also had a heart operation. It was difficult for Steven to take his medication while he was street homeless.	Steven made a homeless application two months ago, and had provided medical evidence in support of his application, but was not accommodated by the local authority. Steven made a complaint to the HPU manager recently and was still waiting for a response. Steven's doctor completed a further medical report, which had been returned to the council. Despite this, the authority still did not accommodate Steven.
Case 11 (Craig's Case)	Craig became street homeless for two weeks after leaving prison. Craig had been rehabilitated for crack cocaine and alcohol addiction, but had a relapse since then because he was depressed. Craig had attempted suicide in the past by overdosing because of his depression.	Craig attempted to make a homeless application. However enquiries were not carried out, and Craig was not interviewed. The council duty homelessness officer verbally informed Craig that there was no reason for the authority to believe that Craig was in priority need. However, Craig was asked to obtain medical evidence.
Case 12 (Cressida's Case)	Cressida was a lone parent with three children aged 14, 6 and 4. She had a statutory periodic assured shorthold tenancy but Cressida did not want to continue to stay in the accommodation. Cressida was self-employed. The rent was not affordable and she did not want to fall into rent arrears.	After seeking housing advice, Cressida made a homeless application on the ground that it was unreasonable for her to continue to remain in her current accommodation because it was not affordable. The local authority officer did not interview Cressida until she returned with a letter from her local housing advice agency explaining the affordability issue. Cressida had to instruct a solicitor to prevent an intentionality decision being made because Cressida subsequently left her private rented accommodation to squat.
Case 17 (Linda's Case)	Linda was a lone parent with three children: aged 5, 12 and 16. She was evicted from her council flat because she fell into rent arrears. Linda and her children then stayed with a friend for three weeks following eviction from her flat until Linda's friend withdrew permission for her and her children to stay.	Linda told me that she attended HPU for two weeks, and each time she attended, was told that a decision had been made and that the local authority will not assist her with her emergency accommodation needs. Linda had not been interviewed and she had not received a written decision in relation to her homeless application. A council officer told Linda to get help from social services. When Linda did, the duty social worker told Linda that her children would be taken from her.
Case 18 (Maria's Case)	Maria was aged 17. She made a homeless application at a local authority area where she did not have a local connection after fleeing her parents' accommodation because they had been violent to her. Maria had been in contact with the police about the violence. Maria was in full-time education and had no income.	Maria was issued with a non-priority need decision, and she did not challenge the decision because the council officer had advised her that she did not have a strong case. Maria then threw the decision letter away. Maria also tried to gain assistance from social services when she first left home a month ago, but was not

		interviewed by a duty social worker.
Case 20 (Mariam's Case)	Mariam was a lone parent with two children: aged 13 (daughter) and 15. Mariam's daughter tried to interpret for her. Mariam and her family arrived as asylum seekers, and were dispersed to the north of England. Only a month later, the family were granted exceptional leave to remain in the UK. A further month later the family returned to London and were able to stay with friends for seven months until asked to leave.	Mariam made a homeless application. When the duty officer contacted Mariam's friend, the friend confirmed that Mariam and her family could no longer stay. Mariam told me that a local authority officer interviewed her, and she had shown the officer evidence of eligibility. However, Mariam was then told that the council could not assist her and her family, but did not issue a written decision. The family were physically removed from the HPU at the end of the day.
Case 21 (Hector's Case)	Hector was aged nineteen, and was a former asylum seeker with indefinite leave to remain. Hector needed the assistance of an interpreter. He had been in England for one year, and in London for a total of four days. Hector had told us that both his legs were 'paralysed' due to an injection he received while in his country of origin, and he usually walked with crutches. However, Hector's crutches were stolen, and he could not walk. Hector also suffered from epilepsy and had seizures once every three days. Hector had not taken any medication since leaving his country of origin. He had no mobility in his right hand (after two operations), he suffered from depression, and attempted suicide while in the UK.	Hector made a homeless application but was not accommodated by the council in emergency accommodation. He had already supplied the authority with all the necessary documents. Hector remained street homeless. While carrying out enquiries, a local authority officer told Hector to return to the city that he had been dispersed to on arrival in the UK. The local police and hospital were aware of Hector's circumstances. Further, the HPU already had a doctor's report about his medical condition.
Case 23 (Anna's Case)	Anna was a lone parent with three children: two of her children were aged 3, and one was aged 2. Anna was also pregnant. Anna and her children had been staying with a friend and the friend was about to ask them to leave. Anna had not been well, and suffered from sickness and fatigue as well as high blood pressure.	The local authority did not keep Anna informed of the progress of her homeless application. When an advisor contacted the HPU on Anna's behalf, the advisor was told that Anna's application was still being investigated, and Anna should return to the HPU on the day she could no longer stay with her friend. A decision would be issued in a week's time. Ten days later (Anna had been staying with her mother), Anna had still not been issued with a written decision. Anna waited for a further three weeks with no further progress on the enquiry process. In the meantime, Anna decided to instruct a solicitor, but was dissatisfied with the work that he had been carrying out on her behalf.
Case 25 (Jackie's Case)	Jackie and her family of five: husband and three children were staying in temporary accommodation in the southeast of England.	Jackie had been issued with an intentionality decision, and had been placed in accommodation outside of London while the intentionality decision was being reviewed. Jackie had requested suitable accommodation, but was told that accommodation nearer to London was not available. The location of the accommodation caused great

		hardship on the family. The family had to get up at 3.30 a.m. on a daily basis in order to catch a train to Jackie's father's home in west London so that Jackie's husband could start work on time and the children could arrive at school on time.
Case 30 (Tim's Case)	Tim was aged 33, and described himself as having been homeless since aged 15: staying in hostels, with friends as well as sleeping on the streets. Tim had clinical depression and had been allocated a mental health social worker. Tim had also been admitted to hospital because of depression. When the local authority placed Tim in bed and breakfast accommodation, he would usually leave. Tim told us that this was because he sometimes felt at risk while staying in the accommodation, or he would find the accommodation unsuitable because his depression brought about a compulsion in him to jump out of the window. Tim eventually returned to hospital and voluntarily admitted himself because he found it difficult to cope with the anxiety and depression that he suffered.	When Tim recently made a homeless application, the HPU day team told him to telephone the emergency out-of-hours service, and he would be accommodated. When Tim did so, the officer informed Tim that he would not be booked into a hotel, and the officer would not give a reason as to why he was not accommodated. When an advisor rang the council out-of-hours service, the advisor was told that there were only two hotels that would accept Tim, but neither had a vacancy. Tim's behaviour was considered to be a danger to other people. The day-team had informed the out-of-hours officer that Tim had voluntarily discharged himself from hospital and that he could not be placed into any accommodation. Tim eventually admitted himself to hospital, and when he was discharged, he returned to the same authority that had assisted him in the past. Tim's doctor at the hospital had given him a letter to take to the HPU with him. However the authority was unwilling to assist Tim. He then tried to contact a solicitor for help.
Case 32 (Angelina's Case)	Angelina, aged 21, with her 20 year-old boyfriend had been sleeping rough. Angelina's boyfriend had been in care for one year from the ages of 16 and 17, and had had a nervous breakdown. Angelina herself had been under a full care order from ages 7 until 18, and had a social worker until she was aged 21 – a month ago. Angelina's social worker had been assisting her with her homeless application.	Angelina had made a homeless application, and had included a police report as evidence that she had suffered violence. Angelina's former partner had physically abused her after leaving prison. However, the council did not offer Angelina emergency accommodation. Angelina did not return to the HPU again because she received a non-priority need decision when she first applied as homeless. Angelina managed to stay with a friend for two weeks.
Case 34 (Adam's Case)	When Adam arrived in London he had planned to stay with relatives. However, on arrival, Adam discovered that his relatives had died. Adam then slept rough for a total of two years. Adam had arthritis of the lower spine, as well as angina, and had alcohol abuse problems. Adam was in hospital on a regular basis. He recently had a nervous breakdown and was admitted to hospital. He had a social worker, but he was	Adam had previously made a homeless application, and was found not to be in priority need. However, Adam did not appeal that decision. After Adam's more recent discharge from hospital, he returned to the HPU with a letter from his doctor, but was not accommodated that night.

	not sure where the social worker was based.	
Case 35 (Adele's Case)	Adele was an EEA worker with a 3 year-old daughter. Adele had been staying with her sister for six months. She had made a homeless application prior to the deadline her sister had given her to leave her accommodation. As the local authority had not taken any action, Adele continued to stay with her sister. Adele returned from shift work at 8.30 a.m. and found her belongings and her daughter outside her sister's flat.	The local authority did not accommodate Adele when the deadline for Adele to leave her sister's accommodation expired. Adele attended HPU immediately the morning she found her daughter and belongings outside her sister's flat, but she was told that an appointment had been made for her in three week's time, and Adele should return to the HPU at that date. Adele was told that she could not be assisted in the meantime. Despite the fact that Adele explained she could not gain entry to her sister's flat, and could not continue to stay there, Adele was not offered emergency accommodation.
Case 36 (Dan's Case)	Dan with his wife and two children had been unlawfully excluded from private rented accommodation. The landlord threatened Dan and told him that he would have to pay five hundred pounds if he wanted his belongings back. Dan had to take county court proceedings against the landlord for recovery of his belongings. Dan made a homeless application, and stayed with family friends in the meantime. He informed his homelessness caseworker that his previous landlord would not co-operate if a home visit were made.	Dan's homelessness caseworker informed him that a visit would be made at Dan's former address in order to establish whether the family were still resident there. Two visits were made, but as forewarned by Dan, contact could not be made with the landlord. A verbal decision was eventually made not to assist Dan because the authority believed that the family was not homeless. No written decision in relation to the homeless decision was issued. When an advisor contacted the local authority on Dan's behalf, the advisor was told that once the excluder had confirmed that the family were no longer living there, the local authority would take appropriate action on the case. The advisor reminded the council officer that the family had been unlawfully excluded from the property and it was unlikely that the former landlord would co-operate with the authority's homelessness enquiries. However, even though Dan's friend had asked him to leave and had put this request in writing, the council did not offer the family emergency accommodation.
Case 38 (Laura's Case)	Laura, aged 16 with her aged 21 year-old boyfriend had stayed in an abandoned car until the car was towed away, along with their belongings. Laura had made a homeless application while staying in the car. Laura had no income and her boyfriend claimed jobseekers' allowance as a single person. Laura's mother had abandoned her, which was why Laura started staying in the abandoned car.	The local authority refused to accommodate Laura. Instead, the council officer told Laura that her boyfriend was responsible for her. When Laura's boyfriend asked the authority officer to take a homeless application from Laura as a single person, the boyfriend was told that Laura could not be assisted. At the time that Laura and her boyfriend made the homeless application, the *Homelessness (Priority Need for*

		Accommodation)(England) Order 2002 had been in force, which meant that Laura – as a seventeen year-old – should automatically have been accepted as being in priority for accommodation.

The above table highlights five common areas of local authority bad practice in relation to the homeless application process. First, potentially unlawful decisions were made in relation to the non-provision of interim accommodation when council officers placed a burden on the applicant to prove his or her circumstances. This practice is evident in Cases 8, 9, 10 and 17. Secondly, inadequate enquiries were carried out or enquiries were not carried out in determining whether interim accommodation should have been offered in a number of cases: Cases 32 and 34. Thirdly, there were instances where the homeless applicant had been told that no duty was owed to him or her, but it appears that enquiries had not been carried out, or inadequate enquiries were carried out and a written decision had not been issued: Cases 1, 2, 11, 20 and 21. Fourthly, there were examples where the authority had apparently not given enough consideration to the suitability of accommodation in terms of the applicant's needs: Cases 25 and 30. Finally and worryingly, decisions were made which might be deemed to be unreasonable or perverse in the authority not assisting the applicant with interim accommodation: Cases 35, 36, 38. Such bad practice can only be challenged, if the homeless applicant is aware of the nature of enquiries that the authority ought to be carrying out, or if the applicant had taken action to seek help. In taking action, and depending on whether advice is sought by the applicant pre or post decision, if pre-decision, an advisor might be able to prevent an unlawful decision being made. However, if the advice were sought only at the post-decision stage, then the advisor would need to assist the homeless applicant to appeal against the decision. There are two stages to the appeal process – the internal review followed by an appeal to the county court should a point of law be an issue.

C. Existing Methods of Resolving Homelessness Decision Disputes

Internal Reviews and Appeals to County Court

The current framework for resolving unsatisfactory homeless applications is contained in the *Housing Act 1996* (1996 Act), as amended by the *Homelessness Act 2002.* A homeless applicant who is dissatisfied with the local authority decision of his or her homeless application can request an internal review of that decision (section 202). An applicant has a right to request a review of any of the following decisions:

- eligibility for assistance (section 202(1)(a));
- what duty (if any) owed to the applicant under sections 190 to 193 and 195 (and 196) – duties to persons found to be homeless or threatened with homelessness (section 202 (1)(b));
- referral of case to another authority under section 198 (section 202(1)(c)-(d))
- any decision under section 200(3) or (4) – decision in relation to duty owed to an applicant whose case is considered for referral or has been referred (section 202(1)(e));
- suitability of accommodation offered to applicant in discharge of duty owed (if any) under sections 190, 191, 192, 193 and 195, 200(3) and (4);
- or the suitability of accommodation offered under section 193(7) – allocation under Part VI. Under section 202(1A) an applicant can request a review of the suitability of accommodation whether or not he or she has accepted the offer.

The Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 (SI 1999 No 71) set out the procedure to be followed by local authorities in carrying out reviews under Part VII. Regulation 8 of the 1999 Regulations state that the authority should notify the applicant in cases where a review has been requested, if the housing authority or person carrying out the review considers there is deficiency or irregularity in the original decision, or in the manner in which it was made, but must still make a decision that is against the applicant's interests on one or more issues. The Regulations

further provide that the applicant or his or her representative may make oral representations, further written representations or both oral and written representations within a reasonable period. This is the only occasion within the process that allows oral representations. Finally, an applicant must request a review within twenty-one days of being notified of a housing authority's decision.

If an applicant who has requested a section 202 review is dissatisfied with the review decision, or is not notified of the review decision within the time prescribed under section 203, he or she may appeal to the county court on a point of law (section 204, 1996 Act). An applicant must appeal within twenty-one days of the date on which he or she is notified of the review decision or the date on which he or should have been notified. On appeal, a county court is empowered to make an order confirming, quashing or varying the housing authority's decision.

While the decision is being reviewed, the local authority only has a power to secure accommodation for the applicant. Interim accommodation disputes pending the outcome of the section 202 review decision are reconsidered by the High Court by way of judicial review. The 2002 Act ended the need for two courts to be involved in the section 204 appeal process by giving the county court a new power to order a local authority to provide accommodation while an appeal to the county court is being heard. On an appeal against the housing authority's decision not to accommodate pending the county court appeal decision, the county court must apply the principles that would be applied by the High Court on an application for judicial review. In addition, the county court has a new power to extend the time limit for homeless applicants to appeal to the county court beyond the current twenty-one days provided there is a good reason.

If the authority had accommodated the homeless applicant prior to the initial homelessness decision (section 184, 1996 Act), the interim duty to accommodate ceases when the authority's decision is notified to the applicant, even if the applicant requests a review of the decision (section 2002, 1996 Act). The authority only has power to continue to secure that accommodation is available for the applicant's occupation

pending the outcome of the review (section 188(3), 1996 Act). Schedule 1, paragraphs 8, 14(d) and 17(b) of the 2002 Act amended the 1996 Act, so that authorities now have the power to provide interim accommodation pending the review decision, even if it has not done so previously. In *R v Camden LBC ex parte Mohammed* (1998) 30 HLR 189, CA, Mr Justice Latham gave general guidance on the principles to be applied by authorities when considering whether accommodation should be provided pending a review decision. The guidance clarified that the 1996 Act did not envisage that every homeless applicant for a review would be entitled to further interim accommodation as a matter of course. An authority was entitled to have a policy that it would not usually provide such accommodation except in exceptional circumstances. However, authorities must have regard to the circumstances of individual cases, and to take into account all relevant considerations, excluded irrelevant information and did not act irrationally. The discretion exercised by the authority is to have regard to four issues. First, the merits of the case itself should be considered. Secondly, any new material, information or argument raised in the application for review had to be taken into account. Thirdly, the personal circumstances of the applicant and the consequences for him or her, of the authority refusing to provide interim accommodation had to be taken into account. Finally, the authority must have regard to any other relevant considerations in relation to the review being considered.

As discussed earlier in this section, the statutory review only gives disappointed homeless applicants an opportunity to have their decision examined in terms of the manner in which the decision had been made. The examination includes the assessment of any new information that comes to light post-initial (section 184) decision but pre-review (section 202) decision. Although limited in scope, such an enquiry, if requested by a homeless applicant who is persistent enough, would give the applicant a "second bite of the cherry." In terms of the HLP who were interviewed, CW5 felt that the twenty-one days deadline to be a time constraint. CW4 had strong views about the timing of the entire appeal processes:

> *You could see such absurd decision, such an appallingly bad decision. You try to get it changed and it comes back saying: there's*

the review process you can go through, and although you're fairly confident you're going to be successful either through the review process or ultimately through the appeal process because the decision is such an absurd decision, you have to go through the process. You know, fifty-six days review process. It's wrong. There should be a way of being able to resolve problems instead of using the review process.

The question in relation to whether the appeal mechanisms are considered to be an effective process for applicants to resolve their homelessness decision disputes, prompted CW5 to ask: does the local authority officer carrying out internal reviews comply with article 6 of the *Human Rights Act 1998*?[6] CW5 commented that the officer carrying out the internal review is the "judge and jury" of the review, and added that the system only works if the applicant has representation. The fact that the officer carrying out the review is both "judge and jury" is a concern in relation to the question of how impartial a reviewer would be (Cowan and Hunter 1997:43). Where the original officer making the decision has more knowledge of homelessness law than the senior officer, that senior officer might be inclined to trust the original officer's judgement in relation to the correct application of law (see Cowan and Hunter 1997:45–6).[7] CW1 considered the section 202 internal review to be a problem because the review did not necessarily examine the decision itself, but "the way in which a decision is made."

A disadvantage of the review process is the fact that it could take a minimum of fifty-six days for the decision to be reached. In that period of time, if the local authority does not exercise its discretion to accommodate, the applicant would have been more concerned about not becoming street homeless than the result of the review itself.

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[6] The right to a fair and public hearing, to take place within a reasonable time by an independent and impartial tribunal is established by law. In response to the question raised by CW5, the case of *Runa Begum v Tower Hamlets LBC* [2003] 2WLR 388, [2003] UKHL 5, [2003] 1 All ER 731 (HL) is of relevance. In this case, the House of Lords upheld the Court of Appeal's decision [2002] HLR 29, 2002 (April) *Legal Action* 31, that the review and appeal provisions of Part VII of the *Housing Act 1996* are compatible with article 6 of the Human Rights Convention. The internal review process (section 202) by itself was not considered to be compliant with the human rights legislation. However, the availability of the appeal to the county court on a point of law along with the review process did mean that overall, the combined review and appeal scheme was considered to be compliant.

[7] In London, some authorities employ an officer specifially to review homelessness decisions.

The reason as to why authorities have accepted the duty to review unsatisfactory homelessness decisions is because it has not increased greatly, the overall costs for authorities to consider further homeless applications it had originally decided against. Halliday (2002) following Edelmann (1990) pointed out that organisations are more likely to embrace due process values where they believe that the costs are minimal (Halliday 2001:478). A major problem with internal reviews is that, based on research already carried out by Cowan and Fionda (1998), many of the local authorities – within the fifteen authorities in England interviewed for the research – believed that they always came to the correct decision. Further, Cowan and Fionda's study found that among the interviewees, there was a wide level of cynicism about the benefit of internal review. Although Cowan and Fionda's research focused on Part III of the 1985 Act, when internal review was a non-statutory review process, their argument in that paper still has relevance to this study. It is important to note that Halliday (2002) considered that, theoretically at least, internal reviews have the potential to be merely the first step in a hierarchy of legal redress. There are few requests for internal review in comparison to the number of unsuccessful homeless applicants (Cowan and Halliday et al 2003:31). This means that homeless applicants lose out on a court review of their homelessness decision because the internal review acts as a 'gateway' to an external review of the decision.[8]

Of the nineteen case studies outlined in Table 7.1 within this section, four homeless applicants did not have an opportunity to request an internal review following a negative decision from the authority. Not only had a written decision not been issued to the applicant in the first place, but the applicant was not aware of an entitlement to a written decision following enquiries, nor had the applicant been made aware of the internal review process: Cases 1, 2, 11 and 20. In terms of Adam's position in Case 34, it was not clear whether he was in exactly the same position as the other applicants when he made his second application. Although Adam had previously made a homeless application, and had told us that he did not request a review of that decision, we are not

[8] The term 'formal review' meaning "internal review as a legal prerequisite to invoking external review" (Harris 1999a) or in the homeless applicant case, the county court section 204 review.

certain whether he had been made aware of the internal review process on the first occasion. Disturbingly, in Case 18, Maria was actively discouraged from requesting a review of her homelessness decision after the same local authority officer, who had made the homelessness decision, advised Maria that she did not have a very strong case.

There are other problems associated with the review and appeal procedures. First, it is unclear whether the internal review is or is not part of the adjudicative process. Cowan and Hunter argue that it should be because for example, this is the only means of redress the applicant has (1997:44). However, Grundy (1998:94) asks whether the review decision is a judicial decision or an administrative decision. Sainsbury makes a convincing argument in asserting that when reviews become a means of redress they cease to be part of the machinery of administration. Instead the review has become part of the machinery of adjudication (1994:288). This is particularly the case for homeless applicants who may not pursue a county court appeal if they are issued with a further negative decision. A point that Sainsbury made, and was discussed by Cowan, Halliday and colleagues is that the internal review is designed to provide an accessible and cheap initial form of redress for the applicant, and a safety check for the local authority to prevent unnecessary litigation (Cowan, Halliday et al 2003:35). Finally, Cowan and Fionda conclude that internal reviews are 'in vogue' but such systems have become cheap ways of denying justice (1998b:186).

A final point to mention is the 'juridification' of homelessness decision-making. Where internal review requests are made without legal assistance, the internal review takes the form of a simple administrative review. Legal representation for the homeless applicant involves the council officer possibly reviewing the decision by using legal values and legal norms, and might involve the officer acquiring legal advice (Cowan, Halliday and colleagues 2003:193). The authors discuss the possibility that internal review may "provide a platform for juridifcation" particularly if other conditions are met. Two basic conditions are suggested. The first and most obvious one is that the applicants must request an internal review. Secondly, applicants would need to seek legal representation.

> *Where these two conditions are met, internal review facilitates the injection of legality into the administrative arena in a new and increased way. Thereafter, the significance of juridification to the practical routines of homelessness decision-making and the substance of decision-outcomes is dependent on the strength of a pre-existing legality discourse within the organisation and the structure of the organisation whereby legal knowledge is disseminated and a commitment to legality is applied in the making and checking of decisions (2003:195–196).*

One of the HLP (CW1) I interviewed suggested that even if a person is aware there is a review process, if that person does not gain expert legal help, there is a likelihood that that person would not gain a positive outcome in the review process. "They don't know about the technical argument. They don't know how to present evidence." CW1 felt that the section 202 review is an effective method of resolving homeless application disputes, "if the clients get additional help. If the client doesn't get help, unless the client is really interested in law then it's not going to be effective. It'll only be effective if the client gets help with the review submission." Finally, CW2 felt differently, the only one to do so, and considered the section 202 review to give

> *the authority a bit of a chance to save face. The fact that it has to be somebody who wasn't involved in the original decision, who actually makes the appeal decision, I think, gives a chance for a bit of face saving: the officer can say, 'I'm actually overturning this' and so, it's not like: I have to eat humble pie in front of the client. I think that does help.*

What Homeless Applicant Disputants Want

The research carried out by Cowan and Halliday et al (2003) found that claimants, who appealed against or sought review of, an adverse welfare decision, want the substantive benefit originally applied for. The research found that claimants also want to be heard, understood, responded to and treated with respect (2003:156 and 160). Yet, applicants are treated as passive participants within their application process. The decision is about them, but their felt need had been marginalized within the process. Sainsbury (1992:304) argues that participation in the process "can enhance the quality of evidence and also serve in their particular circumstances (i.e. increase the 'acceptability of the decision process')." Cowan, Halliday and colleagues observed that some of their interviewees

expressed dissatisfaction with the substantive unfairness of the result (2003:165). Such a situation usually arose where there is limited or no understanding of the provisions being applied by the Homeless Persons Unit in coming to the negative decision.

Although Genn's study did not focus specifically on the experiences of homeless applicants, instead concentrating on "the behaviour of the public in dealing with non-trivial justiciable civil problems and disputes, as potential plaintiffs or potential defendants" (1999:12), it is nevertheless of great significant to this study. A few of the findings from the 1999 study are noteworthy. First, Genn's study reported that, "in finding pathways to solutions, members of the public want routes that are quick, cheap, and relatively stress-free. That is true for all social groups. People want to get on with their lives as quickly as possible and few relish the thought of having to pay to obtain what they believe as their right or what is due to them" (1999:254). Secondly, Genn points out that it is formal legal proceedings that are "largely remote from the resolution of the day to day justiciable problems." The reason why this is the case is because of the "real and imagined cost and discomfort of becoming involved in the procedures that currently exist for the resolution of civil disputes and claims" (1999:254). Genn's study indicates that there is a great need for knowledge and advice about rights, obligations, remedies, and procedures for resolving justiciable problems (1999:255).[9]

The Need to Involve Homeless Applicants in the Dispute Resolution Process

The current legal framework for managing disputes between local authorities and homeless applicants has been developed in such a way that dissatisfied applicants are more likely to obtain a fairer assessment at the review stage provided a representative assists the applicant. However, the involvement of a representative, although useful, distances the homeless applicant from the whole process. The review experience then becomes less meaningful to the applicant, and in some cases, may cause the applicant to complain that he or she had not been adequately listened to, either by the representative, or by the local. In addition, the HLP who were interviewed commented that the appeal system is more likely to be accessible to practitioners than the homeless applicants

[9] As previously discussed in Chapter Five, Section C.

themselves. Such a comment is in direct contradiction to the suggestion that internal reviews are accessible to vulnerable homeless people (Cowan, Halliday and colleagues 2003:35). Yet, as Cowan, Halliday and colleagues (2003) go on to point out, there are few requests for internal reviews in comparison to the number of unsuccessful homeless applicants. Hence, a question that arises is whether the internal review is necessarily the best method for homeless applicants to access housing justice. However, if the internal review were not the most appropriate mechanism, which dispute process would be appropriate for homeless applicants with unsatisfactory decisions? This study argues that the second stage appeal to the county court remains an appropriate dispute process in relation to unsatisfactory homelessness decisions. However, we are not convinced that the internal review is an appropriate first stage appeal process bearing in mind the problems that applicants experience during the application process itself, and secondly for the reasons we have given within this section of the chapter. The question in relation to appropriate dispute processing for unsatisfactory homelessness decisions will be discussed in Chapter Nine of this study. The remainder of this chapter discusses the civil justice climate within which the issue of appropriate dispute processing for unsatisfactory homelessness decisions is considered.

D. Civil Justice System: Twenty First Century Vision

The Woolf Civil Justice Reforms

In carrying out his enquiry into civil justice in relation to housing litigation, Lord Woolf only focused on housing cases, in particular, possession (including actions for possession on grounds of harassment or nuisance) and disrepair. Based on consultation with housing law practitioners, conducted in conjunction with the enquiry, Lord Woolf concluded that the creation of a separate housing court was not necessary because it would not encourage flexible use of judicial and other resources within the civil justice system as a whole. Lord Woolf was concerned that reform of court procedures could only ever have a limited impact in an area where the main source of difficulty is the complexity of the substantive law. In considering use of the judicial review procedure, Lord Woolf conceded that the only way of challenging local authorities' decisions in

cases involving homelessness was by way of judicial review. However, Lord Woolf did question whether judicial review, primarily a procedure that is concerned with issues of wider public interest, is an appropriate procedure for such cases. He noted that there were also potential difficulties, the process being a relatively lengthy and expensive one. Moreover, at the same time that the enquiry was carried out – from 1994 until 1996 – the government had accepted recommendations from the Law Commission that judicial review in homelessness cases should be replaced by a right of appeal to an independent tribunal or to a court (see Law Commission 1993). Part VII of the 1996 Act was a consolidation of Part III of the 1985 Act, but with substantive changes, which included a right to request an internal review of an authority's decision. Lord Woolf was satisfied that the standard of local authorities' decision-making on homelessness would be improved by the requirement that each local authority establish a formal internal appeal mechanism.[10] Further, Lord Woolf considered that the effect of the internal appeal mechanism would reduce the volume of applications for judicial review in the area of homelessness (Woolf 1996:paragrah 74).

The county courts were considered to be the most appropriate forum for handling the appeals of local authority homelessness decisions. County court adjudicators were believed to have knowledge of local conditions, and cases were presumed to be heard by specialist circuit judges who had the opportunity to build up some expertise on housing matters. As with the judicial review procedure, Lord Woolf asserted that any new county court procedure for homelessness should not provide an appeal on facts because it would be inappropriate for courts to overturn administrative decisions of local authorities. Hence, recommendations were made that there should be a new route of appeal to county courts on judicial review principles, against local authority decisions on homelessness.

[10] This was optimistic reasoning on Lord Woolf's part. Cowan, Halliday and colleagues (2003) found that there was a temptation for some local authority officers to make poor quality decisions because they were aware of the potential safety-net that internal review could provide to ensure that a better quality decision is ultimately produced. The 2003 study then went on to demonstrate that the number of requests for internal review was low in comparison to the number of homeless applicants.

Lord Woolf made observations that the Local Government Ombuds (LGO) service provided an alternative remedy to the courts in many types of housing disputes, including disrepair and homelessness. The context within which he carried out his enquiry – legal processes leading to adjudication by judges in court – precluded an enquiry into mechanisms that exist to monitor the quality of service given by council officials. However, it would seem that there is tension between internal monitoring imposed on local authorities by legislation, and the external scrutiny of local authority decisions by court. The internal monitoring systems: Local Authority Monitoring Officer,[11] the complaints procedure, link into the remedies offered by the LGO. Yet, questions remain as to how the various procedures interface, as well as the availability of a legal process. This might be particularly problematic because not only do the various processes appear to cause tension with each other, there is potential for aggrieved homeless applicants to become confused as to which dispute process might match their particular circumstances. The use of different language in relation to the different complaints processes is bewildering. When the applicant makes a complaint against the conduct of the officer assessing the homeless application, the applicant is known as the 'customer.'[12] Being treated, on the one hand, as a dependent of an eroded welfare state for help with housing as homeless, and then to be treated as a consumer, when a complaint is made in relation to the assessment process of the homeless application, has potential to cause confusion in the homeless applicant's mind. A further dilemma relates to the homeless applicant's expectations from the different processes: an applicant might believe that the complaint will not satisfactorily be addressed, as happened in Cases 1 (Sandra) and 10 (Steven) of the case studies. An even worst scenario is the perception that the applicant could receive an unfavourable homelessness decision as a result of making a complaint against the assessing officer, as expressed by Nicole in Case A of the in-depth interviews (Chapter Six of this study).

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[11] The LA Monitoring Officer is appointed under section 5 of the *Local Government and Housing Act 1989*. He or she is responsible for reporting to the local authority any proposal, decision or omission in relation to the council's work, that would give rise to unlawfulness or maladministration.

[12] See for example Mulcahy and Tritter (1996) and Lewis and Birkinshaw (1993) for a discussion of the citizen as a customer of public services. The then DCA (2004) also acknowledged "the existing landscape is confusing, with many variations in name, style and technique" (paragraph 2.8).

Proportionate Dispute Resolution

In 2004, the then Department for Constitutional Affairs (DCA) published its White Paper, *Transforming Public Services: Complaints, Redress and Tribunals.* The Law Commission Project is linked to the DCA examination of improving public services and improving access to justice to such services. The approach to examining dispute processing by the DCA and Commission were similar: both concentrated on dispute prevention before considering proportionate dispute processing. The DCA focused on administrative justice as a whole, and made proposals to prevent administrative disputes from arising. Suggestions were also made to improve the method of dispute processing should prevention fail. The starting point of this evaluation, as the DCA pointed out, was what users of public services wanted. The DCA also set out a vision for a fundamental reconsideration of how current approaches to systems of grievance redress could be changed, particularly in relation to those in public services. The Law Commission (Commission) agreed to evaluate "housing adjudication issues" in a similar way, by focusing on what users of the justice system wanted in resolving their housing disputes. The Commission admitted that this was an unusual project for it to carry out since the Commission's work usually involves the proposal for the reform of substantive law.

In 2004, when the Law Commission agreed to carry out the housing proportional dispute resolution project, it also held a seminar with housing specialists. In 2006, the Commission published an *Issues paper*, a consultation paper, along with background research papers, as well as a *Further Issues paper*, which contained the socio-legal literature it had taken into account when drafting the *Issues paper*.

Essentially, the project was set up to:

> *(1) investigate the capacity of current modes of housing dispute resolution to solve people's housing problems;*
> *(2) consider how they might be adapted into a broader approach to housing problem-solving;*
> *(3) examine the relationship between housing problems and dispute-resolution processes; and*

> *(4) consider the nature of disputes and how they arise, and the social processes involved in the shaping of disputes and their resolution.*
> (Law Commission 2006a:10–11)

The Commission's Project focused on proportionality in the resolution of housing disputes. However, a question that immediately arises is: proportionate to whom, to what and from whose perspective? The Commission's answer is "we consider that a proportionate dispute resolution system is one which allows appropriate balances to be struck between the core values" (2006a:19). The Commission's answer is elaborated in paragraph 2.17 of the *Issues paper* as being a system where the resources expended on using it "bear a sensible relationship to the problem to be solved or dispute to be resolved. A proportionate system of housing dispute… recognises that there is often a trade-off with other values such as accuracy."

The approach to the issue of 'proportionality' has varied from Lord Woolf's position, which was 'top-down,' with the decision of 'proportionality' being left to a procedural judge. 'Appropriate' dispute resolution for Lord Woolf means the use of ADR mechanisms, which could process a dispute more economically and efficiently than court proceedings (Adler 2008:312). In relation to the DCA's White Paper, 'proportionality' was analysed from the 'bottom-up' perspective. This left the decision to the disputant to decide upon the remedy and procedure to achieve the outcome he or she hopes. In contrast, the Commission's approach is to provide people with assistance to decide upon the remedy and dispute processing mechanism (see Adler 2008:315). The method suggested by the Commission resonates with, and is a step closer to the views of Sander (1976), Sander and Goldberg (1994) and Sander and Rozdeiczer (2006). We support the view that the grievant ought to be assisted by a neutral third party in deciding upon appropriate dispute processing. However, the question still remains open as to whether a mediator is best (Sander and Rozdeiczer 2006) or an early neutral evaluator (Sander and Rozdeiczer 2006, Adler 2008:316–318). Possibly even the Commission's recommendation of Triage Plus, depending on how such a service is developed (Adler 2008:316–318) could be the most appropriate way forward.

In relation to the Law Commission view of 'proportionality,' a total of eleven core values underpinned the direction of the project: accuracy, impartiality, fairness, equality of arms, transparency, confidentiality, participation, effectiveness, promptness, efficiency (also linked to cost), and finally, impact – the need for the system's outcome to have a direct impact on the person with the problem, as well as an indirect impact. An example of what the Commission meant by impact was "by promoting means to improve the quality of initial impact making, thus preventing similar problems arising in future. An important aspect of impact is the provision of feedback to decision makers" (Law Commission 2006:19).

Part of the aim of the consultation was to explore the possibility of avoiding disputes at the outset, an objective being to improve the quality of initial decision-making. However, if disputes could not be prevented, the project envisaged a system of dispute resolution that is flexible (Law Commission: 2006a:39). The Commission suggested a model of dispute resolution that embraced a 'triage plus' system that included support services, such as money support, floating support, and resolution of disputes that is managed and could be resolved by adjudication, either by court or tribunal. Other means, such as mediation, the ombuds service or other methods were also suggested. The model of dispute resolution suggested by the Commission depended on a system to feedback problems to the body or person creating the problem, in order to understand how the system itself was working and to assess how it could be improved. The Commission considered the provision of feedback to the person or body creating the problem as being "at the heart of a proportionate system" to the proposed system (2006:41). The Housing: Proportionate Dispute Resolution Project also considered key questions in relation to the adjudication of housing disputes, in terms of when this would be the most appropriate dispute resolution process. Key questions included: Should a specialist or generalist body carry out the adjudicatory function? Should that body be a court or a tribunal?

After a period of consultation on the *Issues papers*, the Law Commission then published its analysis of responses to the Issues papers. In June 2007, the Commission published a

further consultation paper, *Housing: Proportionate Dispute Resolution – The Role of Tribunals*. In that paper, the Commission consulted on a specific question of which forum should formally adjudicate housing disputes that cannot be resolved in any other way. The Commission's provisional proposals in the consultation paper included the suggestion that homelessness statutory appeals (section 204, *Housing Act 1996* county court appeals) and homelessness-related judicial review appeals should be transferred to the Upper Tribunal. However, the Commission did not examine the appropriateness of the section 202 internal review, and merely acknowledged that "an approach to internal review of decisions made by officers, militates against the success of this model" (Law Commission 2006a:62).

The Commission reminded consultees in its paper, that Clause 15 of the Tribunals, Courts and Enforcement Bill would give the Upper Tribunal "a judicial review jurisdiction, to grant mandatory, prohibiting and quashing orders, declarations and injunctions, on an application which falls within a class specified in a direction given by the Lord Chief Justice" (paragraph 3.69). In provisionally proposing this transfer, the Commission had considered that such appeals should be heard by "a body with specialist knowledge of administrative law principles, housing law and local housing conditions" (paragraph 3.70).

The Law Commission published its final proposals, *Housing: Proportionate Dispute Resolution (Law Com No 309)*, in May 2008. In general, the Commission recommended that the government keep in review of the possibility that further specific matters might be transferred to the Land, Property and Housing Chamber of the First-tier Tribunal, or to the Upper House (Paragraph 5.47). More specifically, and bearing in mind the consultees' responses, as well as the fact that at the time the Commission's final report was published, the exact details of how the Upper Tribunal would work was still being finalized, the Commission decided it could not make a final recommendation in relation to its earlier proposal that the section 204 statutory appeals should be heard by the Upper Tier. Instead, the Commission suggested that it would "see considerable advantage" for the government to establish pilot schemes to test the transfer of the section 204 *Housing*

Act 1996 homelessness statutory appeals, as well as other housing-related judicial reviews to the Upper Tier of the new Tribunal service. However, the Commission recommended that there should only be a change to the jurisdiction provided legal aid is made available for cases dealt with by a tribunal, on the same basis as it is currently made available for cases being resolved by a county court (Paragraph 5.53).

E. Conclusion

Having considered within Section B of this chapter some of the problems that applicants experienced within the statutory homelessness process, it is easy to understand why, when the HLPs were interviewed, the overwhelming response could be represented by the comment made by CW5, in that the system only works if the applicant has representation. This chapter has raised questions about the appropriateness of the internal review in resolving disputes in relation to unsatisfactory homelessness decisions. However, the lack of requests for internal reviews at the same time enables council officers to protect the limited resources of authorities. The internal review process is a cheap mechanism for the local authority to administer, and provides some sort of a forum for the more determined dissatisfied applicants to access. However, on the whole, the internal review does not appear to be an appropriate dispute process for unsatisfactory homelessness decisions.

With that in mind, the next question which needs to be addressed is which dispute process would be appropriate for those who need to challenge unsatisfactory homelessness decisions? Before this question is explored in Chapter Nine, the following chapter examines the use of mediation as a tool to prevent homelessness, particularly in relation to young people. The discussion in Chapter Eight will focus on whether mediation would enable greater access to justice for the homeless who need assistance in relation to their housing needs.

Chapter Eight
Mediation and Homeless Applicants

A. Introduction

This chapter looks at the issues surrounding the growing use of mediation as a homelessness prevention tool promoted by the government, in particular by the Department for Communities and Local Government (DCLG). The DCLG has responsibility over housing and homelessness, and the role that mediation plays in relation to homeless applicants. The question this chapter addresses is: would greater use of mediation enable homeless applicants to enjoy access to justice? In exploring this key question, the methods of delivery of homelessness mediation will be discussed in the context of the homelessness prevention work that the government has been promoting. This prevention work includes mediation.

The process of mediation, in this situation, takes place in the context of potential homelessness for one party (the evictee), with the other party (the evictor) in the process of evicting or having evicted the first party. Mediation might only be offered to the potentially or already homeless person when he or she approaches the local authority for emergency housing assistance. At the point of approach, a local authority officer would need to decide whether a homeless application, among other potential housing options, ought to be taken from the person needing assistance.

The concept of homelessness prevention flows from the *Homelessness Act 2002.* The 2002 Act amended the *Housing Act 1996* where the main homelessness duties placed on local authorities can be found. The 2002 Act imposed a further duty on each local authority to review its local homeless situation and to formulate and publish a strategy, based on the results of the review, to prevent homelessness – at least once every five years after the publication of the first strategy in 2003. The DCLG has not given local authorities concrete guidance on the manner in which a mediation scheme should work, other than publishing in 2006 a Good Practice Guide on homelessness prevention work, which includes the DCLG's thoughts on mediation. The government is certainly serious about the "homelessness prevention ethos." The then Office of the Deputy Prime Minister (ODPM) committed itself from the 2005/06 financial year to making available £200 million over three years, until the

2007/08 financial year, to support local authorities and the voluntary sector in the provision of homelessness prevention schemes. On the 5 December 2005, the DCLG announced that councils will receive at least £150 million over three financial years from 2008/09 to help them prevent and deal with homelessness in their areas. A further question that this chapter addresses is whether homelessness prevention work, of which mediation is one of the tools, is genuine homelessness prevention or a method to contain the number of homeless applications being accepted by local authorities, thereby encouraging authorities to safeguard their financial resources.

In addition to the government's Code of Guidance on the homelessness duty imposed on local authorities, there is guidance from case law in terms of when mediation can be carried out and when a homeless application ought to be taken by an authority, and processed: the case of *Robinson* below is reported in Section B of this chapter. Additionally, Section B discusses homelessness mediation in the context of the local authorities' homelessness prevention work. The safety–net homelessness duties remain under the *Housing Act 1996*, as amended by the *Homelessness Act 2002*, and the tension arising from these two Acts will briefly be discussed.

Section C appraises the experience of community mediators who were involved in an early homelessness mediation scheme piloted by a local authority. In addition, a brief survey was carried out in relation to the methods of mediation that some local authorities in London have adopted. This assessment on the use of mediation in local authority homelessness prevention work is carried out in the context of the Relate report (2008) on therapeutic mediation.[1]

In 2005, the then Office of the Deputy Prime Minister (the DCLG's predecessor) commissioned Relate to "develop a standard model for a service to address relationship breakdown that may lead to homelessness" (Relate 2006). Relate was

[1] Relate is registered charity and a voluntary organisation, which was set up to provide relationship support services, among other work. Relate has a network of over 600 services across England, Wales and Northern Ireland. Relate became involved in homelessness prevention work in 2002, when the Harrow Council set up the first known contract for a mediation service with a local Relate Centre (Relate Central Middlesex now called Relate London North West). The service aimed to prevent homelessness as a result of breakdown of relationships between homeless applicants and their family members, relatives or friends.

funded to develop the mediation with a counsellor (MWC) project to prevent homelessness from the financial year 2005/06, and to pilot the service from 2006 until 2008.

The standard model that Relate developed for homelessness prevention was a model based on counselling and mediation, which was a problem in itself since the aims of therapy and mediation are often very different. Relate did usefully suggest, however, that where local authorities provide a mediation service, such schemes ought to be delivered by an independent agency. The MWA scheme was devised and added because Relate report that in most cases only the homeless person was prepared to participate in mediation. The evictor is often the parent, because most mediation schemes are aimed at homeless young people who have been living with their parents, guardians or carers. And the evictor is usually very reluctant to attend the mediation. Close inspection of some schemes delivered by local authorities suggests, that an additional problem is that it cannot be said in all cases that the homeless person attending the mediation session does so ***voluntarily*** – arguably an essential characteristic of mediation. Nor may it even be said that mediation had indeed been provided for the homeless person.

Where mediation is offered, it appears that many local authorities have integrated the mediation service into the homeless application process, in such a way that applicants are under pressure to attend mediation. Examples of how authorities incorporate mediation into the homeless application process can be seen in the Table within Section C of this chapter.

Section D of this chapter explores ways forward for the potentially homeless, and focuses on factors that could improve the delivery of homelessness mediation, which could effectively prevent homelessness. The classical form of mediation is appraised in terms of how it might effectively assist people who are potentially going to be made homeless because of a relationship breakdown. I make recommendations of how aspects of facilitative mediation could be more suitable than the MWC model in facilitating communication between the evictor and evictee. However, we will start by examining the government's homelessness prevention policy agenda in the

context of the current homelessness legislative duties imposed on local authorities to provide emergency accommodation to statutory homeless households.

B. Homelessness Prevention Work and Homelessness Mediation

Tension between the Housing Act 1996, as Amended by the Homelessness Act 2002 and the Homelessness Act 2002

As will be seen within this section of the chapter, there is tension between the duty imposed on local authorities to accommodate homeless households under the *Housing Act 1996*, as amended by the *Homelessness Act 2002*, and the strategic aims under the latter Act to assist the local homeless population. The strategic approach to dealing with the local homeless population that authorities are expected to take has been underpinned by the change in policy direction of central government – that of preventing homelessness.[2] The homelessness prevention approach, in which homeless people are assisted to help themselves to resolve their homelessness situation, is not necessarily a wrong direction taken by the government because the safety-net of the homelessness duties still exist. Admittedly, the safety-net of the homelessness legislation does not catch as many homeless people as it did in the past. Paragraph 6.4 of the Code of Guidance clearly advises authorities that they must not avoid their obligations under Part VII (the homelessness duties). Nevertheless, it is open to authorities to suggest alternative solutions in cases of potential homelessness where these would be appropriate and acceptable to the applicant. However, provided the government genuinely aims to assist people to prevent them from becoming homeless, with the homelessness legislation safety-net still in place, the assistance to prevent homelessness can certainly be seen as an advantage for some homeless people.

In conjunction with a change in homelessness legislation, the Government's new policy direction was confirmed in documents, especially *More Than a Roof* in 2002. In January 2005, the then Office of the Deputy Prime Minister (ODPM) – the

[2] The new strategic role for local authorities created by the 2002 Act is set out in sections 1 to 3 – the duty to carry out a homelessness review for the district and to formulate and publish a homelessness strategy to reduce or prevent homelessness.

government department responsible for overseeing homelessness – announced its *Five Year Plan for Housing: Sustainable Communities: Homes for All.* In March 2005, the ODPM published *Sustainable Communities: Settled Homes; Changing Lives – a Strategy for Tackling Homelessness.* This explained the government's strategy for combating homelessness, raising the question of legislative change in order to encourage homelessness prevention. In that document, the government outlined its plans to start consultation on proposals to assess the need for possible changes to the existing homelessness legislation. The consultation would also consider whether legislative changes could be made to encourage greater use of the private rented sector to provide settled housing options, should such options be suitable and meet the needs of households in temporary accommodation (ODPM March 2005:para 3.15). However, as at June 2009, the green paper has yet to be published, and there is no announcement on the DCLG's website as to when the green paper might yet be published. The original news announcement made on 18 September 2008 in relation to the publication date of the green paper appears to have been withdrawn from the 'Latest News' section of the DCLG website.

In June 2006, the DCLG, which replaced the ODPM in May 2006, published its *Homelessness Prevention: a Guide to Good Practice.* The Good Practice Guide is merely a document providing authorities with recommendations of good practice in the delivery of a service with what the DCLG calls "a new ethos" (of homelessness prevention) to people in housing need, including people who need emergency housing assistance.

It is here where tension is particularly apparent between two different types of duties arising from the two statutes, the 1996 Act and the 2002 Act. The 2002 Act imposed a duty on local housing authorities to have a strategy in place in order to deal with their local homeless population. However, the 2006 DCLG Good Practice Guide appears to take the strategic direction further by suggesting to authorities that it is good practice to deal with potential homeless applications as a two-stage process. Yet, Part VII of the 1996 Act (the homelessness duties), as amended by the 2002 Act is still in operation. The existing emergency housing duty imposed on housing authorities has not been amended by the 2002 Act so as to become a two-stage enquiry process. As the DCLG had also set targets for authorities to keep the number

of homeless application acceptances down in relation to three specific causes of homelessness,[3] in practice, local authorities are more likely to treat the 2006 Good Practice Guide on the same level as the Code. Certainly, the 2006 Good Practice Guide at paragraph 3.1 tells us that a central feature of homelessness prevention is giving advice on housing options to a person who is at risk of homelessness. Hence, it would appear that the government is exerting pressure on authorities to find alternative options, as the housing law practitioners who were interviewed inferred (see section below), thereby creating a diversion to accepting a homelessness duty. Moreover, the Code of Guidance has already been diluted by the homelessness prevention ethos, although authorities are still reminded that they must not avoid their obligations under Part VII of the *Housing Act 1996.*

In addition to reminding authorities of their emergency housing duties,[4] the 2006 Code also advises authorities of which situations use of homelessness prevention tools could be considered to be appropriate:

- The situation where people have been asked to leave accommodation by friends or family (Paragraphs 8.9–8.12, 8.11).
- 16 and 17 years old are expected to live in the family home unless it would be unsafe or unsuitable for them to do so (Paragraph 12.7, 12.8–9).
- Finally, the government suggests that counselling, negotiation, home visits, mediation and practical solutions could help prevent homelessness in relation to three main causes of homelessness. See footnote 3. (Annex 7 paragraphs 4–6, 10).

Aims of the Government's Homelessness Prevention Ethos

The aims of the government in relation to the homelessness prevention work on the one hand can be applauded, provided the real concern of the government is to enable authorities to assist people to help solve their homelessness problem.

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[3] As a reminder, the government believes that three causes of homelessness: family or friends who are no longer willing to accommodate, relationship breakdown – which includes domestic violence – and the ending of assured shorthold tenancies, are preventable. Housing authorities are expected to decrease the number of homelessness duty acceptances against these three specific causes of homelessness. See Section B of this chapter for the context of the setting of these three targets.

[4] For example, see Chapter 7 and a reminder at paragraph 7.3 to authorities that the threshold for interim duty to accommodate is low. The interim duty takes immediate effect (paragraph 6.5), even where the authority considers the applicant may not have a local connection with their district but may have connection with the district of another local housing authority (paragraph 7.4).

Unfortunately, the data gathered for this study questions the real motive of the government behind the homelessness prevention approach to assisting people in need of urgent housing. The government has been honest enough to admit that the issue of financial constraints has been the reason why it advocates the homelessness prevention approach. However, the evidence also indicates that, in practice, the safety-net of the local authority homelessness duties is being pulled away from even the most vulnerable homeless in society unless these potentially homeless or already homeless people have representation to assist them to make a homeless application. As will be seen below, the DCLG's *Homelessness Prevention: a Guide to Good Practice* published in 2006 suggests that a 'two-stage process' is operated in relation to households that are likely to be eligible for assistance and in priority need for homelessness assistance. In addition, local authorities have been set targets, and are monitored by central government. This has encouraged authorities to take fewer homeless applications and, in effect, has thereby indirectly pushed authorities to take the homelessness assistance safety-net from applicants by gatekeeping the taking of homeless applications.

The housing law practitioners who were interviewed in 2005 for this study were specifically asked for their views on the 'homelessness prevention' work that authorities carried out, and whether the practitioners believed that the homelessness prevention work was effective in assisting those that needed help. CW1's response was that "it depends [since] there's a whole spectrum of work [that the local authority carries out]." In terms of the rent deposit scheme that authorities set up as part of the homelessness prevention work "in my eyes [the rent deposit scheme] is a gatekeeping scheme. The way it works as gatekeeping is the local authority will say, for example, 'We've got this lovely property [for] this client, [you can move in with a] rent deposit [which we will give you] or of course you can [make a homeless application and] go into that grotty B&B and wait for a council house that you won't like. What would you prefer to do?'"

CW2 did not believe the homelessness prevention work that the local authorities carried out was very effective, declaring that such work was mere 'window dressing,' delaying the inevitable [for clients who ought to have had a homeless

application taken when they first approached the local authority for emergency housing assistance], diverting people from access to social housing." CW2 echoed the thoughts of CW1,

> *CW2: I think it's legitimate to offer [rent deposits and rent in advance] as an option, but I think that certain local authorities have been quite cynical in the way that they've used it, and they've actually diverted people away from access to social housing*
> *Me: So, you think that the key problem with 'homelessness prevention' work is diverting people.*
> *CW2: it's not making it clear that it's one among other options.*

However, CW5 commented that the local authorities are "very good in assisting with preventing unlawful eviction."

Interviews with these practitioners took place from June until July 2005, almost three years after the implementation of the *Homelessness Act 2002*. However, the comments made by the housing law practitioners about the local authorities' homelessness prevention work were an indication of the subsequent guidance the central government would give in this exact area.

Chapter Two of the 2006 *Code of Guidance*, the DCLG's *Homelessness Prevention: a Guide to Good Practice* published in 2006, as well as interim direction through the government Policy Briefings, now provide the necessary policy steer to the authorities in relation to the homelessness prevention work. The Good Practice Guide, as mentioned already, is merely a document providing authorities with recommendations of good practice in the delivery of a service with a homelessness prevention approach to assisting people in urgent as well as non-urgent housing need. In contrast, authorities need to demonstrate that they have had due regard to the *Code of Guidance* when considering a homeless application, as mentioned in earlier chapters of this study. Yet, even the Code has been diluted to incorporate the homelessness prevention ethos. Thus, Chapter Two of the Code focuses on homelessness prevention work, and paragraph 2.2 provides the definition of homelessness prevention work, which means "providing people with the ways and means to meet their housing, and any housing-related support, needs in order to avoid experiencing homelessness."

In addition, paragraph 2.6 of the Code gives guidance on the three stages at which authorities may intervene in an attempt to prevent homelessness. The three stages mentioned are early identification, pre-crisis intervention, and preventing recurring homelessness.

Paragraph 2.3 of the Code advises authorities that it is open to them to suggest alternative solutions in cases of potential homelessness where these would be appropriate and acceptable to the applicant. At the same time, however, authorities are minded of the need not to avoid their obligations under Part VII of the *Housing Act 1996* (the homelessness duty), which include the duty to make inquiries under section 184, if the authority has reason to believe that an applicant may be homeless or threatened with homelessness.

Authorities are reminded further of their interim duty to accommodate, until completion of the homelessness enquiries and a decision is issued (section 188,1996 Act). The reactive safety-net duty runs parallel to the authorities' homelessness prevention work (paragraph 6.5 of the Code).

In reality, homeless households now have to overcome a further barrier in attempting to gain emergency housing assistance under the 1996 Act. This is because the homelessness prevention policy direction is reinforced by " a crucial component of the new ethos of homelessness work" (DCLG 2006b: paragraph 2.7) namely, the housing options approach. Such an approach means that applicants who are potentially in priority need for accommodation would have a 'housing options' interview first, when the officer will determine whether homelessness can be prevented (paragraph 2.8).

Regardless of advice from the DCLG to local authorities not to develop a 'gatekeeping' mentality when assisting people in need of emergency accommodation (see for example, DCLG 2006b: paragraph 2.11), the performance of authorities are monitored by central government. The performance monitoring system in place up until the financial year 2007-08 was the Best Value Performance Indicator.[5] Up until

[5] The Audit Commission through the Comprehensive Performance Assessment (CPA) process formally assesses local authority performance. The CPA process examines how well councils deliver

April 2008, success was measured in terms of reductions in official acceptance levels, namely, Best Value Performance Indicator 213. BV213 was first introduced in the financial year 2005/06, and measured the impact of housing advice in averting actual or imminent homelessness. Good performance would be a low figure. At the same time, the government expected, and still does expect housing authorities to decrease the number of people being accommodated in bed and breakfast hotel and temporary accommodation – now against National Indicator 156. In the context of the DCLG's policy guidance, homelessness prevention, in practice, has meant that local authorities must try to decrease the number of homelessness duty acceptances against three specific causes of homelessness as identified and set by central government (see footnote 3).

Mediation as a Homelessness Prevention Tool and the DCLG's Understanding of Family Mediation

The DCLG's understanding of family mediation can be found in the *Homelessness Prevention: a Guide to Good Practice.* As will be seen, the Good Practice Guide very much leaves local authorities to decide how best to pursue the delivery of homelessness mediation services. It would appear that the aim is being seen to be taking the correct approach, yet still be able to contain homeless application acceptances at the same time.

One of the three main strands of the government's plan in its five-year *Strategy for Tackling Homelessness* to prevent homelessness more effectively included, "encouraging and rewarding the modernisation of services provided by local authorities which offer a wider range of preventative help, support and housing

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their services as well as how well the council is run. The CPA is based on performance information from a number of sources, which included Best Value Performance Indicators set by the government. The BVPI was replaced by another monitoring system, which started in April 2008. The last time authorities were measured against the BVPI, which were reviewed in the 2005/06 financial year, was the 2007/08 financial year. The National Indicator Set or NIS replaced BVPI from 1 April 2008 – a single set of 198 national indicators. From the financial year 2008-09, authorities were measured against National Indicator 156 in relation to the number of households living in temporary accommodation. Councils already gather P1E statistics – a record of how many homeless applications local authorities accept. Annex 4 of the *National Indicators for Local Authorities and Local Authority Partnerships: Handbook Definitions* – published by the DCLG, and revised in May 2008 – gives guidance to authorities on what good performance in relation to N1 156 entails, "each local authority has submitted projections showing how they plan to reach their own targets, which we monitor against actual performance each quarter. Good performance is typified by a lower figure" (DCLG 2008:15), available at www.communities.gov.uk/documents/localgovernment/pdf/735143.pdf

options – so that they reach more people earlier on" (ODPM March 2005: paragraph 3.2). Additional aims of the government's strategy included the promotion of effective mediation and counselling services with the aim of reconciling families and prevent homelessness (ODPM March 2005:13).

In its *Homelessness Prevention Good Practice Guide*, the government openly admits that the housing options approach to preventing homelessness "recognises the limited scale of social housing resources" (DCLG 2006b: Paragraph 2.10). Homelessness prevention tools, in keeping with the housing options approach, include the use of private rented accommodation, which incorporates the use of rent deposit schemes (DCLG 2006b: Chapter Four), housing advice (DCLG 2006b: Chapter Three) and family mediation (DCLG 2006b: Chapter Two). The DCLG does not define family mediation, but does discuss what it considers to be key elements of family mediation. The DCLG's views of family mediation are contained in Chapter Five of the DCLG's Good Practice Guide. To the DCLG, family mediation means at one level, the dictionary definition, 'mediation' involves a process of intervention (by an intermediary agency) between parties in a dispute to produce agreement or reconciliation (paragraph 5.2). The DCLG did not indicate which dictionary it had referred to though. The DCLG acknowledges the Shelter (2004) guide on mediation, which discusses "a process for resolving disagreements in which an impartial third party (the mediator) helps people in dispute to find a mutually acceptable resolution." The DCLG promotes the view that there are differing views on exactly what is involved in 'family mediation' as a homelessness prevention technique. At paragraph 5.3 of the Good Practice Guide, the DCLG suggests the key elements of mediation as being the following (specifically mentioning the Lemos [2001] report on mediation services in Scotland, as well as the above mentioned Shelter Good Practice Guide):

- Those in dispute being willing to take part
- Openess and honesty on the part of all parties
- Commitment to working cooperatively with the other party to find a solution
- Clients feeling that they are in a safe atmosphere and that confidentiality will be respected

The DCLG concludes that ideally, family mediation should include both the young person and their parent or other host householder (paragraph 5.20). The DCLG acknowledged at the same time that in many local authorities, where mediators are willing to work with only one of the estranged parties, such sessions ought strictly to be described as involving counselling. Finally, it appears that the DCLG accepts that in some cases, mediators see their role as extending beyond simply attempting to reconcile the estranged parties (paragraph 5.22). However, the DCLG considers it crucial for mediation officers to be trained to enable them to understand better the homelessness application process (paragraph 5.24), just as homelessness officers ought to understand the mediation process as well as "the mediator's proper role."

It is interesting that in both the Code of Guidance and Chapter Five of the Good Practice Guide, the term 'family mediation' is used. However, as will be discussed in the next section of this chapter, mediation used specifically in the homelessness situation by local authorities has been a distinct process in itself, which is not mediation in the classical sense. Indeed, in some cases it may not even be recognised as mediation: for example, the mediation carried out has usually involved only one of the estranged parties, because only the evictee attends the mediation. The DCLG suggests that contact even with only one of the parties could be useful, since time could be spent "in developing problem-solving strategies which may preclude the need for the young person to leave home" (paragraph 5.20).

In 2005, the then ODPM commissioned Relate to develop a standard model for a service to address specifically relationship breakdown that might lead to homelessness. Relate also piloted a two-year "innovative homelessness mediation service that meets the new service standards" (Relate 2006:12). In its 2006 Standards Checklist for local authorities providing a homelessness mediation service, Relate asserts that the scheme will offer an independent, impartial and confidential service for homeless applicants experiencing conflict or relationship breakdown in family relationships, which may lead to homelessness. The service "aims to address the underlying conflicts and strengthen relationships, enabling clients to negotiate their workable solutions and avoid homelessness" (Relate 2006:12). The service will include both, what Relate call "a therapeutic element" and mediation where appropriate between clients and their partner, family member or friends, to enable

them to negotiate their own workable solutions. The 2008 Relate Report will be discussed below in the next section of this chapter.

Questions that need to be addressed by this chapter are how should homelessness mediation be best carried out? What would be the purpose of mediation? This, in turn, requires answering a number of more specific questions. What factors need to be borne in mind in deciding upon a homelessness mediation process? Is there a need to separate the aim of a mediator in attempting to repair a relationship or to facilitate communication from the aim of mediation to keep the excluded (or evictee) in the excluder's (or evictor's) home? If a third party were to be used to assist in communication or repairing relationships, would counselling – a therapeutic tool – not be more suitable than mediation? Perhaps a counsellor ought to carry out the mediation, as Relate suggested in its 2008 report. However, if the aim of mediation is really to be used as a tool to keep the excluded in the excluder's home, it could be argued that mediation has been misused because it is an inappropriate tool to use in the situation where there is a significant power imbalance in the relationship.[6] In many instances, those who stay in the family home, with relatives or with friends with their permission, tend to be bare licensees. The licensee is granted personal permission to enter and stay in the accommodation. Once the permission to stay has been withdrawn, that person becomes a trespasser, and will have to leave the property. A court order is not required for eviction to take place. The power in this situation lies very much with the excluder. In which case, it could be argued that any 'mediation' offered in this situation might only be a 'quick fix' solution for the potentially homeless person to enable him or her to stay on an extremely temporary basis. It is also possible that the excluder might feel coerced into allowing the evictee to stay longer, so that the excluder did not 'lose face.'

In their research for the then Scottish Homes, Lemos and Crane (2001) concluded that there are benefits to mediation schemes, if such schemes are used to assist in the repair of relationships where this is possible. However, mediation should not be used as a way of reducing demand for social housing or avoiding statutory duties. This was a factor that was identified as problematic in the London area by the mediators

[6] See Roberts 2005 and Chapter Nine of this thesis.

that I interviewed for this study. Lemos and Crane argued that mediation could produce other benefits, "principally in the sustaining and strengthening of social networks" (2001:22).[7] This is the approach that this study advocates. Our view differs slightly from the view of Lemos and Crane, in that we would add that a successful outcome for mediation schemes could also be the facilitation of communication or getting the parties to start talking to each other, which is a good start, as is re-establishing contact between the parties (Roberts 2008:9).

Having discussed the government's underlying intention behind the homelessness prevention ethos, then briefly reviewed the government's perspective of mediation as a homelessness prevention tool, before we examine the manner in which local authorities have adopted the use of homelessness mediation, we need to discuss the best timing for carrying out homelessness mediation. The case of *Robinson* is the main authority on the question of when a local authority can use mediation as a homelessness prevention tool in the circumstances in which a homeless application also needs to be taken.

The Case of Robinson

The case, *Robinson v Hammersmith and Fulham LBC* [2006] EWCA Civ 1122, concerns a seventeen year-old (Akilah Robinson) who had been asked to leave the family home by her mother, and who then attempted to make a homeless application at Hammersmith and Fulham Council. Ms Robinson first approached the authority on 17 February 2005 – her eighteenth birthday was due on 11 March 2005. When Ms Robinson approached the council, the housing officer informed her that it would take twenty-eight days for the council to investigate the matter, and by the end of that period Ms Robinson would be eighteen years old. The officer considered that there would be no point in the young woman continuing with a homeless application. The authority, however, did not provide Ms Robinson with interim accommodation at

[7] Social networks, in general, tend to be friends and family (see also Lemos and Durkacz 2002 for further information). In this context, it would mean those who are able to provide emotional and practical support, including advice. It also means the need to have better relationships with family members. In a wider social setting, people who could be included in the social network would be colleagues through employment. Or, if the person is unemployed and uses a day centre, it could include other people who use day centres. Day centres are places where a homeless person can drop in for food, to use a shower, or the laundry facilities. It is a place where homeless people can go to during the day. Medical practitioners, such as a GP or dentist might hold sessions at a day centre, as might housing advisors, to give advice or to help find an emergency hostel vacancy.

that time. Ms Robinson sought advice from a law centre and approached the council again on 18 February 2005 where she saw the same housing officer. On this occasion, the housing officer telephoned Ms Robinson's mother, who confirmed that Ms Robinson could not return home. At that stage, Ms Robinson's mother was willing to engage in mediation. Ms Robinson saw a mediation officer for the first time on 4 March 2005 and agreed to mediation. At that time the mediation officer informed Ms Robinson that she would be contacting Ms Robinson's mother. On 9 March 2005, Ms Robinson's mother refused mediation.

On the following day, the Hammersmith and Fulham Council decided that Ms Robinson was not in priority need, and informed her of that decision by phone. The written decision was not sent to Ms Robinson until the following day. In the decision letter, the council informed Ms Robinson that she would be accommodated for a further fourteen days from the date of the decision. Ms Robinson's solicitor requested a review of the non-priority decision. The council's review decision confirmed that Ms Robinson was not in priority need for accommodation. However, the council would accommodate Ms Robinson up to and including her birthday on 14 March. In the same review decision, the council also informed Ms Robinson that the initial three-week placement into accommodation was agreed in order to engage the council's in-house mediation service. According to the judgement "as in the majority of cases of 16/17 year old homelessness the preferred resolution is reconciliation, it is the council policy not to proceed with such cases until mediation has been attempted" (paragraph 7).

In terms of the decision that the council had made, Walker LJ considered at paragraph 26 that the decision made on 10 March 2005 that Ms Robinson was not in priority need was not lawful. Walker LJ's reasoning was that the appellant was under eighteen at the time the decision was made (paragraph 26).[8]

On the question of whether the section 202 review should have been decided on the facts as at the date of the review, Walker LJ stated at paragraph 32[9]:

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[8] *www.bailii.org/cgi-bin/markup.cgi?doc=ew/cases/EWCA/Civ/2006/1122.html&query=Robinson+and+v+and+Hammersmith+and+Fulham+and+LBC+and+2006&method=boolean*.

[9] See reference in footnote 8 of this chapter.

In my view accordingly the decision on review would not have been lawful if it had simply stated that the appellant was now 18 and thus not in priority need. If the original decision was unlawful which for the reasons I have already given it was, the review decision maker should have so held and made a decision that would have restored to the appellant the rights she would have had if the decision had been awful.

Walker LJ went on to address the following questions. Is it legitimate to take the view that inquiries normally last 28 days and thus because a person will be aged eighteen before the end of that period, that person has no priority need? Walker LJ's response (paragraphs 34 and 35) to this question was that it is an illegitimate stance. The authority has a duty to make enquiries if it has been told by the homeless applicant that he or she cannot return home. The authority must provide accommodation in the meantime. The authority is not entitled to take the view that enquiries take an average amount of time, and that because that period is going to end after the homeless applicant's eighteenth birthday that "no duty of any kind arises."

In answer to the following question: is it legitimate to postpone a decision to avoid a duty? Walker LJ's comment was, "it seems to me that it is clear that the authority is not entitled to postpone the taking of a decision simply to avoid a duty" (paragraph 36). Walker LJ further reaffirmed that *ex p Sidhu* (1982) 2 HLR 45 (QBD) was the correct statement as to the law in relation to the fact that the local authority was not entitled to postpone the taking of a decision.[10]

In terms of the question: is it legitimate to persuade the parties to take up mediation before reaching a decision as to what duty is owed under section 184, all three of their lordships commented separately. Walker LJ at paragraph 41[11] stated that he believed it was not right for an authority to persuade a family into mediation while " a child is 17 and then use the time that the mediation would take to deprive the child of a right that it would have had without mediation."

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[10] In *Sidhu* Hodgson J stated, 'They have confused the making of enquiries into the factual situation pertaining at the time, when by statute they are required to make enquiries, with being satisfied that nothing will happen in the future to change the factual situation then pertaining."

[11] See reference in footnote 8 of this chapter.

Jonathan Parker LJ added at paragraph 42,[12]

> *It goes without saying that mediation is an enormously valuable tool in the resolution of problems of homelessness. However, the process of mediation is not to be confused with the duty of a local housing authority under section 184 of the Act to make inquiries as to what (if any) duty it owes to an applicant under Part 7 of the Act. In my judgment, the process of mediation is wholly independent of the section 184 inquiry process. The two processes may of course proceed in parallel; and if mediation is successful while the section 184 inquiry process is still on foot, then of course there will be no need for the latter process to continue any further. On the other hand, a local housing authority has, in my judgment, no power to defer making inquiries pursuant to section 184 on the ground that there is a pending mediation.*

Finally, Jacob LJ stated at paragraph 45,[13]

> *It also follows that the authority cannot wait for a mediation to take place. In addition to the reasons given by my Lords there is another reason why this is so. Section 179 provides that "every local housing authority shall secure that advice and information about homelessness, and the prevention of homelessness, is available free of charge." A near 18 old who came to the authority could obviously not be properly advised to mediate if the effect of mediation would be to delay the actual s.184 decision past the 18th birthday. Yet mediation from the outset is obviously highly desirable. The only way one can reconcile the mediation process with performance of the s.184 duty to make inquires and come to a decision is to hold that they are processes wholly independent of one another.*

Hence, the judgement of *Robinson* emphasises that local authorities may not use family mediation to justify a delay in homelessness enquiries or in the notification of the decision on a homeless application.

Section C. Homelessness Mediation

As mentioned in Chapter One of this study, mediators who had been involved in an early homelessness mediation scheme with a local authority were interviewed for this study. Although the mediators were interviewed a few years ago, the insight they have in relation to setting up and running a homelessness mediation scheme is still valuable for the purposes of this study. In terms of the mediators who were

[12] See reference in footnote 8 of this chapter.
[13] See footnote 8 of this chapter.

interviewed, two of the five mediators – Med3 and Med4 – were closely involved in a mediation project with the local authority, working with homeless young people.[14] My questions about the homelessness mediation scheme were mainly directed at Med4, while Med3 provided me with some of the background information to the scheme. The homelessness mediation scheme ran from October 2004 until March 2005 and lasted about five months. The aim of the project was to prevent homelessness among young people by the provision of mediation for young people who had been made homeless by their parents or carers following a breakdown in relationship.

However, even during the period leading up to the setting up of the project, there were already problems when the various local authority officers who were originally involved in the setting up and development of the mediation scheme left their jobs. Med3 and Med4 ended up working with different local authority officers each time a member of staff left his or her job, which delayed the setting up of the scheme. In addition, the project only operated for five months.[15]

After the mediation scheme was set up, Med3 and Med4 spent time with local authority staff in order to assist the staff to gain an understanding of the work that the mediators did, as well as to ensure that the local authority staff were aware which mediators were working on the scheme. The mediators also spent time with the local authority staff to ensure that they themselves gained an understanding of the various roles local authority staff played within the homelessness prevention and filtering team, as well as work that the housing department carried out. However, the mediators were working with busy local authority staff, with a high turnover of staff members, which meant that the mediators regularly had to introduce themselves to the local authority officers. The mediators felt it was important to ensure that local authority staff were aware of who they were because they wanted to ensure that referrals were made to the mediation scheme. However, even though the mediators worked hard at building strong working relationships, communication between the

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[14] See Section B, Chapter One for further information about the interviews carried out with the mediators.

[15] Med4 commented that eighteen months is a good length of time to test the running of a new project. This amount of time is reasonable because it ensures there is enough time for the project to become established before it is fully running.

local authority officers and mediators remained a problem. Med4 gave an example of the crucial issue in relation to referrals, and how the local authority staff did not inform her or her colleague of a change in council policy – a change which resulted in a different team making referrals to the mediation project.

Through working on the scheme, the mediators perceived that the local authority wanted a 'quick-fix solution' to youth homelessness, that mediation could be a tool, which could be used to assist young homeless people to return to their parental home. Once the young person engaged with the process of mediation, it was only possible to discuss the probability of repairing relationships with the young person's parents or carers, but not a return home.

Med4 further commented that when mediation is offered at the point the young person presents him or herself at the Homeless Persons Unit – the point at which local authority officers suggest mediation to the young person – substantial damage has already been done to the parent-child relationship.[16]

> *For me personally, it didn't matter at what point they [the young people] presented to the HPU. Often it was too late. They'd already had the mass of the damage done to their relationship with their parents. Or their parents have had the mass of damage done long before they got to the point when they were asked to leave the house. Or they decided that their parents weren't listening and they wanted to leave.*

Med4 observed that she could see obstacles being put in the young person's way whenever a young person tried to make a homeless application. The applicants were always asked to supply numerous documents first before a homelessness officer took any action. The gathering of documentary evidence would invariably prove difficult for young people who had experienced relationship breakdown with their parents or their carers. As Med4 informed me, "there are young people who have problems with communication with their parents already. And now you're asking them to be consistent."

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[16] In its recommendations, Relate suggested that earlier intervention might be needed, which might mean that the excluder is more willing to attend mediation sessions (Relate 2006:62 at paragraph 7.3.10).

During the life of the homelessness mediation project, the mediators worked with a total of twenty-three cases. However, in relation to the cases they worked on, Med4 remarked that, "we never got one young person and one person [the excluder] in the room at the same time who were prepared to do a mediation." In addition, some young people had difficulty with timekeeping, and some parents just did not want their children to be around them any longer. In addition, parents needed the mediator to reassure them that they would not be forced to take their children back into the home.

In terms of the outcome of the mediation, this was not so straightforward. Med4 observed that through ongoing discussion with her joint co-ordinator, Med3, they believed the best outcome of the mediation was to repair relationships,[17] "it is about trying to repair some of the damage that's been done to your relationship by giving you the ability to be in the same place and not have what you would normally call as a normal conversation screaming match. For you to learn how to communicate with each other and to be able to hear, listen and understand." Unsurprisingly, the mediators' perception of the nature of outcome that could be achieved by mediation did not match that of the local authority's vision, which appeared to be the 'quick fix' solution by which the young person could return home.

There were instances where the mediators could see that the young person was reluctant to attend mediation because that young person was more interested in being accommodated by the local authority. Med4 perceived that the problem of a shortage of social housing in the borough was an issue for parents who saw the need to help their children secure a council flat while it was still possible. The implementation of the *Homelessness Act 2002* meant that young people who were sixteen or seventeen years old would be in priority need for emergency accommodation assistance.

The mediators were clear that referrals to the mediation scheme were made at the wrong point, although Med4 was not certain at what point the best time would be.

[17] Some of the issues that could cause conflict in the family, which could lead the young person to leave home, include household rules, friends and relationships, money, education, work, dugs and alcohol.

However, the time at which the young person presented him or herself at the HPU was certainly not a good time because substantial damage to the parent-child relationship had already been done.

The mediators felt that the project would have benefited from running for a longer period of time. More time would have given the scheme an opportunity to focus on repairing relationships, rather than working on the young people to return home. Further, as a homelessness prevention tool, mediation might produce more beneficial results if other agencies that worked with children, as well as schools and colleges and other council departments, could make referrals to the homelessness mediation scheme.

The housing law practitioners, who were asked about their views on mediation, independently supported the views of the mediators. Interviewees in the former group were asked specifically to comment on how effective they considered the local authority mediation work to be in preventing homelessness. CW1 stated,

> *CW1: Most of the [local authority] mediation work is to do with sixteen and seventeen year-olds. As the NHAS social policy work found out, mediation is a big gatekeeping exercise that is disguised as homelessness prevention. It's homeless application prevention, not homelessness prevention, and it badly affects abused children.*
> *Me: You mention the case where local authorities still force young people to go through mediation even though clearly it's not suitable for them to go through mediation.*
> *CW1: And refuse to house in the meantime.*

CW2 also felt that the local authority mediation scheme was 'pretty ineffective' as a homelessness prevention tool, and considered, "it's just another stage of gatekeeping."

Finally, CW5 felt that "[mediation being used by local authorities is] putting off the inevitable, delaying accepting duty because it's a complete waste of money. Not if you can delay [accepting a housing duty] to aged eighteen. Very cynical view though! For it to work [the local authority] must invest a lot, involve social services, Youth Offending [Teams]."

The views of the mediators and housing law practitioners indicate that there are advantages and disadvantages of using mediation as a tool to prevent homelessness. We did not discuss the form of mediation that local authorities used in relation to potentially homeless people. Where local authorities have used mediation as a 'quick fix' solution, as a tool to enable a young homeless person to return home, and when mediation is only offered at crisis point, when the mass of damage has already been done to the parent-child relationship, it is difficult to achieve a successful outcome. A major concern, as articulated by the practitioners working with vulnerable homeless people at the time, has been that mediation would be used as a gatekeeping exercise. The aim would be to prevent homeless applications being taken rather than real homelessness prevention work being carried out. However, mediation, if used properly by the housing authority, could result in good work being done in repairing the parent or carer-child relationship, or even friend-friend relationship. It could also facilitate a supported move for the evictee, particularly if the communication channels are open between the parties. The following section will discuss how local authorities use mediation in relation to homeless and potentially homeless people.

Models of Homelessness Mediation Schemes Adopted by Local Authorities

An internet survey carried out in 2008 revealed that not all thirty-three of the London boroughs publicised the homelessness mediation scheme they delivered, if indeed they did.[18] It would appear that at least a total of fourteen councils offer mediation to potential homeless people.[19] Where it is clear the authority offered mediation, the majority of such schemes appeared to be aimed at anybody staying with their parents, guardians, relatives, and in some cases friends. The aim was to keep the potential homeless person in the accommodation they have been staying in. Out of the fourteen authorities offering mediation, eleven[20] of the councils offer mediation through an independent mediation scheme, whereas three boroughs, Hackney,

[18] In a sense, it does not matter so much whether all local authorities publicise whether they use mediation or not as a homelessness prevention tool, since there is enough information available from those authority websites that do advertise such information, to indicate the range of practice that is taking place.

[19] Barking and Dagenham, Bromley, Croydon, Ealing, Hackney, Harrow, Merton, Redbridge, Hammersmith and Fulham, Kensington and Chelsea, Islington, Lambeth, Richmond, and Westminster City Council.

[20] Barking and Dagenham, Bromley, Croydon, Ealing, Harrow, Merton, Redbridge, Hammersmith and Fulham, Islington, Kensington and Chelsea, and Lambeth.

Richmond and Westminster, appear to offer mediation via their own officers. Of the fourteen councils that offer mediation, two authorities, Bromley and Redbridge appeared only to offer mediation to sixteen and seventeen year-olds, while Croydon offers mediation to young people from the age of sixteen up to twenty-five year-olds.

The following models of 'homelessness mediation' existed as at July 2008 – see Table 8.1 below.[21]

Table 8.1

Model	London Borough
Landlord and Tenant mediation scheme.[22]	Brent
YP expected to attend independent mediation scheme first.	Bromley
Information from 2003 states that mediation is offered where appropriate. The One Stop Shop for YP is operated by the HD, SS and Croydon Association for the Young Single Homeless, is linked to Connexions and plays a key role in arranging mediation, accommodation and support for 16–19 year-olds but the service will be extended to cover 20–25 year-olds.	Croydon
Council staff will make referral to mediation scheme.	Ealing
Independent mediation scheme that reports back to the council, the outcome of mediation will be assessed as part of the HPA.	Harrow
Mediation is offered to homeless 16 and 17 year-olds where appropriate, to help them remain at home.	Redbridge
Housing Advice Team can offer mediation between disagreeing parties to try to address problems.	Richmond upon Thames
The Housing Options and Advice Teams are assisted by mediation workers, including a specialist worker for YP threatened with eviction from their family home.	Hammersmith and Fulham
Variations on following: A. Mediation service required to report back to LB of Islington on the outcome of the mediation. LBI has an expectation that the HPA will attend mediation because the outcome of the referral might influence the decision of the HPA. B. The housing advisor at K&C might suggest a referral to CALM (community	Islington Kensington and Chelsea Lambeth

[21] Relate provided homelessness mediation within the following London boroughs in its pilot mediation with a counsellor scheme: Brent, Ealing, Hammersmith and Fulham, Harrow, Hillingdon (Relate 2008:17 at paragraph 3.1.2).

[22] In general, Tenancy Relations Officers – who are also law enforcers in relation to certain aspects of Landlord and Tenant law affecting private rented sector tenants – would negotiate with private landlords on behalf of private rented sector occupiers.

mediation service) or the HPA might approach CALM him or herself. HPAs are encouraged to use CALM as a realistic option to solve their housing needs. The mediation process will form part of the council's HPA assessment. The mediator will feed back to the housing officer at K&C the outcome of the mediation. C. The service is available to anyone living in Lambeth council, where a household dispute may result in one party becoming homeless – this includes parents, relatives or friends who wish a person to leave. The outcome of the mediation will be fed back to the referring officer.	
If the HPA is living with his or her parents or friends, WCC will mediate on the HPA's behalf to try to keep him or her at home.	Westminster

Key

YP	Young people
HD	Housing Department
HPA	Homeless application
SS	Social Services

Analysis of the Models of Mediation Schemes Adopted by Local Authorities

As discussed earlier in this chapter, in Section B above, the DCLG gave general guidance only to local authorities in relation to the setting up of mediation schemes as a homelessness prevention tool. Relate published *A New Framework for Homelessness Prevention* in 2006. The original framework provided only basic information, and in June 2008, Relate published a further and more detailed guidance in relation to the setting up, delivering and managing a homelessness mediation service. Separate documents were produced for commissioning agencies and for service delivery agencies. Hence, a greater amount of information on the Relate homelessness prevention mediation model is available now for service commissioners as well as service providers.

The models of homelessness mediation schemes appearing in Table 8.1 above raises areas of concern which would benefit from discussion, particularly because these issues span across many of the homelessness mediation models adopted by local authorities. A primary concern is whether mediation is an appropriate process for councils to use as a homelessness mediation tool. The answer really depends upon

the manner in which authorities use mediation. There is support in the alternative dispute resolution (ADR) literature, and among mediators that I interviewed, for mediation to be used as a communication tool or to facilitate communication or repair relationships. Mediation used in such a manner might or might not result in a return home for the person being evicted. If mediation is to be used to repair relationships or to communicate, the timing is crucial as to when mediation becomes available. Although the DCLG expects local authorities to record the outcome of the direct and resultant benefit of the mediation in relation to homelessness prevention, it also appears that the DCLG can see the 'indirect' benefits of mediation. Thus, the DCLG is able to perceive the advantage in authorities recording the improvement in family relationships, even if the young person does not return home. An improvement in family relationships can help prevent homelessness in the longer term (DCLG 2006:73). An example of a longer-term benefit would include the family being available to the young person as a source of practical and other support. In its guidance documents, Relate also suggest the need to acknowledge 'interim outcomes' "or stepping stones in the prevention of homelessness, for example outcomes in relation to personal, family and social circumstances." Relate argues that the interim outcomes "need to be recognised as having a value in their own right and will also help Local Authorities to achieve their targets for reducing homelessness in the medium and longer term (Relate 2008b: 10)."[23]

[23] Relate report that the service it delivered during the pilot phase included the following list of fifteen outcomes: (1) Clients having an opportunity to explore and address the personal and family issues which have led to actual or threatened homelessness and to develop positive strategies to manage their short-term and longer term situation; (2) Direct contact, positive communication and constructive negotiation are re-established between partners, family members or friends; (3) A short-term arrangement is achieved to alleviate pressure on all parties; (4) Conflict is reduced or eliminated and disputes are resolved; (5) A mutually acceptable way forward is negotiated; (6) Family relationships and social networks are sustained and/ or strengthened; (7) Relationship transitions are managed with reduced conflict; (8) Sustainable family living arrangements are successfully negotiated, for example, agreement is reached that a person facing homelessness can, as appropriate: return or stay at home permanently; return or stay at home on a temporary basis to allow time for a planned move to independent living; stay with relatives or friends on a temporary basis to allow time for a planned move to independent living; move out but continue contact with and receive support from family members; (9) Clients are signposted/ referred to other relevant agencies; (10) Clients' sense of isolation is reduced; (11) Clients' confidence and self-esteem are enhanced; (12) Clients avoid homelessness; (13) Clients experiencing violence in the home are referred to the appropriate statutory agencies in order to move out with proper planning and support; (14) Clients avoid life on the streets and are therefore safer; (15) Clients' personal and life skills are enhanced, leading to better educational and work opportunities and improved economic stability.

However, an issue of concern is whether local authority officers give adequate enough consideration as to whether or not mediation is appropriate before making the referral for mediation. Whether local authority officers gave adequate enough consideration in relation to a referral to mediation was an issue that the Advice Services Alliance raised.[24] This was also the reason why Med3 and Med4, the mediators I interviewed, worked hard at getting to know local authority staff that might be making the referrals. They also ensured that these members of staff understood the nature of the mediation scheme. Unfortunately, referrals were not always forthcoming or inappropriate referrals were made, perhaps due to a genuine misunderstanding of what mediation is able to achieve, or to inadequate information and training for staff. Sometimes, the lack of time and pressure of other work could explain why an insufficient number of referrals or inappropriate referrals were made. Conversely, referrals by local authority staff to mediation schemes might be no more than conduct intended to contain homeless applications rather than to provide the applicant with genuine mediation assistance.

As already mentioned, the timing of access to mediation is crucial. Med4 informed me that, "there's so much that happens within a family in a very short space of time, and you can have some people that can tolerate things for years, and some people that are like, 'I'm not having it, and I'm out of the door'." Certainly, in relation to someone's housing situation, a referral to mediation at the point that person has become homeless is too late.[25] In addition, Marian Roberts discusses the disadvantages of someone undergoing mediation at too early a stage, which really is as much of a concern as someone who agrees to mediation when it is too late (Roberts 2008:179).

In terms of which types of problem mediation should not be used to resolve, Relate as well as the DCLG recognise that where the relationship breakdown is due to

[24] ASA is a national membership body, as well as umbrella group for independent advice services in the UK. ASA's members are national networks of not-for-profit organisations providing advice and assistance on law, access to services and related issues. See www.asauk.org.uk/go/MiscPage_52.html.

[25] Med4 comments in the earlier part of this section of the chapter:

> *For me personally, it didn't matter at what point they [the young people] presented to the HPU. Often it was too late. They'd already had the mass of the damage done to their relationship with their parents. Or their parents have had the mass of damage done long before they got to the point when they asked [the young person] to leave the house. Or they decided that their parents weren't listening and they wanted to leave.*

violence, a referral to mediation ought not to be made.[26] In any case, mediation alone, as a homelessness prevention tool, would not be sufficient to assist young people, particularly if the focus of the mediation is on communication or repairing the relationship between the young person and his or her parent or carer. In this situation, if the young person cannot return home, not only is a strong family and friends network important, an effective support network is necessary, which links the young person into various services, such as Connexions, accommodation providers, employment or education institutions. An organisation that could teach the young person life skills, is also valuable.[27] However, in general, mediation is certainly an appropriate mechanism to facilitate communication or to repair relationships, provided proper attention is given to the characteristics of mediation and the integrity of mediation is maintained. This will be discussed below.

In addition, the issue of whether an evictee does really attend mediation on a voluntarily basis is a further area of concern.[28] The authors of the DCLG Good Practice Evaluation report acknowledged this as a problem, but did not address the problem within the report (DCLG 2007b:81, at paragraph 5.10). It is necessary at this point to mention the problem of some of the mediation models intertwining the mediation process with the homelessness process, thereby incorporating the mediation process as part of the homelessness assessment. A number of local authorities appeared to have intertwined the processes, for example, Royal Borough

[26] MedLA, a former local authority officer, who provided mediation to young people at a London authority, confirmed that any young people who asked for help, and were experiencing violence and abuse at home were immediately accommodated in a hostel. An immediate referral was made to social services at the same time.

[27] The Advice Services Alliance believes that, homelessness mediation is intended to bring – usually – young people together with their family, to explore whether it is possible to negotiate a safe and sustainable return home. Mediation could be effective in improving communication and restoring relationships. However, homelessness mediation by itself would not be able to sustain the relationship that is in the process of being repaired, and ongoing support would be necessary for the family from a caseworker along with mediation before a safe return home for some young people is possible. See the ASA website at www.adrnow.org.uk as well as www.als.org.uk.

[28] Ada, a client, was not given an option whether or not to attend mediation. A local authority officer told her she had to attend mediation because she had been asked to leave her parent's home. MedLA informed me that should a young person approach her local authority with a request for accommodation, but did not want mediation the young person would be placed in a hostel. However, approximately 50 per cent of the young people would later ask for mediation in order to be able to return home. MedLA told me that usually, after a young person has lived in a hostel for a few weeks, he or she tended to miss home. The authority that MedLA worked for believed in giving young people a chance to live away from home so that the young person can gain some 'living experience.'

of Kensington and Chelsea and Islington Council.[29] The DCLG probably caused confusion in its 2006 Good Practice Guide by discussing the need for the mediator's judgement about the scope of reconciliation between the applicant and excluder when the mediation process is integrated with the homeless application process (DCLG 2006:67-68). The act of referring a homeless applicant to an independent mediation service is good practice at the point that that person needed emergency housing assistance. The timing might not work though for the applicant if the focus of the mediation was on repairing the relationship for him or her to return home. However, the case of *Robinson*, which was decided in 2006 explicitly states that a local authority is not entitled to postpone making a decision on a homeless application in order to avoid a duty. Hence, the mediation process ought to be run independently of the homeless application process, although both processes can run parallel to each other. Moreover, the homelessness officer should not wait for the outcome of the mediation process before making a decision on the homeless application, nor can an authority expect the young person to attend a mediation prior to making a homelessness application, if housing was an urgent need at the point the young person needed assistance form the authority. Bromley council would be acting unlawfully if this were the case. Further, Shelter advises the following,

> *Understand that it is not the business of mediators to make judgements about whether clients are homeless or not, or what kind of housing problem they may or may not have. Being non-judgemental is another core value in the mediation process and it should not be compromised. Mediators do not have the training or experience to undertake a housing assessment, just as housing officers do not have training or experience to deliver mediation work (Shelter 2004:15).*

Where mediators are asked to make judgements about whether a client is homeless or not, these mediators are clearly asked to take on an evaluative role, which, in itself, continues to cause disagreements among ADR commentators, as Section D below of this chapter shows.

[29] MedLA informed me that the local authority she worked for did not take homeless applications from 16 and 17 year-olds because the young person could not lawfully hold a tenancy. Instead, should a young person arrive at the council reception, he or she was directed to MedLA, who worked for a project specifically set up by the council to assist young people. MedLA would place the young person in a hostel and offer mediation at the same time.

Although the case of *Robinson* was not originally discussed in the DCLG's 2006 Good Practice Guide on Homelessness Prevention, the DCLG's 2008 Homelessness Prevention Evaluation paper did refer to *Robinson*. In the evaluation paper, the authors merely commented that in the light of the *Robinson* case, practices that inter-relate mediation and the homelessness process "must now be seen as of doubtful legality" (DCLG 2007b:83).

As discussed above, the referral of a homeless or potentially homeless applicant to an independent mediation service is good practice. However, a related issue that needs to be discussed is that of independent mediation organisations being funded by the local authority, and the expectations placed by the authorities on the mediation organisations. As we saw in Table 8.1 above, some local authorities expect the independent mediation schemes to report back to the council the outcome of the mediation in a manner that clearly identifies the client. The issue of local authorities intertwining the mediation process with the homeless application process has already been addressed earlier on. Nevertheless, a further issue that needs to be addressed is that of the independent mediation service reporting confidential information between the mediator and client to the council. This issue is linked to another concern, which is the fourth issue, that of the integrity or characteristics of mediation, which includes confidentiality.[30] Clearly, the independent mediation service reporting to the local authority the individual circumstances of a client is a problem. In its guidelines for service delivery agencies, Relate only mentions "it is recommended that practitioners must make the client aware at the start of the session that… a report [on the client, of his or her circumstances, state of family relationships and the likely impact of these relationships on the client's housing situation] is to be made and must gain client consent to each report back to housing officials. This ensures that the reporting process is clear and open" (Relate 2008c:19).

There are more serious considerations, however, which Marian Roberts addresses in relation to the key issue of the confidentiality of the relationship between the mediator and the parties (Roberts 2008:10 and Chapter 9; see also Roberts 2007:94,

[30] In Ada's case, a local authority officer provided the mediation. However, confidential information of an extremely sensitive nature about Ada was divulged to her father by another officer after the mediation. The disclosure of such information to her father caused Ada to fear for her own safety, and probably caused irreparable damage to the father-daughter relationship.

and McCrory 1988). Roberts suggests that it is a matter of the discretion of the parties to decide what information they impart to their solicitors or anybody else (Roberts 2008:187). Yet, it is worth bearing in mind that "the court will be very reluctant to allow confidential exchanges between the parties to be used as evidence in any subsequent proceedings" (Roberts 2008:187). Hence, following court practice, particularly if a homeless application decision is challenged, which could lead to litigation, local authorities should not expect independent mediation organisations to divulge information of a more personal nature in relation to the mediation process. Alternatively, independent mediation organisations should not allow themselves to fall into that situation, and thereby contravene an ethical and professional code by breaching confidentiality with the client.

In its guidance for commissioning agencies on the setting up, delivering and managing the homelessness mediation service, Relate suggests that,

> *Wherever relevant and with the client's knowledge and consent, it is expected that the SDA [service delivery agency] will report back factual information to the commissioning agency at the end of the initial appointment. For the service to be effective, and to encourage the client to speak openly, practitioners should make the client aware at the start of the session that such a report is to be made and will also seek the client's consent to each report* (Relate 2008b: 15).[31]

A question that immediately comes to mind is whether knowing that information from the mediation session will be passed to the council, would the client be willing to talk openly to the mediator? While the issue of the mediation organisation reporting to the local authority of the client's personal circumstances could fall within the demands of the service level agreement, and therefore be seen as a practical issue, there are ethical considerations. First, it is clearly wrong, if the information reported to the local authority were to be used as part of the homeless application – see the case of *Robinson*, as discussed above. Relate could be seen to have caused confusion and be encouraging the interconnecting of the mediation and homeless application by suggesting that "referrals to the 'therapeutic mediation' service can help housing officers make assessments given a broader base of more

[31] See also Relate 2008c:19.

information and understanding of the client's circumstances" (Relate 2008b: 14, section 4.2).

Other than the potential unlawful use of the information, should mediation organisations be expected to divulge information of a private nature that ought to remain confidential between the mediator and client? It is worth bearing in mind Marian Roberts' comments about confidentiality,

> *integral to the relationship between the mediator and the parties... one of the four fundamental and universal characteristics of mediation. It is the cornerstone of the relationship of trust that must exist between the mediator and the parties, and of the free and frank disclosure that is necessary if obstacles to settlement are to be overcome* (1997:133).

This raises a fifth issue, in relation to the integrity of mediation and the model where council officers mediate, such as the practice of Westminster City Council.[32] Confidentiality, as discussed above is one of the four core principles of mediation – both ethical and professional. The other three core principles of mediation are the impartiality of the mediator, and the voluntary nature of the process. The mediator

[32] Westminster City Council's 2003–2008 Homelessness Strategy (at page 13) contained an aim of preventing or delaying homelessness by mediation in 100 cases. In the strategy, the council stated that it would, where appropriate, offer independent mediation to appropriate parties. The council did, indeed, work with Alone in London Service (AILS) on a pilot basis for six months, however, upon review after six months, Westminster Council decided that the scheme did not produce the results it was looking for, i.e. the delay or prevention of more cases of homelessness than it did in reality, and the partnership with AILS did not continue – see a Report from the Director of Social and Community Services and Chief of Housing to the Cabinet Member for Housing and Social Services dated January 2004 (at www.westminster.gov.uk). Instead, the council decided to provide itself – through a dedicated young persons support team based in the housing options service – 'crisis mediation' to 16 and 17 year-olds being evicted from the family home (Section 4.33 of a Report dated 4 May 2005, to the Cabinet for Housing from the Director of Housing entitled, the Supply and Allocation of Social Housing and Low Cost Home Ownership 2005/06, available at www.westminster.gov.uk). At that time, Westminster was exploring the possibility of providing longer-term mediation and counselling, to be 'bought in' when required. In another report on the same subject matter for the financial year 2004/05, the Director of Social and Community Services, along with the Chief Housing Officer, provided information to the Cabinet Member for Social Services and Housing of how Westminster Council worked in partnership with AILS. The mediation was provided as an integral part of the homelessness application process. Any young people evicted from the family home would not be offered temporary accommodation unless the young person was in fear of violence or abuse at home. The young person was offered an interview within three days of initially presenting to the council as homeless. AILS would attempt mediation with the young person and would make recommendations to the council about whether mediation would or would not be successful. Interestingly, one of the findings of the council's review of the partnership mediation service was that AILS found it difficult on a number of occasions to prevent homelessness. Cultural difficulties that AILS found difficult to overcome in Westminster was cited as an issue, but not expanded upon, apart from an explanation that the type of mediation that AILS practised was "not particularly geared up to prevent homelessness when someone has already been evicted."

does not have power to compel participation in the process, nor impose an agreement on the parties. And finally the procedural flexibility available to the mediator (see Roberts 2007:94).[33] Should mediation be carried out by an officer while visiting the home or former home of the homeless applicant, and the officer succeeds in delaying homelessness, the first question that needs to be asked is whether mediation has really been carried out? Not so, in accordance with the core principles of mediation outlined above. The officer might call the process mediation, but the householder meeting with the officer that one time would have felt pressure to agree to the applicant staying longer. In addition, the local authority officer clearly has a vested interest in the outcome of the 'mediation.'

This now brings us to the problem of the situation where only one party attends mediation. While the DCLG might be aware of this problem, its Good Practice Guide discusses the ideal situation of family mediation, which should involve the young person and his or her parent or 'other host householder' (DCLG 2006:68). Of concern is that many local authority procedures allow for 'mediation' to take place with only one party, and of greater concern is that mediators are willing to work with only one of the estranged parties (see DCLG 2006:68). Should a model of mediation, which includes an initial session – where initial information is gathered from the applicant before the excluder is interviewed prior to the start of mediation – and the evictee attends that one session, this is understandable. However, time spent with the applicant in the initial session to "developing problem-solving strategies which may preclude the need for the young person to leave home" or "removes the possibility that one of the parties can effectively 'sabotage' the process by refusing to participate" is of concern (see DCLG 2006:68-69). The first situation is clearly not mediation, but, as the situation suggests, 'problem-solving' to prevent the young person becoming homeless. The second scenario outlined, either demonstrates the outcome of a situation where mediation is not the most appropriate mechanism for resolving that particular problem or that more work needs to be done to enable both parties to understand the process of mediation, what mediation could achieve, as well as the voluntary nature of attending mediation since the parties will be agreeing that

[33] See also, Gulliver 1979:212, Roberts and Palmer 2005:154 for a discussion of the 'neutrality' expected of a mediator, and Advice Services Alliance at www.adrnow.org.uk.

they vest power in the mediator to assist them to resolve their difficulty, and to arrive at a joint agreement.

The then ODPM funded Relate to run a pilot mediation with a counsellor scheme from 2006 until 2008 (Relate 2008a:13).[34] In its evaluation paper, Relate informed in its Preamble that it became aware that traditional mediation was not always the most appropriate process for people that presented with their problems at Relate. In terms of people with a homelessness problem, Relate report that the evictee tended to come to sessions alone, and the evictor, most often the parent, was not prepared or able to attend mediation sessions. Relate added that some housing departments sought information through the practitioner, which would give them insight into whether an applicant was intentionally homeless, and this created professional issues for the practitioner who was working to an ethical standard of confidentiality. Relate does not distinguish the homelessness team from the housing allocations (non-emergency housing) team. In addition, Relate saw many people who had presented with "long term patterns of family or relationship breakdown. Accounts of estrangement, isolation and despair were often felt beyond the traditional scope of mediation" (Relate 2008:12). Hence, Relate considered that a therapeutic element being offered in conjunction with mediation would be a more suitable model for homeless clients who presented at the service with complex familial and relational cases. This led to the development of 'therapeutic mediation' in the housing context.

However, a question that arises is why Relate did not consider offering counsellor by a qualified counsellor to clients, if appropriate, at the point when mediation reached an impasse, rather than combining the mediation process the therapy? Marian Roberts warns of the dangers in the adoption by the mediator of family therapy techniques, "where family therapy approaches are adopted in mediation practice, there is a danger that covert attempts to manipulate the perceptions and preferences

[34] MedLA informed me that the council she worked for automatically referred young people to Relate while MedLA provided mediation as well. However, when MedLA's manager compared statistics in terms of the mediation achieving a successful outcome of the young person returning home, it was discovered that the council's in-house mediation service was more effective. Relate had a very low success rate, and the authority ended up housing the young people. MedLA is not a trained mediator although she has had some training as a counsellor, and had worked as a volunteer counsellor at a national counselling organisation. MedLA believes that her success rate as a mediator can be explained by the fact that she is a mother herself, and has insight into the problems the parents and young people are experiencing.

of the parties will occur" (see Roberts 2008:172). Yet, Relate justifies the use of therapeutic mediation because, "homelessness cases which were being referred into the service offered by Relate were relational in nature, and often accompanied by chronic and long-standing patterns of family breakdown" (Relate 2008a:20). In addition, particularly because only the evictee was attending mediation, and "Practitioners [wanted] a greater sense of purpose and focus in the initial (and often only) session."

A simple rebuttal to Relates' argument is that mediation and therapeutic interventions have different goals, rational, process and method, and theoretical assumptions (see Roberts 2008:20). While mediation is a dispute resolution process, therapeutic interventions can range from a few sessions to years of therapy. Hence, a client or evictee with issues that require therapeutic treatment would be put into a disadvantageous position if the mediation organisation is under pressure to deliver certain targets to the local authority in relation to the number of cases of homelessness prevention made, and such a client is only given "task-centred intervention of practical advice-giving and guidance," which could last between one to three sessions, when he or she could really have benefited from a more extended intervention of counselling lasting approximately six to ten sessions, or psychotherapy which might last up to three years.[35]

Further, the fact that only one party attends the mediation session could indicate that mediation is not the best dispute process to resolve that particular problem at that particular point in time. The simple explanation could be that as Med4 pointed out when interviewed, the timing when the referral to mediation was made was at the point when "the mass of damage" to the parent-child relationship had already been done. It might well be that therapeutic intervention could be incorporated into initial sessions, and as a result, could assist both parties to prepare for mediation. Practitioners and clients could then gain a greater sense of purpose and focus in these early sessions. However, mediation and therapeutic intervention should remain separate processes. In addition, the manner in which the mediation process is explained to the parties is important. There might be a hidden agenda, as Med4

[35] See Roberts 2008:20-27 for a more detailed discussion.

suggested, in terms of both the parent and young person depending upon the local authority in relation to the young person's longer-term housing needs, which needed to be addressed immediately, and mediation could have been perceived by both parties as an obstacle to gaining that type of assistance from the local authority. Or simply that both parties felt coerced in taking part in the mediation, in which case, the party with the most to lose by not attending mediation – the evictee – would attend alone. Perhaps a better explanation of mediation and how the dispute process could assist the two parties could result in improved attendance.

Section D. Analysis and Recommendations

In the true spirit of homelessness prevention, provided the mediation process is not abused, mediation could have a positive impact, as a homelessness prevention tool, on people's lives whose personal circumstances contain the danger of homelessness. As a start though, the DCLG should give guidance on ensuring that mediation is maintained as a separate process from the homeless application, and not allow outcomes of mediation to be considered as part of the application process. Both processes need to remain distinct from each other. Indeed, the case of *Robinson* has determined that this should be so. In addition, the DCLG should give guidance to local authorities to the effect that mediation as a homelessness prevention tool ought to be used to assist with the longer-term housing needs of homeless people in terms of strengthening their support network. The support network of individuals in society would at the same time lead to the development of a more cohesive society and ultimately save public money. There are four recommendations this study makes to strengthen the use of mediation as a homelessness prevention tool, thereby enhancing access to housing justice for the vulnerable homeless in London.

First, the authors of the *Homelessness Prevention Good Practice Guide* (DCLG 2006:69) mention contact with one party removes the possibility that one of the parties can effectively 'sabotage' the process by refusing to participate. In addition, the Good Practice Guide refers to the dictionary meaning of mediation, as involving "a process of intervention (by an intermediate agency) between parties in a dispute to produce agreement or reconciliation" (DCLG 2006:64). Additionally, the DCLG Evaluation report also highlights the limited literature focusing specifically on

homelessness mediation, to which I agree. Yet, neither of the two reports considers the rich source of information, which can usefully be referred to within the ADR literature, particularly in relation to mediation and more specifically, family mediation. If reference had been made to the ADR literature on mediation, then a greater understanding would have been gained in relation to the mediation process.

In terms of improving the initial intake process to assess the suitability of parties for mediation, an in-depth interview carried out by representatives of the independent community mediation organisation, if not already done so, with the respective parties individually, could provide information as to whether mediation is the most suitable dispute process to be applied to the dispute between the evictor and evictee (see Roberts 2008:151). Information gathered for this study indicates that timing, in terms of when mediation is offered, is important. The data considered for this dissertation appears to indicate that parties might not attend mediation sessions, particularly if the evictor understands the purpose of the mediation is to allow the evictee to return home on a short-term basis as an outcome of the mediation. There might well be a greater uptake of mediation from both the evictor as well as the evictee if the focus of the mediation is only on facilitating communication or in repairing the relationship. This means that although mediation could still be used as a homelessness prevention tool, the aim of mediation would be to assist the evictee on his or her medium to longer-term housing needs.

In encouraging the evictee to attend mediation, local authorities should not exert pressure on the evictee by making threats of withdrawing the offer of emergency housing assistance. As suggested earlier in this section, a short-term session of counselling or even another form of support, which would enable both parties to understand the benefits of, and prepare the parties for mediation could encourage voluntary participation.

Once the parties are engaged in the genuinely facilitative mediation process itself, the parties would be able to benefit from the assistance of a mediator to exchange information, to gain an understanding of each other's views, to shift the focus from the past to the future, and to find a creative solution to the problems experienced by the parties so far.

Time spent with the mediator, jointly as well as separately (in caucuses), is essential. At the joint meetings, the mediator can explain and clarify the reasons for participating in the mediation sessions as well as assist the parties to gain a clear understanding of the issues. While the individual sessions with the mediator would enable the parties individually to tell the mediator on his or her own of any concerns about attending mediation, to give background information, and to inform the mediator what he or she wants to achieve from the mediation (see Roberts 2008:151-158). By telling their story to the mediator – an independent person – each party is able to gain cathartic relief. The mediator, by summarising the issues, objectives and feelings of each party in the joint meeting, could give each party some new information, and would certainly enable each party to gain a better understanding of the other party's position: "it makes sense… to address the summary to the *same* person whose account it is. In this way, the validity of each person's viewpoint is affirmed, whatever the difference" (Roberts 2008:154).

Secondly, the assumption that some local authorities hold, as a starting point, that there is potential collusion between the host householder and young person, and therefore the potential for "collusive collaboration between households and young people" – rephrased as a service objective – is not helpful (see DCLG 2007b:82). Surely, the mediation service, in opening communication between the parties will gain a greater insight into the problems between the parties by arriving with an open mind at the start of the process? It is like implanting the mediator with a thought in advance and encouraging the mediation to be biased rather than to approach the mediation session with an open mind to genuinely facilitate communication between the parties, so that a greater understanding of each other's views can be gained. In this respect, the personal qualities of the mediator are important if he or she is to act as a catalyst and facilitator assisting the parties to arrive at an agreement.

The mediator needs to remain impartial, in the sense that he or she must not take the side of one party over the other. At the same time, the mediator ought to be able to lead the parties towards a mutual agreement by creating an environment to enable this to happen. By encouraging open communication and mutual respect, the mediator can assist the parties to reach an agreement. Marian Roberts has produced a

list of preferred qualities expected of a mediator, which, as an example, include (2007:43 and 2008:141):

- originality of ideas
- sense of appropriate humour
- ability to act unobtrusively
- the mediator as 'one of us
- the mediator as respected authority – having personal prestige
- ability to understand quickly the complexities of a dispute
- accumulated knowledge
- control over feelings
- attitudes towards and persistent and patient effort invested in the work of mediating

There is much debate within the ADR literature about whether mediators ought to evaluate. Riskin, in his 1996 article produced a grid, which was meant to assist parties to choose a mediator with appropriate qualities that could assist in reaching an agreement by facilitating or evaluating. The grid garnered much criticism, and arguments about why mediator should not evaluate.[36] Lela Love (1997) offers a definition of an 'evaluative' mediator, who "gives advice, makes assessments, states opinions – including opinions on the likely court outcome, proposes a fair or workable resolution to an issue or the dispute, or presses the parties to accept a particular resolution" (Love 1997:938). It is clear that where authorities have asked community mediators to make a judgement about whether a client is homeless or not, these mediators have been asked to provide an evaluation. I am of the opinion that in the context of mediation being used as a homelessness prevention tool, facilitative, rather than evaluative mediation would be much more appropriate.

Thirdly, the manner in which mediation organisations ought to work with local authorities is an issue in terms of information that mediation organisations are expected to report to local authorities. For example, reporting the outcome of mediation in relation to individuals to the local authority, and reporting to local authority to inform the council's own decision as to whether the young person was statutorily homeless (DCLG 2007b:85 at paragraph 5.2.7). This could be an issue in relation to terms agreed within service level agreements. However, the case of *Robinson* should prevent such practices from continuing (DCLG 2007b:88).

[36] Leonard Riskin's original article is entitled, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed"(1996). Commentators who criticised the grid include, for example, Stulberg (1997); Love (1997); Kovach and Love (1998); Gutherie (2001); Love and Cooley (2005); Kenneth Roberts (2005). Riskin (2003) wrote a further article updating his original grid.

Moreover, monitoring the performance of mediation organisations in order to assess the effectiveness of service is fine in general when information is anonymised.

Fourthly, it must be acknowledged that provision of mediation service ***is*** homelessness prevention work, and hence worth pursuing. However, it might not work in the way the government or local authorities envisage, particularly if carried out properly, and within the integrity and values of mediation. Mediation has great potential to prevent homelessness, but should not be used to prevent immediate homelessness. Mediation can contribute to preventing homelessness for people who have medium to longer-term housing needs. A greater recognition is needed of the more 'indirect' benefits of mediation.[37]

Lemos and Crane, in their 2001 research for the then Scottish Homes were clear about what homelessness mediation might or might not be able to achieve,

> *For many people at risk of homelessness mediation will have no role to play, either because their relationships with their family are not susceptible to repair and they are not willing therefore to co-operate with mediation, or because family or relationship breakdown was not the only reason they became homeless. So the number of cases in which mediation would be relevant would be limited, and even in those cases, many people who wish to restore friendly relationships with their family may not want to move back. In fact, they may regard moving back as potentially destructive of the new found but probably still fragile harmony. The purpose of the mediation would be to strengthen social networks, not necessarily to get people to go back home.* (Lemos and Crane 2001:22)

Lemos and Crane did not discuss the potential benefits of mediation as a communication tool. Moreover, mediation needs to be offered well before a homeless application is made because if mediation fails, the young person would need to make a homeless application anyway. If mediation were to be offered to young people at secondary school, and young people thereby better understand the mediatory process, this could prevent disputes between parents and young people from escalating into greater misunderstanding, and a breakdown in communication, leading eventually to homelessness for the young person.

[37] See Footnote 23 above for a list of the 'indirect' benefits of mediation.

Section E. Conclusion

We are living in an eroding welfare state, and the main reasons for this change in direction have been both financial and political.[38] Increasingly, the role of local authorities continues to change from that of the provider of emergency housing assistance to statutory homeless to that of assisting people in finding a solution to their housing problems through the 'homelessness prevention' approach. The changing role of the local authority has had an impact on the most vulnerable people in society who would hope for the authority to look after their basic housing needs. The reality is that among the vulnerable people that need housing assistance, there is now a division into those that would be assisted to help themselves, and those that will be assisted by the state.

To a certain extent, it could be argued that the extension of the use of mediation by local authorities to homeless applicants as a homelessness prevention tool, wherever mediation is being used, is evidence of the authority playing an assisting role. Superficially, mediation would appear to be able to enable greater access to justice for the vulnerable homeless. However, the shift to homelessness prevention ethos in central government policy, which is also manifested in the nature of targets the government has set for local housing authorities to decrease the number of people being assisted by the statutory homelessness process, has also encouraged the misuse of mediation by local authority staff. The court has given guidance on the timing of when mediation is to be offered and when a homeless application ought to be taken, and a decision on the homeless application is made, in the case *Robinson* in 2006. Yet, the existence of legal guidance does not guarantee that councils will immediately change such bad practice. Unfortunately, individual challenges by homeless applicants, usually with the assistance of a housing law practitioner, continue to be necessary. It does not help that the DCLG's guidance in its 2006 *Homelessness Prevention: Good Practice Guide* was not more prescriptive in recommending good practice in relation to homelessness mediation, which it calls 'family mediation.' However, the lack of firm guidance, together with the targets set

[38] See for example King (2007), Somerville and Sprigings (2005), Carmichael and Midwinter (2003), Jones and Stewart (2003).

for authorities to contain homeless applications could well be construed as the government seeing mediation as a 'quick fix' solution to applicants. The lack of guidance from central government also enables authorities to find ways of gatekeeping homeless applications acceptances, something that the housing law practitioners pointed out was already happening at the time when I interviewed them in 2005. In which case, mediation as a 'quick fix' solution does not enable greater access to justice for the vulnerable homeless in London. However, should the thinking at central government level change, and this could mean an adjustment of the nature of targets set for local authorities in relation to the containment of homeless applications, then as a homelessness prevention tool, mediation could assist people with their medium to longer-term housing needs.

The form of mediation offered by many local authorities in London could certainly be improved upon, and in most instances, might well be unrecognisable as mediation in its classical sense. Hence, to prevent an abuse in the use of the process, authorities need to be given an opportunity to explore the possibility of offering mediation in its more classical, genuinely facilitative sense, paying proper attention to the characteristics and principles of the process. Authorities should also be guided by the DCLG to respect the relevant professional ethical codes governing mediators. In doing so, authorities would be genuinely addressing the needs of the vulnerable homeless and at the same time opening a window, at the start of the homeless application route, for this group of people to access justice. Bearing in mind that the majority of people who make homeless applications are not successful, and many of these unsuccessful applicants do not go on to challenge an unsatisfactory decision, the least the government can do is to ensure that genuine mediation is carried out to facilitate communication between parties where homelessness could be an issue. Even if mediation does not resolve the relationship problem with the homeless applicant and his or her evictee at the time, an incremental improvement in the relationship would be beneficial. Mediation could well be an effective homelessness prevention tool for a homeless person in relation to his or her medium to longer-term housing needs. Moreover, mediation should not be imposed on any party, and only appropriate cases should be referred for mediation. The argument about authorities making available mediation in the classical facilitative sense to potentially homeless people would surely strengthen a wider area of the government's work in building a

cohesive community. The communities and neighbourhoods section on the DCLG's website states that "the DCLG is working to help people and local organisations create strong, attractive and economically thriving communities and neighbourhoods. [The DCLG's] aim is to ensure that they [people and local organisations] are given all the support they need to make the best of communities and overcome their own difficulties."

While this chapter focused on the local authorities' use of mediation in relation to homeless applicants, the following chapter will discuss ways forward for homeless applicants who wish to challenge decisions made by the local authority. This discussion takes place in the context of the Woolf amendments to the civil justice system, with litigation being used as a last resort for the disputing parties.

Chapter Nine
Alternative Processes and Ways Forward for Homeless Applicants Who Need Access to Justice

A. Introduction

The Woolf civil justice reforms, which began with the changes to the Civil Procedure Rules in 1998, continue to change the way parties manage their disputes within the English civil justice system. The introduction and phasing in of tools, since the reforms, to aid 'settlement' have included the mandatory use of Pre-Action Protocols[1] with the aim of preventing disputes from escalating to litigation. Even after court action has been initiated, the fact that the judges' role now includes the duty to manage cases (Civil Procedure Rule 3.1) means that judges will assist parties to settle their dispute wherever possible. The magnitude of the pressure used by judges in aiding settlement has included the punishment of parties by the awarding of costs against the party that had unreasonably refused to resolve the dispute by alternative dispute resolution (ADR), which most judges mean mediation – see *Cowley* below. However, not only are private parties with disputes expected to settle, public bodies who are in dispute with private individuals or parties are also expected to settle when appropriate.

In 2001, the then Lord Chancellor, Lord Irvine pledged – known as the 2001 Government Pledge – that government departments and agencies are to take practical steps, using ADR procedures to settle disputes where appropriate. This pledge is monitored on an annual basis. The government's advocacy in the use of ADR to settle disputes, where appropriate, should government departments and agencies be involved, is disconcerting when power imbalance is very much an issue. Where the dispute is between local authorities and homeless applicants, there is clearly a power imbalance between the two parties – a public body and a vulnerable homeless person

[1] Pre-Action Protocols outline the steps parties ought to take in seeking information from and to provide information to each other about a potential legal claim. The Practice Direction outlines the objectives of the pre-action protocols (1) to encourage the fair exchange of early and full information about potential legal claims; (2) to enable parties to avoid litigation by agreeing settlement of the claim before commencement of proceedings; (3) to support the efficient management of proceedings where litigation cannot be avoided. The Pre-Action Protocol for Judicial review (at paragraph 3.1) includes the directive that parties should consider whether some form of ADR procedure could be more suitable than litigation. Parties are reminded that courts consider litigation to be a last resort, "and that claims should not be issued prematurely when a settlement is still actively explored."

who might or might not have staying power to resolve the dispute. We have already considered how homelessness and other problems impacted upon people's lives (Chapter Two), and discussed the research findings related to the access to justice problems that vulnerable homeless applicants experienced (Chapters Five and Six). Hence, there is evidence, within this study, to suggest that ADR might not be an appropriate forum within which to resolve homelessness decision disputes with local authorities when power imbalance is a factor that needs to be taken into account. This study suggests that 'appropriateness' or matching the "forum to the fuss" (Sander and Rozdeiczer 2006) is an evaluation that ought to be taken into account when assessing dispute processing against the dispute to be resolved. We also advocate a shift in thinking within the English civil justice system, in relation to dispute processing in terms of not viewing court adjudication as a last resort, but as a process that should be on equal footing with other dispute processes.

We observed the government's enthusiasm in using ADR to settle disputes, with an interest in resolving disputes in a manner that is proportionate to the dispute itself (Chapter Seven).[2] The White Paper, *Transforming Public Services: Complaints, Redress and Tribunals* (July 2004)[3] of the then Department for Constitutional Affairs (DCA) preceded the Law Commission's (Commission) series of consultation papers on *Housing: Proportionate Resolution*. The Commission examined the nature of housing disputes and how such disputes could be resolved proportionately. The Commission itself was interested in assessing whether housing disputes that could not be settled would best be adjudicated in a court or tribunal that specialised in housing. Although the Commission's Housing: Proportionate Dispute Resolution work focused on housing rather than homelessness disputes, in its consultation process it did touch upon the homelessness statutory appeal process. Hence, it is timely for this chapter to explore the question of what would be the most appropriate,

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[2] See Chapter Seven for a discussion of the then DCA's 2004 White Paper and the Law Commission's various consultation papers.

[3] Genn is of the opinion that, "the judicial enthusiasm for ADR in England and Wales does not stem principally from the need to clear court lists, since the rate of issue of fresh proceedings has been decreasing rather than increasing over recent years." Instead, she believes that:

> *The interest in ADR is apparently altruistic. It is the desire to spare litigants the cost, delay, and trauma involved in proceeding to trial or continuing with litigation up to the point of a late pre-trial settlement. Although the government might be interested in the cost-savings potential of ADR for the Community Legal Service Fund budget and the court service bill, this was not the prime motivation o the judiciary (Genn 2002:102).*

meaningful, and practical solution for homeless applicants who need access to justice in resolving their homelessness decision disputes. In exploring such a question, it is useful to be aware of the court's approach and attitude in the use of ADR by the litigating parties (which includes public bodies), in resolving their disputes. Thus, Section B of this chapter begins with a discussion of the recent and significant case law in such an area. An analysis of the issue of power imbalance then follows in Section C. Section D makes recommendations in terms of the manner in which homeless applicants could have greater access to housing justice within the context of the current civil justice landscape. Section E concludes this chapter.

B. Use of Alternative Processes and Disputes Involving Public Bodies

The overriding objective of the Civil Procedural Rules (CPR) is to deal with a case justly, as far as practicable, and includes the following aims: (a) ensuring that the parties are on an equal footing; (b) that expenses are saved; (c) and that the case is dealt with in ways which are proportionate to (i) the amount of money involved; (ii) the importance of the case; (iii) the complexity of the issues; and (iv) the financial position of each party. In addition, the court must (d) ensure that the case is dealt with expeditiously and fairly; and that (e) the court allots to the case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases (CPR 1.1(2)). The court also has a duty to manage cases, and must further the overriding objective by actively managing cases (CPR 1.4 (1)). Active case management includes the encouragement of the parties in the use of an ADR procedure if the court considers that appropriate and facilitating the use of such procedure (CPR 1.4 (2)(e)). The Rules provide a definition of 'ADR' as being a "collective description of methods of resolving disputes otherwise than through the normal trial process."

Since the Woolf civil justice reforms, parties in dispute are expected to follow the Pre-Action Protocol for Judicial Review before initiating proceedings in court for judicial review. As already mentioned in the introductory section of this chapter, paragraph 3.1 of the Pre-Action Protocol for Judicial Review instructs that "parties should consider whether some form of ADR procedure would be more suitable than

litigation, and if so, endeavour to agree which form to adopt." Parties are reminded in that paragraph that, "the courts take the view that litigation should be a last resort."

Specifically in relation to the resolution of disputes by public bodies, the 2001 Government Pledge by the then Lord Chancellor, Lord Irvine needs to be taken into account. At the time he made the Government Pledge, Lord Irvine accepted that there might be cases that would not be suitable for settlement through ADR. Lord Irvine gave some examples, which included cases involving intentional wrongdoing, abuse of power, public law, human rights, and vexatious litigants. In addition, there would also be disputes where, for example, a legal precedent is needed to clarify the law, or where it would be contrary to the public interest to settle. However, it is worth noting, at this point, that in the case of *Halsey*, mentioned below, Dyson LJ raises an important issue in relation to the Government ADR Pledge. The argument that Dyson LJ makes is that "it is difficult to see in what circumstances it would be right to give great weight to the ADR pledge" since the pledge was not more than an undertaking that ADR would be used in all suitable cases (Paragraph 35). Hence, with this in mind, we now need to assess how courts over the recent years have decided in what circumstances it would be appropriate to settle cases.

Change in Position in Terms of Courts Use of ADR

The courts, in the past, have been strict in treating the use of ADR by parties to resolve their dispute as a mandatory requirement – a condition that had to be imposed on the parties. This position can be illustrated by *Cowl and Ors v Plymouth City Council* [2001] EWCA Civ 1935, where judges were firm that litigation ought to be avoided as far as possible.[4] In *Cowl*, Plymouth City Council had decided to close down a residential care home for the elderly, and Mr Cowley, and other residents were unhappy with the decision. The claimants, Frank Cowl and others, had failed to gain permission from the High Court to judicially review the council's decision-making process in relation to he closure of the home. The claimants then

[4] A question arises as to whether mediation ought to have been forced on the parties in *Cowl*, particularly because one of the parties was a group of frail elderly people living in a home. One of the claimants dies during the course of proceedings. In addition, there were legal issues that required court adjudication (see Boyron 2006:336–337).

appealed against this refusal, and the case was heard by Lord Woolf CJ (as he then was), Mummery LJ and Buxton LJ, in the Court of Appeal.

In his judgment on behalf of the other Court of Appeal judges, Lord Woolf CJ, in *Cowl*, started by focusing on the fact that, "even in disputes between public authorities and the members of public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever possible" (Paragraph 1).

Lord Woolf CJ added that,

> *particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress* (Paragraph 1).

In paragraphs 2 and 3, Lord Woolf CJ suggested that the courts ought to "make appropriate use of their ample powers under the CPR to ensure that the parties try to resolve their dispute with the minimum involvement of the courts." Co-operation would be needed from "the legal aid authorities" in this approach, and the court could take its own initiative to hold an inter partes hearing which would give the parties an opportunity to explain what steps they have taken to resolve the dispute without the involvement of the courts. At paragraph 3, Lord Woolf CJ stated,

> *In particular the parties should be asked why a complaints procedure or some other form of ADR has not been used or adapted to resolve or reduce the issues which are in dispute. If litigation is necessary the courts should deter the parties from adopting an unnecessary confrontational approach to the litigation. If this had happened in this case many thousands of pounds in costs could have been saved and considerable stress to the parties could have been avoided.*

Lord Woolf CJ criticized the parties on arguing about the past instead of focusing on the future. Costs was an issue that appeared to the foremost in his mind when he commented that the parties "should have been able to come to a sensible conclusion as to how to dispose of the issues which divided them" (paragraph 25) without having to incur high costs. If the parties could not have arrived at "a sensible conclusion" without assistance, then "an independent mediator should have been recruited to assist. That would have been a far cheaper course to adopt. Today

sufficient should be known about ADR to make the failure to adopt it, in particular when public money is involved, indefensible."

Over the years since the Woolf civil justice reforms, courts have awarded costs against the party that had refused to use ADR regardless of whether that party eventually won the case or not. Hence, in *Dunnett v Railtrack PLC (Costs)* [2002] EWCA Civ 303 (CA) (22 February), the successful party – Railtrack PLC – was required to pay the costs of the case, even though it had won its case on appeal. Railtrack had refused an offer of mediation from Mrs Dunnett. The case of *Halsey* (discussed below) has now shifted the burden to the unsuccessful party to demonstrate that the successful party's refusal to mediate was unreasonable.

A question that needs to be addressed is what amounts to reasonable behaviour? In the case of *Hurst v Leeming* [2003] EWHC 499 (Ch) (14 March), the defendant gave a number of reasons for not refusing to mediate. The judge in the case rejected some of the reasons put forward by the defendant in refusing mediation. However, he also decided that mediation would not have had a real prospect of success. The case assessed what is considered to be reasonable behaviour in terms of whether or not mediation is pursued as an option.

Burchell v Bullard [2005] EWCA Civ 358 (CA) was an exception to the rule in terms of costs being warded against the party that had refused to use ADR. The appeal case of *Burchell* focused on the question of which party should be responsible for paying the costs of the case. Although the case was decided in 2005, the refusal by Mr and Mrs Bullard to mediate pre-dated major cases, such as *Dunnett* and *Halsey*. The appeal court judge, Ward LJ, was reluctant to penalise the Bullards on costs. Mr and Mrs Bullard had refused mediation because they felt that the case was far too complex to be resolved by mediation. However, Ward LJ did consider small building disputes, such as this case, as the type of dispute most suitable to ADR. The original dispute was between the Bullards and a builder, Mr Burchell, who had a contract to build an extension to Mr and Mrs Bullard's house.

The Case of Halsey

The cases of (1) *Halsey v Milton Keynes General NHS Trust (2) Steel v Joy and Halliday* [2004] EWCA Civ 576 (11 May) (CA), which were decided together, is an important decision. For the first time, general guidance is given to courts in the manner in which ADR ought to be used within the court system. The judgment also addressed the question of whether the court could compel unwilling parties to mediate.

In the first case, *Halsey*, Lilian Halsey brought a claim against Milton Keynes NHS Trust alleging that her husband was treated negligently while he was a patient at Milton Keynes General Hospital. Bert Halsey, aged 83, had died on 27 June 1999 at that hospital, and Mrs Halsey's claim was made pursuant to the provisions of the *Fatal Accidents Act 1976.*

In the second case, *Steel*, the claimant, was injured in an accident involving the first defendant on 15 December 1996, and he was injured in an accident involving the second defendant on 13 March 1999. The claimant brought separate actions against the two defendants, Joy and Halliday. However, the claims were subsequently consolidated.

The two appeals, *Halsey and Steel*, raise a question of general importance: when should the court impose a costs sanction against a successful litigant on the grounds that the party has refused to take part in an alternative dispute resolution? Specifically, in relation to the *Halsey* appeal, the claim was dismissed and the only ground of appeal was that the judge was wrong to award the defendant costs, since he had refused a number of invitations by the claimant to mediate. In *Steel*, the appeal judges considered two grounds of appeal. First, the appellant wanted the appeal court judges to consider that the trial judge had reached the wrong conclusion on the causation issue. Steel further submitted that it was wrong of the trial judge to award the successful second defendant his costs against the first defendant because the second defendant had refused a number of invitations by the first defendant to mediate.

Dyson LJ, on behalf of the other appeal court judges gave judgment on the case of *Halsey*, along with the case of *Steel*. Dyson LJ began by giving some guidance on the use of ADR. He referred to the definition of ADR in relation to that found in the CPR Glossary,[5] and added that, "in practice, however, references to ADR are usually understood as being references to some form of mediation by a third party" (paragraph 5). In addition, he asserted that, "there are those who believe that the virtues of mediation have not yet been sufficiently demonstrated" (paragraph 6). He cited Genn's 2002 report on court-based ADR initiatives for non-family civil disputes in relation to the Commercial Court and the Court of Appeal, in support of his statement. After a reminder of the Lord Chancellor's 2001 ADR Pledge, Dyson LJ referred to a line of cases that strongly supported the use of ADR in general, and mediation in particular: *(R) Cowl v Plymouth City Council* [2002], *Dunnett v Railtrack* [2002], and also *Hurst v Leeming* [2003]. Dyson LJ concluded as follows:

> *It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. The court in Strasbourg has said in relation to article 6 of the European Convention on Human Rights that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to "particularly careful review" to ensure that the claimant is not subject to "constraint": see Deweer v Belgium (1980) 2EHRR 439, para 9. If that is the approach of the ECtHR to an agreement to arbitrate, it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6* (paragraph 9).

Hence, on the issue as to whether judges could compel parties to settle their dispute by ADR, the clear answer is no, bearing in mind that this would be regarded as an unacceptable constraint on the right of access to the court, and therefore a violation of Article 6 of the European Convention on Human Rights.

Dyson LJ then gave guidance on the issue of costs, a thorny area that has tied into the behaviour of the parties in terms of whether or not they employ ADR in the settlement of the dispute, and whether that behaviour was considered to be reasonable. Dyson LJ started with a reminder of the CPR 44.3(2) and the situation

[5] "The collective description of methods of resolving disputes otherwise than through the normal trial process" (49th update). Available at www.justice.gov.uk/civil/procrules_fin/menus/glossary.htm.

where the court decides to make an order about costs. The general rule is that the unsuccessful party would be ordered to pay the cost of the successful party. However, the court could make a different order, and CPR 44.3(4) provides that in deciding what order, if any, in relation to costs could be made, the court must have regard to all the circumstances, which included the conduct of the parties. The conduct that could be taken into account includes behaviour before, as well as during the proceedings, the proceedings itself, and the extent to which parties followed any relevant pre-action protocol.

> *In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR. We shall endeavour in this judgment to provide some guidance as to the factors that should be considered by the court in deciding whether a refusal to agree to ADR is unreasonable* (Paragraph 13).

Hence, the court could decide to deprive successful parties of some or all their costs on the grounds that they have refused to agree to use ADR. However, it should be borne in mind that such an order is an exception to the rule that costs follow the event. The burden to justify a departure from the general rule is on the unsuccessful party to demonstrate how that the successful party acted unreasonably in refusing to agree to settle by ADR.[6]

In relation to costs, Dyson LJ gave guidance by referring to the opinion of a submission made by the Law Society about the value of mediation. In that submission, the Law Society had opined that mediation and other ADR processes do not offer a panacea, that there are advantages as well as disadvantages to using such processes. Crucially, ADR is not appropriate for every case. Dyson LJ added that the

[6] In addition to the *Halsey* ruling, section 24 of the *Tribunals, Courts and Enforcement Act 2007* provides that "mediation of matters in dispute between parties to proceedings is to take place only by agreement between those parties." Hence, any tribunal within the *Tribunals, Courts and Enforcement Act 2007* structure cannot order parties to engage in mediation where the parties are unwilling to do so, though tribunals are to encourage use of mediation. Section 24 of the *Tribunals, Courts and Enforcement Act 2007* also provides for mediation to be conducted by members of the tribunal (Law Commission 2008).

question of whether a party has unreasonably refused ADR would include, although it would not be limited to the following factors that the Law Society suggested: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success. Dyson LJ went on to say that, "we wish to emphasise that in many cases no single factor will be decisive, and that these factors should not be regarded as an exhaustive check-list" (Paragraph 16).

Dyson LJ then gave a further explanation of the factors he had listed. First, in relation to the nature of the dispute, he commented that there are disputes that, "renders them intrinsically unsuitable for ADR," the most obvious being cases where the parties wish the court to determine issues of law. Other examples included the situation where a party wants the court to resolve a point of law where a binding precedent would be useful, or where an injunction is crucial. In general though, the judges considered that most cases are not unsuitable for ADR. In terms of the merits of the case, Dyson LJ reasoned, "the fact that a party reasonably believes that he has a strong case is relevant to the question whether he has acted reasonably in refusing ADR" (Paragraph 18). Lightman J's comment in the case of *Hurst* was referred to: "the fact that a party believes that he has a watertight case again is no justification for refusing mediation." Dyson LJ qualified that comment by adding that a party who unreasonably believes that his case is watertight is not justified in refusing mediation. However, a reasonable belief that a case is watertight might well be sufficient justification. Further, Dyson LJ suggested that courts should be alert to claimants with a weak case inviting mediation as a tactical ploy, using the threat of cost penalties to force a settlement.

In relation to whether other settlement methods have been attempted, Dyson LJ advised that where settlement offers have already been made, is potentially a relevant factor to the question of whether a refusal to mediate is unreasonable (paragraph 20). Dyson LJ made further comments in terms of whether the cost of mediation would be proportionately high related to the types of cases where the amount in dispute is comparatively small, and where the prospects of a successful mediation would be

difficult to predict (paragraph 21). As to the factor of delay, consideration would need to be given to whether a late offer of mediation is likely to delay the "trial of the action" (paragraph 22). Finally, in terms of whether mediation had a reasonable prospect of success, Dyson LJ again referred to the case of *Hurst*, and Lightman J's comments about whether, when viewed objectively, mediation had any real chances of success. In relation to the guidance given in *Halsey*, the responsibility falls on the unsuccessful party in showing that the successful party had unreasonably refused to agree to mediation. The unsuccessful party only needs to demonstrate that there was a reasonable prospect of the mediation succeeding. Thus, in deciding whether the successful party had behaved unreasonably in refusing to agree to mediation, the court would take into consideration any encouragement it had given to the resolution of the dispute by mediation. The stronger the encouragement, the easier it would be for the unsuccessful party to prove that the successful party's refusal was unreasonable (paragraphs 23--29).

Dyson LJ concluded the general guidance on the court's use of ADR with a comment on the 2001 Government ADR Pledge, and its significance in relation to whether the court ought to make cost orders against successful public bodies who had refused to agree to ADR. In this context, Dyson LJ referred to the case *Royal Bank of Canada v Secretary of State for Defence* [2003] EWHC 1841 (Ch). Dyson LJ was critical of the fact that although the judge in that case, Lewison J, believed the case concerned a question of law, Lewison J's attached 'great weight' on the Government Pledge. In Lewison J's view, the need for the government bodies to keep the pledge resulted in his penalising the defendant on costs for not using ADR. On behalf of the judges in the *Halsey* case, Dyson LJ commented that the judge in the *Royal Bank of Canada* case was wrong to place such significance on the ADR pledge. He inferred that the pledge was a bit redundant when he remarked at Paragraph 35,

> *If the case is suitable for ADR, then it is likely that a party refusing to agree to it will be acting unreasonably, whether or not it is a public body to which the ADR pledge applies. If the case is not suitable for ADR, then a refusal to agree to ADR does not breach the pledge.*

In conclusion, *Halsey* clarified the position of the courts in relation to the issue of the judges making ADR compulsive for the parties. The *Halsey* case reverses the trend of courts compelling a party to mediate even when they are unwilling to do so. This

case makes it clear that courts cannot force unwilling parties to mediate. This is the position we support because the parties are giving their power to the mediator in return for assistance in negotiating a joint agreement. Great care needs to be taken where there is a power imbalance between parties, as in the case of the homeless applicant and local authority.

C. The Issue of Power Imbalance

Homelessness brings with it a special set of circumstances when a vulnerable homeless person has tried to gain assistance from a local authority for his or her emergency housing needs. If denied assistance, the challenge, brought by a homeless applicant is against a decision issued by a local government body, with that body traditionally bearing a 'bureaucratic veil' (The Law Commission 2006a:73). The homeless application decision-making process the authority follows in this situation gives that local government body much discretion. The authority should in accordance with homelessness legislation give reasons justifying its decision, and the reasons given in relation to the decision should not be unreasonable or fettered by other local government policies. Provided the authority follows such principles, in general, it is difficult to make successful arguments against that decision. Yet, this study has demonstrated the instances when local authority officers have acted unlawfully in giving verbal decisions. Further, Cowan, Halliday and colleagues (2003) found that some local authority officers were tempted to issue poor quality decisions because of the belief that internal review would correct any poor decision. This study focuses on the process or the range of processes that could be used to control and prevent power imbalances between the disputing parties affecting the outcome of the processing of a homelessness decision dispute. In particular, neither party should be prevented from achieving a fair outcome in relation to the resolution of the dispute.

The situation of the homeless applicant, in this study, is linked to the English and Welsh homelessness legislation, which provides a potential right to emergency housing for a homeless person and his or her household in very particular circumstances. In this situation, not only does the homeless applicant need to "pierce the bureaucratic veil" of the public sector organisations, he or she additionally

requires urgent assistance in order to meet a basic human need: emergency housing that is adequate for his or her needs.

The Discourse Within ADR Literature on Power Imbalances between the Parties

The discourse within ADR literature on power imbalances between parties, in the main, took place in the 1980s, and predominantly by scholars in the USA. Roberts and Palmer (2005) perceive the discussion on power imbalance to be very broadly divided into three main strands; first, the conditions available for 'judgement' – a debate that for the purposes of the discussion on civil justice and the movement towards procedural innovation can refer to the more recent dialogue originating from the 1960s and 1970s. It was then articulated as an "access to justice" movement, and represented the contemporary expression of concerns about costs, delays and general accessibility of adjudication. This strand of conversation characteristically expressed the need for quicker, cheaper, more readily available judgement with procedural informality. The second strand of discussion on power imbalance focused on the merits of settlement – discussions emerging in the 1970s – which Roberts and Palmer characterised as having 'problematised' adjudication and declared the advantages of 'settlement.' The third element in the conversation, which began in the mid-1970s, looked beyond the problem of adjudication and the possibility of settlement through lawyer negotiations and concentrated instead on the search for 'alternative' or 'complementary' forms of dispute resolution.

Power imbalance can be seen as affecting parties in the wider cosmic or 'macropower,' as characterised by de Sousa Santos (1982), which is 'physically' located in formal institutions and is hierarchically organised. Authors such as Abel (1982), consider the sinister implications of the state sponsoring informal dispute resolution processes as "extending the ambit of state control" particularly when the informal institutions are imposed from the top down, by state or capital – manufacturers, retailers, service industries (1982:295). De Sousa Santos described such a situation as the 'micropower' or the 'chaosmic power' emerging wherever there are social relations and interactions are unequal, such as in the family or at school or on the street. On the more micro level, power imbalance can refer to the more specific problem within the dispute processing relationship itself. Hence Fiss

(1984) has argued against what he saw as a trend towards the practice of settlement. To Fiss, settlement for the parties prior to a court hearing underlines the "disparities of power between parties." Fiss opposed any further move to redirect disputes away from adjudication. He asserts that imbalances of power shape the processes of which grievance is constructed, the insight and advancement of a dispute, and awareness of the likely outcomes. In addition, Fiss is concerned with the imbalance of power in relation to resources, and how such imbalance can influence the process of settlement. There are three particular areas that cause concern: first, the lack of finance could cause the litigant to be less capable than his or her opponent to gather and analyse the information necessary to gain a reasonably accurate picture of the probable outcome of litigation. Secondly, the poorer party might well have a real need for the damages he or she seeks, which means that the poorer party will be under pressure to settle in order to attain payment at an earlier date. Thirdly, the poorer party may be forced to settle because he or she lacks the resources to finance litigation.

However, Fiss' greatest concern and objection to settlement is that a move away from the court would compromise key legal and political values. In relation to this objection, Fiss asserts that the judge's role in resolving disputes is only secondary to their function of restating important public values. McThenia and Shaffer (1985) address Fiss' central objection to settlement, pointing out that Fiss' argument rests on the faith that justice is usually something people acquire from the government. The authors remind readers that courts, the branch of government that resolves disputes, are the principal source of justice in fragmented modern American society.

Focusing on the more micro level, the discourse on power imbalance within the ADR literature concentrates very much on the context of the resolution of disputes by mediation.[7] The solution that the mediator is expected to find depends to a significant extent on where the inequalities in power lie. Davis and Salem (1984), in their essay on the issue of power imbalance in mediation, specifically focusing on inter parties disputes, define 'power' as the ability to influence or control others (1984:18). To Davis and Salem, power is relative, and they argue that the mediator would need to

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[7] Negotiation is of course part of the mediation process. See Gulliver (1979) and Augusti-Panareda (2004).

consider how willing people are to use their power and the conditions that might discourage them from using it to its full extent. In addition, they make practical suggestions on the manner by which power imbalance might be remedied. Three of the situations the authors focus on include the circumstances in which there are language difficulties. Davis and Salem recommend that the ideal solution would be for the mediator to make arrangements for the use of a bi-lingual mediator or an interpreter being present. In addition, the authors declare that the needs of young people should receive the same amount and quality of attention as adults. The authors remind the reader that young people are neither powerless nor fully emancipated. As a result, young people might need help in identifying the limits of their current power, and help in thinking through options available to them as minors. Davis and Salem suggest that for young people, silence is often the only means that many young people have of expressing power. However, in the situation where the inequalities of the parties are brought about by the lack of information in divorce mediation, Folberg and Taylor suggest that such a problem

> *can be countered by the educational function of the mediator... If the inequality is based on negotiating or decision-making style or on a lack of information, the mediator should intervene to remind the participants of the need for equality in decision-making. This can be done by use of reflection, clarification, redirective statements, supplying information, and other techniques... as well as caucusing with each participant to discuss his or her behaviour (1984:185).*

When a homeless applicant does challenge a local authority's decision about whether he or she ought not to be given emergency housing assistance, such an applicant does not really have bargaining power. The applicant does not possess an ability to cause change or – as in Davis and Salem's definition of power – the ability to influence or control others. The homeless applicant, through a representative, could certainly try to exert influence. However, it is also possible for the housing authority to hide behind a lawful decision that would not offer assistance to the homeless applicant. In addition, the applicant is in need of assistance with his or her basic human need for shelter. The homelessness legislation grants local authorities discretion in the decision-making process of a homeless application. Thus an authority is always able to make a decision in its own favour, and can refuse to provide assistance provided it does not fail to exercise discretion, misuse its discretionary power or to make a

decision that no reasonable authority would make (the principles that judges follow when reviewing local authority decisions).

Linked to the extensive discretion local authorities have in the homeless application decision-making process is the fact that, the homeless applicant has only a potential right to emergency housing assistance. An applicant can only present facts in support of his or her claim that the authority owes him or her a duty. The problem areas for a homeless applicant include the 'vulnerability' assessment, which the local authority ought to consider if an applicant does not clearly fall into one of the listed priority need categories. The other area that causes applicants difficulty is the need for them to demonstrate that homelessness was not intentional. A local authority officer might make verbal threats not to assist a homeless applicant based on this ground of intentionality, which can and does happen because officers play the dual role of assessment officer and gatekeeper of local authority resources. However, the authority must give reasons for not assisting the applicant and these justifications should not breach the principles outlined in the previous paragraph.

Hence, the matter to be considered in this situation is not the obvious fact that a local authority is likely to be in a stronger position compared to the dissatisfied homeless applicant because the authority retains discretion over the ultimate decision of the homeless application. In addition, neither the homeless applicant nor the local authority needs to maintain some sort of a relationship with each other. Mediation could assist to facilitate communication between the applicant and the local authority officer. However, an advocate could also speak on the applicant's behalf. The issue of power imbalance in this study is linked to the question raised in terms of which dispute processes would be the most suitable in addressing effectively the situation of the unsatisfactory homelessness decision, where a public body is the decision-maker. Facilitative mediation has been discounted because of the power imbalance between the local authority and homeless applicant. However, a more interrogatory approach to the examination of homelessness decisions might be appropriate. A question that needs to be explored is whether the ombuds scheme might be the most appropriate dispute process for determining grievances that arise in relation to homeless applications. Such discussion takes place in the following section.

D. Ways Forward

Thus far, we have seen in the final section of Chapter Two (and Appendix 2), some of the problems homeless applicants experience when attempting to make a homeless application. In Chapters Five and Six, the discussion centred on access to justice problems that homeless applicants experience, which could include difficulties in recognising and taking steps to address disputes. While in Chapter Seven, we focused on the administrative decision-making process, and the nature of problems homeless applicants experience. In addition, the manner in which the review process (first stage appeal) is 'juridified' when a representative brings in case law in the written representations was discussed. In assessing which dispute resolution mechanism might be the most appropriate to remedy unsatisfactory homelessness decisions, the issue of power imbalance between the local authority and homeless applicant was given particular consideration. Bearing in mind that there is already an imbalance of power between the two parties, the local authority and homeless applicant, a more interrogatory approach to resolving such disputes is likely to be the most appropriate method.

The housing law practitioners who were interviewed were asked the question: [if you do not consider the appeal mechanisms to be effective methods for homeless applicants to resolve such disputes with the local authority], what other mechanisms would you consider to be satisfactory? CW1 suggested "a speeded up ombudsman with sufficient resources to understand the legal implications and are willing to make a judgement because you cannot expect a client on their own to explore why a decision is wrong." However, for CW1, the ombudsperson

> *would only work if you had somebody alongside the client, making those representations... [unless there are housing specialists in the ombudsman office] who will be independent, impartial and who will then look at the evidence presented by the client and look at all the casework evidence.*

CW1 added that the ombudsperson would need to be the independent reviewer that would have "massive resources [where a decision is given in a timely manner]." CW2's thoughts echoed those of CW1 when she mentioned "a kind of ombudsman, where [the] client appeals and they get interviewed by somebody who's neutral,

perhaps from outside the local authority and is legally trained and can report back to the local authority."

However, CW4 preferred

> *... the old system, you could threaten JR... it wasn't the most effective system but it was there, and you could use that. You could actually threaten them with that. I've engaged a solicitor and you're going to JR over this decision because it's not, in a sense, a decision. But it's an appeal process. Ok, you've got the review process we can go through – that's my biggest bug bear – and as you say, the twenty-one days and I know it's written but if you've got English as a second language, is that really effective?*

In contrast, CW5 believed that "county courts do not have enough judges with experience in housing law. Possibly a Housing Tribunal that would deal with housing cases for clients not represented could be a way forward."

Bearing in mind that civil justice reforms are likely to continue on the path away from court adjudication, with tribunal adjudication more favoured, the 'old system' that CW4 favours in relation to challenging unsatisfactory homelessness decisions might not return. As we are already aware, the Law Commission (2008) itself had made an initial recommendation that the section 204 appeal could ultimately be transferred to the new Upper Tribunal.

Hence, the ombudsperson, more specifically the Local Government Ombudsperson (LGO) appears to be the most logical solution as a replacement for the first stage appeal internal review. Within the UK, the ombudsperson is already most well known for resolving administrative disputes between public bodies and users of public services. We consider that adjudication, whether by court or by tribunal, remains the most appropriate dispute process for the second stage appeal. Our comments in relation to the ombudsperson only concern the first stage appeal process. We suggest that the first stage internal review of unsatisfactory homelessness decisions could be replaced by an external review by an enhanced LGO. This section now examines the possible and greater involvement of the ombudsperson in the first stage review process.

This study takes the view that the inquisitorial approach of the ombudsperson is likely to bring about a more effective and fair outcome to both local authority and homeless applicant. We suggest that an enhanced LGO service that delivers timely decisions would be the most appropriate dispute process to review unsatisfactory homelessness decisions. The ombudsperson uses the following processes in arriving at a decision as to whether a complaint that has been brought to its attention has foundation.

> *Initially, classical ombudspersons listen to the complainant. Then they investigate. Then, if they find the complaint legitimate, they engage others in resolution of the dispute. They may require the production of records and witnesses from anyone in the organization, including the top administrators. Once they find the complaint legitimate, they assume their role as 'citizen offenders'* (Wiegand 1996:137).

In addition, the ombudsperson might use other processes, such as mediation or adjudication (The Law Commission 2006a:69, see also Seneviratne 2002:226).[8] Wiegand is very clear about the benefits of the ombuds approach to resolving complaint:

> *The ombudsperson's concern is not to protect the organization's reputation; rather it is to help ensure that all of the organization's members conduct themselves in a manner neither arbitrary, dishonest, illegal, disruptive nor unethical* (Wiegand 1996:137).

The ombuds process has an advantage over mediation, in that,

> *unlike a mediator, ombudspersons can take sides, not in favor of the complainant and against the respondent, but in favor of honesty, integrity, legality and principle. Their client is integrity* (Wiegand 1996:137–138).

Traditionally, the ombuds process has been limited to investigating complaints of injustice arising from acts of maladministration (Seneviratne 2002:199). Ombudspersons are not empowered to "overturn unjust decisions or request that end to an unjust or inappropriate practice"(Gadlin and Walsh Pino 1997:33).

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[8] See the *Regulatory Reform (Collaboration etc between Ombudsmen) Order 2007* (SI No1889).

The present study proposes that ombudsperson powers are widened specifically to replace the first stage appeal process of internal review in relation to unsatisfactory homelessness decisions. In the context of addressing homeless application disputes, the LGO already has power to investigate claims of maladministration. This study takes the view that the LGO should be given the power to reverse administrative action where necessary. The ombuds process could replace the section 202 internal review mechanism, with an entirely independent review carried out by the LGO with more extensive powers.[9] Additionally, timely decisions ought to be made since time is of the essence for somebody without housing.

It is unfortunate that the Woolf enquiry into civil justice was conducted during a period when the homelessness legislation had only just been amended. The internal review mechanism was introduced as a compulsory 'appeal' process in the *Housing Act 1996* for the first time because of a perceived fear by the judiciary that the higher courts would be inundated with requests by dissatisfied homeless applicants to have their homelessness decisions judicially reviewed. Some housing authorities had already been employing internal reviews, on a voluntary basis, to deal with dissatisfied homeless applicants. The Woolf enquiry was a lost opportunity to examine methodically the entire 'appeal' process for dissatisfied homeless applicants. Instead the 'cheap' internal review or the 'management response' mechanism, which was a safeguard against poor decision-making, at the time was accepted without further discussion. The internal review mechanism was not on the agenda for the Law Commission either, when the Commission recently reviewed the possible reform of the formal process for resolving housing disputes.

The Commission *Issues* paper reminds us that traditionally, "their [the ombudsperson] primary utility lay in equalising the relationship between individual citizens and public bureaucracy" (The Law Commission 2006a:73). Finally, the

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[9] In its 2006 Housing Issues paper, the Law Commission points out some of the drawbacks in relation to the existing ombuds system and also provides a valuable overview of the powers of existing ombuds services. In terms of current drawbacks, the ombudsperson currently enforces its recommendations indirectly through publication of adverse findings in reports. An argument against direct enforcement is that the ombudsperson and his or her recommendations carry 'moral authority' which leads to compliance in practice. If the ombudsperson's recommendations were to become directly enforceable then this might lead to defensive practices and thence to formal legal safeguards into this non-formal scheme of 'administrative justice.'

Commission, in its 2006 Housing Issues Paper reminds us that, "the focus of the ombudsmen is on accountability and the appropriateness of administrative action. They seek to promote good quality administration and, through this, accurate decision taking. They prioritise the value of independence. They seek to promote fairness and transparency" (2006a:74).

E. Conclusion

The Woolf civil justice reforms have dramatically changed the landscape of dispute resolution within the English legal system. A problem with the civil justice system now, is that court adjudication can only be used as a last resort, thereby surely restricting real access to justice for those with 'justiciable' problems. The *Housing Act 1996*, formally introduced the internal review as the first stage of the appeal process in relation to unsatisfactory homelessness decisions. However, policy and legislative reformers have neglected to carry out a further examination to consider whether the internal review is the most appropriate dispute process for unsatisfactory homelessness decisions. There is a fundamental problem with the internal review in that the same body that made the original decision carries out the review. And that same body needs to protect its financial resources. The internal review provides obvious benefits to the local authority, in that such a process is cheap process to administer. At the same time, the process denies justice to the homeless applicants (see Cowan and Fionda 1998b:186). As discussed in Chapter Seven, many homeless applicants do not request to have their decisions reviewed. A truly independent review can only be carried out by an independent body. There will be instances when the homeless applicant would still need to resort to court adjudication following a review. However, the involvement of the LGO at the first stage appeal might well assist in the dispute processing of homelessness decisions effectively enough. Enabling the ombudsperson to deal with homelessness decision complaints at the first stage review would be more expensive than the internal review process, but ADR processes should not only be resorted to because it is believed – mistakenly so – to be less costly. In addition, the review of a homelessness decision requires an interrogatory approach, since the power imbalance between the local authority and the homeless applicant is so uneven. The LGO adopts such a approach in its work,

and it is for this reason that this study suggests that an enhanced LGO scheme would be the most appropriate body to carry out the reviews of homelessness decisions.

Chapter Ten
Conclusions

There are three basic reasons why homeless applicants in London do not fare well when they attempt to claim their potential emergency housing entitlement. First, the homeless application process itself is complex, and often difficult for people to cope with without advice, guidance and sometimes representation. Secondly, the first stage appeal internal review is not an appropriate dispute process for homeless applicants with an unsatisfactory homelessness decision. Thirdly, the use of homelessness mediation by local authorities is potentially a homeless application containment device.

Homelessness Application Process: Procedural Complexity

Observations about the homelessness legislation, homeless application as well as the review process, expressed by various housing law practitioners interviewed for this study indicate that not only are there are clearly problems with the homeless application process itself, the substantive law does not encourage access for the vulnerable homeless applicants in London who need immediate accommodation. The enquiry in relation to the homeless application process led to the conclusion that authorities gatekeep their financial resources. Some of the ways of gatekeeping include diverting the homeless persons attention away from the possibility of making homeless applications. In many instances, 'obstacles' were put in the homeless applicant's way, such as requests for an increasing amount of documentary evidence in the course of the enquiries. An obvious solution in relation to unsatisfactory decisions for those who finally get a decision is for authorities to produce better decisions, which make it more difficult for homeless applicants to challenge successfully. The original intention of the homelessness legislation, which aspired to give greater assistance to the vulnerable homeless over the years, has developed into an 'obstacle' course for homeless applicants. In addition, over the years, the courts have given the 'vulnerability' a narrow definition.

When vulnerability is examined within a social context, we gain a greater understanding of just how few people are assisted by authorities under the homelessness legislation compared to the number of people who try to gain

assistance. Discussion of the homeless in London has necessarily taken place within the context of the general housing and homelessness literature (Chapter Two). This was essential, since before it was possible to begin an examination on the central question, it was necessary to be aware of the nature of problems homeless people experience, how they deal with their problems or how they might find it difficult to cope with their circumstances. A discussion of this area of literature helps us to understand how difficult it could be for someone to gain assistance for his or her housing needs (see e.g. CASE and Camden Council 2000, Neale 1997).

One of the findings of the dissertation was that homeless people need help to access their potential substantive right to emergency housing, which is linked to the homeless applicant's need to challenge unsatisfactory decisions. In particular, the exploration by in-depth interviews of why problems do not develop into disputes, has been a contribution of this dissertation to the discussion of the Feltstiner, Abel and Sarat (1980-1) "naming, blaming, claiming" paradigm. Commentators of ADR and access to justice issues, such as Genn do mention the Feltstiner and colleagues paradigm. However the reference tends to be brief, with just an acknowledgement of the existence and usefulness of the idea. There are clients though whose problems do transform into disputes, and who are not only aware that they need help, they also do seek help. We will return to this discussion when the issue of access to justice is examined.

My experience as a housing advisor and caseworker has been a guide to identifying issues that could usefully be discussed in relation to homeless people. The in-depth interviews carried out and the case studies gathered in my professional diary provided information from the perspective of an advisor. Such data confirmed my own experience and the existing literature on homelessness. In addition, the 'picture' from my perspective of the many types of homelessness that people experience helped to provide a context, within which we are able to have a more meaningful discussion about accessing legal entitlement. Having a picture of homelessness, and homeless people and the often complex needs of homeless clients for this study was important because the analysis of the central question takes on a different meaning when we are able to see how the lives of the homeless would be affected. As the

empirical data gathered for this dissertation demonstrates, homelessness and the potential solutions for it, are rarely straightforward.

Access to justice for the vulnerable homeless or access to housing justice in this study has meant essentially the same thing, namely access to justice in relation to housing matters, and particularly the enabling of greater procedural access for homeless applicants who are not satisfied with their homelessness decision. This study is limited to the examination of access to housing justice in terms of accessing procedures, which may not necessarily result in substantive housing provision.

Given the problem in the UK of the situation where people feel unjustifiably denied of some form of justice in terms of how the system treats them as a homeless applicant is the issue that this dissertation addresses. The term "access to housing justice" does not mean the exploration of whether UK standards meet the international standards of satisfying the housing needs of its citizens. Instead, the question of whether procedures are in place to enable its citizens to claim a potential entitlement to emergency housing assistance in UK terms is explored. The continuing global debate on the right to housing is necessary to ensure that a basic human need, such as housing, is not allocated a lower priority by states.[1] England is unusual in providing to some groups of homeless people, a legally enforceable right to suitable accommodation (DCLG 2006c).

The idea of a right to housing is linked, but it is a lesser issue of this thesis. Although resources, or the lack of financial resources will always be an issue, this study has addressed a procedural question, which is, how do the vulnerable homeless in London gain access to housing justice. The point at which this question becomes important is after the issue of the written decision because parameters within which the analysis of this question takes place is linked to the review and appeal process. The fundamental problem in relation to homeless applicants is twofold, in that first, there is only a limited supply of social housing for those in need,[2] and secondly, the

[1] Such an ongoing discussion is necessary, particularly in the age of governance by the regulatory state (King 2007, Carmichael and Midwinter 2003).

[2] This is because of the availability of limited public resources, the erosion of social housing stock over the years through the right to buy scheme for secure tenants, and right to acquire for the assured

existing methods of resolving disputes between local authorities and homeless applicants do not aid the delivery of justice for the applicants.

The decision to concentrate on procedural access under the homelessness legislation meant an uneasy separation of the substantive and procedural access issues. The limitation of the enquiry to procedural access raises an interesting question: to what extent is it possible to focus only on procedural access when the investigation of appropriate procedure is to increase access to the substantive benefit. Accessing the substantive benefit from the homelessness legislation, as already discussed above, is difficult but there is an obvious need for homeless applicants to be able to access their potential substantive right.

A different study, which focuses specifically on balancing substantive and procedural access to the homelessness legislation, would assist in drawing out particular concerns that the separation of issues could cause. The basic human need of shelter, and the substantive claim under the homelessness legislation is intrinsically linked to the procedural access, particularly when there is a problem with the claim. When a person makes a homeless application, the act of making a claim comes with it the hope and expectation of making a successful claim. It could be argued that enabling greater procedural access when the substantive claim remains elusive is pointless. However, a fair procedure to access a legal entitlement, a procedure that is accessible, appropriate in terms of the type of claim being made, and that applicants are aware of, still needs to be in place. And the crucial question in these circumstances is, what procedure would be appropriate for homeless people who are dissatisfied with their homeless application decisions?

There has been silence in the public arena about the appropriateness of the first stage appeal process of the internal review. A problem in relation to homeless applicants is that not many applicants challenge decisions or they do not challenge unsatisfactory decisions effectively. Many also do not have a great understanding of what could be achieved in an internal review (Cowan, Halliday and colleagues 2003). A discussion, with the government, which centres on 'fitting the forum to the fuss', or the need to

tenants of Social Registered Landlords. The central government policy from at least 2002 has been to 'prevent homelessness.' See ODPM (January 2005) and ODPM (March 2005).

match the appropriate dispute resolution process to the dispute, would clearly benefit anybody with disputes needing to be resolved.

The Internal Review: Appropriate Dispute Processing

A problem discussed within the literature is that dissatisfied homeless applicants, in the main, have not been using the first stage appeal, the internal review, to challenge homelessness decisions (Cowan, Halliday and colleagues 2003). A finding of this study has been that the internal review mechanism is an inappropriate dispute process for applicants who are dissatisfied with their homelessness decision (Chapter Seven). The enquiry as to which "forum fits the fuss" (Sander and Goldberg 1994, Sander and Rozdeiczer 2006) of unsatisfactory homelessness decisions led to the suggestion that an enhanced Local Government ombuds (LGO) service is best suited to provide the first stage review of the applicant's unsatisfactory decision.

The suggestion about the ombuds service has been made with the knowledge that the climate within the twenty-first century civil justice landscape would be more welcoming of such a suggestion. The then Department of Constitutional Affairs (2004) acknowledged the effectiveness of the various ombuds services. The interrogation style and working methods of the LG Ombudsperson appear to be the best mechanism for reviewing unsatisfactory homelessness decisions issued by local authorities (Seneviratne 2002:223–227). The fact that the ombudsperson does take sides "in favour of honesty, integrity, legality and principle" (Wiegand 1996:137–138) is the type of bias needed to investigate unsatisfactory decisions made by a government official. On the other hand, the financial costs involved in a first stage external review is likely to be greater than the costs of an internal review. However, local authorities could jointly fund an enhanced LGO service. The idea of funding an ombuds service by members is not new, and the Independent Housing Ombudsman and the Financial Service Ombudsman are examples.

In examining the suggestion of an enhanced LGO service against Sander and Goldberg's grid of dispute resolution mechanisms (1994:53),[3] an enhanced LGO

[3] Sander and Goldberg assess the following objectives against non-binding and binding processes. The objectives are: the minimisation of costs, speed, privacy, maintain/ improve relationship, vindication, neutral opinion, precedent (whether adjudication is required), minimising/maximising

service would not mean that costs would be minimized for authorities. Instead, the process could be more costly. However, it is hoped that authorities would contribute towards the cost of the service, as discussed later in this chapter. There would be no cost to the homeless applicant needing to use the service. In addition, it is hoped that both parties could expect a speedier review decision. Traditionally, the LGO service is not known to be able to make speedy decisions, although it has improved over the years (Seneviratne 2002:226–227). The suggestion made in this study of an enhanced LGO service reviewing unsatisfactory homelessness decisions would involve the need to assess how a faster decision can be delivered, certainly well before the fifty-six days that authorities have within which to make the review decision. The ombuds decision would be non-binding on the parties. However, the review process is only the first stage of the two-stage appeal process. Should the LGO issue dissatisfied applicants with a negative decision, the applicant would be aware that the local authority decision had been thoroughly investigated.[4]

In terms of whether the LGO would maintain or improve relationship between the authority and the applicant, the LGO has a role to play in promoting fair and effective administration in local government. Certainly, the feedback of bad practice to authorities could result in better quality decision-making in the longer term, which eventually might improve relationship between the two parties over a period of time. The dissatisfied homeless applicant might or might not feel vindicated by the decision itself, depending upon the homelessness decision that has been reviewed. The LGO would render a neutral opinion, bearing in mind that the ombudsperson's "client is integrity" (Wiegand 1996:138). Finally, the LGO service would help to maximize or minimize recovery because the work of the LGO investigator involves umpiring (Roberts and Palmer 2005:346).

The suggestion for the first stage review to be carried by an external body does come with a caveat. Better decision-making in the first instance could prevent many of the

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recovery. The processes listed are: mediation, mini trial, summary jury trial and early neutral evaluation, arbitration or private judging and court. A maximum score of '3' is given to a procedure that satisfies the objective very substantially. A score of '0' is given to a procedure, which is unlikely to satisfy the objective.

[4] Seneviratne provides information about how the investigation is conducted (2002:224–225). See also www.lgo.org.uk.

problems people experience in attempting to access justice. The issue of the need to make better decisions is not an emerging concern (see for example Harris 1999a, also Adler 2007). External reviews by an external body do not automatically result in better first-instance decision-making. Certain conditions need to be met before first-instance decisions can be improved. In addition to the need for decision-making to be adequately resourced, internal forms of accountability need to be developed (Adler 2007:975). Authorities would need to ensure that a sufficient amount of money is allocated to training needs of its staff or to employ staff who are able to issue better decisions (Adler 2007). Such an issue would potentially be problematic for the poorer London authorities. By far the easier choice for authorities though, has been for staff to divert the potential homeless applicant's attention to homelessness prevention options – a practice that was observed by the housing law practitioners interviewed for this dissertation.

Homelessness Mediation

The need for more social housing has resulted in an attempt by the government to find more creative solutions to circumvent the housing shortage. A finding of this study is that mediation, a dispute processing mechanism more commonly used within the civil justice arena, has been imported into the housing and homelessness area of the government's work. Further, mediation, as a homelessness prevention tool, appears to have been used as a homeless application containment device by local authorities. It is a process for preventing the taking of homeless applications. The Department for Communities and Local Government (DCLG) promotes the idea of 'family mediation,' predominantly, as a way to "help support young people to remain at home or to return home" (DCLG 2006b:63) rather than an attempt to improve communication between the evictor and evictee.

The legal position of keeping separate the mediation and homeless application decision-making processes is clearly stated in the case of *Robinson*, which was discussed in Chapter Eight of this study. One cannot help but suspect however, that the original idea of the government was to prevent a significant number of homeless applications being taken by introducing mediation as a homelessness prevention tool. As already discussed above and in Chapter Eight, the manner in which the performance of local authorities is monitored appears to indicate a policy of

containment of homeless applications. The need by the government to monitor local authorities to reduce the number of people staying in temporary accommodation is a manifestation of this policy.

This study advocates the use of facilitative mediation as a communication tool in homelessness mediation. This dissertation considers that there are problems in terms of the Relate mediation with a counsellor model, a hybrid process that affects the integrity of the mediation itself (see Roberts and Palmer 2005, Roberts 2008). In addition, mediators ought not to be asked to evaluate a homeless person's circumstances, and report back to the authority the applicant's situation following mediation, as suggested by Relate. We consider the reporting of personal information to be a breach of confidentiality, arguably a core value of mediation (Roberts 2008). This study follows Roberts and Palmer's argument that mixed processes, that is, evaluative mediation, should be identified as such, and support the suggestion that the spirit of mediation is facilitative (see for example Love 1997, Kovach and Love 1998). Parties should not be coerced into mediation since voluntary participation is another core characteristic of mediation (Roberts 2008).

The findings in this dissertation suggest that homelessness mediation, as a homelessness prevention tool requires further discussion. As a tool to prevent immediate homelessness, if mediation were to be offered at the point a person has been asked to leave the accommodation, mediation would not be effective. If the purpose of mediation were to repair relationships or to facilitate communication, and such mediation were offered to assist people with medium term to longer term housing needs, then such an approach could genuinely aid greater access to justice for the homeless applicants in London. Further, the carrying out of a survey of the homelessness mediation models adopted by local authorities across London means that useful data could be gathered for a more in-depth examination of the models. The findings of the in-depth enquiry could then contribute to a discussion with the government in terms of the appropriate use of family mediation to aid homelessness prevention.

The DCLG already advocates the use of mediation in the situation where an assured shorthold tenancy is coming to an end. This study suggests that it is entirely

appropriate to extend alternative dispute resolution methods to the lives of potentially homeless people. Mediation could be offered to homeless people staying in temporary accommodation or hostels, where there is a need to preserve an ongoing relationship, and violence or harassment are not problems experienced by either of the parties. Mediation would have a role to play between homeless people and services set up to assist homeless people, when these 'formal' relationships break down. Another example of where mediation could be used is where a potentially homeless person is given practical support, and the relationship between the support worker and homeless person breaks down. In the longer term, the provision of mediation where there is 'formal relationship' between the accommodation project or homelessness service and the client, mediation could assist in enabling a homeless person to successfully resettle in accommodation. Such assistance could help to reduce the number of tenancies that fail (Lemos and Crane 2001:25. See also Nelson and Sharp 1995).

ADR literature on mediation, in the main, focuses on family mediation, and there is a gap in the literature on homelessness mediation, which needs to be filled. Mediation, as applied to the situation of homeless or potentially homeless people has much potential in facilitating communication, and would benefit from further examination in another study.

The Homeless Person's Place in the Twenty-First Century Civil Landscape

A related discussion to the access to justice discourse within this study has been the emphasis of settlement within the English civil justice system, and the use of ADR methods to aid an early settlement (Chapter Nine). A continuing debate in this area could be useful in persuading the government of the need for further adjustments in the civil justice system. This study advocates the need to move the civil justice system forward to a position where ADR processes are treated as a complementary dispute resolution mechanism to adjudication. ADR processes should not be treated as a first stage tool within the English civil justice system to aid or force early settlement.

In addition, the idea of "fitting the forum to the fuss" (Sander and Goldberg 1994, Sander and Rozdeiczer 2006) is a useful approach in analysing dispute resolution –

by keeping an open mind and flexible approach, with the focus being on finding the most effective way of resolving the dispute. Such an approach assists in identifying a more satisfactory way forward for the parties in dispute. The matching of conflicts and procedures is not an easy task, and Sander and Rozdeiczer acknowledge this. The identification of the most appropriate process to fit the dispute could mean, that "matching processes may be just the first step of the process choice, after which the parties should modify their preferred procedure to suit the particular needs of their dispute. Probably the most important process choice takes place when the parties first choose their dispute process. That original choice, however, may not continue to be optimal" (Sander and Rozdeiczer 2006:4). A goal of matching processes to disputes also means choosing the most effective tool for the dispute that best satisfy the interests of both parties. Maintaining a flexible approach as to the choice of process used during the different stages of the dispute is the key to enabling a successful outcome. Using such an approach means that parties need to be amenable in trying out unfamiliar dispute resolution processes, such as med-arb should such a process be appropriate.[5] The matching the forum to the fuss approach is a useful way of opening out the discussion in relation to appropriate dispute resolution. However, in relation to the situation of the more vulnerable groups of people in society, homeless people sometimes need assistance from non-legal advocates as well as legal advocates when attempting to claim a legal entitlement.

For clients who need access to justice, not only is access to legal services an issue, but the more vulnerable of the homeless applicants also require assistance from non-legal advocates. This last finding could prove problematic for solutions to be found, bearing in mind the English civil justice landscape in the twenty-first century. Such a landscape forcefully encourages settlement and rations access to justice. The government's priorities for the different strands of the civil justice system need to be borne in mind. The search for proportionate dispute resolution continued with the then Department of Constitutional Affairs 2004 White Paper on *Transforming Public Services: Complaints, Redress and Tribunals,* and the Law Commission's work on the Housing: Proportionate Resolution project. The Legal Action Group's aspirations

[5] Med-arb is a process where in the event of failure by the third party to reach a mediated outcome that is acceptable to both parties, that same third party takes on the role of arbitrator to make a binding decision and final award.

for equal access to justice (Smith 1997:4 –6, also Hannah 2006a) are not out of place, but seek to remind civil justice reformers that unmet needs do not remain hidden. It seems that other than effective management of financial resources, creativity is necessary, in thinking about ideas of how to enable as many people as possible to achieve justice within the constraints of a civil justice system that lacks financial resources. From the perspective of someone looking for a just outcome of his or her dispute, it is not helpful that courts can only be a last resort.

In terms of contribution to the access to justice debate, bearing in mind the universally accepted three stages of the access to justice movement (see Cappelletti and Garth 1978), this study has shown that access to housing justice specifically in relation to the situation of the homeless applicant has not broken through to the third stage yet.[6] Better decision-making in relation to homeless applications would prevent the need for greater access to legal aid, although the argument for the need for better decision-making should not detract from the general deplorable state of legal aid in the UK.

The discussions within this study aim to relate to those initial criticisms of the early ADR movement, especially by those of the left, in terms of political persuasion, such as Richard Abel, De Sousa Santos and also Laura Nada dealing with poor and marginal people. The suggestion made of an enhanced LGO service being an appropriate dispute process for homeless applicants with unsatisfactory decisions was made in recognition of the fact that it is difficult for poorer people who are dependent on legal aid to acquire legal representation. This study considers the interrogatory approach to review unsatisfactory homelessness decisions to be appropriate because such a method will assist in maintaining a power balance between the local authority and homeless applicant. The use of mediation as a dispute processing tool and in the government's homelessness prevention work could be seen as informal justice extending the ambit of state control (Abel 1982:270). In

[6] The first stage of the access to justice movement is access to the courts through the reform of legal aid to the poor, to enable them to acquire representation in court. The second stage is the representation of group interests. The third stage is the use of alternative methods of dispute resolution. As the homelessness legislation is so complex, redesigning the legislation so that homeless people can access assistance under the legislation without a great amount of advice, guidance or representation could assist. As would the availability of dispute processes that people with a grievance can access without the need for advice or representation.

the latter situation, state control has extended into 'regulating' the lives of people who require state assistance for emergency housing. In the former situation the case of *Cowley* was an extreme example of the imposition in the use of mediation on parties in a case that could arguably be inappropriate in its resolution by mediation. The fact that mediation was forced on the parties within the context of the civil justice reforms (court adjudication being the last resort) reinforces the argument that the government chooses which disputes are to be publicised.

This study accepts that the initial criticisms of the early ADR movement in the United States have arguably, mostly been correct. However, we add that, rather than the British government taking a systematic approach to prevent the masses from resorting to litigation, the imposition by the government of the use of informal processes has been a reaction to the escalating state expenditure in relation to the administration of justice. The low point for poor and marginal people was the case of *Cowley* when the judges forced a vulnerable group of people to mediation. As Cranston, one of Lord Woolf's academic consultant during the civil justice enquiry has argued, "not a great deal of social research had been done" on civil justice that Lord Woolf was able to use (1995:33). However, Lord Woolf also chose to ignore any relevant existing research (Zander 2009:368). Zander makes this comment in arguing that lawyers are not to be blamed entirely in delaying the litigation process.

An under-represented voice in the literature in relation to the discourses relevant to this study is that of the homeless person. The discussions taken place within this dissertation has spanned across different areas of literature. The literature examined included housing and homelessness law, access to justice and alternative dispute resolution, as well as strands of the civil justice literature, which includes administrative justice. It is hoped that the approach of this study in taking into account the client's perspective in debates will influence and provide a bridge for the client's voice across the areas of literature examined.

Practical Policy Considerations

There is an urgent need for a discussion in bringing the internal review of unsatisfactory homeless applications to the jurisdiction of the LGO scheme to resolve homelessness decision disputes in order to ensure greater access to justice for

homeless applicants. Very few homeless applicants resort to the ombuds service when they experience maladministration. In the 2007/08 financial year, the ombuds service received 325 complaints (there were a total of 3,741 housing complaints).[7] A problem that requires debate is the manner in which the enhanced LGO service will be funded. The Financial Services Ombudsman, and Housing Ombudsman Service are both funded by all businesses covered by the ombuds service and social landlords as well as landlords and management agencies that opt to become members respectively. This seems to be the obvious solution for the enhanced LGO service in handling homelessness decision reviews. Local authorities could contribute and invest in the service to ensure that justice is not only done but be seen to be done.

In terms of homelessness mediation, provided the parties with a relationship problem are interested in opening a communication channel with each other or repairing the relationship, then homeless people with medium to longer term housing needs would most likely benefit from mediation. However, mediation is not an effective tool, and should not be used as such to prevent homelessness in the short-term, since the immediate prevention of homelessness by mediation, in most cases tends to be an artificial remedy. Further, therapy and mediation are very distinct processes, and mixing the processes in the delivery of homelessness mediation would not gain a faster result. Neither should 'quick-fix' outcomes be the ultimate aim of such services. Facilitative mediation, provided the different aspects of this process is used properly, would far more likely be an affective method aiding in communication and the repair of relationships.

The question of proportionality in relation to the most appropriate dispute resolution process – finding the form that fits – in resolving the dispute at hand, in general, requires a common sense approach. The question is whether the proportionality approach would produce results in the context of the dispute itself. Proportionality cannot be adequately addressed, since it raises many more questions than can be answered.

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[7] See www.lgo.org.uk/publications/annual report.

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Housing (Homeless Persons) Act 1977
Housing and Planning Act 1986

Human Rights Act 1998
Local Government Act 1972
National Assistance Act 1948
National Heath Service and Community Care Act 1990
Powers of Criminal Courts (Sentencing) Act 2000 – Chapter Three
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Homelessness (Suitability of Accommodation) (England) Order 2003 (SI 2003 No 3326)
Regulatory Reform (Collaboration etc. between Ombudsmen) Order 2007 (SI 2007 No 1889)

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W v Lambeth LBC (2002) 2 FLR 327

APPENDIX 1
Table of Homelessness Legislation

	HOMELESSNESS ACT 2002 (Amendments)	HOUSING ACT 1996, PART VII	HOUSING ACT 1985, PART III	HOUSING (HOMELESS PERSONS) ACT 1977
Homelessness or threatened with homelessness definition		s 175	s 58	s 1
Eligibility for assistance	*The Homelessness (England) Regulations 2000* (SI 2000 No 701)	*The Homelessness Regulations 1996* (SI 1996 No 2754), ss 185, 186, 187		
'Priority need'	*The Homelessness (Priority Need for Accommodation)(England) Order 2002* (SI 2002 No 2051), s 10	s 189	s 59	s 2
'Intentional' homelessness (IH)		s 191	s 60	s 17
Local connection		ss 184(2), 199	s 61	s 18
Duty to make enquiries		s 184	s 62	s 3(1)–(3)
Duty to provide interim accommodation		s 188	s 63	s 3(4)
Notification of decision		s 184	s 64	s 8
Duty to homeless persons	Non-priority need: s 5 Abolition of minimum period: s 6	Non-priority need: s 192-7 Priority need: s 193	s 65	ss 4(1)–(3), (5)
Duty to persons threatened with homelessness		ss 184(1), 195, 196	s 66	ss 4(1), (2), (4), (6)
Duty to persons found IH		s 190		
Referral to other local authority (local connection issues)		ss 198-201	s 67	ss 5(1), (7)–(9), (11)
Duties to person referred		s 200	s 68	S5(3)–(6), (8), (9)
False statements, etc.		s 214	s 74	s 11
Code of Guidance		s 182	S 71(1)	
Statutory review		s 202		
Appeal to county court	S 11 (new section 204(A) inserted re provision of accommodation	s 204		

APPENDIX 2
The Case Studies

The types of client and the nature of accommodation or shelter – if the household had any shelter at all – have been tabulated immediately below in Tables 2.1 and 2.2.

Table 2.1
Who were the homeless applicants?

Household Type	Total Number of Cases
Single Male	15
Single Female	7
Childless Couple	5
One parent family – Male	0
One parent family – Female	9
Two parent family	4

The category "One parent family – Male" has been included as a household type, even though this particular household type is not represented among the forty case studies analysed for this thesis. The reason for the inclusion of this household type in the table is because the lone-male parent is one type of household that constitutes the homeless population.

The information about ethnicity of clients, as well as disability issues, was not specifically gathered for this study. However, some of the issues that relate to the ethnic origin of the clients have been recorded, such as language difficulties where English is not the client's first language. It is acknowledged that if both ethnic origin and disability information of the clients had been fully recorded, a more rigorous analysis of the access to justice issues concerning clients could have been undertaken. However, in the sometime quite difficult world of providing housing advice to homeless people, it is not possible to record all relevant details at the time of the interview.

Table 2.2
Types of accommodation

Types of Accommodation	Total Number of Cases
Friends	4
Family or Relatives	2
Bed & Breakfast – Self Placed	0
Bed & Breakfast or Temporary Accommodation – Provided by Local Authority	5
Private Rented Accommodation	1
Other – Hospital	4
Other – Street homeless, including parks	18
Other – Abandoned car	1
Other – Own car	2
Other – Bus station or bus stop	2
Other – Hallways and stairwells	1

The types of accommodation recorded in Table 2.2 above – where clients were not street homeless – were all of a very temporary nature. Attention must be drawn to the fact that many of the clients experienced frequent moves that can range from staying with friends until asked to leave and being forced to stay at a bus station (Case 20), to squatting before staying in an abandoned car (Case 37). In Case 20, Mariam was a lone parent with two children. Mariam and her children were originally dispersed to Leeds when they arrived as asylum seekers to London. After the Home Office granted Mariam and her family exceptional leave to remain in the UK, the family stayed with friends in London for about seven months. It was not until Mariam had an argument with the friends that the family were asked to leave. Mariam and her family ended up staying in a bus station for the night after Mariam had experienced difficulties trying to make a homeless application. In Case 37, Jack and his girlfriend separated around the time both were evicted from a squat, and at the same time Jack was involved in an incident which left him with a punctured lung. Jack managed to stay in an abandoned car. However at the time that I spoke to him, he had a chest infection because of the punctured lung. He also had had two seizures in one night – his epilepsy had remained stable for the past ten years until then. The epilepsy was only one of the many health problems that Jack had.

For those who do become homeless, some people manage to find temporary shelter with friends, or even with strangers, on a very temporary basis before sleeping rough on the

streets again. Even those who have been fortunate enough to be accommodated by the local authority on a temporary basis, three households – included in the case studies – have been placed into unsuitable accommodation (Cases 25, 26 and 27). In Case 25, a west London local authority had placed Jackie and her family in one room in bed and breakfast accommodation in Slough. The family would have to get up at 3.30 a.m. in order to catch a train to Jackie's father's home in west London. The children would go to school from there. The family needed to travel daily to Jackie's father because Jackie's husband worked as a postman and started work at 5 a.m. each day. It was also more cost effective for the family to travel together at such an early hour, as the cost of travel each month far exceeded Jackie's husband's income. In Case 26, despite suffering a range of health problems, which included epilepsy and mobility problems, and having two very young children with chronic asthma and breathing difficulties, Maureen was placed in accommodation above a shop which had a flight of steps. While in Case 27, Kay, who had a six week-old baby, was placed into a room in a hostel where the water was discoloured with bits floating in it. Kay did not have drinking water, and only had access to a shared bathroom, which Kay described as being very dirty. Kay told me that she did not have cooking facilities in her room, but the there were no communal cooking facilities in the hostel either. She was not able to sterilise her baby's things.

One of the categories of accommodation, 'self-placed' bed and breakfast hotel accommodation, has been included, even though none of the cases from the forty case studies analysed for the thesis fell within that category. However, the self-placed bed and breakfast category is a temporary accommodation option that some of those in housing need.

Although the case studies have been presented within different categories of homelessness experience, the classification of these case studies is somewhat artificial. Many of the facts contained within many of the case studies have relevance to issues arising in other categories of homelessness experience. Indeed, at times, it has been difficult to decide into which section certain case studies should be inserted. I have tried to include as wide a range of cases as possible, so that a more representative impression

could be made. It is hoped that the case studies reported in this appendix speak to the sheer number of homeless or potentially homeless people who need different forms of help. Certainly, many people experience similar problems that could – and should – be better dealt with by the statutory and voluntary agencies.

Changing Family Structure

Some children are asked to leave home at a fairly young age, and end up either living with relatives or with family friends or are taken into the care of social services.

Case 1 – Sandra's Case

Sandra was aged seventeen. When Sandra first sought assistance from the telephone advice line, she informed us that she had just applied for severe hardship payments,[1] had no money and had become street homeless that same day.

Sandra informed us that she was taken out of the care of her mother at the age of thirteen by her aunt. Sandra stayed with her aunt until she turned seventeen. She then stayed with family friends for four months and then her cousin for a few days before becoming street homeless. Sandra further informed us that her mother had neglected her, and had made her take time out of school to look after her younger brother. She had to pick up drugs for her mother as well.

Sandra reported to us that she had tried to make a homeless application at the local authority area where she last stayed. However, the duty homelessness officer was rude to her and did not listen to her properly. Sandra explained that she had complained to the manager of the homeless persons unit (HPU) but that the manager supported the duty officer's version of events. As a result, Sandra did not feel that her complaint had been resolved satisfactorily. The homelessness officer then gave Sandra a list of hostels, for her to ring each one of the hostels to check whether there were vacancies. When Sandra told the duty officer that she did not have any money to make the calls, the duty officer informed her that that was Sandra's problem. Sandra left the HPU without a written decision in relation to her homelessness application.

Case 2 – Doug's Case

Doug was aged eighteen, and at the time that he contacted the telephone advice line, informed us that he wanted his aunt to speak on his behalf because he did not have the confidence to seek advice by himself. Eventually, I spoke to Doug as well as his aunt.

Doug's aunt informed me that he was staying temporarily with her in west London. The background to this case, based on previous contact Doug's aunt had with the advice line, was as follows: Doug had left his mother and stepfather's home, as they were both drug

[1] Severe hardship payments are awarded to people who do not qualify for income-based job seeker's allowance under any of the rules for sixteen and seventeen year-olds, or for income support. Footnote 12 provides a brief explanation of the two types of job seeker's allowance. If it is decided that the claimant is in severe hardship or will suffer severe hardship, a "severe hardship direction" is issued. A "severe hardship direction" usually lasts for eight weeks but can be extended or curtailed depending on the claimant's circumstances. Once the "severe hardship direction" ends, it is possible for it to be renewed.

users. Doug's aunt further reported that Doug's stepfather had also been violent to him, and that he had been mentally abused from an early age. Doug also had a drug dependency problem until his sister helped him to detoxify two weeks before Doug's aunt first contacted us. In addition, Doug's aunt believed that he was in a vulnerable situation as he had only recently been detoxified. He had not had any contact with his family since leaving home, and that it had taken him a lot of strength to leave his mother. Doug's aunt felt that he needed a great amount of practical support in order to overcome the drug addiction, the trauma of leaving the family home and of having to find accommodation. She also thought that Doug had other problems, but that he did not want to divulge information about these problems unless it was necessary for him to do so.

Doug's aunt further explained that he had already attended the HPU, and been told by the local authority that he could not be assisted. Doug's aunt also informed us that an officer at the HPU had not interviewed Doug. However, when she attended the HPU with Doug, she managed to secure an interview for him for the following week, but at the same time was told that it was unlikely he would be accommodated when he returned for his interview the following week.

I answered the call when Doug's aunt next rang the telephone advice line, and managed to gain further information from Doug himself. Doug reported that he had not been in contact with any doctors about his drug addiction, and that he had been detoxified at his sister's home, with her assistance. Doug's aunt also informed me that Doug had been mentally abused from an early age, and that social services had probably been working with the family. However, Doug's aunt did not have the full details and further information would have to be gained from Doug's sister who did not live in London. Doug's aunt informed me that he and his two sisters had been 'in trouble' from a very early age, and that the siblings had been in foster care for a few weeks while their mother was in hospital. His aunt added that different family members looked after Doug from an early age.

Case 3 –Ben's Case

Ben was aged twenty-one, and had been in contact with the telephone advice line staff over a period of time. He had spoken to various advisors before I spoke to him. Ben had informed us that he has a hearing impairment in one ear, and that he had been in the care of social services and been accommodated by them from the ages of fourteen to sixteen. Ben further reported that while he stayed at a young people's hostel in central London, he started taking drugs. In addition, Ben had previously been incarcerated in a young offenders' institution for thirteen months. In a later telephone call, Ben informed the advisor that after he was released from the young offenders' institute, he slept rough for six months. At some point, Ben was excluded from his parents' home. He explained to us that he had stayed briefly with his mother, but that his stepfather had been violent to him. Ben reported that he has a history of self-harm from the age of sixteen. When he was incarcerated at aged seventeen, he had a nervous breakdown, and has not had any psychiatric support since being released from prison. In addition, Ben had abused ecstasy and cocaine until he went to prison. In 1999 his girlfriend died and he still has nightmares about this and as a result, quite often gets emotionally upset.

More recently, he had been dismissed from his job because he did not turn up for work. Ben explained that it was because he did not have any money, and as a result, he could not telephone his manager to let him know that he was unable to go into work.

Ben had mainly been on contact with the telephone advice line in order to try to access a hostel vacancy, which is part of the reason why it was possible for more information to be gathered in relation to his circumstances. There was a long period of time from Ben's last call to the occasion when I spoke to him. When I spoke to him, Ben informed me that since his last call – four months ago – he managed to stay in a young peoples' hostel for twenty-eight nights. Ben then managed to

stay with his mother until his brother was released from prison a week ago. After his brother was released, Ben had to leave his mother's home because his brother assaulted him. Ben explained that he had been sleeping rough for one week, but was recently robbed. He was afraid of being assaulted again, and he felt very fragile. He had not had contact with any GP since leaving prison as he had a phobia about the medical profession because of what had happened to him in the past. Ben did not expand on this point and it was difficult to probe further because he was emotionally upset at the time of the call.

Case 4 – Tilye's Case

Tilye was aged seventeen, and had informed me that she was on training and in receipt of a training allowance of only forty pounds a week. She and her aunt had slept rough for one night, as it was not safe for Tilye to remain at home. Tilye explained that her aunt had slept rough with her, because her aunt was concerned about her safety while she was street homeless.

Tilye originally left home a year ago because her father had been physically abusive to her and there had been a history of violence. Social services were involved, and Tilye was placed in the care of her aunt. After four months, Tilye moved back home, and her aunt moved into the family home as well. Tilye thought that her father would not physically abuse her again, especially because social services had intervened. However, more recently Tilye's father started to abuse her again. Although Tilye's aunt can return to the family home, her aunt did not feel able to leave Tilye while she was street homeless.[2]

People Facing Multiple Problems

It is rare for one single problem to cause someone to become homeless. It is usually a combination of problems, or a progression of problems that eventually leads to homelessness.

Case 5 – Claire's Case

Claire was a single parent mother, with two children. Claire and her children had been staying with two of her friends as a 'split household' because neither of Claire's friends could accommodate the entire family. Claire worked part-time and was also in receipt of working families tax credit.[3] Claire had dyslexia.

[2] When Tilye spoke to me – in February 2002 – if Tilye had approached her local authority for emergency housing assistance, the authority would have had to take into account her age, the fact that her father had been physically abusive to her over a period of time, as well as the fact that social services had worked with the family. However, the local authority had no duty to assist Tilye if it did not consider her to be vulnerable. After 31 July 2002, Tilye should automatically have qualified for emergency housing assistance, since the *Homelessness (Priority Need for Accommodation) (England) Order 2002* conferred priority need status on sixteen and seventeen year-olds.

[3] Working families tax credit is a means tested benefit. The benefit is paid only where the claimant has limited income and capital resources and the claimant's means are investigated. Working families tax credit is paid to couples or lone parents responsible for one or more children under the age of sixteen or nineteen if in full-time education up to 'A' level or the equivalent standard. The parent or parents should normally work for sixteen hours or more per week, and in addition, must be present and ordinarily resident in Great Britain. Further, the parent or parents must be earning a low income and have savings of less than eight thousand pounds, and must not be "subject to immigration control." There are however, exceptions to this rule. This benefit is only awarded for twenty-six weeks.

Claire informed us that she had been a housing association tenant for six years with adequate housing. However, the family had not been able to stay in the accommodation for the past four months. This was because two of Claire's former partners who were violent to her while in the relationship, had connections with the Yardies.[4] Claire did not feel safe in her own home after the relationships ended. She reported that her housing association housing officer had advised her to obtain injunctions against both of her former partners. However, Claire informed the housing officer that she could not consider taking this action because of their gangland connections, and the consequences that would follow if they became aware of the injunctions.

Claire explained that since leaving her home, she had stayed at different refuges, as well as with different friends, and this is the reason why her family have had to split up. None of her friends could accommodate her entire family.

As Claire worked part-time, she fell into rent arrears trying to make payments for two properties – her housing association property and rent for the refuge space – whenever she was able to stay in a refuge. Claire mentioned that she had an agreement to pay back the rent arrears to the housing association, and that she had been making regular payments to her landlord.

Claire further explained that the housing officer was adamant she had to follow the course of action he suggested so that she and her children could continue to stay in the housing association property. Claire supplied the housing association with letters from the police confirming the dangerous situation she was in. Moreover, the housing association mislaid these letters and she was unsure whether she could obtain further letters.

Claire told me that she had sought advice from a solicitor but had been advised that there was no legal matter for the solicitor to address at this point. Claire asked him to assist her in applying to her landlord's waiting list. However, the solicitor informed her that he would only be able to take action if she were already on the waiting list.

Case 6 – Tom's Case

Tom was a single man in receipt of both income support and incapacity benefit.[5] He informed us that he had depression and was seeing a psychiatrist on a monthly basis as an outpatient at a hospital. Tom was due to see a psychologist the following week for more intensive treatment, and at present was taking Prozac. He also abused alcohol and was being assisted by the Alcohol Recovery Project. However, at the time, Tom was waiting to find out whether a local hospital could provide him with treatment. He also suffered from an ulcer and had been prescribed medication to treat the problem.

Tom moved into private rented accommodation in May 2000 and appeared to have had an assured shorthold tenancy with limited security of tenure. This means that if Tom were a

[4] A member of a West Indian gang or Mafia-like syndicate involved in drug dealing and related crime.
[5] Income support is a benefit for people with a low income who are not required to be available for work, such as pensioners or lone parents. It is not paid to unemployed people who are available and are actively seeking work. Income support is also a means tested benefit – see footnote 3 for an explanation of 'means tested.' Incapacity benefit is generally paid to people who have been sick or who have been paid or been credited with sufficient national insurance contributions, and are incapable of work through sickness or disability. To receive incapacity benefit, claimants must continue to prove incapacity for work – initially by providing a medical certificate when an application is made. Incapacity benefit was replaced by employment and support allowance for new claimants on 27 October 2008.

statutory periodic tenant [6] he would be entitled to a court order if the landlord wanted to evict him. Tom explained that he had an argument with the landlord, and that the landlord "scared him into leaving." As a result, he left his belongings in the property and went to stay with a friend. He did not mention when he left his tenancy, only that his friend's accommodation was overcrowded and he had been asked to leave.

Case 7 - Yolanda's Case

Yolanda and her fiancé had been street homeless, staying in different areas in London for short periods of time. They had been sleeping rough particularly in two areas within two different London boroughs. Both were in receipt of income support and both had medical problems.

Yolanda informed us that she suffered from arthritis in the spine, which affected her mobility, and she was taking painkillers for this. In addition, she suffered from depression and took prescribed anti-depressants and sleeping tablets. She also had high blood pressure and had a heart attack in 1999. Her GP monitored her heart on a weekly basis. Yolanda added that she also suffered from asthma. Yolanda's fiancé had a fractured spine and was diagnosed with cancer of the spleen three weeks ago.

It was difficult trying to gain a sense of where Yolanda and her fiancé had lived, since they had slept rough in so many different places. Yolanda told us that she originally had a joint tenancy with her husband in Northamptonshire but had left the accommodation because her husband physically abused her in 1999. After she left her matrimonial home, she became street homeless in Northamptonshire initially, and at the time that she sought telephone advice, might already have been street homeless in London for about six to seven months.

Case 8 - David's Case

David was aged twenty-eight and had been staying with his friend for a month until he was asked to leave. When David tried to return to the accommodation, his friend called the police. David reported that he had had an alcohol problem since aged nineteen, and that he spends most of his money on alcohol. He admitted that his friend was aware of this problem, which was part of the reason why his friend had asked him to leave. David explained that he had the contact details for Alcoholics Anonymous, but that he had not yet had the chance to contact the organisation. He also told us that he had a personality disorder, and had an appointment for a mental health assessment the following week. David had tried to gain assistance from the local authority for emergency housing. However, the authority issued him with a non-priority need decision, which meant that the council had no duty to assist him. David mentioned that he did request a review of that decision but the authority advised him that he needed to obtain a medical report from his doctor in order to confirm his medical problems.

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[6] This is the period after the tenancy agreement has expired. The period refers to the frequency of when rent is paid. If rent were paid on a monthly basis, then Tom would have a monthly tenancy, which continues until Tom serves written notice on the landlord if he wanted to leave the property. Alternatively, the landlord needs to serve Tom with a written notice – lasting not less than two months – if he wanted Tom to leave the property. After the expiry of the notice period, Tom is then entitled to a court order before he is required to leave the property. If, by the expiry of the court order, Tom had not left the property, the landlord must obtain a bailiff's warrant in order to evict Tom. The entire eviction process could last a few months, and Tom would be liable for costs if his landlord had to apply for a court order. However, it is common for judges, when making a possession order against a tenant who is publicly funded, to make no order for costs (see Madge, McConnell, Gallagher and Luba 2006).

David originally rang the telephone advice line about a year ago when he had had his own council tenancy, but had problems managing money. At that time, David had informed us that with the local advice agency worker's assistance, he had been successful in obtaining a total of ten suspended possession orders. Each of the possession orders was suspended on condition that he paid some money towards the rent arrears. However, he did not keep to any of the agreements drawn up to pay the rent arrears, and he was eventually evicted from the tenancy. David reported that he became confused easily, and was forgetful. He explained that from infants stage, he attended an educational special needs school. Further, he was dyslexic, had learning difficulties, and was in care from the ages of twelve until sixteen. Moreover, he has had problems with alcohol since aged nineteen, and had a personality disorder.

Before he was evicted, David had wanted to move out of his flat, because it was located in a dangerous area, and he had already been robbed once. He was also experiencing noise nuisance from the neighbour situated above his flat. David wanted to be considered for a transfer to another area. However, the local authority could not assess his application because he was in rent arrears. While still a tenant, he had requested that the local authority directly deduct the rent arrears from his benefits. This would have prevented the rent arrears from increasing, but direct deductions were not made. David's rent arrears increased, as he would forget to make payments in addition to rent. David's situation was more complex. Part of the reason David's local authority would not take direct deductions from his benefits was because as soon as the direct deductions began, David would start working and hence, might not be entitled to benefits. David admitted to us that he often became confused and did not always take action to prevent his problems from escalating.

When David was evicted from his tenancy, he tried to obtain emergency accommodation assistance from the local authority. However, the council verbally informed him that he would probably be found to be intentionally homeless.[7] The local authority had not issued David with a written decision at the time David rang the telephone advice line because David had been given an appointment to return to the HPU at a later date in order to be interviewed. The telephone line advisor suggested that David should pursue his homeless application, and to obtain medical evidence, if possible, a psychiatric assessment before he returned to the HPU.

David did not contact the telephone advice line again until a month later, after he had been evicted from his council flat. David informed us that after he had been evicted, he was allowed to stay with a friend on condition that he found a job. Unfortunately, he was not able to find a job and his friend asked him to leave. David explained that the police were involved in 'evicting' him. David also told us that the local authority had also issued him with a non-priority need decision, which meant that there was no duty for the authority to provide David with emergency accommodation. When I told David that he was entitled to request an internal review of his homelessness decision, David told me that he would contact the council with his request for a review. He would also obtain assistance from a local citizens' advice bureau in relation to this matter.

Case 9 – Alex's Case

Alex was a single man and had been street homeless following discharge from a psychiatric hospital. Alex informed us that he had problems with alcohol, and he had

[7] David lost his council tenancy through rent arrears. An argument the council would have made was that David had contributed to his own homelessness. If at the end of the homelessness investigation, the council did arrive at this conclusion, then the authority would not be under a duty to accommodate David on an emergency basis.

recently been detoxified. Alex reported that he suffered from clinical depression and took three types of medication. In addition, he suffered from bladder failure and had a catheter attached from his stomach leading to a bag attached to his leg.

Alex told us that he had been living with his brother for the past eight years, but his brother also abused alcohol, which meant that he could not return to his brother's home because he did not want to start drinking again. Alex was discharged from hospital without seeing a social worker, and he had already sought advice from a local law centre about this matter. Alex reported that the local authority's out of hours service[8] did accommodate him for one night. However, when he tried to make a homeless application at his local authority the following day, Alex was not accommodated because he had been unable to provide documentary evidence in support of his medical conditions. Alex further reported that apart from the fact his brother might be away, his brother would not allow him back into his home to pick up these documents anyway. That night Alex slept rough.

When Alex next contacted the telephone advice line for further advice, he told me that he now had his incapacity benefit[9] details with him, as well as a letter from hospital confirming his medical problems. On that basis, I advised Alex to approach the HPU again in order to make a homeless application. Unfortunately, the day team did not accommodate Alex – probably because he could not provide proof of homelessness. However, that same night, after intervention from a telephone advice line advisor, the local authority's out-of-hours service agreed to search for accommodation for Alex for a night.

Case 10 - Steven's Case

Steven had been street homeless for five months following a relationship breakdown. Steven informed me that the relationship breakdown was the direct cause of his homelessness. He added that since being street homeless, he had experienced difficulties in gaining access to services, particularly those provided by the Case and Assessment Team, which works with street homeless people with the aim of referring them to accommodation. Steven told me that he suffered from depression, and had a heart condition. He had had three heart attacks and there were blood clots in his lung, heart and leg. In addition, Steven recently had a heart operation. Although he needed to take various medications, he had not been able to do so because he had been homeless. Steven further reported that he made a homeless application two months ago and had submitted a letter from his doctor, which confirmed his medical problems. At that time, he felt that he was extremely vulnerable but the council did not accommodate him. Steven added that he had made a complaint to the HPU fairly recently – after seeking advice from the telephone advice line – and was still awaiting a response. Steven explained that his doctor recently completed a medical report, and he had already handed in the document to the local authority. However, he had not been accommodated. I suggested that Steven sought further

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[8] The out-of-hours service operated by a local authority literally operates after office hours, so that homeless applicants can still seek emergency housing assistance after office hours – in theory at least. The out-of-hours assessment is less strict because the homeless applicant is usually interviewed by telephone. However, should the duty officer be satisfied that an interim duty ought to be owed to the homeless applicant, the accommodation would only be available for one night, and the homeless applicant would be expected to make a formal application at the homeless persons unit the following day. On many occasions, the duty officer would experience difficulties in placing the homeless applicant into a hotel for the night because of the general lack of bed and breakfast hotel vacancies in London that would accept a homeless person referred by a local authority.

[9] Incapacity benefit is paid to people who have paid or been credited with sufficient national insurance contributions, and are incapable of work through sickness or disability. Employment and support allowance replaced incapacity benefit for new claimants on 27 October 2008.

advice from a local law centre in order to gain assistance in relation to his homeless application.

Case 11 – Craig's Case

When Craig first contacted the telephone advice line, he reported that he had been street homeless for two weeks after leaving prison, where he had been incarcerated for nine months. He told us that he used to abuse crack cocaine, and had a heavy drinking problem, but had been through rehabilitation. Unfortunately, Craig had a relapse and had started drinking again because he was depressed. Craig had taken an overdose in the past because of his depression. He had suffered depression as well as anxiety for a number of years, and had abused alcohol and drugs for a number of years.

Craig attempted to make a homeless application, but had not been interviewed. The HPU duty officer verbally informed him that the authority did not have reason to believe that he was in priority need for accommodation. This meant that Craig would not be offered emergency accommodation. The duty officer did, however, advise him to obtain medial evidence first before returning to the HPU. When an advisor from the telephone advice line contacted the local authority out-of-hours service that same evening, after Craig first contacted us, the duty officer agreed to accommodate Craig without interviewing him.

When Craig next rang us, he explained that he had approached the HPU the following day. However, he could not provide proof of homelessness, or a doctor's letter confirming his medical problems, and as a result the day team did not accommodate him that night. Craig slept rough that same night and because he was depressed, started to abuse alcohol again.

When Craig contacted the telephone advice line the following day, he told me that in the meantime, he had managed to secure a letter from his GP. The letter not only confirmed his medical problems but also his vulnerability, and the fact that his mental health was deteriorating because he had been sleeping rough. Craig was not able to acquire documentary evidence confirming his homelessness however, and the stress of trying to gather the necessary documentation exhausted him. It was not surprising that the HPU day team did not agree to accommodate Craig that night because of this very reason. Craig told me that by the following day, he would be able to secure the evidence confirming his homelessness. With the documents he already had, and with his worsening mental health state, the local authority out-of-hours service agreed to accommodate Craig that night when we contacted them.

Responses to Homelessness

People react differently to their homelessness situation. Some will seek advice from professionals – either from the local authority, a telephone advice line or a solicitor. While others are guided by other professionals into seeking help when they are assisted with other problems in their lives, such as a drug dependency or debt problem.

Case 12 – Cressida's Case

Cressida was a lone parent with three children, aged fourteen, six and four. When Cressida first telephoned the housing advice line, she and her family were living in private rented accommodation. Cressida had an assured shorthold tenancy, but the tenancy agreement

had expired and her status at that stage was of a statutory periodic tenant.[10] Cressida had a continuing right to stay in her accommodation until her landlord issued her with written notice asking her to leave. However, she was concerned that the rent was not affordable. She was self-employed and did not want to fall into rent arrears. One of Cressida's friends had been squatting at the same house for five years at that time, and had offered the squat to Cressida, who saw this as an easy solution to her current problem.

When Cressida first rang the telephone advice line, the advisor suggested that she make a homeless application on the ground that it was unreasonable for her to continue to occupy her accommodation because it was not affordable. Cressida followed the advice and attempted to make an application, but was not offered an interview until she returned with a letter from a local housing aid centre explaining the unaffordable issue.

Cressida did not contact the telephone advice line again until four months later, when she was living in the squat and about to be evicted in a week's time. Cressida told me that she had instructed a solicitor in the meantime, and had managed to resolve the issue over whether she had made herself intentionally homeless in relation to her leaving her private rented accommodation. Her concern now focused on whether the temporary accommodation the local authority would be securing for her might be affordable.

Case 13 – Lucy's Case

Lucy informed me that she had three children and was a student. She made a homeless application at the start of the children's school holidays and was accommodated by the local authority. Lucy had told her homelessness caseworker at the council, that she would be in France for three weeks during the summer period. The caseworker asked Lucy to confirm this in writing, which she did. However, Lucy explained to me that the real situation was that her former partner, and father to the children, from four years ago had managed to trace her and was persistent in his demands in seeing their children. The children were also keen to see their father. Lucy reported she was in shock about being traced, she thought that she had "walked out of the relationship forever," and panicked, thinking that if she told the local authority the truth, her benefits would be affected. Lucy further explained that she had not been in contact with her former partner for four years and that after the relationship ended, she and her children stayed with her mother. For the three weeks, while her homelessness caseworker thought she was in France, Lucy and the children had been staying with her former partner.

On her return, Lucy had to attend the HPU to see her caseworker, who had asked her to supply tickets as evidence that she had been to France. When asked to provide this evidence, Lucy told me that she panicked again, and told her caseworker that she had in fact only been in France for a week. Lucy was now concerned that her caseworker still required evidence from her proving she had been on holiday. Lucy then explained that she was a joint mortgagee four years ago, and that her former partner continued to occupy the property. She then divulged that this 'former' partner was in fact her husband, and she was still married to him. Lucy told me that she intended to initiate divorce proceedings some time in the future. She added that she had forgotten about the joint mortgage. When she separated from her husband, she had not expected to see him again. She further believed that her separation from her husband meant that she was no longer responsible for the property because she had not been paying the joint mortgage for four years. Lucy then disclosed the fact that when she completed the formal homeless application at the council office she had written 'private' next to this former address, when she gave details of accommodation she had stayed in for the past five years. Lucy thought that 'private' meant owner-occupier.

[10] See footnote 6 for an explanation of the legal status of a statutory periodic tenant.

Case 14 – Natalie's Case

Natalie was single, suffered from depression, she self harmed and tried to commit suicide in the past. She had tried to commit suicide again a week ago before contacting the telephone advice line. Natalie also had chronic asthma. When she contacted the advice line, Natalie was staying in temporary accommodation provided by the local authority pending an appeal to the county court.[11] Natalie told me that she had originally been asked to leave the accommodation over two weeks ago. However, her solicitor managed to get an extension for her to stay in the accommodation for a further two weeks. Her solicitor could not get an additional extension because the local authority had decided that Natalie was not in priority need for accommodation under Part VII of the 1996 Act. Natalie explained that she was getting support from the social services mental health team, and that there was a risk she could be sectioned under the *Mental Health Act 1983*. She had slashed her wrists because she believed she could not get help. She had children, but all of them (apart from her eighteen year-old son) had been taken into the care of social services as a result of her failure to protect her children.

When I spoke to Natalie, she had found it difficult to organise her thoughts because she was so anxious about her impending homelessness. Natalie told me quite a few times that she would not be able to cope with being street homeless, and that this was the reason she tried to commit suicide again recently. Since I was advising Natalie by telephone and therefore could not see any of the paperwork that she had, I offered to ring her solicitor. I needed to confirm whether he was aware of Natalie's recent circumstances, and to establish the reason for the non-extension of stay at her current accommodation.

When I spoke to Natalie's solicitor, he informed me that he was not aware that the mental health team had been giving support to Natalie, nor was he aware of the risk of her being sectioned. The solicitor was aware of the self-harm, although again, he was not fully aware of her suicidal tendencies. Her solicitor agreed that she should telephone him immediately, so that he could be fully informed of her circumstances.

I spoke to Natalie again, and after I had updated her about the discussion I had with her solicitor, Natalie told me that head was swimming, and that she was not aware whether her solicitor was up-to-date about the state of her mental health. She then explained that her doctor had referred her to the mental health team three months ago, and she was waiting for the mental health team to assess her. Natalie then added that she saw her GP a week ago because she was feeling very low in mood and her doctor had suggested that she attended hospital. She said that she did not follow through the suggestion, since she feared that she would be sectioned. Natalie then explained that the reason why she was so fearful was because she tried to commit suicide a week ago and she would have succeeded if her partner had not stopped her.

[11] A homeless person who approaches his or her local authority for emergency housing assistance under the *Housing Act 1996* has a right to a decision letter under section 184 of the 1996 Act. The decision letter is the notification by the local authority of the applicant's homelessness case. If the applicant is issued with an adverse decision, then he or she has a right to request a review of that decision by the issuing authority. The applicant must exercise the right to have his or her case reviewed by the authority within twenty-one days of notification of the decision. The local authority must normally conduct the review within fifty-six days of receiving the request. If the applicant is dissatisfied with the review decision or does not receive written decision within fifty-six days, the applicant may appeal to the county court if there is a point of law in contention (section 204(1) of the *Housing Act 1996*). The appeal must usually be brought within twenty-one days of the notification of the review decision, and the court can make an order to confirm or quash or to vary the decision.

Case 15 – Simon's Case

Simon had been staying at a drug crisis intervention residential nursing home where he had had been detoxicated over a period of twelve days. Simon told me that when he left the nursing home a day ago, he was arrested by the police and held at a police station until the evening. The police later informed Simon that they had wrongly identified him. After he was released, Simon did not know what to do, and since he did not have any accommodation, slept rough that night. He added that because he had slept rough that night, he got disorientated the next day and had a relapse. He explained that he had taken drugs and felt suicidal because of the relapse.

Simon reported that when he left the drug crisis nursing home the day before, he should have met with his funders in order to secure accommodation. However, as he had been arrested, and because he was not released until the evening, he did not know what to do about his lack of accommodation. I telephoned the drug crisis nursing home and the worker informed me that Simon had been given letters in order to take to the HPU, and that "everything was set up for him."

Case 16 – Victor's Case

Victor was recently discharged from hospital following a seven-day stay. Victor told me that he had fallen from the third floor of a building, and he remembered that he had been drinking at the time. Victor had been accommodated for one night by the local authority after being assessed by the local authority out-of-hours team. However, Victor then had to be interviewed by a duty officer from the day team at the HPU.

Victor contacted the telephone advice line after the duty officer at the HPU had interviewed him. He told me that the duty officer had asked him to return the following day in order to see the Single Homeless Officer. Victor had shown the duty officer the letter a member of staff at the hospital gave him upon discharge. He explained that he had fallen from the third floor of a building, and that he had been drinking at the time. He then added that he remembered he had deliberately thrown himself out of the window at the time. However, he did not inform hospital staff of this. Victor told me that he had been street homeless for a while, and was in despair when he decided to jump out of the window. Moreover, since he did not inform any of the hospital staff about this fact, Victor had not been given appropriate assistance while in hospital. His suicidal attempt could not be confirmed by a medical staff, which would have been taken into account in his homelessness investigation. Victor reported that the duty officer did not contact the hospital for further information. However, even if the hospital had been contacted, the attending doctor would only have been able to confirm that Victor had been given treatment after his fall.

Case 17 – Linda's Case

Linda was a lone parent with three children, aged five, twelve and sixteen. She informed me that she and her family had been evicted from her council flat, which was a secure tenancy, because she fell into rent arrears. Linda explained that the local authority sent the court papers to the wrong address, and that the first time she became aware she had been evicted was when she received the bailiff's warrant. She added that sometime after she fell into rent arrears, she offered to pay about forty or fifty pounds each week in addition to the rent in order to start clearing the rent arrears. Linda was working on a part-time basis when she made this offer, which was rejected. She had also appeared before a council panel to discuss her rent arrears situation.

Since being evicted, Linda and her children had been staying with a friend for three weeks up until the day that she rang the telephone advice line. Linda told me that the family could not return to the accommodation because her friend had withdrawn permission for them to stay. Linda had attended the HPU for the past two weeks, but each time she attended, was told that a decision had been made, and that the council will not be assisting her with her accommodation needs. However, to date, not only had Linda not been interviewed, but neither had she been issued with a decision letter in relation to her homeless application. The HPU duty officer had told her to seek assistance from social services. Yet, when Linda attended social services, she was told that her children would be taken from her.

Case 18 – Maria's Case

Maria was aged seventeen, and had made a homeless application at a local authority area where she did not have a local connection after fleeing from her parents' accommodation. Maria told me that her parents had been physically abusing her. She had contacted the police and had a crime number. She received a non-priority need decision from the council, but did not challenge the decision. A local authority officer had advised her that she did not have a strong case. As a result, Maria threw the letter away immediately.

Maria wanted to stay in the area where she made the homeless application because her close friend, Amy, lived in the borough. Although Maria had been staying with Amy since fleeing her parents' home, she recently left that accommodation because she experienced some problems with Amy's boyfriend and no longer felt safe staying there. Maria has since been staying with another friend.

Maria explained that she first tried to seek assistance from social services a month ago, when she first left home. The duty social worker did not interview her though. Maria had also been trying to make a claim for jobseeker's allowance (JSA),[12] but had not received any money. Recently, she was told that she did not qualify for JSA because she was in full-time education.

Maria explained that she lacked self-confidence in trying to seek help from the HPU. She gave me permission to contact a young person's advocacy project, so that a worker could accompany her to the HPU.

Inability to Access Services

Some people find it difficult to seek advice, or help about their homelessness situation, or even have difficulty accessing services. The following case studies describe and explain what some of these reasons could be.

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[12] Jobseeker's allowance (JSA) is paid to claimants who are available to work, are actively seeking work, have entered into a jobseeker's agreement or not working for more than sixteen hours a week. The claimant must be capable of work. There are two types of JSA – contribution based or income based. Contributory based JSA is paid for up to six months to those who have paid the correct amount of national insurance contributions. Income based JSA is paid if the claimant satisfies the conditions for a means-tested benefit. See footnote 3 for an explanation of this term.

Case 19 – John's Case

John sought advice on behalf of a family member, Ken, who did not know how to seek help. John explained that Ken had been living with his mother until she asked him to leave. Since then he had been living in a van. John told me that although Ken had bowel cancer and used a colostomy bag, he worked full-time. Ken needed accommodation where he had access to his own bathroom, and had tried to get help from the council about his housing need. John suspected that Ken had not made his case clearly enough to the local authority, because he was too embarrassed about his medical problem. John wanted to know how he could help Ken.

Case 20 – Mariam's Case

Mariam was a lone parent with two children, aged fifteen (daughter) and thirteen (son). At first, Mariam's daughter tried to interpret for her mother. However, Mariam's daughter did not fully understand the housing terms used in the discussion. Instead, I contacted an interpreter who assisted by phone. Through the interpreter, I was informed that Mariam and her family had arrived in London in November 2000 as asylum seekers, and were dispersed[13] to Leeds two months after their arrival. One month later, the family were granted exceptional leave to remain in the UK, and one further month later, Mariam made the decision to return to London, and managed to stay with friends for a total of seven months before being asked to leave. Mariam reported that she and her friend argued, but that the argument took place after she had already been asked to leave. The argument was not linked to the family being asked to leave her friend's home.

Mariam told me, via the interpreter, that after her friend had asked her to leave, she made a homeless application. The duty homelessness officer contacted Mariam's friend, who confirmed she could not stay, and was therefore street homeless that day. When the duty officer interviewed Mariam, she had shown documents in support of the homeless application. The information she had supplied included her benefit book and the Home Officer papers confirming her immigration status. The exceptional leave to remain status that the Home Office had granted Mariam meant that she would not be barred from seeking assistance, which involves the use of public funds. However, the duty officer told Mariam that the council could not assist, and a written decision was not issued. Mariam tried to telephone the advice line while she and her family were still inside the HPU, but did not manage to speak to an advisor from the advice line. Mariam and her children did not leave the HPU until they were physically removed. She and her children spent that night at a bus station.

When I discussed the possibility of contacting the local authority on Mariam's behalf, she was reluctant to agree because of her experience of having been physically removed from the HPU by the security staff.

Case 21 – Hector's Case

Hector was aged nineteen, and a former asylum seeker with indefinite leave to remain in the UK. A telephone interpreter assisted each time Hector rang the telephone advice line

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[13] An asylum seeker, who is aged eighteen or over, who makes an application for asylum and who is destitute may be provided with accommodation in the area in which he or she has arrived in the UK. This might be in the form of emergency accommodation while the asylum seeker completes an application for support. However, the National Asylum Support Service (NASS) may then arrange for him or her to be accommodated wherever there is adequate accommodation. This accommodation is likely to be located in another part of the UK. It is NASS' policy to disperse people away from London and the south east of England.

when the following information was gathered. During the first call, Hector informed us that he had only been in the country for one year and had been in London for four days. Both his legs were 'paralysed' – the words that the interpreter used – due to an injection he received while in his country of origin, and that he usually walked with the aid of crutches. However, the crutches were stolen a night ago and he had not been able to walk since then. In addition, Hector suffered from epilepsy, and had seizures every three days. He had not taken any medication for the epilepsy since leaving his country of origin. Further, Hector could not use his right hand (he was right handed) following an injury, despite having had two operations to try to bring mobility back to his hand. He reported that he suffered from depression and had attempted suicide while he had been living in the UK. He lived in Birmingham for the past year and had stayed with friends until they could no longer accommodate him.

When Hector first rang the advice line, he was in the reception of a hostel because there were no vacancies at the hostel. The local authority out-of- hours service did not accommodate him that night because the officer could not find emergency housing for Hector. The hostel staff allowed him to stay in the reception area overnight, so that he could approach the HPU for assistance the following day. On the next occasion when Hector rang the advice line again, he informed us that the HPU did not assist him, and that he had slept in the park for the following three nights. However, one of his friends accompanied him to the HPU and acted as an interpreter and advocate.

When Hector rang the advice line two days later – he was at a telephone box outside the HPU – he told us that the HPU still had not accommodated him, and a homelessness officer had told him to return to Birmingham. The telephone line advisor informed Hector about his rights as a homeless applicant. Hector did not contact the advice line until eleven days later, by which time he had been sleeping rough in a park for a total of three weeks. Hector told the telephone line advisor that a local specialist advice centre could not assist him. Hector had made a homeless application and supplied all the necessary documents to the HPU, and was waiting for news in relation to his application. During that call, Hector was in an agitated state. He informed the telephone line advisor that there were many people waiting to use the phone, and that they were getting angry about the length of time he had been using the phone. Unfortunately, while speaking, Hector's call was suddenly cut off.

Hector did not ring the advice line until a day later, when he informed us the local specialist advice agency could not assist him because the advice centre only assisted asylum seekers and refugees with interpretation. It was not clear why Hector did not qualify for assistance though. Nevertheless, this meant that at present, Hector could not effectively further his homelessness case.

When Hector rang the telephone advice line the following day, he told me that he had been sleeping rough outside of the HPU building. Hector confirmed that both his legs were paralysed, and that he had difficulty standing and walking. He also reported that the local police and hospital were aware of his circumstances, and that he had already given the HPU a doctor's report about his medical conditions. Unfortunately, Hector still did not have any crutches. The HPU had not yet issued Hector with a written decision in relation to his homeless application. While I was trying to gather information about Hector's circumstances, he became involved in an argument with somebody who wanted to use the telephone. Again, the call was cut off before I could discuss with Hector the course of action he could take.

Case 22 – Jennifer's Case

Jennifer was aged twenty and had been sleeping rough for four days since leaving her parents' home after an argument. Jennifer informed us her brother had claimed that her behaviour was strange and she had a mental illness. When Jennifer first rang the telephone advice line, she told us that her brother had been abusive to her. As a result of this claim, the advisor contacted the local authority out-of-hours team for an emergency homelessness assessment. That night, the out-of-hours team agreed to accommodate her.

When Jennifer rang the next day, she complained that she did not arrive at the accommodation until 4 a.m. because she was misdirected. At the time of the call, Jennifer was more concerned with getting something to eat than in securing accommodation. When the advisor reminded her of the importance of attending the HPU in order to secure further emergency housing assistance, Jennifer claimed that she thought she would not be able to acquire further assistance because she did not attend the HPU at 9 a.m. When the advisor informed Jennifer that provided she approached the HPU as soon as she could, she should still be assessed. Jennifer complained that she did not have any money to travel to the HPU and it would be too far for her to walk. The advisor then gave Jennifer details of her nearest HPU at another local authority area, which was only 200 yards from the telephone box she was in, but Jennifer complained that it was still too far for her to walk. The advisor impressed upon Jennifer the importance of attending the HPU in the daytime, and that if she did not, she would experience difficulties trying to gain emergency housing from the council's out-of-hours team. Jennifer informed the advisor that she would get something to eat first, and might ring the telephone advice line later in the day.

It is difficult to judge whether Jennifer was just being difficult, or that she genuinely found it difficult to absorb the information given her, or even that she could not entirely grasp the situation she was in. One of the advisors who spoke to Jennifer noted that there might be mental health problems because of the way Jennifer would fixate on relatively unimportant future events, and misunderstood or misinterpreted short pieces of information given to her.

When Jennifer next rang the advice line, she reported that she had an appointment to see an advisor at a local young people's day centre in a central London borough. She was convinced that the day centre worker would be able to refer her to a hostel immediately. When asked about attending the HPU, Jennifer again told the telephone line advisor that she thought she had missed her appointment. Earlier in the day a telephone line advisor had advised her that she did not have an appointment, and that she would have to attend the HPU as soon as possible. Jennifer did not have any identification, which would make it more difficult for anybody to assist her in securing a hostel place.

I spoke to Jennifer later that evening when another advice line referred to our telephone housing advice line. Jennifer did not make it clear that she had been in contact with our telephone advice line, and complained that I was asking too many questions when I tried to find out about her housing problem. Jennifer became impatient and started to get frustrated, and swore. She told me that she ran away from home nine days ago because she had been physically and emotionally abused. Jennifer added that the abuse started in her childhood, and got worse when she was a teenager. She last saw her GP four months ago when her GP advised her not to get stressed because her doctor suspected she had high pressure. Jennifer reported that she suffered from depression but she had stopped taking medication a year ago. She is aware that she had mental health problems and told me that she felt suicidal.

Case 23 – Anna's Case

Anna originally contacted the telephone advice line a month before I spoke to her when the following information was gathered: Anna was a lone parent with three children, two of her children were aged three and two, and she was also pregnant. Anna informed us that she and her children had been staying with a friend, who wanted her to leave. She added that she was not well and suffered from sickness and fatigue. She also had high blood pressure.

Anna had already made a homeless application, but did not know at what stage the homelessness investigation had reached. The telephone line advisor contacted the HPU on her behalf and was informed by the duty officer that Anna's application was still being investigated and that she should return to the HPU on the day of homelessness so that she could be interviewed. When Anna did approach the HPU on the day she could no longer stay with her friend, her local authority homelessness caseworker informed her that a decision would not be made until a week's time.

Anna contacted the telephone advice line for assistance because she had to leave her friend's accommodation that day, and she was also concerned that the local authority might find her intentionally homeless. Anna had previously left private rented accommodation because the property was in poor condition and she had problems with the landlord. By the end of the call, Anna decided that she would try to stay with her mother for a few days, and to approach the HPU again the following week. However, ten days later, Anna had still not had a decision from the local authority, and she rang the telephone advice line for assistance to contact her local authority homelessness caseworker. When the advisor spoke to the officer, the telephone line advisor was informed that a decision had still not been made. When Anna continued to express concerns to the telephone line advisor that the outcome of the local authority's homelessness investigation might be that she is found to be intentionally homeless, the advisor suggested that Anna should contact a solicitor for further assistance.

When Anna rang the telephone advice line about three weeks later, she told me that she was worried because she did not know whether a decision had been made in relation to her homeless application. Her homelessness caseworker had requested further documentary evidence. Anna complained that her solicitor was 'no good' and had told her that she must wait for a decision, and that no action could be taken against the local authority until a decision had been issued.

Case 24 – Margaret's Case

Margaret first contacted the telephone advice line when she was aged seventeen and in receipt of income support. At that time, Margaret had just been evicted from a hostel for using drugs and she had no accommodation that night. Margaret told us that she had previously made a homelessness application, but the local authority had issued her with a non-priority need decision. Margaret explained that she had submitted a letter from the hospital as evidence after her discharge. However, she did not want to disclose the reason for her admittance to hospital.

During the following months of contact with the advice line, Margaret rang mainly to check information about hostel vacancies. She was often vague when giving information about out-of- hours local authority placements. It appeared that whenever a telephone line advisor referred her to the local authority out-of-hours team, following the placement, she did not attend the HPU the following day. Margaret's vagueness in giving information included details about her medical problems, which changed from time to time. This meant

that Margaret was not following up a potential source of assistance from the local authority.

I spoke to Margaret when she rang to check hostel vacancy information, again giving vague details about another out-of-hours placement. Margaret reported that her social worker was helping her to find accommodation. She told me that he was trying to find her a flat, but at the same time, contradicted herself by saying that he was only checking hostel vacancies, and also, that he was not really assisting. Margaret drifted in and out of the conversation, and did not give coherent information. It was not clear from the conversation the nature of advice and assistance that she required. However, Margaret did give me permission to contact her social worker in order to gather further information about her homelessness circumstances.

Those Assisted by Local Authorities

Inadequate or Unsuitable Accommodation

The most acknowledged problem about London is the inadequate supply of accommodation that is reasonably priced and of a reasonable quality. For many years, homeless applicants who are owed a temporary housing duty have been placed in bed and breakfast hotel accommodation. Over the years, local authorities have been competing for bed and breakfast hotel vacancies. However the lack of this type of accommodation has led many local authorities to accommodate families outside their local area. Offers of accommodation made by London local authorities have been as far as Bedford, Peterborough, Newcastle, as well as Slough and Eastbourne. The *Homelessness (Suitability of Accommodation) (England) Order 2003* (SI 2003 No 3326) changed the manner in which housing authorities could discharge their duty to secure accommodation for homeless applicants with family commitments. Authorities can provide bed and breakfast accommodation where facilities are shared, provided no other accommodation is available, and only as a last resort. In addition, the provision of bed and breakfast accommodation should be for a period, or periods, not exceeding six weeks (see the 2006 Code of Guidance paragraphs 17.24–17.29).

Case 25 - Jackie's Case

Jackie and her family of four – husband, two girls aged twelve and five and a boy aged ten – made a homeless application at a west London borough where they have lived and where they have family. Following the homeless application, the whole family were placed into one room in a bed and breakfast hotel in Slough.

Jackie told me that she and her family were evicted from their council accommodation in August 2001 having fallen into rent arrears. When Jackie first approached the council for emergency housing assistance, the local authority had decided that the family had made themselves homeless intentionally because the eviction from the accommodation resulted from rent arrears. The local citizens advice bureau assisted Jackie with an internal review[14] but the intentionality decision was upheld. Jackie added that she was now waiting for a second stage internal review decision from a council panel.

Jackie explained that after she had been issued with the intentionality homelessness decision, social services took over the financial responsibility of accommodating the family. Despite Jackie's request for more suitable accommodation for the family, the council informed her that larger roomed accommodation was not available. The location of the accommodation caused hardship for the family. In the weekdays, the family would have to get up at 3.30 a.m. in order to catch a train to the home of Jackie's father in west London. The children would then go to school from there. The reason why the family have to travel to west London so early in the morning was because Ken, Jackie's husband, worked as a postman and had to start work about 5 a.m. each day. In addition, it was more cost effective for the family to travel together otherwise the travel cost each month far exceeded Ken's income.

Jackie was aware that social services would only be financially assisting the family to stay in the hotel until the second stage review decision had been made. Jackie told me that her social worker had advised her to look for private rented accommodation. However, she had not been able to find any accommodation that was affordable as well as of a reasonable size for her family.

Case 26 - Maureen's Case

Maureen was a single parent mother with two children, one was aged three years while the other was three months old. Maureen was in receipt of income support and invalidity allowance[15] (mobility and care both at high rate). She was diabetic, and was diagnosed with asthma and epilepsy. Her three year-old child had chronic asthma and the three month-old child suffered from breathing difficulties. When Maureen has seizures she needs her carer to stay over night until her health stabilises. Once the seizures are over the carer stayed with her for at least two to three more nights. The local authority had accommodated Maureen and her children temporarily in a one bedroom flat over a shop. The living room was not large enough to accommodate one person. Further, Maureen had difficulties climbing the stairs and it took her about twenty five to thirty minutes to climb ten steps. This was partly because she had difficulty manoeuvring the pushchair in the narrow passage, and partly because of her mobility problems.

In addition to the problems with the size and location of the accommodation, Maureen told me that there are other difficulties with the flat. There had been water penetration in the flat, and the flat did not have a fire escape. In addition, the flat lacked a fire alarm. Maureen had problems trying to install a baby gate at the top of the stairs, as the gate would not fit the width of the hallway. The accommodation was not suitable for all these reasons.

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[14] See footnote 11 for an explanation of the appeal procedure. It appears that the local authority offered a further review, which is unusual. Authorities are only required to review the homelessness decision once.
[15] Disability living allowance (DLA) is a benefit for people with care or supervision or mobility needs and who are under the age of sixty-five. DLA is divided into two components: care and mobility. Within each of the component, there are three rates: higher, middle and lower rates. Greater care needs as well as greater mobility problems would result in a higher rate of benefit.

Case 27 - Kay's Case

Kay had a newborn baby and originally she had difficulties obtaining temporary accommodation from the local authority. Following the intervention of a telephone line advisor, the authority offered Kay a room in one of its hostels.

However, Kay reported that there was a problem with the water, which was discoloured and had bits floating in it. There was no drinking water at all. Kay's baby was only six weeks old. She had use of the hostel communal bathroom but could not bathe her baby there, not only because the bathroom was so dirty but because the water was also discoloured. Kay had not been able to bathe her baby for three weeks, since moving into the hostel, neither had she been able to sterilise the baby's things. She explained that her room was not large enough to store a baby bath. Her baby's skin had started to turn red and scabs had started to form on the baby's back, neck and now face. Kay's doctor had advised her to keep her baby clean, and Kay had not informed her GP that there were no bathing facilities for her baby. Furthermore, she was still waiting for the health visitor to see her at the hostel. In addition, Kay's room did not contain cooking facilities, nor did the hostel provide communal cooking facilities.

Kay was issued with a positive decision from the local authority three weeks ago, which meant that the local authority's two-year duty to accommodate her commenced from three weeks ago. This meant that the local authority had a duty to ensure that the two-year accommodation was suitable for Kay's needs. Kay's local authority caseworker informed her that the search of a two-bedroom flat for her had started

Separation of Families

At the time these cases were gathered, some of the families who approached social services for assistance were separated, and the children taken into care, while the parents were left to make their own arrangements for accommodation. Other families had threats directed against them that their children would be taken into the care of social services.

Case 28 – Hawa's Case

Hawa was part of a couple with two children, aged two and four. Hawa's first language was not English and a telephone interpreter assisted with the advice call. Hawa reported that her family had made a homeless application and was subsequently assessed by the local authority as having made themselves intentionally homeless because the family had been evicted from their private rented accommodation owing rent. This meant that the local authority housing department did not have a duty to accommodate the family. Since the housing department did not owe the family a housing duty, the family approached the social services department for assistance, only to be told by the SSD that the children, but not the parents would be assisted.

Hawa explained that when she and her husband first received the local authority's intentionality decision, they sought advice from a solicitor, but withdrew instructions at the point that her solicitor was about to instruct a barrister to represent the family over judicial review proceedings. The solicitor had felt that the case had sufficient merit for him to argue that the family ought to be accommodated pending the outcome of the review of the homelessness decision. However, he was not willing to take on the social services aspect

of the case. It was not clear why Hawa and her husband withdrew instructions to their solicitor.

When Hawa contacted the telephone advice line, the advisor spoke to the duty social worker on the family's behalf, arguing that social services owed the entire family a duty under the *Children Act 1989*. However, the duty social worker was adamant that assistance would only be given to the children and not the parents.

When a telephone line advisor spoke to the duty senior social worker, she was informed that a section 17 *Children Act 1989* assessment had been completed and that the children were found to be in need of accommodation. Accommodation was then offered to the children but not the parents.[16] The telephone line advisor sought legal advice on behalf of Hawa and was informed that there was no legal remedy should the social services department refuse to accommodate under section 17, or to offer the children accommodation and not accommodate the whole family. Social Services had a power – target duty – to accommodate, as opposed to a section 20 duty, which was a specific duty. However, while carrying out the section 17 assessment, social services would still need to demonstrate that it had assessed all alternative options to foster care. It could be argued that it would be perverse if social services did not consider cheaper options to taking the children into its care. Other options could include the offer of bed and breakfast hotel accommodation for the whole family or the offer of rent deposit. The spirit of section 17 is to keep the family together, and there are certainly human rights implications.

Case 29 – Sarah's Case

Sarah was aged forty-eight. She told me that she had been homeless for nine months, sleeping in parks, hallways and stairwells. Sarah had contacted the telephone advice line on many occasions requesting information on hostel vacancies in one particular borough. When I spoke to Sarah she made the same request, and did not want to give me further information about her circumstances, which meant that I could not effectively advise her. However, one of Sarah's friends then rang the advice line – I took the call – and explained that Sarah was not capable of speaking for herself, and that when Sarah had rung the advice line earlier, she had been sitting next to her.

Sarah's friend explained that Sarah originally had a council secure tenancy, which was possessed after she fell into rent arrears. She made a homeless application, was assessed by the local authority to have made herself intentionally homeless and hence was not accommodated by the housing department. Social Services then took Sarah's children into care, but did not accommodate the whole family. Sarah's friend explained further that Sarah's former neighbours had made complaints against her because she had been sleeping in the hallways and stairwells of the block where she used to have a tenancy. Sarah sought advice from a solicitor about five months ago when her children were taken into care. Her solicitor had agreed to write to social services arguing that Sarah ought to be accommodated with her children. However, Sarah was waiting to hear from her solicitor about progress of her case. The reason why Sarah could only consider a hostel place in one particular borough was because her children had been placed into care at that particular

[16] It appeared that the senior social worker's decision had been made in line with the following decisions: *R (G) v Barnet London Borough Council* (2001) (CA) and *A v Lambeth London Borough Council* (2001) (EW HC Admin 370). In both cases, the judge rejected the argument that once an assessment under section 17 of *Children Act 1989* had identified that a child had specific needs, there was a specific duty owed to the child to meet those needs. A duty under section 17 is and remains a target duty, as opposed to section 20 of *Children Act 1989,* which is a specific duty and therefore enforceable.

borough and she needed to see them every day. Unfortunately, when Sarah was evicted from her flat, she also lost documents confirming her identity. Hostel workers tend not to consider any applicant whose identity documents are missing and it would be difficult to assist Sarah until she had secured further documents.

The Most Visible Homeless in London

In London, the 'street homeless' are the most visible among those who are homeless, and it is this image that many people have of a homeless person. The case studies presented below demonstrate that sleeping on the streets is a last resort for many. Lack of affordable accommodation and the lack of a support network,[17] are among some of the reasons that can cause homelessness to anybody. Unfortunately, homeless people who find it most difficult to cope with life, or find it difficult to seek help are the most likely to sleep rough.

Case 30 – Tim's Case

Tim was aged thirty-nine and described himself as having been homeless since the age of fifteen, staying in hostels, with friends as well as sleeping on the streets. He suffered from clinical depression and had a mental health social worker. Tim told us that he had also been admitted to hospital because of the depression. He sought advice and assistance from the telephone advice line over a period of a few years before I first had contact with him on the telephone advice line.

Tim's problem was that when placed into temporary accommodation – usually bed and breakfast hostel accommodation – by the assisting local authority, he would usually leave. When questioned, Tim gave us different reasons as to why he left the accommodation: sometimes he felt at risk while staying in the accommodation, or the accommodation was unsuitable because his depression brought about a compulsion in him to jump out of the window. Once, he had an argument with another resident and felt too afraid to return to the hotel. He would usually then stay temporarily with friends or slept rough.

After gaining initial advice and assistance from various advisors at the telephone advice line, Tim did not contact the advice line for one year until he needed assistance to access local authority assistance out of office hours. Tim told the telephone line advisor at the time that when he attended the HPU in the daytime, he was told to telephone the emergency out-of-hours service for accommodation. However, when he did telephone the emergency number, not only was he told that he would not be booked into a hotel, but the duty officer did not give a reason why he would not accommodate Tim. At that point, Tim rang the telephone advice line, and the advisor contacted the out-of-hours duty officer on Tim's behalf. The duty officer informed the advisor that there were only two hotels that would accept Tim, and both these hotels did not have a vacancy. He explained that Tim's difficult behaviour had caused problems for the local authority attempting to place him into a hotel, and he was considered to be a danger to other people. The local authority out-of-hours duty officer reported to the advisor that the HPU day team had told him that Tim

[17] Social support networks tend to be friends and family who are able to provide emotional and practical support, including advice. See Lemos and Durkacz 2002 for further information.

had discharged himself from hospital and he could not be placed into any accommodation. The type of emergency accommodation available might well be unsuitable for him, and the duty officer added that he was not prepared to put other people at risk by accommodating him.

Tim contacted the advice line over the next two days in order check whether there were any hostel vacancies. He next rang six weeks later, when he informed me that since he last contacted the telephone advice line, he had voluntarily admitted himself to hospital because he had found it difficult to cope with his depression and anxiety. He told me that the hospital allowed him to stay an extra night, as he did not have any accommodation to return to. Tim added that he had returned to the same local authority that had assisted him in the past, with a letter from a hospital doctor. However, the local authority was not willing to help him. He explained that he had contacted a solicitor for assistance the day before, and was still waiting for the solicitor to telephone him.

Case 31 - Peter's Case

Peter told me that he had been street homeless for one year. A hospital was treating him for drink and drugs abuse, and he had been admitted for the past nine days. He explained that he had now resolved his drinking problem and only needed treatment for the drugs abuse. He was due to be discharged. Peter had been street homeless prior to being admitted to hospital. He was deaf in one of his ears and he had a leg injury, partly because of 'self abuse,' as well as problems with his right hand. He was concerned that he might have hepatitis C but was too afraid to find out.

Peter's doctor agreed to write a letter confirming his medical conditions, so that he could make a homeless application. With Peter's permission, I spoke to the nurse, who first telephoned the advice line on his behalf. The nurse explained that she had contacted social services, but the duty social worker informed her that Peter did not fall within the criteria for social services assistance.

Case 32 – Angelina's Case

Angelina was aged twenty-one, and with her boyfriend, had been sleeping rough for two nights. When Angelina first rang the telephone advice line, she told us that she had made a homeless application, and had given the duty officer the crime number, as well as a police report about the domestic violence that she had suffered, but had not been accommodated by the local authority. She explained that she had fled from a physically abusive relationship prior to her former partner going to prison. She added that while he was in prison, her former boyfriend had made threats to her over the telephone. After he was released from prison, he managed to trace her whereabouts and when he found her, physically abused her. Angelina told us that her new boyfriend was aged twenty and had been in care for a year from aged sixteen to seventeen, and had had a nervous breakdown.

Angelina reported that she had a housing association tenancy, but relinquished the tenancy because the housing association could not assist her with an emergency transfer. Angelina added that she was under a full care order from the ages of seven until eighteen, when she was offered her own flat. She also had a social worker until she turned twenty-one a month ago, and the social worker had been assisting her with the homeless application.

Angelina explained that she had previously approached the same HPU for assistance, but was found not to be homeless. When Angelina rang the advice line again, she informed me that she had not returned to the HPU since making the second homeless application. She managed to stay with a friend for two weeks after fleeing from her accommodation, but she had slept rough over the past two nights.

Case 33 – Jodie's Case

Jodie, aged twenty with her nineteen year-old boyfriend had been street homeless for one night. Jodie was admitted to hospital for fifteen months following a diagnosis of acute psychosis. Following discharge from hospital, Jodie returned to her parents' home. However, her parents could not cope with her mental illness, and as a result, asked her to leave. Jodie made a homeless application. The authority accommodated her for three months but following a non-priority need decision she was asked to leave the temporary housing, which she did two days ago.

In the meantime, Jodie's boyfriend also became homeless after his parents asked him to leave home because he did not follow their strict rules. Both Jodie and her boyfriend were now in need of accommodation as a couple. Jodie should have been allocated a social worker immediately following discharge from hospital but was still waiting to be contacted by social services. When Jodie first rang the telephone advice line, she was advised to request that the local authority review the negative homelessness decision. During the review stage, the authority has discretion whether or not to provide accommodation, which meant that there was no guarantee Jodie would be accommodated pending the review decision. Hence, when Jodie next rang the advice line, she was advised to make a further homeless application based on the fact that she was now part of a couple.

Case 34 – Adam's Case

Adam first came to London about a year ago. He told us that he had planned to stay with relatives once he arrived, but discovered that they had died. He had been sleeping rough for a total of two years. He suffered from arthritis in the lower spine, angina – he had been hospitalised on a regular basis because of this – and had problems with alcohol. He was recently admitted to hospital following a nervous breakdown.

Adam explained that seven months after his arrival in England he made a homeless application at a south London borough. He told us that the authority issued him with a non-priority need decision, but Adam did not request that the local authority review the decision. In February 2001, Adam made a further homeless application, and occasionally would be accommodated by the local authority out-of-hours team, but not by the day team.

Adam did not ring the telephone advice line until two weeks later, when he informed me that he had been discharged from hospital a day ago. The hospital admitted him after he suffered a nervous breakdown. He attended the HPU with a letter from his doctor, but the council did not accommodate that night, and as a result he slept rough. Adam explained that he now had a social worker, who was probably based in the psychiatric wing of the hospital, but he was not certain.

'Self-help'

The 'Hidden' Homeless

Many homeless people remain 'invisible' and are not accounted for in any official statistics. They are the "hidden homeless." The 'hidden homeless' include those who would not be successful in obtaining emergency housing help from the local authority, as well as those who cannot gain a hostel vacancy. There are also those who have no choice but to rely upon the generosity of friends or relatives in providing short-term accommodation, however inadequate this may be. As will be seen by some of the following case studies, some have resorted to finding creative though very short-term solutions in order to prevent themselves from becoming roofless.[18]

Case 35 – Adele's Case

> Adele was an EEA worker. Adele and her three year-old daughter had been staying with Adele's sister for six months. Adele's sister had given her a deadline to leave her home, and had written a letter for her to take to the local authority in order to seek emergency housing assistance. Adele reported that she handed the letter to her homelessness caseworker in good time. However, after the deadline for leaving her sister's accommodation had passed, the local authority still did not accommodated Adele, so she continued to stay with her sister.
>
> Adele explained that she worked night shifts and when she returned to her sister's accommodation at 8.30 a.m. the morning that she rang the telephone advice line, discovered her young daughter sleeping outside her sister's property. Adele's belongings had also been placed outside of her sister's accommodation. She subsequently found out from another sister, that the sister who had allowed her to stay with her had gone on holiday.
>
> Adele told me that she immediately approached the HPU for emergency housing assistance, but her caseworker informed her that an appointment had been made for her to be interviewed in three weeks time. Her caseworker advised her to return home and attend the HPU on the appointed date. The caseworker then informed Adele that she could not assist her in the meantime, despite the fact that Adele had explained she was no longer able to stay with her sister, and that she did not have a key to her sister's flat. Her caseworker was aware that she had a daughter.

Case 36 – Dan's Case

> Based on the information that Dan gave us, it was clear that Dan and his partner with their two children were unlawfully excluded from their private rented accommodation. The

[18] See Chapter Two section, E, for the discussion on the government recording of homelessness statistics, which currently reflects the immediate reason – the last settled base – of why households approach local authorities for emergency housing assistance, as opposed to the original cause of homelessness.

landlord told Dan that he would have to pay five hundred pounds if he wanted his belongings back. Subsequently, Dan took action in the county court against the landlord for the recovery of his belongings.

The family stayed with friends while the local authority assessed their homeless application. Dan had informed the local authority that the family's accommodation was dependent upon the good will of friends. However, Dan's local authority homelessness caseworker told him that a visit would be made to his former private rented address in order to establish whether the family were still resident there. Dan had already spoken to his former landlord, who had told Dan he would not co-operate with the local authority enquiries. A local authority officer did visit Dan's former home twice, and unsurprisingly, was not able to speak to his former landlord.

The local authority subsequently decided not to assist Dan and his family because the authority believed that the family was not homeless. Dan's local authority homelessness caseworker informed Dan that on the local authority officer's last visit to Dan's former landlord's property, the landlord did not co-operate – as Dan had previously informed the local authority would happen. When an advisor from the telephone advice line contacted Dan's local authority homelessness caseworker, the caseworker told the telephone advice line advisor that she was still investigating the family's homelessness situation. She informed the advisor that the visiting officer had been to the family's former property and had left a letter for the excluder of the property. She added that once the excluder had confirmed that the family were homeless, the local authority would take appropriate action on the case. The advisor reminded the local authority caseworker that the landlord had unlawfully excluded the family from the property and was unlikely to co-operate with the investigation. In addition, Dan's friend had also asked him and his family to leave and had confirmed this in writing to the local authority.

Unfortunately, one week later, Dan and his family were still waiting for the local authority caseworker to update him of the progress of its investigation into the family's homelessness situation. The family had continued to stay with Dan's friend, but were now in an awkward situation in that Dan's friend wanted the family to leave, but would not ask the family to leave until they had secured further accommodation. In the meantime, Dan knew that he was imposing on his friend, and did not want to lose the friendship, so for one evening the family stayed with a different friend. The children were now ill because of their homelessness situation.

Squatting

Case 37 – Jack's Case

Jack had been living in a squat with his girlfriend for six months. The relationship broke down at the same time as Jack was being evicted from the squat. In addition to the eviction and relationship breakdown, Jack told me that he was involved in an incident and ended up being stabbed in the shoulder, which punctured his lung. Jack had stayed in an abandoned car for two nights and was trying to get into another squat but found it difficult to locate another one. He now had a chest infection because of the punctured lung. Jack also suffered from epilepsy and although he had not had a seizure for the past ten years, had two seizures one night ago.

Jack added that he had problems with alcohol and was waiting for an appointment to attend a counselling project, so that he could start working on this problem. He suffered from depression and was recently prescribed anti-depressants again. Finally, he suffered from panic attacks, anxiety and wass prone to experiencing 'black-outs.'

Other Short Term Temporary Solutions to Prevent Rooflessness

The following case studies demonstrate the resourcefulness of homeless people in finding temporary solutions to their homelessness, however inadequate the solution might be. A major issue for many street homeless people is their personal safety.

Case 38 – Laura's Case

> Laura, was aged sixteen. She, with her twenty year-old boyfriend, Gavin, stayed in an abandoned car for about three months before the car was towed away, along with their belongings – on the day that she rang the telephone advice line. Laura told me that part of the reason both stayed in the car for such a long time was because the local authority refused to accommodate them. This was despite the fact that the 2002 Act had amended the 1996 Act, and the *Homelessness (Priority Need for Accommodation) (England) Order 2002* conferred a duty on local authorities to accept sixteen and seventeen year olds as being in priority need for accommodation. When Laura tried to make a homeless application, the duty homelessness officer informed her that she was Gavin's responsibility. When Gavin asked the duty officer to take a homeless application from her as single person, he was told that Laura would still not be assisted.
>
> Gavin was in receipt of jobseeker's allowance, as a single person, whereas Laura had no income and had been financially dependent on Gavin's income. Laura had left school three months ago, and she and Gavin initially stayed with his mother for two months before Laura left school. About this time, Laura's mother abandoned her, and Laura had no father. Gavin had known her for a total of three years because her mother was a friend of his mother's. When Laura's mother became homeless a year ago, Gavin's mother allowed both Laura and her mother to stay with them while Laura's mother searched for accommodation.

Case 39 – Keith's Case

> Keith told me that he and his family of six had been sleeping in a car for eight months. Keith was originally a council tenant, but fell into rent arrears and subsequently evicted from that accommodation.
>
> Keith told me that he made a homeless application but the local authority had decided that Keith had made himself intentionally homeless following eviction from his council flat owing rent. Keith thought that he had asked the local authority to review the intentionality decision, but the original decision was upheld. At some point he consulted a solicitor about the intentionality decision, and probably appealed to the county court, but was not certain about the outcome of his case.
>
> Keith approached social services four months ago for assistance, but the duty social worker informed him that there was no obligation for social services to assist his family. A section 17 *Children Act 1989* assessment was undertaken at that time, but the children were considered not to be in need because they were healthy. Keith told me that he then attended a local housing advice agency and was referred to a solicitor for help with initiating legal action against social services under the *Children Act 1989* for not assisting the children with their family. Unfortunately, about the same time, new case law

supporting the local authorities argument that they only need to accommodate the children in need and not their families, meant that Keith would have lost his case.

Keith explained that he had not been able to find accommodation because many landlords did not rent accommodation to a potential tenant who was in receipt of benefits. The car broke down in early December – it was now late December – and there had been no heating since then, but Keith could not afford to have the car repaired. Three of the children had not been attending school because of the family's homelessness situation.

By the time Keith rang the telephone line for advice, the case law in relation to *Children Act 1989* assessments and the nature of assistance that arises from the assessments, changed yet again. The new case law now enabled families to be accommodated with their children.

Case 40 – Martin's Case

Martin told me that he had been sleeping in a van for a period of time before sleeping rough at bus stops for a week. Martin described himself as disabled and explained that he had back and leg problems. He added that he easily became confused, experienced dizzy spells, had problems with his memory, and recently had been diagnosed as suffering from epilepsy. He rented his friend's flat until it was sold – the reason for Martin's homelessness.

Martin reported that he had made a homeless application two months before telephoning the advice line but the local authority decided he was not in priority need for accommodation. When Martin first contacted the telephone advice line, the advisor spoke to Martin's local authority homelessness caseworker. The advisor and homelessness caseworker both agreed that because he had new information about his medical problems, the local authority homelessness caseworker would accept a new homeless application. Martin made a further application two weeks ago. The problem now was that Martin had to obtain a medical report from his doctor confirming his medical problems. Martin explained that he had tried to see his GP prior to contacting the telephone advice line, but had not been able to obtain an appointment any earlier than two weeks later.

APPENDIX 3
Homeless Application Procedures

The Statutory Homelessness Process

The statutory homelessness process, which appears to be straightforward, has caused problems for many applicants. In Case A, Nicole had an extremely difficult experience with the homeless applications she made.[1] In terms of her application with a central London authority, Nicole told me that she was scared when she received a decision from the not to assist her and her family in relation to their immediate housing needs. Nicole thought that the process would be straightforward. Her 'fright' was compounded by the local authority officer providing interim accommodation for her family 'far away' outside of the local authority area. Nicole did not realise that a common problem many local authorities shared was the lack of temporary accommodation within the local authority area.

Nicole informed me that she was stressed because she thought that the local authority officer did not like them; she felt that she had always cooperated with the officers. However, it appeared that the family were always given accommodation outside of the borough. After the central London authority issued Nicole with a negative decision, Nicole made a homeless application at a north London authority. In terms of her north London homeless application, Nicole told me that the officer from this local authority who interviewed her always made her cry. She added that the officer shouted at her when she attended her first interview, and her daughters witnessed her crying. Nicole was more 'scared' of officers from this local authority because the accommodation was closer to where her husband worked. However, it seemed to Nicole that the officer was never really happy with Nicole's answers in relation to the questions he asked her. Nicole felt that the officer always inferred she was lying about her circumstances. Yet, he never asked to see copies of letters that Nicole carried with her as evidence of the events that took place, which caused her homelessness. Nicole was distressed by the fact that the officer would tell her that he wanted a direct answer from her (via the interpreter used) when he asked Nicole a precise question, but complained that when Nicole gave him her answers, these were

[1] An advisor from a voluntary organisation suggested that Nicole made a homeless application at another authority after her application at a central local authority had been unsuccessful.

either too short or too long. Nicole told me that she always carried documentary evidence with her. These documents needed to be translated, but the officer never asked her for them.

A problem that many clients tell ma about is the officers ask for information, but then do not really pay attention to the answer the clients give. Apart from clients experiencing frustration that that are not listened. This potentially causes a problem. If the officer is not taking information that could be relevant to the application or might be taking into account information that might not be relevant to the application, it could be argued that it is difficult to give a fair consideration to this information. As mentioned above, in Case A, Nicole told me that her homelessness officer had accused her of lying. However, rather than perceiving the injury in the context of a possible claim, Nicole was more angry at the way he had treated her in comparison to the other applicants. Nicole told me that her anger was directed to the fact that the same officer that had accused her of lying, appeared to her to accept other people's stories when these people did not even provide written evidence in support of their story. Nicole was concerned that she would not be helped, and therefore co-operated with the authority's enquiry process.

Not all homeless applicants stay with the statutory homelessness process, especially if they are not accommodated in the earlier stages of the enquiry process under section 188 of the *Housing Act 1996*.[2] Some applicants are in need of continuing support and guidance from an independent advisor in order to be able to complete the application process. In the main, applicants tend not to view the lack of accommodation as a cause of immediate complaint. Some just accept they could not be helped. In Case 10, Steven had made a homeless application after he had had a heart operation following three heart attacks. At that time Steven also had blood clots in his lung, heart and leg and he suffered depression. However, regardless of all these medical problems, the authority did not accommodate Steven. He was still waiting for emergency accommodation, two months after he first made his homeless application. He did not make a complaint until after he sought advice from us.

[2] When the authority has reason to believe that the applicant could be homeless, eligible for assistance, and is in priority need for housing, while continuing to carry out further enquiries, interim accommodation ought to be provided.

For some clients, the local authority officer is somebody they view as being a person in authority. I have worked with clients who when they receive a negative decision have been discouraged by a local authority officer from requesting a review of that decision. The officer might suggest to the applicant that he or she did not have a strong case. Some applicants usually would not think about challenging that suggestion because the comment had been made by a person in authority. In Case 18, Maria, who was aged seventeen at the time, received a non-priority need decision after fleeing from her parent's home when they were physically abusing her. Maria had even reported her parents to the police. However, Maria told me that she threw away her decision letter when a local authority officer advised her that she did not have a strong case, and it would not be worth her while requesting a review of that decision.

For those who were given verbal decisions for non-assistance, challenging such a decision is not foremost on their mind. This might be because the applicant believed the officer had made the correct decision because he or she is in a position of authority. The applicant might well not be aware of what might constitute a correct decision. Whatever the reason, these cases do not evolve into claims if the applicant is not given sufficient information about the statutory process or unless assisted by an advisor or housing law practitioner. For Mariam (Case 20), not only was she given a verbal decision that the authority could not assist her, the verbal decision was delivered via her fifteen year-old daughter, who had to act as an interpreter for her mother. English was not Mariam's first language. Mariam further explained to me that she and her children had also been physically been removed from the HPU by staff recently. The family did not leave the HPU because they had nowhere to stay. Understandably, even when I offered to contact the local authority to establish the reason as to why they could not assist the family, and to assess whether I could advocate on their behalf, Mariam was reluctant to approach the council for assistance again.

A recurring problem that homeless applicants experience is the applicant's lack of understanding of how the system works. Such a problem was common to applicants who grew up in England or Wales, as well as to applicants who were originally from

the EEA countries or from non-EEA countries. In Case 17 of the case studies, when she rang the advice line, Linda and her three children had been staying with a friend for three weeks after making a homeless application, but could no longer do so. Linda told me that when she attended the HPU for the past two weeks, each time she attended, she was told that a decision had been made, and that the council would not accommodate her and her family. At the time of the call, Linda had still not received a written decision.

For applicants who are allocated interim accommodation (be prior to a decision being made), the accommodation could be a problem for different reasons. In Case 27 of the case studies, when Kay and her new born baby were eventually offered a room in one of the local authority's hostels, there was a problem with the water, which Kay described as being discoloured, and had bits floating in it. Kay told us that there was no drinking water at all, and she and her baby had to share the communal bathroom, which was dirty. Kay did not have cooking facilities in her room. The hostel did not provide a communal area for people to cook. Kay could not sterilise her baby's things. As a result, her baby's skin started to turn red and scabs started to form on the baby's back, neck and then face.

Another recurring theme in relation to problems that homeless applicant clients experience is poor health – the impact on the clients' health of a complicated system that is meant to assist the most vulnerable people in society at the most difficult time of their lives. The frustration and difficulties they experienced of trying to manage and navigate the statutory homelessness process has sometimes affected their physical and psychological health, thereby impairing their ability to help themselves in getting through the many hurdles of the homelessness process. In Case B, Agnes told me that the local authority officer did not explain the homelessness process to her. At the time she made a homeless application she had only recently had a positive decision in relation to her asylum claim. Agnes explained to me that friends had told her she could not approach the local authority to make a homeless application until the day of the eviction from the accommodation itself.[3] When Agnes did make the

[3] In practice, local authorities do not provide accommodation to a homeless person until the day the applicant is physically homeless. However, the homelessness legislation imposes a duty on authorities

homeless application, she was asked standard questions in relation to priority need issues. This did not include questions about long-term illness, and Agnes had to tell the local authority about her illness.

As a result of not being given adequate information in relation to the homeless application process from the local authority, Agnes told me that she felt that her health was affected. Agnes told me that each time she had a set back in her homeless application, she became ill. She had a long-tem illness anyway, prior to making the homeless application. At first Agnes thought that the application process would be straightforward. She was homeless, and she also had a long-term illness, and had experienced trauma while in her country of origin. However, an officer verbally informed her that she was not in priority need for accommodation. This meant that the local authority would not accommodate Agnes on an emergency basis until more permanent accommodation became available. Agnes moved out of the interim accommodation the same day the local authority officer asked her to leave because she did not realise that she was entitled to a written decision in relation to her homeless application. Agnes informed me that after she left the accommodation, she did not know what to do and ended up sitting on a bench outside the hotel until a couple who knew her by sight because they lived in the same hotel she had stayed at, told her about a local independent housing advice agency. Agnes did not have an understanding of her rights, had insufficient knowledge of the homelessness process, and had not been interviewed properly by an officer when she made her homeless application. Agnes's experience of when she was first made homeless after her asylum application initially failed might also sum up her experience in relation to her experience of homelessness, "it was really… it was somehow hell. You know, like, you're in a country where you don't know anybody, and nowhere to run to, and when you're sent a letter saying, 'You have to move out tomorrow, you're evicted.'"

In terms of the housing law practitioners' experience of the statutory homelessness process, CW3 commented that the administrative system is not sensitive nor is it 'user friendly' to homeless applicants. Officers taking homeless applications are not courteous and do not listen to the applicant's story or to the professional either. In

to take a homeless application, and to make enquiries, up to twenty-eight days before the applicant becomes homeless (Section 184, *Housing Act 1996*).

addition, the homeless application process is considered to be a very complicated long process. CW3, CW4 and CW5 felt that homeless applicants needed the assistance of advocates ("people need good representation") because of the bureaucracy involved in the process, and the fact that "traps are set for people to fall into" in relation to the homeless application process.

In particular, the application process has been particularly challenging for those who have had to flee from domestic violence. The emotional and psychological impacts on clients are not taken enough into account by the London local authorities. An example is the situation where local authority officers are strict in requiring applicants fleeing from domestic violence to provide a statement from the police. CW3 pointed out that people who are the victims of domestic violence do not want to involve the police, nor would such applicants necessarily have had contact with the police. CW3 felt that the client's knowledge and fears that there are problems about the quality of emergency housing being offered, the limited housing options available, and the fact that accommodation could be located outside of the borough, where the client does not have a social support network,[4] could prevent a client who is experiencing domestic violence from leaving that situation.

Comments were gathered in relation to the manner in which local authority officers made decisions, in terms of how the law is applied. CW5 felt that local authority officers do not apply the law properly. In addition, the housing law practitioners (CW1, CW2 and CW5) commented that officers acted the role of 'gatekeeper' to the local authority financial resources, in particular, the Housing Department's. The decision-making process of the officers prompted CW5 to raise the question: Why are poor decisions being made? While CW4 commented that "The [administrative] systems do not help us [the practitioners] nor do the staff help us. CW4 felt that homeless persons units have a 'call centre' mentality, where staff have no idea about a case, files are lost, and there is difficulty getting through to the staff by phone." CW4 added that the enquires carried out by officers were inadequate and rushed, thereby leading to negative homelessness decisions. In addition, officers placed the onus on applicants to give proof, thus placing greater hardship on single people.

[4] Social networks tend to be friends and family who are able to provide emotional and practical support, including advice. See Lemos and Durkacz 2002 for further information.

CW5 felt that local authority officers do back down and make correct decisions when the law requires them to. However, CW4's perception was that very little resources are put into the interview process, and that the emphasis of the local authority officer is on reaching negative decisions, which is the root of the problems since such action is directly linked to homelessness.

The term 'gatekeeping' in relation to the practice by local authority officers in preventing or delaying homeless applications being made, thereby temporarily safeguarding the local authority's financial resources, is not one that all practitioners felt comfortable with.[5] Nevertheless, the following two comments is a reflection of how all the practitioners interviewed felt about the limited resources available to assist the vulnerable homeless. In the first comment, CW1 remarked that the local authority officers have an institutionalised attitude, "we must resist taking homeless applications at all costs because we have scarce resources, therefore we are going to put all obstacles we can in the way of homeless applicants." In Agnes' case, when she first tried to make a homeless application, she was only asked questions in relation to the standard 'priority need' categories of pregnancy, or being part of a priority need applicant's household, but she was not asked any questions about the possibility of her being vulnerable. Agnes would have been prevented from making a homeless application if she had not persisted and told the local authority officer that she had a long-term illness. Christa was still working on a full-time basis after she became pregnant, and when she first made a homeless application. She had to take time off work repeatedly because of the amount of documentary evidence she was asked to provide in support of her homeless application. Christa told me that she saw different local authority officers each time she handed in the documents, and that different officers would ask her to bring in different documents. It appeared to Christa that apart from inconveniencing her greatly – to which the officers did not seem to care – there was no apparent consistency in the way the different officers worked.

[5] At the time I carried out the interviews with the housing law practitioners, the homelessness prevention agenda of the government was beginning to have an effect on how local authorities worked with potential homeless applicants.

CW1 further commented that "Local authorities are target driven, and must get homelessness figures down. This delays people from getting housing sooner, sometimes until assistance is no longer available." CW1 gave the example of the scenario of a homeless family with a seventeen year-old child, who when they approach the homeless persons unit for emergency housing assistance, are offered assistance with rent in advance through a rent deposit scheme. This enables the family to rent accommodation privately, possibly for about eighteen months. After the eighteen months have passed, and the family presents as homeless to the local authority again, they will not be considered to be in priority need for emergency housing assistance. By that time, the seventeen year-old would be well over eighteen years old. Whether the child is still considered to be 'dependent' on his or her parents is crucial to whether the family would then by assisted by the local authority if the family became homeless again. "The Local authority practice of funnelling homeless applicants to rent deposit schemes is causing cyclical homelessness because a homeless application is not taken, and private rented accommodation is expensive.

A further comment made by a housing law practitioner refers directly to the practice of local authority gatekeeping, "one of the HPU managers commented that 'we are gatekeepers of scarce resources, and like other local authorities, we will be making dodgy decisions, and might back down if challenged'" (CW2).

The Homelessness Legislation

A full discussion of the homelessness legislation can be found within Section D, Chapter Four of this thesis – the *Housing Act 1996* as amended by the *Homelessness Act 2002* being the current law in operation. The specific sections of the current law can be found in Appendix 1 of this dissertation.

All of the housing law practitioners interviewed considered the homelessness legislation to be complex; CW4 and CW5 specifically indicated that concepts such as 'priority need' (CW5 commented that "people do not understand what 'priority need' means, let alone use such words on day-to-day basis") and 'intentional homelessness' are concepts that are difficult to grasp for lay people. In general, the housing law practitioners interviewed felt that the homelessness law needed to be strengthened for single people, particularly in relation to the 'catch-all' definition of

'vulnerability.' CW5 felt that the definition 'vulnerability' was weighed too much in favour of the local authority, especially in London where there is a particularly acute problem with the shortage of housing at affordable prices to rent. CW1 specifically pointed out that the two-stage vulnerability test is partly a problem to do with the law, and partly because of local authority practice. The likelihood of bad practice, such as the burden of proof being unlawfully placed on the homeless applicant is a practice that happens routinely in London as well as outside of London.

APPENDIX 4
Range of Problems Experienced by the Ten In-depth Interview Clients

The different strands to a client's problems are intertwined. Separating the strands only provides an artificial setting within which to understand the difficulties that clients face in their daily lives. However, it was considered useful to be able to understand the type of problems clients experienced.

Issues	Client Comments
Domestic violence (DV)	- DV caused Martha's homelessness. She only left her partner's accommodation after her life was threatened. Martha suffered psychologically and emotionally, and had low self-esteem. She had a difficult pregnancy and was depressed. Martha was isolated from her community and her relatives from her country of origin because she became pregnant out of marriage, and with a man from another community. - Martha had a negative experience in relation to the police: the police put pressure on Martha to press charges against her former partner, and Martha was misinformed by the police in terms of the availability of legal assistance. The attitude of police was a cause of concern to Martha because the officer believed in Martha's partner's version of events, wanted physical proof of DV, and was biased towards Martha's former partner. This meant that Martha's immigration status within the UK became the focus of the officer's concern.
Recognition that there might be a problem	Lesley was adamant she was not aware there was a problem until the community mediation organisation contacted her. Lesley felt that the fact her neighbour (P and R) was not talking to her was P and R's problem, particularly because she believed that P and R had alienated themselves from the other neighbours.
Trust	For Nicole, the ability for her to trust a professional to help her was a major problem because of events that took place in her country origin that caused her to flee from that country. Nicole did not trust officers from a North London local authority (LA) and had stopped trusting officers from a central London LA because of the suspicious manner she had been treated over her homeless applications. A voluntary organisation gave her and her family much practical assistance, and gained her trust, as did the solicitor who took on Nicole's case.
Making complaints	- Nicole believed that if you complain, "you end up without." Hence, Nicole did not complain when her family was given accommodation on the top floor of the building, even though was pregnant. Nicole felt that the LA officer 'tested' her all the time. She was told that she had to find her own

	accommodation if she did not accept the LA's offer of accommodation, but Nicole had already searched, and could not find anything suitable. - Christa felt that it was difficult to make complaints, and apologies felt meaningless. Christa told me that when she did make complaints, she felt that the manager made her empty promises. Christa believed that there was a breakdown in the complaints system. Christa only found out about the Housing Ombudsman when she signed a tenancy agreement for her temporary accommodation.
Self help	Samuel helped to start an organisation – also a pressure group – to deal with hate crime within the London borough he lived in.
Lack of co-ordination between statutory agencies	When Samuel reported incidents of hate crime to the police, the police told Samuel to report the incidents to the LA, which Samuel did, only to be told by the LA to make reports to the police. Samuel was 'yo-yo-ed' between agencies for a year.
Solicitors - trust - working relationship - client's own fears - attitude - free legal help	**Trust** – Agnes felt that her working relationship with her immigration solicitor (S) was important; S was the only person who was aware of the events that had caused Agnes to seek asylum in the UK. But S did not attend an important interview with Agnes, and Agnes felt let down. The housing solicitor from a voluntary organisation had effective communication skills and achieved a successful outcome for Agnes. As a result, Agnes felt that she could trust the housing solicitor. - Christa perceived that legal aid solicitors were not really interested in helping, but wanted to claim their money. - Both Agnes and Martha had had bad experience with their immigration solicitors. **Good working relationship** – Isabel was assisted by solicitors from a voluntary organisation for housing and immigration matters. Both solicitors were understanding, non-judgemental, and were good at providing detailed information and explanation. The personal qualities of the solicitors resulted in a positive working relationship between them and Isabel. Isabel was also the type of person who read a lot and gathered information about her case. - Markus felt the same about his solicitor from a voluntary organisation: "she seemed to know what I'm going through." Markus stated that his solicitor was very good at keeping him informed. The solicitor was the stable point in his life, particularly because he was so ill with a long-term illness. Markus wished that he had approached the organisation for help much sooner, but he did not want to be constantly reminded of his illness. **Client's own fears** – Initially, Isabel was fearful of

	being judged by her solicitors. Isabel told me that she was much older, and was therefore meant to be wiser, and she wondered whether her solicitors – who appeared to be much younger – would think: how did she get herself into this kind of problem? **Attitude** – Kay told me that she initially had problems with her criminal solicitor because of the solicitor's attitude. However, this changed when J 'fired her' before finally asking the same solicitor to represent her. **Free legal help** – Jane was assisted by a solicitor in court. The solicitor was there for another client. The solicitor gave Jane some advice. As a result of the help, Jane managed to save her tenancy at that time. The solicitor assisted Jane with arguments to make in front of the judge.
Access to help available - self help	- Agnes did not expect much from an independent advice worker because the social worker contact that Agnes's hospital gave her was not helpful, and Agnes had already had a bad experience with the National Asylum Support Service when she was made homeless, and with her immigration solicitor. Agnes knew that the housing advisor worked hard for her even though he did not achieve the outcome she wanted in relation to her homeless application. - Christa thought that the LA officers knew their job and the law, such as welfare benefits and housing benefit. However, she was given conflicting advice. Christa tried to seek advice from an independent advice agency, but the organisation was closed on the day she sought assistance. Christa stated that she was determined to sort out her benefit problems, even though she was pregnant and working. - Markus felt that the voluntary organisation he approached was helpful, but the staff kept changing, and the move from the hotel (interim accommodation) to temporary accommodation (TA) caused his health to deteriorate. - Samuel, who had endured about ten years of racial harassment, did not see the need for a solicitor, but kept reporting crimes perpetrated against him to the police. He did not feel that the problem warranted a solicitor. Samuel did not have faith in the legal system, but at the same time, his own old age was a factor, in that he did not want a legal battle to drag on for years. When Samuel first realised there was a problem with his neighbour, he did not do anything immediately because he was concerned that his temper might cause him to take action that he would regret. When he tried to resolve the problem, his neighbour shouted and swore at him. Samuel told me that he did not feel able to speak face to face with his neighbour, because she was too aggressive and would shout at him. Instead, he would call over the adjoining wall to her.

	- Initially, Kay did not want to seek help for her housing problem, although she clearly knew she had a problem. Kay stated that being in prison made her realise that people had not been helping her in the past: "talk is cheap." - A stranger on the street – from Martha's community – told Martha about a charity where Martha could get help. A nurse witnessed the aftermath of Martha's partner abusing her, and tried to get social services to help Martha. The police report that was sent to her immigration solicitor convinced Martha that she would be doubted by people she needed help from, unless they see evidence of violence. However, Martha was psychologically and emotionally damaged, which affected her ability to get help. Martha told me that her experience with immigration solicitors was poor (see section on solicitors), and Martha felt that she did not gain effective help from a floating support worker specialising in assisting women fleeing from violence.
Statutory homelessness process - impact on health	- Christa's health was affected because she was stressed, and Christa was emotional because she did not know what was happening. Christa felt that she was given poor quality interim accommodation where she felt insecure. Christa stated that the system was inflexible and inaccessible in terms of the nature of documents required by the LA. Christa had to see different officers each time, and had to endure long waits, while pregnant, to hand in documents. She felt that the applicant literally had to shout at the officer to get a result. - Agnes explained that the LA officer did not explain the homelessness process to her. As a result of the lack of information, Agnes's health was affected. Each time Agnes had a set back in her homeless application, she became ill. At first, Agnes thought that the process was straightforward because she was homeless and she had no accommodation. In addition, Agnes had a long-term illness. However, she was given a verbal non-priority need decision. Agnes moved out of the interim accommodation the same day because a local authority officer asked her to move out of the accommodation and she did not realise that she was entitled to a written decision. Agnes did not have information about her rights, did not understand the process, and was not interviewed by an officer when she made her homeless application. - Nicole had an extremely difficult experience with the homeless applications she made. Central London authority application: Nicole reported that she was scared when she received a negative decision because she thought that the process would be straight- forward. Nicole's fright was compounded by the LA accommodating her family

	'far away' outside of the LA area. Nicole was also stressed because she thought that the council did not like them. Nicole explained that she always co-operated with the LA, but that the family were always given accommodation outside of the borough. North London authority application: Nicole commented that the officer from this LA always made her cry. The LA officer shouted at her when she attended her first interview, and her daughters witnessed her crying. Nicole was more scared of this LA because the accommodation was closer to where her husband worked. However, the caseworker was never happy with Nicole's answers, and Nicole always carried documentary evidence with her that needed translation, but Nicole was never asked for them. - Isabel she felt that the entire homelessness experience was made easier because she had help from the voluntary organisation solicitors from the very beginning. As a result, Isabel did not experience any problems at any stage of the process. - Markus told me that the hotel he was staying in was filthy, and the rent extremely expensive. He had to put much effort into convincing the LA why he needed to move, and that the accommodation was inappropriate for him because the kitchen was immediately in front of his bedroom. Markus would deliberately come home late in order to avoid the cooking fumes, and as a result, his health deteriorated.
Personal ability to deal with process	- Markus had a long-term illness, and he felt that "it's bad, the system's really bad." Markus found it difficult to deal with the process when he was living in interim accommodation, in terms of the way he was treated when he made the homeless application. Being moved to more suitable interim accommodation enabled Markus to gain weight again, and to feel less stressful about his situation. The entire homelessness process was unpleasant and lengthy and costly, which made Markus feel worthless because he was homeless.
Mediation	- Lesley thought that mediation did help to clarify things to a certain extent, but felt that mediation did not assist her to "get to the bottom of her story." Lesley did not perceive mediation as a problem, but a chance to find out what the problem was. Lesley felt it was important for both P and R to see things from her side, especially because Lesley valued neighbourliness, and felt lonely. - Mediation for Samuel took place after one of the sons of his neighbour (M) died, and the pace of racial harassment slowed down. However, M still made her presence felt. Samuel originally did not want mediation when this was first offered to him because he wanted to remain anonymous. Samuel

	took up mediation, six months after he was initially offered this service. A simple verbal agreement was reached, with the organisation monitoring regularly. Samuel now has faith in mediation.

Abbreviations
DV: domestic violence
LA: local authority
VO: voluntary organisation

Issues of Concern to Practitioners

Issues	Practitioner Comments
HOUSING LAW PRACTITIONERS Homelessness legislation - 'Vulnerability'	- The homelessness legislation is complex. Concepts such as 'priority need' (PN) and 'intentional homelessness' are difficult to grasp for lay people. - The law needs to be strengthened for single people. - In terms of 'vulnerability' the general catch-all definition is not good. In relation to the local authority (LA) position, if the risk of injury or detriment, likelihood of experiencing injury or detriment is set too low, there is a risk of the LA not having housing to assist everybody. The definition is weighed too much in favour of the LA, especially in London because of the shortage of housing. - The two-stage vulnerability test is partly a problem to do with the law, and partly because of LA practice – the likelihood of bad practice, such as the burden of proof unlawfully being placed on the homeless applicant. This is a practice that happens routinely in London as well as outside London.
The homelessness process - Clients fleeing from domestic violence (DV)	- This is a difficult process, and homelessness laws are very difficult for lay people to understand. The system is not sensitive nor is it user friendly, and officers are not courteous. Officers do not take the time to listen to the applicant's story, and the officer does not listen to the professional either. The reception at the Homeless Persons Unit (HPU) – where homeless applications are taken – is a barrier because there is no privacy. This makes it extremely difficult for a client fleeing from DV or who has been raped, to give information to the officer. - Because of the bureaucracy, and the fact that traps are set for people to fall into, homeless applicants need advocates. Single people fleeing DV, in particular need an advocate because they are not treated with consistency compared to other homeless applicants. With single people, it feels as though a different system is in operation. - The emotional and psychological impacts on clients are not taken enough into account. The client's knowledge and fears that there are problems

	about the quality of emergency housing being offered, the limited options available, and the fact that accommodation could be located outside of the borough, where the client does not have a social support network (friends and family who are able to provide emotional and practical support, including advice), could prevent a client fleeing DV – or for other reasons – from taking action about his or her housing circumstances. - LA officers are strict in requiring applicants fleeing DV to provide a statement from the police, but DV survivors do not want to involve the police nor would people necessarily have had contact with the police. - The negative impact of DV on clients' lives could mean that it would be difficult for victims to assist with evidence gathering. The criminal justice system lets down DV victims by giving perpetrators low sentences. - If an applicant experiences accommodation problems while waiting for a review decision, the impact on children – including their health and education – is likely to be great. In any case, the cost of temporary accommodation puts people in poverty and the impact on the family is a great concern.
Statutory right of appeal	- The 21 days deadline for internal reviews and county court appeals is a time constraint. - Does the local authority officer carrying out internal reviews comply with Article 6 of the *Human Rights Act 1998*? The officer is the "judge and jury" of the review. The local authority has vested interest in the decision. The system only works if the applicant has representation. - The appeal mechanism is a huge advance in terms of what was there before. It gives the authority a chance to save face, and prevents basic mistakes being made. The fact that a different officer makes the review decision is good.
Local authority decisions – application of law and 'gatekeeping' resources	- Why are poor decisions being made? The systems do not help us nor do the staff help us. HPUs have a 'call centre' mentality, where staff have no idea about a case, files are lost, and there is difficulty getting through to the staff by phone. - LA officers do not apply the law properly. - Enquiries are very inadequate and rushed. - LA officers place the onus on clients to give proof – placing greater hardship on single people – but do back down and make correct decisions when the law requires them to. - One of the HPU managers commented that "we are gatekeepers of scarce resources, and like other local authorities, we will be making dodgy decisions, and might back down if challenged." - Very little resources are put into the interview process. The emphasis is on reaching negative

	decisions, which is the root of the problems. This is directly accountable to homelessness. - Institutionalised attitude of LA officers: we must resist taking homeless applications at all costs because we have scarce resources, therefore we are going to put all obstacles we can in the way of homeless applicants. LAs are target driven, and must get homelessness figures down – this delays people from getting housing sooner, sometimes until assistance is no longer available – for examples, see box immediately below.
Client problems - DV - Support services and partnership working - Ability to articulate problems - Informal advice from friends and family - Housing Benefit system - Local Authority homelessness 'prevention' work - Where English is not the client's first language	- Not only do clients fleeing DV need an accessible process to leave their accommodation, but the speed with which this assistance is given, the suitability of accommodation in terms of safety and quality, is important. This does not mean that all DV survivors need emergency accommodation, It could be that an efficient and sensitive transfer system, for clients living in social housing, is provided. - For women fleeing DV without recourse to public funds, usually, these women need a practical solution to their difficulty – despite the concession that the Home Office made. - Partnership working in support services is the key to assisting clients, such as a legal advisor holding surgery once a week at a voluntary organisation's office. - If there is a need to focus on homelessness prevention work, it is better for the education system to include classes in finance, housing options, managing relationships and conflict. - There is a problem in that social services (SS) are reluctant to take a client's problem and situation seriously. This problem is particularly evident in the statutory response relating to children. SS will take responsibility for the children, but will not pay for the mother to be accommodated with her children, and the mother of the children thinks that SS will take her children into care. - Some clients are not able to articulate their problems, while some have difficulty understanding the system for assisting people who are homeless or in housing need. - The informal advice of friends and family 'foisted' on people is often wrong, based on misinformation, but followed to the person's detriment, such as someone being offered accommodation, which is refused, following advice from friends or family, which leads to cyclical homelessness. - Many clients find it difficult to understand the housing benefit system. As a result, rent arrears arise, and increase, leading to homelessness. - LA "homelessness prevention work" has generally been perceived as the prevention of homeless applications being made, and gatekeeping (of LA financial resources), therefore delaying the client's

	homelessness. - When clients are homeless and approach the LA for help, staff do not mention homeless applications, but rather, rent deposit schemes, which could mean a family with a 17 year-old child being offered a private rented tenancy for eighteen months. After the eighteen months, and if the family presents as homeless to the LA again, they will not be considered to be in PN for emergency housing assistance. The LA practice of funnelling homeless applicants to rent deposit schemes is causing cyclical homelessness because a homeless application is not taken, and private rented accommodation is expensive. Problems are compounded where there are housing benefit problems and the tenant moves in and out of employment. - Where housing problems are resolved without using law, options other than taking a homeless application is 'sold' to families. - Where English is not the client's first language, nuances of language are not taken into account, and there is misunderstanding on the client's part, particularly where LAs set traps because of their gatekeeping role. This also means that interpreters are not always used. - Clients' cases are not compromised if an interpreter is needed, it just means that information would have to be extracted differently.
Solicitor referrals	- There is generally not a problem for solicitors referring cases to solicitors unless the solicitor accepting referrals is not known. However, there are problems with making referrals to immigration solicitors. - Effective joint working with a local firm of solicitors where it is possible to refer clients, as and when needed, and the firm achieves brilliant outcomes is a dream team. - Generally, as a caseworker, there have been difficulties in making referrals to solicitors. There are fewer solicitors doing these types of cases under CLS. One caseworker had to ring 15 firms of solicitors before she was able to get a solicitor to take on her case. However, the difficulty in making referrals appears to be cyclical. It could be the fact that inner London LAs are more difficult to deal with unless threats of legal action are made. - There are two difficulties in referring clients to solicitors: (1) the client must be entitled to assistance with legal aid, and (2) he or she must be able to find a solicitor. This has been a great difficulty because solicitors often have huge caseloads, and there are not enough solicitors and there is much LA bad practice.
Client expectations	- It is important to explain to the client how the whole system works.

	- Once a client gets accommodation, he or she is not keen to continue with the case, "I want to get on with my life now." There is a need for an organisation to assist clients with their case, and a need for clients to get and pursue help, and there is a need for lawyers to threaten judicial review in certain situations before the LA would house.
The need for clients to be represented	- There is a need to make credible threats of legal action to LAs , or start legal action, but the nature of action depends upon the situation. - People need good representation. Most cases taken on by solicitors have got a win-outcome. Only a very small proportion [of clients] request reviews.
Suggestions for ways forward	- County Courts do not have enough judges with experience in housing law. Possibly a Housing Tribunal that would deal with housing cases for clients not represented could be a way forward. - A kind of ombudsperson who is neutral and legally trained, and would report to the LA, but is independent, impartial, and possibly funded by LAs on a sub-regional basis. - Possibly a "speeded up ombudsperson with resources." The agency staff would need to understand the legal implications and be willing to make judgement, and be impartial and make independent review with timely decisions. The client will need someone to assist with representations.
Legal aid	- With the time needed to complete forms, and the bureaucracy involved, time is not available to spend with clients. There has been no increase in pay, and LSC costs have increased. More is spent on bureaucracy. Civil legal aid spending has decreased by 22 per cent, and there are fewer housing solicitors. The emphasis is on billing, and the need to make every minute count, which does not foster team-work. More firms have left housing, and most firms have only two housing solicitors. Hence there are capacity issues in relation to solicitors caseload. - It is positive that CLS brought the basic level of competence, which solicitors now have.
Time	- There is a problem with actual time and caseload, the fact that the housing problem is dealt with in isolation, and support is not provided to clients, which is a gap in service provision. - One caseworker with supervisory and other responsibilities, working in the voluntary sector, commented that she has a tough caseload. She needs more staff, her current staff are over stretched. She manages two part-time workers and really needed a total of three full-time workers.

Issues	Practitioner Comments
MEDIATORS Process - Transformative model - Role of facilitator - Monitoring - Comments	- The parties are told at the start of mediation of the alternatives, if mediation is not successful. Potential remedies are considered at the start, before mediation or if the mediation process has broken down. The referral sources are usually from the Police, the LA Housing Department or the LA Anti-Social Behaviour team, and if mediation is not successful, parties are aware that they would be referred back to the referral agency. In any case, one of the parties could move out of the area or pull out of the negotiation process or the parties could fight and murder one another. - There is a need to solve underlying issues and attitudes. The transformative model empowers the parties in dispute and changes their attitudes, the model is to do with "skilling your parties to take charge of the situation." The problem solving approach will not prevent problems from reoccurring; it brings people's emotions and feelings into the process but it depends upon the type of dispute, and the structure that mediators are working in, such as, whether the dispute is one involving neighbours, hate crime, or special needs education. People say how they feel. It is a flexible model. - The facilitator explores issues. He or she needs to do much preparation before the parties come together to mediate. The facilitator needs to go over how the parties want the mediation sessions to be, and what they want to get out of it, as well as what the facilitator and co-mediator wants from the session, and how the session should run. - Monitoring is important to prevent repeat victimisation, and monitoring post mediation could take up to a year. In relation to hate crime, different people might target the same person, such as in homophobic harassment. - The entire process could consist of indirect mediation. Whether a party is ready for mediation or not depends upon whether mediation is direct or indirect. The question is: what is mediation? When does the process cease to be mediation and becomes something else. Mediation sessions have to be limited to a point or else it turns into therapy. - Mediation is a fluid process depending upon the nature of the problem. It is possible to review the process through co-mediation, and through discussion with other staff. We tend to mediate in pairs. - Mediation would not work in the following situations: where one of the parties has alcohol addiction; where one or both parties are unable to forgive, where conflict plays an important role in one of the parties' life; where one of the parties needs to be proven right; where one of the parties

	wants to punish the other party, or where there is dishonesty or the withholding of information. - About 72-75 per cent of cases are resolved or settled, and 25 per cent of cases are inappropriate referrals or mediation does not work. The mediation process is fluid depending upon the nature of the problem. - In relation to working with young homeless people, it is difficult to get a young person to see a mediator. Young people tend to use mobile phones and will not prioritise contacting a mediator. Once the young person is engaged, it is possible to discuss repairing relationships rather than returning home. Mediation will make a difference in the young person's life by empowering him or her. When mediation is offered at the point the young person presents him or herself at the HPU, the mass of damage has already been done to the relationship. In terms of the pilot scheme that the LA ran, the project was only funded for six months, when eighteen months of funding would have enabled us to see the development of the project. However, the LA wanted a quick-fix solution to youth homelessness, and for the young person to return home. Some of the problems the project experienced included: the LA changed the referral process without communicating this to mediators, barriers were put in the young people's way in making homeless applications – in terms of the nature of documents required, and the fact that young people were not allocated an officer to assist with the homeless application process, but saw a different officer each time they attended the HPU. - In terms of peer mediation, "they don't have to talk or anything, but at the end of the day, they still need to get along. They still need to get on in life." The key to successful mediation is to focus on the positive. The service should be non-judgemental, and the fact that pupils were listened to had a positive effect and produced positive results. Hence teachers and pupils were happier. Where parties did not initially engage in mediation, a reminder of the rules of mediation convinced both parties to engage in the process. The mediation process was simple. Pupils could put her name on a piece of paper and into a box outside the Mediation Room, or be referred by a teacher or the head of year, with the pupil's permission. The pupils would need permission to come out of class. Both parties are invited to the mediation room where the mediation rules are explained. An invitation is extended to one party to leave the room first. Party One tells her story once: what has upset her. Party Two waits outside. "We try and get how they feel." Party Two is then called in and tells her story once. Both parties are invited into the mediation room and

	"discuss how they feel" – what can come out of this, and to reach an agreement. The dispute is usually resolved after the first round of mediation. A written agreement is jointly reached, and if both parties agree, both sign. The aim for the mediators is to arrive at an agreement by listening, and being non-judgemental. If the conflict is unresolved or if the pupil refuses to have mediation, the teacher or head of the year, will try to resolve the conflict, or the pupil might be suspended or expelled from school. - In relation to hate crimes, the average length of time before disputes reach the organisation is usually after a dispute has been ongoing for two or three years. It is rare for a three-month old dispute to be referred to an organisation. Party Twos (the alleged perpetrator) usually engage because the mediation centre is a voluntary organisation and the mediation process is not linked to a legal process.
Representatives	- Parties are encouraged to attend with 'silent support,' such as friends, support worker, counsellor or mental health worker. - Representatives, in general, are not encouraged to attend mediation. A silent supporter can help a party to remember what it is they want to say.
Agreements	- Getting the parties towards an agreement is "verbalising the nods" and provides greater understanding between the two parties in dispute. - To keep the power imbalance in check, it is necessary to test the agreement. - Mediators should be focused and be able to check cracks in agreements.
Mediator baggage	There must be trust between mediators and parties. It helps if there is another mediator present, particularly when one experiences 'passing thoughts' (of the judgmental kind), particularly when mediators must be non-judgemental, neutral and impartial to engage parties in mediation.
Use of interpreters	- Trust is needed between mediators and interpreters. It is helpful for the interpreter to have an understanding of the mediation process. - There is an issue of the interpreter being affected by the conflict, and the need for the interpreter to remain neutral and impartial.

Abbreviations

CLS: Community Legal Service
HPU: Homeless Persons Unit
LSC: Legal Services Commission
PN: Priority need
LA: Local Authority
SS: Social Services

APPENDIX 5
Semi-structured Questionnaire for Clients

1. Please describe the accommodation you live in. What is your tenure?

2. Please describe the problem or problems that you are currently experiencing or have experienced in respect of housing.

3. When did you realise that there was a problem?

4. Did you decide to ignore the problem initially?

5. Over how long a period of time did you endure the problem or problems before deciding to take action?

6. At what point did you decide you had to do something about the problem or problems?

7. What made you decide to take action about your problem or problems?

8. If there was delay in you taking action about your problem or problems, what do you think prevented you from dealing with the problems much earlier?

[In deciding what action to take, did the fact that you have a family affect the decisions that you made?]

9. In deciding to delay taking action earlier, was your health affected?

10. What action did you decide to take?

11. What action did you take?

12. Did you speak to anybody before taking action?

13. If so, to whom did you speak to, and after speaking to the person or persons did you take a different course of action? If so, what information did the person give you that caused you to change your original course of action?

14. What did you hope to achieve once you decided upon a course of action? How did you think your problem or problems might be resolved?

15. What help do you think you may get in resolving your problem?

16. To whom would you be likely to approach for help? (Local advice agency? Council Officer? Councillor? Solicitor? Or any other person?) Why?

Seeking Advice: Lawyer-Client Relationship

17. When you first realised you had a problem, did you think about approaching a solicitor for help? If not, why not?

18. Have you had help from a lawyer before, in relation to any other housing problem? If so, did you feel that the lawyer listened to you properly as you told him or her the problem – as you had understood it? Did you understand the advice that was given to you, and did you understand the work that the lawyer was going to carry out on your behalf? Did the lawyer explain the legal process to you and did you understand the process as it was explained to you?

19. What does 'justice' mean to you?

20. What about "access to justice"?

APPENDIX 6
Semi-structured Questionnaire for Housing Law Practitioners

Access Re Substantive Law, Procedure and Legal Assistance

1. At what stage of the homelessness process do requests for assistance come from 'statutory' homeless clients?

2. Have some clients tried to resolve their problem or problems before coming to you for advice? If so, what were they able to achieve, if anything?

3. What types of problems have you had to assist clients with in terms of homelessness cases?

4. What type of advice or assistance are you able to give to homeless clients?
   - identifying what the problem could be
   - advice about legal rights
   - advice about procedures or what to do next, e.g. how to deal with summons, court procedure
   - advice about ways to solve problems
   - advice about financial position
   - other, please explain

5. In assisting homeless clients with their problems, have you experienced difficulties in trying to resolve these problems for clients? If so, please explain what difficulties you experienced.

6. What sort of advice or assistance are clients looking for?
   - assistance to contact the other side to try to resolve the problem
   - negotiate with the other side on client's behalf
   - seek advice or help from another person or organisation on the client's behalf
   - help client to contact another person or organisation, e.g. make appointment, give list of people to approach
   - threaten other side with legal action
   - accompany client to court, tribunal or arbitration/ start a court, tribunal or arbitration case against the other side
   - go to mediation or conciliation
   - take problem to an ombudsman
   - give other advice or help

7. Other than advising and assisting the client with the assertion of his or her rights, do you suggest alternative methods of resolving the client's dispute?

8. If you feel there are constraints that prevent you from assisting clients effectively, what would improve your ability to help?

9. Do you feel that your work level or caseload prevents you from being able to assist clients effectively?

10. Have clients returned to you for further help when they experience other problems? If so, were these homeless difficulties or were they other problems? If other problems, what were they?

11. Do you think that the current homelessness laws are enough of a safety net for homeless applicants when in need of emergency housing assistance from local authorities?

12. Do you consider the 'appeal' mechanisms that are available to dissatisfied homeless applicants to be effective methods for homeless applicants to resolve disputes with the local authority? If not, what other mechanisms would you consider to be more satisfactory?

13. In general, how well do you consider the homeless client group to be able to articulate their problems?

14. Are clients clear about what they want to achieve in seeking help? How realistic are these expectations?

Access to Lawyers

15. Have you had difficulties referring homeless clients to solicitors?
If so, what has been the nature of problems that you have experienced?

16. What in general has been the response you have had from clients when you refer homeless clients to solicitors?

17. After referring a homeless client to a solicitor, have you had to work with the solicitor along with the client? If so, what level of work have you had to do?

Other Issues

18. In terms of the homelessness prevention work that local authorities are doing with the homeless or the potentially homeless, how effective do you consider this assistance to be?

19. In relation to the local authority mediation work to prevent homelessness, how effective do you consider this assistance to be?

20. Do you consider the local authority preventative work truly to be assisting homeless or potentially homeless people or do you believe that such work has, instead, delayed people in need of housing, to gain assistance sooner?

21. Have you ever attended or been asked by a client to attend a mediation session with him or her?

APPENDIX 7
Semi-structured Questionnaire for Community Mediators

1. Please tell me what professional qualifications you have as a mediator.

2. Do you specialise in mediating particular types of disputes?

3. What is the regulatory framework that mediators work within?

4. Please describe and explain the mediation model used by your organisation – if any.

5. Over what period of time does the entire mediation process last – from the start to the end of the process when an agreement is reached?

6. How are disputants informed about the mediation process (i.e. the process they will experience while mediation is taking place)? By letter in advance of the first mediation session or at the start of the first mediation session?

7. Does the organisation limit the number of mediation sessions on a particular problem a disputant is able to have?

8. Have you ever had to work with an interpreter in mediation sessions? If so, in what way were the dynamics of the mediation changed?

9. Have you ever had to refer or seek advice from any professional body in relation to any of the mediation sessions you have had to carry out for whatever reason?

10. Do disputants have opportunities to contact you in between mediation sessions about additional problems related to he dispute that bother them or in relation to other issues they wish to raise with you but not in the presence of the other party in dispute?

11. How much work is done individually with the disputants prior to the mediation session? Are the number of individual sessions – caucusing – restricted or are clients worked with until the disputants feel ready to attend mediation sessions together?

12. Have you ever got caught in a situation where you were in greater sympathy with one party? If so, what did you do?

13. During the mediation process does someone in the organisation ever review the case?

14. Has there ever been an occasion when it has been difficult for you to grasp the dispute you are mediating, if so, please describe a case where this has happened. What did you do?

15. Do you know how many cases there are within your organisation, of parties that do not reach an agreement, in the area of mediation that you specialise in?

16. What happens to disputes that have not been resolved by mediation?

17. What happens to the disputants after the successful conclusion of mediation? How is the client's situation monitored after the successful outcome of mediation? How long does the monitoring process continue?

18. Have any clients attended mediation sessions with a representative or with somebody else (friend, family member or other – please explain)?

19 (a) Do clients have a choice whether to be represented or not during the mediation sessions?

19 (b) What about the final session?

20. Has there ever been an occasion when you felt that the client would have benefited more from the mediation session if represented? Or the client had representation but would have been better off without representation? If so, please explain why.

21. Have you ever had to mediate in sessions where only one party is represented, if so, what happens? Do you intervene more frequently during the mediation process in order to keep the power more balanced between the parties?

22. Do you ever intervene when you consider an agreement to be unfair? Or does this situation never happen?

23. Once an agreement has been reached by the disputing parties, and the written agreement is then presented to the parties, have any disputants ever changed their mind about the agreement, immediately or any day thereafter? Or even breached the agreement? Please give examples and explain what happened.

24. At what stage of the problem do requests for assistance come from disputants (or are referred to your organisation) for mediation?

25. What types of specific problems have you had to assist disputants with (homelessness, hate crimes, neighbour disputes, etc.)?

26. What would prevent a disputant from wanting to resolve his or her problems by mediation?

27. If there has been reluctance on the part of the disputant to resolve his or her problem by mediation, what method did the disputant use to resolve the problem? Or did he or she simply 'lump it'? Please give examples of cases where the disputant has either

resolved his or her matter by another method of dispute resolution, and the method used, or where he or she has 'lumped it.'

28. Can you give examples of what problems have emerged during the mediation process, which prevented an early resolution of the dispute from taking place?

29. Have you come across disputes that you have tried to mediate, and realise that mediation was not the best method of resolving that dispute. If so, please give examples.

30. Have you had to involve other parties in the mediation process, other than the two main parties to the disputes (particularly in relation to homeless young people)?

31. Have there been instances when you have had to refer either party to the dispute for legal advice? If so, please give examples. Having sought legal advice, have disputants returned to your organisation to try to resolve their dispute by mediation?

32. Have you worked with a legal advisor to try to resolve particular disputes?