

Home Truths

Discrimination in the Renters' Rights Bill

Natalie Foster: Welcome to *Home Truths* - the Housing Law Podcast from 42BR Barristers. I'm Natalie Foster.

Iris Ferber KC: And I'm Iris Ferber KC.

NF: This is the next episode in our series of podcasts about the Renters' Rights Bill. Today we're going to be discussing the discrimination provisions, which are chapter three of the Bill.

This is a discussion of the Bill as it looks today on the 29 of July 2025. The Bill has completed its journey through parliament, so bearing any changes that come from government, which now seem very unlikely, this is the version of the Bill that will become law sometime later this year.

IFKC: So, Natalie, chapter three of the Bill is headed '*Discrimination in the Rental Market: England*', and it relates to housing law as it applies in England, but I thought the Equality Act already applied to the relationship of landlord and tenant. And so I thought landlords and agents are not allowed to discriminate under the Equality Act against tenants in connection with their sex, race, disability, age, and the other protected characteristics.

NF: Yes, that is right. So, part four of the Equality Act already applies those rules to lettings. So, what exactly is this chapter about then?

IFKC: Ah now, okay, let's oversimplify it for a moment to start this podcast off. This chapter adds two further protected characteristics, having children and being on welfare benefits.

NF: And so why is this oversimplifying it? That sounds very straightforward.

IFKC: Wouldn't it be nice if it was as straightforward as that? The reason it is oversimplifying it is that chapter three of the bill does not just say something like 'for lettings cases, add two more protected characteristics to the end of the list in section four of the Equality Act'.

Now wouldn't that be a nice, simple piece of legal drafting and everybody would understand then what they had to do, what type of discrimination was unlawful, but that is not the way the Bill is drafted.

NF: So, we've been looking at the clauses of the Bill, haven't we? And it will soon, in fact be the Renters' Rights Act 2025.

And the clauses in particular that refer to discrimination are clauses 33 to 42. So, it is a self-contained set of laws that deal with this particular type of discrimination. It is not the same as the provisions in the Equality Act. So, shall we start by looking at what these clauses actually say?

IFKC: Yes, that's a good idea, and then we can have a chat about what it means.

So, Natalie, what does chapter three actually make unlawful?

NF: Alright, so looking at the structure of the chapter as a whole, what it is is a prohibition that is applied to the status of a child living with you or visiting you and to the status of being a benefits claimant.

IFKC: Okay. And we're going to talk about what these prohibitions are that these two statuses apply to. Now, just focusing for a moment on the status, I can understand the words 'having a child living with you', 'having a child visiting you'. Okay. But 'benefits claimant', that sounds to me like something that needs to be defined.

Is there a definition?

NF: Yes. So, this is found in clause 42. That's the interpretation section. And what that does is includes a long list of benefits statutes, and I won't provide you with that list now, but it's worth noting that it includes not just receiving benefits, it includes being entitled to benefits and also being provisionally entitled if the tenancy were to start.

IFKC: Okay, so it's not just about money in the pocket, it's the entitlement to benefits much more broadly. That really is a very broad definition then of benefits claimants. And before we delve into the specific prohibitions, are there any, broadly speaking, are there any defences to unlawful discrimination against these two groups, tenants of children, benefits claimants?

NF: Okay, so generally it is possible to justify discrimination relating to children. So, for example, it could be lawful if there's a legitimate aim for the action and its proportionate, but it isn't possible to justify discrimination relating to being in receipt of benefits, you can't even run that argument according to this statute.

IFKC: Right. So, there's a distinction between the types of defences available and depending on the status of the tenant. Okay, that makes sense. Okay. And there are different types of prohibition, different types of discrimination as we said that this defence could apply to. Starting with the labels that are maybe familiar to those of you listening to this podcast who have some understanding of the Equality Act.

You might think this was a bit like direct discrimination or a bit like indirect discrimination, but actually these provisions are nothing like that.

NF: Iris, can you explain that?

IFKC: Yes, absolutely. This is perhaps the most baffling part of the way this chapter has been drafted. Let's start with Clause 33.

Clause 33 is the one that deals with the main prohibitions that relate to tenants who are going to have a child either living with them or visiting them. Clause 33 1A says that a landlord or a landlord's agent must not prevent a person, so that's going to be the prospective tenant, so landlord or agent must not prevent the prospective tenant from doing various things, come back to those, on the basis that a child would or might live with or visit that person at the property. And the things that the landlord or agent mustn't prevent the person from doing are: inquiring about a letting, accessing information about a letting, viewing a property or entering into a tenancy of the property.

So those of you who are familiar with the Equality Act will already see that that's a very different description than either direct or indirect discrimination. We'll break that down a bit in a moment. And there is another separate prohibition, which is in Clause 33 1B, which is that a landlord or a landlord's agent must not apply a provision criterion or practice in order to make people who would have a child live with them or visit them less likely to enter into a tenancy than people who would not have a child live with them or visit them.

N F: And so Clause 34 duplicates that and applies the same prohibitions to those who are on benefits. But it doesn't, in fact, sound to me like the wordings of these provisions are the same concepts as the Equality Act. So, they don't use the words direct discrimination, indirect discrimination. It sounds sort of similar, but it's not actually the same.

IFKC: It absolutely isn't the same. And I'll give you an illustration. Let's turn the way in which Clause 33 1A describes the prohibition into a

single sentence and then compare it to direct discrimination in a single sentence.

So, I would say, if I was going to put Clause 33 1A into a single sentence, it's the landlord preventing a person from doing X on the basis that a child might live with them.

I know there's extra bits to it, but basically that's it. Preventing a person from doing X on the basis that a child might live with them. And then compare that to Section 13, Equality Act, direct discrimination - A person subjecting another person to less favourable treatment because of their age, their race, their sex, et cetera.

Subjecting a person to less favourable treatment, I think, I think it's obvious, that the Clause 33 discrimination that we've been talking about relating to children and welfare benefits is much, much narrower than direct discrimination. Preventing a person from doing X, Y, and Z is definitely narrower than less favourable treatment.

And maybe 'on the basis of' is a phrase that is narrower than 'because of' which is the phrase in section 30,

NF: Well we actually simply don't know, do we? Because it could be that they are interpreted as meaning the same. So, 'on the basis of', 'because of', they sound similar. It may be that they are interpreted to be the same or similar, but again, we simply don't know until this actually comes into practice and we are able to see how this works.

So why did they just not use the same words that would've made it so much simpler and it would have just been consistent?

IFKC: Yes, it's a very strange way of drafting legislation.

NF: And so, then what about the second type of discrimination in Clause 33? So, applying a provision criterion or practice in order to make a person with a child less likely to enter into a tenancy.

IFKC: And this one, I think, okay, you may say the one we were just talking about is really different from direct discrimination. I think this one is **really** different from any kind of discrimination that exists in the Equality Act. Superficially, you could say it sounds like indirect discrimination. It uses the phrase 'provision criterion or practice'. It refers to people with a child versus people without a child, which makes it sound like there's a group difference, which is how indirect discrimination works.

But let's repeat, at the risk of being boring, let's repeat the words of Clause 33 1B – 'Applying a provision criterion or practice in order to make people who would have a child live with them or visit them less likely to enter into a tenancy than people who wouldn't have a child living with them'.

That is not a neutral provision that happens to affect different groups differently, which is how indirect discrimination works. This is a provision positively motivated to discourage tenants with children. Or to discourage tenants who are on benefits. Actually, in that sense, it is much more like direct discrimination, something being done because of the status of that person, that tenant, as a person with a child or a person on benefits.

But really it doesn't fit neatly at all into either direct or indirect discrimination.

NF: No, it's sort of like they've confused themselves by using the wording of indirect discrimination to mean something similar to direct discrimination...

IFKC: ...but much narrower. Because it is so specific as to what you're not allowed to do. Absolutely.

NF: So it is actually impossible to know how this will play out and work in practice. There's absolutely no precedent for it in the Equality Act. And there is, in terms of the guidance that we've looked at, nothing, which provides us with more information as to what this actually means. So, we've got what they've set out in the clauses about the discrimination.

What about possible defences to that?

IFKC: Well, we talked about justification already that applies to tenants with children, that's Clause 33. It is not contained in Clause 34 at all. In other words, as we said, it's possible to argue, for a landlord, that avoiding having tenants with children could be a proportionate action to achieve some legitimate aim, even if it's active discouragement of tenants purely because they've got children that could potentially be justified.

But the way the legislation is drafted says that is not going to be possible as an argument for benefits claimants at all.

NF: So we've had a discussion about this Iris, haven't we? Because we've been trying to come up with examples of how this in fact could play out, what could be a legitimate aim type of situation for landlords wanting to avoid tenants with children.

IFKC: Okay, so we thought about maybe a converted old Victorian terrace of the kind there are many, many of in London with terrible soundproofing and maybe a neighbour downstairs who is fed up with noise nuisance from previous tenants, and the landlord doesn't want children in the top floor flat because they're going to stomp about and

cause even more noise nuisance for the downstairs neighbour. So that could be a legitimate aim.

NF: That sounds perfectly legitimate, I think. So, in theory there we have it but then we could look at in more detail, this could be even more legitimate if the downstairs neighbour is an elderly tenant, if they have previously complained about the upstairs neighbour with children making a noise nuisance, so that sounds fine to me.

However, actually let's look at the second part of that justification test, which is proportionality.

IFKC: Right, I mean, that's something that's often, I think, forgotten by housing lawyers, that justification defences in discrimination cases, and this is one place where the Bill uses exactly the same words, so it's proportionate means of achieving legitimate aim, the second part of that test is proportionality. The legitimacy of the aim is only the first part.

Proportionality essentially, is about whether there are other ways of achieving the aim that are less bad for the tenant or the proposed tenant, and I think that's the problem with this defence for landlords. Is banning tenants with children or discouraging tenants with children from taking that top floor flat really the only way to deal with that soundproofing problem?

There are plenty of other tenants who would also stomp about that. Don't have children. Set that you still have the same problem. Surely the proportionate and actually relatively cheap and straightforward action is to lay some solid soundproofing under the carpet of the upstairs flat.

And once you come up with something that is not discriminatory, which is going to resolve the problem in a different way than banning tenants with children, then you've not got a good justification defence.

NF: Yes. Then that defence fails. So, it is really difficult to think of a set of circumstances where it would be genuinely justified to exclude a tenant with children from taking a tenancy.

This is outside of the normal sort of overcrowding type of rules, in any event, this is a particular set of circumstances that we're going to be looking at or a landlord would be looking at, to say, is it a legitimate reason to prevent these people from taking up this tenancy? And what will happen is they will look at the particular facts of the particular case on a case by case basis.

So, then we've looked at that justification defence. There are two other defences aren't there, and they apply to both Clauses 33, which deals with the children, and Clause 34, which deals with receiving benefits.

IFKC: Absolutely. So, there's two more statutory defences. Summarising them briefly. The first one is the insurance defence.

That's where there's already an insurance policy in place for the landlord, that requires the landlord to include terms relating to no children or no benefits claimants. And if the landlord would be breaching their insurance by allowing a tenant with children or a tenant on welfare benefits, then that can be a defence.

NF: And then the other defence is in sub clause three of Clauses 33 and 34. And what that does, it carves out a particular set of actions which are not unlawful. So as long as the landlord or agent does nothing else. So, for example, publishing advertisements, disseminating information or providing a means by which a

prospective landlord can communicate directly with a prospective tenant...

IFKC: ...which basically means giving contact details.

NF: Exactly, yes. And then it says the reverse, so, providing a means by which a prospective tenant can communicate directly with a prospective landlord. And then, or, and they sort of a caveat here, something else that could be applied in future by regulations.

IFKC: Okay. So those are kind of, maybe not trivial, that's a bit unfair, but really small things, that as long as that's all the landlord does, then it's not going to be caught by the discrimination provisions.

But there is a massive exclusion, a massive defence to these prohibitions, which sits in Clause 41 of the Bill, and it's so important it's worth reading out word for word. Clause 41 – 'Nothing in this chapter prohibits taking a person's income into account when considering whether that person would be able to afford to pay the rent under a relevant tenancy'.

So that probably, I think, seems to me, takes care of 95 or 99% of every welfare benefits discrimination case that you can imagine ever being brought. Because the landlord will say, well, the reason that I'm concerned about benefits claimants is because they just can't afford the rent for this property.

And that's a permitted defence. In fact, it's a complete defence.

NF: And also it doesn't explain in this complete defence what being able to afford to pay the rent means, so the landlord can say, I say that this person needs to be able to earn seven times the amount of rent that is applicable for this property, and they don't earn that amount, they don't have benefits that cover that amount. Therefore, they're not able to afford this property. There's nothing which says...

IFKC: ...what affordability is going to mean. And it's actually such a wide carve out that it is difficult to imagine this not being the only thing that ever gets referred to.

NF: Just say that's it. That's answer. You just say that that's the reason why. It's not because they have children or it's not because they receive benefits, it's because they simply can't afford it, on my assessment as the landlord.

Okay. Let's move on to the next prohibition. So, this is, we've looked at Clause 33 and 34, after that, the Act then looks at discriminatory terms in the tenancy and it prohibits specific discriminatory terms relating to children or benefits.

We find this in Clause 35.

IFKC: Okay, so this is the prohibition mirroring the same phrases. *People who might have children living with them or visiting them.*

People who are welfare benefit claimants. And this is the prohibition that applies to landlords, not just when they're considering granting a tenancy, but once the tenancy is being drafted and the terms are being inserted into it.

So what is Clause 35 say about what terms of a tendency are?

NF: Exactly, so what this is looking at is it's looking at that agreement itself and what it says, if you have a term in your tenancy which prohibits a tenant from having a child live with you or visit you, there's a term that restricts the circumstances in which the tenant may have a child or prohibits the tenant from being a benefits claimant, then that term or those terms simply have no effect.

IFKC: Okay, well, what happens if I am the landlord and the reason I've got those terms in my tenancy agreement is because I have a superior

lease, so I myself am also a lease holder or I've got a mortgage and there are terms in that mortgage and the terms in my mortgage or the terms in my superior lease say that I'm not allowed to let to tenants with children or benefits claimants and I'm just following what my superior lease or mortgage terms say?

NF: So then this is dealt with in Clause 36 and Clause 37. You will not be in breach of that contract. If you have a contract with your superior lease or you have the mortgage terms, you will not be in breach because the terms of that lease or the mortgage contract simply have no effect when they relate to these specific aspects, however they are expressed.

So, if it says in the superior lease, you are not allowed to have tenants with children, tenants with children that visit you or benefit claimants...

Iris Ferber KC: ... you can just ignore it?

NF: You can.

IFKC: And in fact you have to ignore it. Because otherwise you're going to be committing an act of discrimination under Clause 35.

NF: Exactly. Those terms do not exist effectively.

IFKC: And okay, is there a justification provision somewhere in there with these terms of tenancy agreements? Prohibitions?

NF: Yes, that's right. So just as we've looked at already, there is the same sort of justification that is in place with Clauses 33 and 34. So they refer to at the time, before the tenancy starts, these clauses are about the tenancy terms, and they also have the justification defence.

But again, that justification defence only applies to tenants with children.

IFKC: So, it mirrors basically the defence is in Clauses 33 and 34?

And what about other defences apart from justification?

NF: Yes. And so there is a further defence, which we've already looked at, again, refers to both the having children and benefits, and that defence is an insurance policy defence. So, if you have an insurance policy in place and that says no children, there's a restriction on children and no benefits claimants in that policy. That's a good defence. That's your defence.

IFKC: And that's Clause 38, isn't it?

NF: Yes.

IFKC: That's got its own specific clause.

And that also by the way, specifies that that defence, the insurance policy defence, is only available if the insurance policy was already in place or was extended before this law came into force. So, what you're not going to be able to do is generate your own defence by organising yourself a contract of insurance after this law comes into force, which just so happens to say that you're not insurable unless you exclude benefits claimants or tenants with children...

NF: ...because they're effectively going to say you can get an insurance policy, which allows you to have tenants with children or benefit claimants.

IFKC: And effectively, if that term is in such an insurance policy, one that is entered into later, that policy of insurance or the terms relating to those things simply have no effect. And don't give you a defence.

NF: And so finally, I think most importantly, we've looked at what the discrimination provisions are, what happens if you breach those provisions? What does that mean? So that is set out in Clause 40, isn't it?

IFKC: It is. And isn't that the most important question? It's all very nice to have these terms, but how are tenants going to gain their rights under these clauses?

While the landlord or the agent, or both of them jointly, can be fined, up to £7,000 for breach of Clauses 33 and 34 in particular. But it's only the local authority that has the power to fine a landlord or agent for breach of Clauses 33 or 34. And it doesn't apply to Clause 35 - Tenancy Terms, only to those prohibitions that we discussed in more detail about entering into tendencies and a local authority can only impose a fine if it is satisfied beyond reasonable doubt that the landlord or the agent is in breach.

So, it is really narrow.

NF: That is a very high threshold. So does it mean that no other claim can be brought? What if we've got a situation where a prospective tenant finds that they have been discriminated against because they have children that want to visit them. What do they do? Can they go directly to the courts themselves?

Do they have, is there a statutory tort available to them? Can they get damages? What can they do? Can they go to a local county court? And make a claim with the lower threshold beyond balance of probabilities. Can they do that?

IFKC: Well, we just don't know is the short and sad answer to that question. The government's guide to the Renters' Rights Bill from the start of this year, published in January 2025, seems to suggest that the

main courses of action for tenants are likely to be their private rented sector ombudsman, or the letting agency redress scheme, but good luck working out when those will be up and running or how they might work. Same guide also says in a, sort of quite blase way, that the roots to Justice will include pursuing a breach through the courts.

What does that mean? There's no section in the Renters' Rights Bill that says that there's a right to go to the county court. Maybe there's an implied statutory tort there, but compare the Equality Act. The Equality Act has an entire part, part nine, which deals specifically with county court, civil enforcement, county court enforcement, and tribunal enforcement.

Chapter two of that part deals specifically with the county court and the jurisdiction of the county court to deal with breaches of the Equality Act. Chapter two includes issues like time limits or provisions, like time limits provisions about the type of remedy that the county court has the power to order.

There is nothing like that in the Renters' Rights Bill.

The only enforcement section there is in the Renters' Rights Bill is about local authority enforcement of fines.

NF: It really does seem like something is missing here, doesn't it? Or they haven't really applied themselves to how this will work in practice.

Local authorities are going have to deal with lots of other things.

IFKC: Are local authorities actually going to ever enforce this with everything else they've got to do?

NF: It just doesn't actually make sense. But then looking at that same guide. It also seems to suggest that this chapter might not even come into force, once the Bill is given Royal Ascent.

It suggests that it will have time to make things work smoothly, but it doesn't actually say this is all coming in at once. So, who knows if it even does come in? We don't know how it'll be enforced. There are so many questions, I think with this particular section, the discrimination section, and so there we have it, chapter three of the Renters' Rights Bill.

I think it really is a truly difficult part of the Renters' Rights Bill to understand and also to understand how it will be enforced.

IFKC: If it will, if it ever will. No one knows. No one knows how it could be enforced, more basically, I don't think any of us know what these provisions really mean. Or how they will look in practice.

What will this type of discrimination actually look like in real life as housing lawyers? Will it ever become a reality for us? Will we ever see cases in which there is an allegation of breach of chapter three of the Renters' Rights Act 2025? I'm not sure that we will ever see any of those cases.

NF: Neither am I, Iris.

IFKC: Well, on that note, thank you for listening to us.

Please do join us for the next instalment of *Home Truths* - the Housing Law Podcast from 42BR Barristers, which will be released shortly.

NF: You can find our podcasts on Apple Podcasts, Spotify, and the 42BR website. Thank you very much for listening.

IFKC: Thank you, Natalie.

NF: Thank you, Iris.