



# **The Law Commission**

(LAW COM No 337)

## **RENTING HOMES IN WALES**

Presented to the Parliament of the United Kingdom by the Lord  
Chancellor and Secretary of State for Justice  
by Command of Her Majesty

April 2013



# THE LAW COMMISSION

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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The terms of this report were agreed on 27 March 2013.

**The text of this report is available on the Law Commission's website at <http://lawcommission.justice.gov.uk/areas/renting-homes.htm>.**

# RENTING HOMES IN WALES

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# THE LAW COMMISSION

## RENTING HOMES IN WALES

*To the Right Honourable Chris Grayling MP, Lord Chancellor and Secretary of State for Justice*

### PART 1 INTRODUCTION

- 1.1 The Law Commission has been asked by the Welsh Government to review and update its recommendations for the reform of housing law. This is in light of that Government's commitment to introduce, during the lifetime of the current assembly, a housing bill that is modelled closely on the Law Commission proposals.<sup>1</sup>
- 1.2 The review process has been collaborative. In particular, we have benefited from a number of meetings with stakeholders representing a wide range of housing interests. The full list of meetings and the attendees is attached at Appendix A.
- 1.3 The analysis and conclusions presented in this report are those of the Law Commission. They are presented here for the benefit of the Welsh Government which is, of course, free to accept, modify or reject them.

### BACKGROUND

- 1.4 Renting Homes: The Final Report, published in 2006, set out the Law Commission's detailed recommendations for the reform of the law relating to residential rented housing.<sup>2</sup> Volume 2 of that report was a draft Bill putting those recommendations into statutory form.<sup>3</sup>
- 1.5 The report was the culmination of a major project which also saw the publication of two consultation papers: Renting Homes 1: Status and Security<sup>4</sup> and Renting Homes 2: Co-occupation, Transfer and Succession.<sup>5</sup> The consultation process

<sup>1</sup> See *Homes for Wales: a white paper for better lives and communities* (21 May 2012), <http://wales.gov.uk/docs/desh/consultation/120521whitepaperen.pdf> (last visited 6 February 2013) para 21 of the Executive Summary.

<sup>2</sup> Renting Homes: the Final Report (1) (2006) Law Com No 297, [http://lawcommission.justice.gov.uk/docs/lc297\\_Renting\\_Homes\\_Final\\_Report\\_Vol1.pdf](http://lawcommission.justice.gov.uk/docs/lc297_Renting_Homes_Final_Report_Vol1.pdf) (last visited 6 February 2013).

<sup>3</sup> Renting Homes: the Final Report (2) (2006) Law Com No 297, [http://lawcommission.justice.gov.uk/docs/lc297\\_Renting\\_Homes\\_Final\\_Report\\_Vol2.pdf](http://lawcommission.justice.gov.uk/docs/lc297_Renting_Homes_Final_Report_Vol2.pdf) (last visited 6 February 2013).

<sup>4</sup> (2002) Law Commission Consultation Paper No 162, [http://lawcommission.justice.gov.uk/docs/cp162\\_Renting\\_Homes\\_Consultation1\\_Status\\_and\\_Security.pdf](http://lawcommission.justice.gov.uk/docs/cp162_Renting_Homes_Consultation1_Status_and_Security.pdf) (last visited 6 February 2013).

<sup>5</sup> (2002) Law Commission Consultation Paper No 168, [http://lawcommission.justice.gov.uk/docs/cp168\\_Renting\\_Homes\\_Consultation2\\_Co-occupation.pdf](http://lawcommission.justice.gov.uk/docs/cp168_Renting_Homes_Consultation2_Co-occupation.pdf) (last visited 6 February 2013).

included presentations of the proposals at more than 100 public events, a significant proportion of which took place in Wales.

- 1.6 At the core of the recommendations is the creation of a straightforward and simplified statutory framework which:
  - (1) reduces the number of available forms of rental occupation of residential property to two – the secure contract and the standard contract; and
  - (2) provides model contracts which set out the basis on which occupiers occupy rented housing in clear terms.
- 1.7 There was little enthusiasm for implementation of the recommendations from the Westminster Government.<sup>6</sup> Its housing policy priorities at that stage were focused on extending owner occupation rather than reforming residential renting. Moreover, the Housing Act 2004, which had only recently implemented major changes in the regulation of rented housing, had required extensive government resources. The Law Commission's proposals relating to anti-social behaviour by the occupiers of rented housing, made in the first consultation paper, had largely been accepted and implemented in the Anti-Social Behaviour Act 2003. The Government eventually (in May 2009) formally rejected the recommendations for England.<sup>7</sup>
- 1.8 There was more interest from the Welsh Assembly Government. In November 2007, the then Minister for Housing accepted the recommendations in principle, for implementation in Wales if the legislative competence necessary to do so became available.<sup>8</sup> At that time, the operative devolution settlement was that contained in Part 3 of the Government of Wales Act 2006, which provided for the incremental addition of "matters" conferring legislative competence, within broadly defined "fields".<sup>9</sup>

## **RENTING HOMES AND WELSH LEGISLATIVE COMPETENCE**

- 1.9 The final report was published in May 2006, during the passage of what was to become the Government of Wales Act 2006. The draft Renting Homes Bill had been drafted on the basis of the Government of Wales Act 1998, and included an important provision designed to give the National Assembly a power to amend the statute that was not made available to Ministers in Whitehall in respect of England.
- 1.10 The report also anticipated the introduction of Part 3 of the 2006 Act, and made specific recommendations for implementation in Wales if the recommendations

<sup>6</sup> See the contrast drawn between the approach from the Westminster Government and the Welsh Assembly Government in Law Commission Annual Report 2007-2008, Law Com No 210, para 3.44.

<sup>7</sup> Department for Communities and Local Government, *The Private Rented Sector: Professionalism and Quality: the Government Response to the Rugg Review* (May 2009), <http://www.propertydrum.com/downloads/20090513/download> (last visited 6 February 2013).

<sup>8</sup> Law Commission Annual Report 2007-2008, Law Com No 210, para 3.44.

<sup>9</sup> Government of Wales Act 2006, sch 5.



were rejected or given a low priority in England. At the time, it was not envisaged that Part 4 of the 2006 Act would be implemented as quickly as turned out to be the case.

- 1.11 In July 2010, a legislative competence order under Part 3 of the 2006 Act was passed, one of the provisions of which would have allowed for an Assembly measure to partly implement Renting Homes for social housing only.<sup>10</sup> However, following the referendum in March 2011, the provisions of Part 4 of the 2006 Act were brought into force, greatly extending the legislative competence of the National Assembly.
- 1.12 The details of the devolution arrangements will be discussed in detail later when the legislative competence of the National Assembly in connection with the implementation of the Renting Homes Wales Bill is considered.

### **THE CHANGING LEGAL ENVIRONMENT OF HOUSING**

- 1.13 Housing law has not stood still since the publication of Renting Homes. In particular, there have been developments in the legal understanding of the relationship between article 8 of the European Convention on Human Rights and the mandatory eviction of social tenants. There have also been relevant statutory developments, particularly in provisions relating to housing related anti-social behaviour. Legislation such as the Equality Act 2010 also impacts upon the provision of rented housing. This report reviews these changes and ensures they can be accommodated within the Renting Homes recommendations.
- 1.14 One of the purposes of Renting Homes was to provide a legal framework for housing which would be responsive to changing policy priorities without the need for further legislation. The Welsh Government has identified a number of policy priorities which are related to housing or have housing implications, such as improving responses to domestic violence, facilitating landlord responses to anti-social behaviour and developing effective homelessness and supported housing strategies for Wales. One of the tasks of this review is to ensure that there are no inconsistencies between those policy priorities and the Renting Homes scheme.
- 1.15 In addition, whilst the Renting Homes recommendations were designed as far as possible to maintain the current balance of rights and responsibilities between landlords and occupiers, the development of the proposals inevitably involved some modifications to the status quo. This review highlights the most significant of these modifications, and, where these have proved controversial, explains our reasoning.
- 1.16 The report is structured as follows:
  - (1) Part 2 provides a summary of the Renting Homes recommendations. It will highlight those provisions which we consider to be of particular relevance to the Welsh Government and other stakeholders in Wales, revisit our reasoning for those recommendations which generated most controversy, and draw upon any learning from similar legislative

<sup>10</sup> Government of Wales Act 2006, sch 5, matter 11.4, in respect of social housing.

initiatives elsewhere, in particular Scotland.

- (2) Part 3 considers the legislative competence of the National Assembly to implement Renting Homes.
- (3) Part 4 updates the Renting Homes recommendations considering:
  - (a) developments in Human Rights;
  - (b) developments in statutory provisions relating to anti-social behaviour;
  - (c) other relevant developments; and
- (4) Part 5 focuses on the Welsh context, in particular our proposals in relation to supported housing, domestic violence and anti-social behaviour.

# **PART 2**

## **SUMMARY OF RECOMMENDATIONS**

### **INTRODUCTION**

- 2.1 The current legal framework for residential renting is complex, detailed and often obscure. Rights and responsibilities depend, amongst other things, on the lease/licence distinction, the status of the provider and the commencement date of the agreement. There is no statutory requirement for full written contracts and no requirement that any contract that is provided accurately reflects the occupier's legal position.<sup>1</sup> Some forms of renting are excluded from statutory schemes, and regulated only by the common law and unlawful eviction legislation. Others, such as supported housing, sit uneasily within the current framework, meaning that some everyday practices of providers put them at risk of legal action.
- 2.2 The complexity of the legal framework is a contributory factor to the poor reputation of the rented sector, as many landlord and tenant disputes result from ignorance of the law. It also means that compliance costs are high and the outcomes of litigation unpredictable, which particularly affects the providers of social housing.
- 2.3 At the heart of the Renting Homes recommendations is the replacement of dense statutory provisions, obscure common law rules and multiple tenancy types with statutorily regulated contracts to be used by all rental providers. Model contracts, underpinned by statute, will set out the basis upon which accommodation is rented, provide clear and accurate statements of the rights and responsibilities of the parties, and explain the circumstances in which rights to occupy may be brought to an end. The contracts will be easily available and easily understood.
- 2.4 Under the Renting Homes scheme, all tenancies and licences that enable occupation as a home are occupation contracts, unless the arrangements are specifically excluded by the Bill. "Tenancies" here includes both fixed term leases and periodic tenancies. Exclusions include long tenancies (over 21 years), business tenancies which include some residential accommodation, agricultural tenancies and Rent Act tenancies.<sup>2</sup> It therefore replaces the two main existing statutory regimes, the secure tenancy in the Housing Act 1985 and the assured regime in the Housing Act 1988,<sup>3</sup> along with ancillary statutory tenancy types like introductory and demoted tenancies.<sup>4</sup> Common law tenancies that come within the definition are included, such as those excluded from the other two regimes, including "tied" accommodation for employees of local authorities and private

<sup>1</sup> It should be noted that a written contract is required for landlords to take advantage of the accelerated possession procedure and the Office of Fair Trading's guidance on Unfair Tenancy Terms indicates that, for tenancy terms to comply with the Unfair Terms in Consumer Contract Regulations 1999, they should be in writing.

<sup>2</sup> The exclusions are set out in full in Part 2 of Schedule 1 to the draft Bill.

<sup>3</sup> Except for assured or assured shorthold tenancies with a fixed term of over 21 years.

<sup>4</sup> Housing Act 1996, Part 5, Chapters 1 and 1A .

sector tenancies with low ground rents.<sup>5</sup> The result is that the vast majority of residential lettings would be covered.

- 2.5 The scope of the scheme recommended by Renting Homes is more comprehensive than current provisions and eliminates the out-dated distinctions between local authority and housing association providers. Most significantly, it provides a unified and streamlined legal framework for renting which will not require the invention of new tenancy types in order to achieve new policy objectives.
- 2.6 The replacement of the current legal framework with the Renting Homes recommendations will not in itself transform the reputation of renting. However, the recommendations will assist in making rational and well-informed decisions to rent rather than purchase a home. Clearly expressed and fair contracts will contribute to the legal security of the occupier as well as enabling occupiers to understand the expectations that a rental contract places upon the parties to it.
- 2.7 The full details of the Renting Homes recommendations are set out in the final report.<sup>6</sup> However here we outline the key recommendations to facilitate subsequent discussion.

## **THE CONTRACTS**

- 2.8 Although there is increasing convergence and overlap between providers of rental housing, which is recognised by our scheme, it remains appropriate to recognise two paradigms of provision – market provision and social provision.<sup>7</sup> The Law Commission therefore recommended two types of model contracts based upon the current assured shorthold tenancy and the secure tenancy.<sup>8</sup>
- 2.9 In the first contract type, the standard contract, the security of the contract holder is determined by the contract – a pre-requisite of a market system. Once any fixed term granted by the contract has expired, the landlord can evict the contract holder provided the landlord has given two month's notice. There is no need to prove fault.

<sup>5</sup> Occupation contracts are capable of being sold and can be inherited: see generally Renting Homes volume 2, Part 5, chapters 1 and 2.

<sup>6</sup> Renting Homes: the Final Report (1) (2006) Law Com No 297, [http://lawcommission.justice.gov.uk/docs/lc297\\_Renting\\_Homes\\_Final\\_Report\\_Vol1.pdf](http://lawcommission.justice.gov.uk/docs/lc297_Renting_Homes_Final_Report_Vol1.pdf) (last visited 6 February 2013).

<sup>7</sup> It was put to us during our discussions that the proposals were insufficiently radical and that there should only be one contract type. However, the level of demand in the private rented sector and the nature of providers and provision mean that it is inappropriate for the statute to impose the type of social obligations upon private landlords that characterise social housing. The outcomes would be too uncertain and could result in a rapid decline in private provision. That is not to say that appropriate policy tools should not be utilised to achieve similar ends.

<sup>8</sup> The “lifetime” security offered by the secure tenancy is likely to become more conditional in the future. The Westminster Government’s White Paper proposes a new mandatory ground for eviction where there has been serious housing related anti-social behaviour. This development is discussed at paras 4.25 to 4.33 below.

- 2.10 The second contract type, the secure contract, offers greater security to the contract holder. The landlord can generally only terminate the contract if the contract holder is found by a court to be in breach of the terms of the agreement, and eviction is determined by the court to be reasonable and proportionate.<sup>9</sup> Security is further enhanced by the possibility of succession to family members or carers.<sup>10</sup>
- 2.11 Landlords are required to provide written contracts which comply with statutory requirements. The contracts will contain four types of terms – key terms, fundamental terms, supplementary terms and additional terms. Many of these terms, other than those relating to termination, are identical across the contract types.
- 2.12 Key terms are those terms, such as the rent and the address of the property, which are unique to that contract. Whilst they cannot be statutorily prescribed, the draft Bill provides that such terms must appear in the contract.<sup>11</sup>
- 2.13 Fundamental terms set out the essential rights and obligations of landlords and contract holders. They include grounds for possession and the requirement that the landlord provide his or her name and address. Many fundamental terms are updated restatements of current statutory provisions, such as the repairing obligations contained in section 11 of the Landlord and Tenant Act 1985. For the first time, however, it will be a legal requirement that these rights and obligations are set out in the contract. Most fundamental terms can be modified or varied, but only in favour of the contract holder.<sup>12</sup>
- 2.14 Supplementary terms deal with the practical matters needed to make the contract work, so, for instance, they cover the payment of rent and the maintenance of the premises. Supplementary terms will be provided for within secondary legislation following consultation.
- 2.15 Additional terms deal with specific issues that parties want covered by the contract, but in relation to which there is no statutory provision. Supplementary and additional terms are significant in determining the extent to which the rented property feels like a home, relating for instance to the keeping of pets. It is therefore very important that such terms are fair and transparent.
- 2.16 Model contracts will be prescribed by statute. These will be easily available and written in user-friendly language. Whilst a written contract is a mandatory requirement, and must include the prescribed terms, landlords will not be forced

<sup>9</sup> There is one mandatory ground which applies to all types of occupation contracts. This is where the contract holder gives the landlord notice to terminate the contract but fails to give up possession of the premises at the due date.

<sup>10</sup> Our proposals for succession rights to secure contracts are one of the few occasions when the proposals adjust the pre-existing balance of rights and responsibilities between landlord and occupier. They are discussed more fully at paras 2.36 to 2.41 below.

<sup>11</sup> Renting Homes: the Final Report (2) (2006) Law Com No 297, [http://lawcommission.justice.gov.uk/docs/lc297\\_Renting\\_Homes\\_Final\\_Report\\_Vol2.pdf](http://lawcommission.justice.gov.uk/docs/lc297_Renting_Homes_Final_Report_Vol2.pdf) (last visited 6 February 2013).

<sup>12</sup> A notable exception is the prohibited conduct term. This fundamental term cannot be modified. Prohibited conduct is discussed further at paras 5.8 to 5.29 below.

to use the model contracts. However, any modified supplementary or additional terms may be scrutinised by the courts for fairness and transparency.

## **LANDLORD NEUTRALITY**

- 2.17 One important feature of the Renting Homes scheme is that the nature of the landlord is no longer part of the definition of the tenancy. This integrates market and social rental housing provision in one legal framework, unlike the current framework.<sup>13</sup> Although the draft Bill provides for circumstances in which social landlords are required to use secure contracts, such requirements will not necessarily apply to all of a social landlord's provision.
- 2.18 This will enable, for instance, social landlords to provide rented housing in circumstances where the social benefit of additional security is not necessary, such as lettings to key workers. Social landlords will also be able to use the standard contract for trial periods when housing policy determines that this is appropriate. The scheme also enables private landlords to provide rental housing with the enhanced security of the social sector.
- 2.19 The scheme is designed to encourage flexibility. One fault of previous housing legislation is that statutory provision was developed to solve the particular rental problems of the moment. This meant that when conditions changed, the statutory framework acted as a brake on providers' responses. We seek to avoid this outcome. At the moment, it is difficult to imagine anything other than excessive demand, high rents and falling incomes. However, we know from housing history that situations change and there may come a time when private landlords will be competing with social landlords for rental business. The statutory scheme is robust enough to accommodate such changes.

## **CONTROVERSIES**

- 2.20 It was not part of our remit to question the existing balance of rights and responsibilities within the provision of rented housing. Rent regulation, for instance, fell outside of the scope of our project, as did security of tenure in the private rented sector. However, in the course of integrating local authority and housing association provision and extending, simplifying and modernising the scope of the scheme, we have inevitably recommended changes that alter the status quo.
- 2.21 Some of the changes are only a matter of tidying up statutory provisions. It made sense, for instance, to make notice periods consistent, even if that results in changes that benefit the landlord or the contract holder. However, some of the changes are more substantial and have proved controversial, both during our consultations prior to the publication of the final report, and during our meetings with housing stakeholders in Wales during 2012 and 2013.

<sup>13</sup> The significance of integration is noted in K Hulse et al., *Secure occupancy in rental housing: conceptual foundations and comparative perspectives* (Australian Housing and Urban Research Institute Final Report No 170) (2011).

### **The recommended abolition of ground 8 in the social rented sector**

- 2.22 The crafting of the secure contract involved the abolition of ground 8, which is the mandatory ground of possession available in the assured tenancy. This entitles a landlord to a mandatory possession order when serious arrears of rent (two months or more) have accumulated. We decided it was inappropriate to reduce the rights of many thousands of local authority tenants and those whose secure status was protected as a condition of transfer from local authority to housing association management. Some registered social landlords and the Council of Mortgage Lenders expressed concern at the loss of this ground during our original consultations.<sup>14</sup>
- 2.23 At our meetings in Wales, some attendees from the housing association sector repeated concerns about the abolition of ground 8.<sup>15</sup> The uncertainty over housing benefit income continues to be a problem. The argument was put to us that the introduction of the universal credit, under which housing benefit is paid to the tenant rather than direct to the landlord, means that rent arrears are likely to rise. In addition, many tenants have had their housing benefit cut as a result of new rules on under-occupation. Ground 8 was supported as a tool to prevent occupiers getting into serious debt. It was said that it is better for the tenant to end the contract sooner and move into affordable accommodation, rather than putting off what is inevitable with serious financial consequences for both provider and occupier.
- 2.24 Concerns about the reliability of judges in granting possession orders were also repeated. We were told that some judges had refused to make mandatory orders and were sometimes reluctant to exercise their discretion and grant outright possession even when rent arrears were at serious levels.
- 2.25 Despite further reflection, we stand by our recommendation to abolish ground 8. This is for a number of reasons:
- (1) security is a hallmark of social lettings and it is entirely appropriate that there should be judicial oversight of evictions from the social sector. The lack of mandatory grounds distinguishes the social contract from the standard contract;
  - (2) providing scope for judicial oversight of evictions where the landlord is a public body is essential in the light of the developing jurisprudence in connection with article 8 of the European Convention on Human Rights (discussed further in Part 4 of this Report);
  - (3) ground 8 is available only in a small proportion of social housing in Wales. It also appears from the relevant statistics that there is very little use of ground 8 by those landlords; and

<sup>14</sup> Renting Homes: the Final Report (1) (2006) Law Com No 297, [http://lawcommission.justice.gov.uk/docs/lc297\\_Renting\\_Homes\\_Final\\_Report\\_Vol1.pdf](http://lawcommission.justice.gov.uk/docs/lc297_Renting_Homes_Final_Report_Vol1.pdf) (last visited 6 February 2013), paras 1.43 to 1.50.

<sup>15</sup> This was not a concern raised at our meeting with the Council for Mortgage Lenders.

- (4) compliance with the pre-action protocol on rent arrears in social housing,<sup>16</sup> together with our recommendations for structured discretion and the judicial training which will accompany the new regime, should mean that outcomes of possession proceedings based upon rent arrears become more predictable.
- 2.26 We applaud the desire of social landlords to prevent their tenants getting into excessive debt. We consider however that using ground 8 as a tool to achieve that end is disproportionate and potentially counter-productive, as tenants will also have to bear the costs of court proceedings.

### **The recommended abolition of the six-month moratorium**

- 2.27 Our recommendations abolish the rule that forbids a court from ordering possession of a private sector assured shorthold tenancy on the notice only (no fault) ground before the end of the first six months of the agreement.
- 2.28 The primary reason for abolishing the six-month moratorium on possession is to enable our proposed scheme to cover as many existing tenancy types as possible. Extensive coverage considerably assists simplification, and the scope for insecurity is greatest within those lettings which fall outside the current statutory control. Service occupancies, for instance, fall outside of the current statutory framework, meaning that people who live in tied accommodation have little security beyond that provided by protection from eviction legislation. Without the six-month moratorium, the standard contract becomes available for circumstances such as service occupancies, student accommodation and supported housing. In addition, the abolition of the six-month moratorium opens up new business opportunities for the private sector in short term lettings.
- 2.29 This proposal understandably raised many concerns during the original consultation from those interested in the rights of private tenants. It was apparent during our meetings in Wales that this concern has not gone away. Indeed, if anything, it has intensified with the increasing use of the private sector by local authorities to house homeless applicants and the evidence that private renting is becoming a long-term housing solution for many people. The argument is that everyone, and vulnerable people and families in particular, requires security in order to access services such as schools and doctors, and build stable lives.
- 2.30 We agree that security is an appropriate policy aim. However, we do not consider that security is enhanced by the six-month moratorium. There are three basic reasons for this.
- 2.31 Firstly, six months in a dwelling does not enable a stable life. We think that tenants' representatives want to defend the six months security as a remnant of the permanence previously offered by the Rent Act 1977 in the private rented sector. In reality what tenants' representatives want is fixed terms of two years or more.

<sup>16</sup> Pre-action Protocol for Possession Claims based on rent arrears, [http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot\\_rent](http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_rent) (last visited 6 February 2013).



- 2.32 Secondly, landlords have an interest in long term occupancy which is why many use fixed term contracts of 12 months or more. They wish to avoid voids and the transaction costs involved in new lettings. Of course, if rents are rising there is some incentive for landlords to evict occupiers, although this is offset by the ability of landlords to raise rents to market levels on an annual basis.
- 2.33 Achieving rent stability is arguably the best way to ensure that occupiers remain in a particular property for as long as they wish. History shows us that trying to achieve this through statutory means results in avoidance (with which potential occupiers often collude out of necessity), diminution of supply and excessive resources being devoted to policing the statutory boundaries.
- 2.34 This accords with the findings of Hulse et al who argue in a comprehensive and comparative study of renting that security is “a product of the interrelationship between market, policy and legal factors”.<sup>17</sup> This suggests that security requires careful management of market, policy and legal factors. It cannot be achieved by imposing legal requirements on the private sector in isolation. We would argue that it is more likely to be achieved by creating those market conditions in which landlords choose to rent long term. Moreover, we consider that local authorities should use their market position to ensure longer term contracts for families they are placing in the private rented sector.<sup>18</sup>
- 2.35 Our third reason for considering that security will not be diminished by the abolition of the six-month moratorium is pragmatic. Landlords are highly unlikely to issue proceedings to terminate a contract in the first few weeks of a rental agreement, particularly when they have received one or two months rent in advance. Furthermore, the timescale once proceedings have been issued is likely to mean that orders for possession are unlikely to be made much earlier than six months after the commencement of the rental contract.
- 2.36 We therefore stand by our original recommendation to abolish the six-month moratorium. We do not consider that it enhances security in the private rented sector, and its abolition enables us to make our scheme wide ranging in its scope and avoids complexities and boundary issues.

### **Succession provisions in secure contracts**

- 2.37 Our recommendations to extend succession rights were not as controversial as those discussed above. However, we consider it appropriate to discuss them in this section of the report as they represent a potential enhancement of the rights of current social tenants.
- 2.38 Succession provisions for tenants of social housing are relatively limited and there are technical differences between providers. The surviving spouses or civil

<sup>17</sup> K Hulse et al., *Secure occupancy in rental housing: conceptual foundations and comparative perspectives* (Australian Housing and Urban Research Institute Final Report No 170) (2011).

<sup>18</sup> For example, Shelter has produced proposals for five year fixed term tenancies, see Shelter, *A better deal: towards more stable private renting* (2012), [http://england.shelter.org.uk/\\_\\_data/assets/pdf\\_file/0009/587178/A\\_better\\_deal\\_report.pdf](http://england.shelter.org.uk/__data/assets/pdf_file/0009/587178/A_better_deal_report.pdf) (last visited 6 February 2013).

partners of assured tenants of registered social landlords are entitled to succeed to the assured tenancy. There can only be one succession.<sup>19</sup> The legal provisions are different for local authority secure tenants – there is one succession which may be to a surviving spouse or civil partner or to a member of the deceased tenant’s family (which includes those living together as husband or wife or living together as civil partners).<sup>20</sup> In practice, the outcomes are similar. A succession as a consequence of the death of a joint tenant counts as a succession for the purposes of the statute,<sup>21</sup> so it is rare that a member of a secure tenant’s family succeeds to the tenancy even in secure tenancies.

- 2.39 The Localism Act 2011 simplified and reduced succession rights created after 1 April 2012 in England, but does not apply in Wales.<sup>22</sup>
- 2.40 We concluded in our final report that the rules on succession were too restrictive.<sup>23</sup>
- 2.41 Our recommendations therefore extend succession rights. We allow a succession to a priority successor, a class which includes a spouse or partner of the contract holder who occupied the home as their only or principal home at the time of their death. There is one significant limit on priority successors – no-one can succeed as a priority successor if the contract holder had himself or herself been in occupation by virtue of a priority succession.
- 2.42 Following the death of a contract holder who was a priority successor, we allow succession to a reserve successor. This class includes family members and carers. In order to be a reserve successor, the person must occupy the home as their only or principal home at the time of the contract holder’s death, and must have done so through the period of 12 months ending with the contract holder’s death. In addition, in order for a carer to succeed, the carer cannot be entitled to occupy any other premises as a home.
- 2.43 During the course of our meetings in Wales, it was suggested that someone who is or has been subject to an anti-social behaviour order or an anti-social behaviour injunction should be disqualified from being a reserve successor. If such a rule was agreed it would be a simple amendment to our recommended statutory rules.
- 2.44 We consider that these rules mitigate the hardship of current succession provisions and promote a key policy objective in protecting carers. We are mindful, however, of the need for stock to be managed properly and so have

<sup>19</sup> Housing Act 1988, s17.

<sup>20</sup> The succession provisions for local authority tenants are set out in the Housing Act 1985, ss 87 and 88.

<sup>21</sup> Housing Act 1985, s 88(1)(b).

<sup>22</sup> Sections 160 and 161. For a full discussion of succession provisions for social tenants see House of Commons Library Standard Note, *Succession rights and social housing SN/SP/1998* (26 November 2012).

<sup>23</sup> Renting Homes: the Final Report (1) (2006) Law Com No 297, [http://lawcommission.justice.gov.uk/docs/lc297\\_Renting\\_Homes\\_Final\\_Report\\_Vol1.pdf](http://lawcommission.justice.gov.uk/docs/lc297_Renting_Homes_Final_Report_Vol1.pdf) (last visited 6 February 2013), paras 7.8 – 7.35.

included a ground for possession based upon the current ground 16 of Schedule 2 to the Housing Act 1985. This would be available where a reserve successor is under-occupying a property following the death of the contract holder. The ground could only be used within a limited time frame, and would be subject to reasonableness and the offer of suitable alternative accommodation.

## **LEARNING FROM SCOTLAND**

- 2.45 Some of the changes we recommend in connection with social housing are similar to, or derived from, changes that have already been implemented in Scotland. The Housing (Scotland) Act 2001 introduced a single tenancy for the vast majority of its public sector tenants regardless of whether the landlord was a local authority or a housing association.
- 2.46 Reforms to tenancy terms in Scotland have so far been limited to the social sector. Nonetheless, although narrower than the Renting Homes recommendations, the experience of the reforms in Scotland provides useful material to inform the implementation of our proposals. We are very grateful to colleagues in Scotland who, in a series of meetings, reflected upon the successes and failures of their own housing law reform process.

### **Introducing the Scottish secure tenancy**

- 2.47 The introduction of the Scottish secure tenancy was generally welcomed. It was seen as a commonsense solution, which reflected the reality of social housing provision. It was clear that ensuring all tenants signed the Scottish secure tenancy was the most challenging aspect of the reform process. It may be that the time scale imposed by the regulator was overly onerous. The Welsh Government may wish to reflect upon how stringently they would wish sign-up to be enforced.
- 2.48 It should be noted that several social landlords reflected upon the introduction of the Scottish single tenancy as an opportunity to have a conversation with their tenants about rights and responsibilities. It was observed that this may prove particularly useful in the context of the end of direct rent payments to landlords for those on housing benefit. The benefits of a tenancy agreement written in plain English were also noted; it was considered that there had been a de-mystification of the tenancy agreement for both tenants and staff.

### **Abandonment**

- 2.49 The Renting Homes recommendations include a procedure to enable the landlord to regain possession without going to court when a property has been abandoned. This procedure was modelled on section 18 of the Housing (Scotland) Act 2001.
- 2.50 No-one with whom we met had anything adverse to say about this procedure. It was clear that some housing associations used the procedure alongside standard possession proceedings, but that was due to cautious legal advice rather than uncertainty about the legal effectiveness of the procedure.

### **Succession to carers**

- 2.51 Schedule 3 of the Housing (Scotland) Act 2001 includes carers as qualified persons under the succession provisions. If no spouse or qualifying family member is available to succeed to the tenancy then a resident carer who has no other home is able to succeed. There is no minimum residence period required before a carer can succeed. As part of a consultation exercise on allocation of social housing, the Scots are considering introducing a 12-month residence requirement for succession to carers. There did not appear to be any demand for the repeal of carers' succession rights.
- 2.52 The Renting Homes recommendations, as outlined above, include a succession right for carers in certain circumstances. They also contain a 12-month residence requirement and a ground for possession for under-occupation following succession to a reserve successor. We consider that the recommendations already contain the safeguards that the Scots are now considering.

### **Joint tenants**

- 2.53 In Scottish law, one joint tenant can terminate their tenancy without it operating to terminate the tenancy of any other joint tenants. The Housing (Scotland) Act 2001 provided a statutory procedure to terminate the tenancy of a joint tenant who has abandoned the tenancy.
- 2.54 The operation of the law in Scotland as regards joint tenants was treated as a matter of common sense and caused no problems.

### **Possession for rent arrears**

- 2.55 There is no mandatory ground for eviction for rent arrears in the Scottish secure tenancy. In the course of our meetings we asked about the implications of the loss of the equivalent of ground 8. Whilst housing association landlords expressed some regret at the loss of mandatory eviction for serious arrears, and frustration at the difficulties in obtaining possession orders for rent arrears, there was no evidence of any increase in rent arrears following the implementation of the Act.
- 2.56 We also note that the Housing (Scotland) Act 2010, which came into force in August 2012, imposes pre-action requirements on landlords and tenants to do all that they can to resolve the arrears before landlords take action to evict onto a statutory footing. One aim was to reduce the mismatch between the relatively high number of possession proceedings issued, compared with the low number of orders granted.

## **PART 3**

### **DEVOLUTION**

- 3.1 Following the implementation of Part 4 of the Government of Wales Act 2006, the Welsh Government is able to consider housing law reform independently of Westminster. This Part of the report considers the current extent of the legislative competence of the National Assembly, and explains why the Renting Homes recommendations fall within those powers.

#### **THE GOVERNMENT OF WALES ACT 2006**

- 3.2 The Government of Wales Act 2006 provides the National Assembly with powers to make primary legislation in particular subjects. Those subjects are set out in Schedule 7, Part 1.
- 3.3 Section 108 of the Act specifies the additional tests that statutory provisions must satisfy if they are to be within the Assembly's legislative competence. In particular, they must relate solely to Wales and not fall within any of the exceptions in that Part. Restrictions on the use of the Assembly's powers, within the scope of its general area of legislative competence, are set out in Part 2 of Schedule 7.
- 3.4 Part 1 of Schedule 7 includes the following at paragraph 11:
- (1) housing;
  - (2) housing finance except schemes supported from central or local funds which provide assistance for social security purposes to or in respect of individuals by way of benefits;
  - (3) encouragement of home energy efficiency and conservation, otherwise than by prohibition or regulation;
  - (4) regulation of rent;
  - (5) homelessness; and
  - (6) residential caravans and mobile homes.

- 3.5 This provides a broad statement of competence to legislate on housing matters with very little further elaboration.

#### **The purpose of legislative provisions**

- 3.6 Further assistance in answering the question whether a particular provision of an Assembly Act relates to a subject is provided by section 108 of the Government of Wales Act 2006. It "is to be determined by reference to its purpose, having regard (among other things) to its effect in all the circumstances" (section 108(7)). Subject to these, and the other tests, being satisfied, an Assembly Act may make any provision that could be made by Act of Parliament.
- 3.7 The significance of purpose in answering questions about legislative competence is reinforced by the decision of the Supreme Court in *Imperial Tobacco Limited v*

*The Lord Advocate (Scotland)*.<sup>1</sup> In deciding that the provisions of the Tobacco and Primary Medical Services (Scotland) Act 2010 fell within the legislative competence of the Scottish Parliament, the Supreme Court provided an analytical approach which can be applied generally to questions about the scope of legislative competence.

- 3.8 Lord Hope, who gave the only judgment, set out a three stage approach to questions of legislative competence. The first stage requires that the purpose of the relevant provisions is identified. The second stage is to examine the relevant rules in the statute which sets out the scope of legislative competence (here the Government of Wales Act 2006) to identify the tests to be applied. The final stage is to draw stages one and two together to reach a conclusion on legislative competence.
- 3.9 The starting point, therefore, for a consideration of the legislative competence of the National Assembly to enact the Renting Homes recommendations is to demonstrate that they are for the purposes of housing. Our recommendations are concerned with the reform of housing law and the creation of a statutory framework that facilitates housing policy. In this context, the scope of housing law and housing policy merit consideration.

#### **HOUSING POLICY AND HOUSING LAW**

- 3.10 Housing policy, in broad terms, is concerned with government interventions to meet housing need and promote the delivery of better quality and affordable homes.<sup>2</sup> It emerged as a policy field in the early years of the twentieth century as part of government responses to the housing problems caused by urbanisation and industrialisation. Following the Second World War, housing policy was largely concerned with meeting demand through large scale public housing building programmes. From the 1980s, there were moves against the provision of state housing and towards the private sector and housing association provision, and the promotion of owner occupation.
- 3.11 In recent years, housing policy has become more sophisticated, recognising the role of housing policy within economic development and in the creation of sustainable communities.<sup>3</sup> The previous focus on the nature and role of the provider has shifted towards effective outcomes. As MacLennan puts it, “housing is a complex commodity and housing outcomes affect environmental well-being, social justice, good governance and, of course, the economy”.<sup>4</sup>
- 3.12 Housing law is a relatively recent specialisation growing out of the welfare rights and law centre movements of the 1960s and 1970s, and the concomitant

<sup>1</sup> [2012] UKSC 61, [2013] Scots Law Times 2.

<sup>2</sup> See D Cowan, *Housing Law and Policy* (2011) ch 1 for a discussion of the complexity, incoherence and contestation inherent in these policy objectives.

<sup>3</sup> The Barker Review of Housing Supply published by the Treasury in 2004 provides an excellent example of this broader understanding of the role of housing in the economy.

<sup>4</sup> D MacLennan, *Housing policies: New times, New foundations* (Joseph Rowntree Foundation, 2005), <http://www.jrf.org.uk/sites/files/jrf/1859353622.pdf> (last visited 6 February 2013) p 25.

development of statutory regulation.<sup>5</sup> It was articulated as a specialist area by Andrew Arden and Martin Partington, and developed beyond a conventional public housing focus in articles for the *Legal Action Bulletin* and in ground breaking publications including *Landlord and Tenant Law*,<sup>6</sup> *Quiet Enjoyment*<sup>7</sup> and *Housing Law Cases and Materials*.<sup>8</sup>

- 3.13 The work championed the individual rights of tenants against the state and property owners. As Arden puts it:

More generally, what practitioners were doing was to seek to persuade courts to move away from deciding issues relating to rented homes on the basis of a clinical and narrow assessment of proprietary rights, but instead to address them from the perspective that what they were deciding was how people lived. In like vein, practitioners were also challenging the traditional protectionist approach to local authority decision-making (whether in relation to access to housing or to housing conditions, rents, eviction or otherwise) to be found in the courts.<sup>9</sup>

- 3.14 Arden explains what was distinct about this new specialism:

In terms of housing law, the very purpose of the initial exercise was to seek to establish the proposition that what it was dealing with was not property, but accommodation - the notion that to own housing was not a pure exercise in investment but about places where people lived, to which the essential corollary is that no one should be turned out of a home without very good cause....Another parameter related to housing conditions - what is tolerable in housing is very different from what may be tolerable in commercial or industrial property, and ought not to be determined by an abstract construction of the balance of responsibilities indiscriminately applicable to all lettings.<sup>10</sup>

- 3.15 At the centre of housing law as Arden and Partington understood it lay the regulation of the rights and responsibilities of those who provide and occupy rented housing. It included the regulation of access to rental housing, the regulation of rent and the regulation of housing conditions.

<sup>5</sup> For a reflective account of the development of housing law as legal practice and scholarship see A Arden and M Partington, "Housing Law Past and Present" in S Bright (ed.), *Landlord and Tenant Law: Past, Present and Future* (2006).

<sup>6</sup> M Partington, *Landlord and Tenant Law* (1975).

<sup>7</sup> A Arden and M Partington, *Quiet Enjoyment* (1982).

<sup>8</sup> M Partington and J Hill, *Housing Law Cases and Materials* (1991).

<sup>9</sup> A Arden and M Partington, "Housing Law Past and Present" in S Bright (ed.), *Landlord and Tenant Law: Past, Present and Future* (2006), p 196.

<sup>10</sup> A Arden, "Origins of Housing Law" (2008) 30(4) *Journal of Social Welfare and Family Law* 287, p 291.

- 3.16 Cowan explains their analytical approach, saying that they “begin with an outline of the different types of legal relationships, or statuses, which occur in housing, followed by a ‘function’ or ‘problem’ based approach”.<sup>11</sup> So once it is established, for instance, that someone is protected under the Rent Act 1977 then he or she can be advised on succession rights; once it is established that someone is an assured shorthold tenant then he or she can be advised to be cautious in enforcing a landlord’s responsibilities for disrepair.
- 3.17 The energy of those who developed the specialism and the scope of the subject, which crosses traditional legal boundaries of public/private, property and contract, have given it a tendency to grow. In addition, it has responded to housing policy developments so that housing related anti-social behaviour and discrimination issues now form part of its terrain.
- 3.18 In *Housing Law and Policy*, published in 2011, Cowan updates the Arden/Partington approach. He draws upon a sophisticated understanding of contemporary housing policy to suggest a three part analytical framework for housing law - *regulation* of housing systems; *access* to housing; and individual *rights and responsibilities* in housing. This enables him to move beyond tenancy status to consider how different forms of occupation are constructed and promoted, and then to include owner-occupation in his close analysis of access, rights and responsibilities.
- 3.19 Cowan’s work highlights the complex relationship between housing law and housing policy. In one sense, housing law and housing policy are distinct; an expertise for instance in housing law does not denote an expertise in housing policy or vice versa. In certain circumstances, housing law acts as a constraint upon housing policy. The constraints can be rights-based, like security of tenure or Article 8 of the European Convention on Human Rights. More significantly housing law is a key tool of housing policy, as the means through which housing policy is put into effect. Law is arguably a slow and cumbersome tool through which to put policy into effect. Reliance on law as a policy tool leads to the statutory complexity which has become a hallmark of housing law.
- 3.20 A major advantage of our recommendations is that they provide a simplified legal framework, so that policy can develop without the need to legislate for new forms of tenancy. Their purpose is to modernise, simplify and clarify the rights and responsibilities of the providers and occupiers of rental housing. They follow the shift in housing policy away from the regulation of providers towards the regulation of outcomes.

#### **RELATIONSHIP OF RENTING HOMES AND CONSUMER PROTECTION LAW**

- 3.21 *Renting Homes* draws upon the law on unfair contract terms which had been extended to housing contracts via the Unfair Terms in Consumer Contracts Regulations 1999. The impact of the Regulations is that if a court finds a term to be unfair then it will not be binding on the occupier and the landlord will not be able to rely on it.

<sup>11</sup> D Cowan, *Housing Law and Policy* (2011) p 7.



- 3.22 The Regulations provide important protections for occupiers but can leave landlords uncertain about the status of terms within their contracts. Moreover it is not easy for occupiers to enforce their rights under the Regulations, particularly because of the lack of security in the private rented sector.
- 3.23 The Renting Homes solution is to integrate the Regulations into the statutory scheme. By making the fundamental terms and those supplementary terms which incorporate supplementary provisions without modification statutorily protected from challenge under the Regulations, landlords are provided with certainty about the legality of the terms. The guarantee of fairness for the occupiers comes from the careful scrutiny of the provisions as part of the legislative process. In essence the Renting Homes recommendations utilise consumer protection law to achieve housing law purposes.
- 3.24 The Unfair Terms in Consumer Contract Regulations contain key limitations on their scope. These are:
- (1) limitation to cases where landlords are “suppliers” and occupiers are “consumers”;
  - (2) limitation to cases where terms are not individually negotiated; and
  - (3) exclusion of “core” terms.
- 3.25 All three limitations are relevant to the Renting Homes recommendations. The first two merit further consideration.
- 3.26 For the purposes of the Regulations a landlord is a supplier when he or she is “acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned”.<sup>12</sup> There is a lack of clarity as to the scope of the term “supplier” in the context of renting. One view is that all landlords are suppliers since they are in the business of renting homes. Alternatively it could be argued that a small number of landlords who are not making their living out of letting but are letting their property temporarily because they cannot sell, or those who let out property which has been left to them pending sale, may be excluded. These landlords are referred to as “hobby” or “accidental” landlords.
- 3.27 Guidance provided by the Office of Fair Trading on the operation of the Regulations in the context of tenancy agreement assumes that, in general, landlords can be considered “suppliers”. In the event of a dispute as to whether an individual small landlord is a supplier, it will be for a court to decide whether the Regulations apply in that case.<sup>13</sup> As far as we are aware there have been no court decisions on this point.
- 3.28 In order to resolve any doubt on this issue, the recommendations and the draft Bill provide that the Regulations apply to all landlords and occupiers. What this

<sup>12</sup> Unfair Terms in Consumer Contract Regulations 1999, reg 3(1).

<sup>13</sup> Office of Fair Trading *Guidance on unfair terms in tenancy agreements* (September 2005) OFT 356.

means is that there is no need to consider whether a landlord is dealing as a business or not.

3.29 This seems the right solution as it avoids uncertainty about the status of, we think, a small number of landlords. It serves a housing law purpose, but equally significantly, has nothing more than a housing law purpose. It is a means to an end, and not an end in itself. Its purpose is to ensure that all landlords operate within the same legal framework, to provide an incentive for the use of model contracts, and to remove unnecessary boundaries.

3.30 The second limitation, relating to the exclusion of terms which have been individually negotiated, has recently been scrutinised by the Court of Appeal. This is relevant to our recommendations as the Renting Homes scheme enables landlords to insert additional terms that are not statutorily provided into the contract. Such terms can be scrutinised for fairness as they are not covered by the exception to the Regulations discussed above, that is they do not reflect mandatory statutory provisions.

3.31 The problem arises that if terms have been individually negotiated, the occupier would cease to have the protection of the Regulations.

3.32 The Regulations define negotiated terms narrowly:

a term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.<sup>14</sup>

3.33 As the Law Commission has recently pointed out, the mere fact that the consumer has had the opportunity of influencing the content of terms is insufficient.<sup>15</sup> This is borne out by the Court of Appeal decision, *UK Housing Alliance (North West) Ltd v Francis*, which held that the fact that a consumer had instructed solicitors who had the opportunity to consider and negotiate terms did not mean that the terms were individually negotiated.<sup>16</sup>

3.34 It is therefore highly unlikely that any rental agreement would include individually negotiated terms that fall outside the Regulations, and we consider that there is no practical need to deal specifically with this limitation in the legislation. If, however, the Welsh Government decided to remove any uncertainty by deeming that all additional and supplementary terms of rental contracts fall within the scope of the regulations, we are confident that such legislation would be for housing purposes and within legislative competence.

## **ENFORCEMENT AND INCIDENTAL PROVISIONS**

3.35 Although we are confident that our recommendations fall into the area of housing it should be noted that the Government of Wales Act 2006 provides some

<sup>14</sup> Unfair Terms in Consumer Contract Regulations 1999, reg 5(2).

<sup>15</sup> Unfair Terms in Consumer Contracts: a new approach? (2012) Law Commission Issues Paper.

<sup>16</sup> [2010] EWCA Civ 117, [2010] 3 All ER 519.

supplemental legislative competence. Section 108(5) provides that a provision of an Act of the Assembly will be law even if it does not fall under one of the headings in Part 1 of Schedule 7 if it either provides for the enforcement of a provision which falls within legislative competence or it is otherwise incidental to, or consequential on, such a provision.

3.36 The purpose of clarifying the definition of supplier is to improve the enforcement of our scheme, by ensuring that the incentive of compliance with the Regulations applies to all landlords.

3.37 Our recommendations to structure the discretion of judges when making decisions about possession orders can also be understood both as housing provisions and as provisions designed to enforce the Renting Homes scheme.

3.38 The provisions on structured discretion were designed in response to comments about judicial inconsistency made during the consultation process for Renting Homes and repeated to us during our work on this current report. In deciding whether it is reasonable to make an order or decision, the Bill requires that a court must have regard to relevant circumstances. Relevant circumstances are broad in scope. The Bill provides judges with a check-list of relevant circumstances, including those relating to breach, the circumstances of the contract holder, those of the landlord and other persons (such as those on the waiting list).

3.39 The housing purpose behind the provisions is to achieve greater clarity and consistency in court decisions. The provisions also ensure that the judges implement the housing policy enshrined in the Bill.

3.40 *Local Government Byelaws (Wales) Bill 2012 – reference by the Attorney General for England and Wales* provides some guidance on the meaning of “incidental to, or consequential on” in the context of paragraph 6(1)(b) of part 3 of schedule 7 to the 2006 Act.<sup>17</sup>

3.41 For Lord Neuberger

The answer to the question whether a particular provision in an enactment is “incidental to, or consequential on” another provision, obviously turns on the facts of the particular case. The answer may to some extent be a question of fact and degree, and it should turn on substance rather than form, although of course, in any well drafted Bill, the substance will be reflected in the form, at least in relation to that sort of question.<sup>18</sup>

3.42 Lord Neuberger refers to the reasoning in *Martin v Most*<sup>19</sup> in connection with a similar provision with the Scotland Act 1998. In a brief passage at [2010] UKSC

<sup>17</sup> *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53, [2012] 3 WLR 1294.

<sup>18</sup> *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53, [2012] 3 WLR 1294 at [49].

<sup>19</sup> [2010] UKSC 10, [2010] Scots Law Times 412.

paragraph 40, Lord Hope described a point as “important” in explaining why it was not “incidental or consequential on provisions found elsewhere in the enactment”. Lord Rodger described certain amendments as falling within paragraph 3(1)(a) of Schedule 4 to the Scotland Act 1998, if they “raise[d] no separate issue of principle”, and were “safely stowed away in a schedule” in paragraph 93. He referred back to that observation at paragraph 128, where he described paragraph 3(1)(a) of Schedule 4 to the Scotland Act 1998 as “intended to cover the kinds of minor modifications which are obviously necessary to give effect to a piece of devolved legislation, but which raise no separate issue of principle”. He contrasted them with other provisions which were “independent and deal with distinct aspects of the situation”.

3.43 In the *Byelaws* case Lord Hope adds some clarity, saying at paragraph 83,

The words ‘incidental to, or consequential on, any other provision contained in the Act of the Assembly’ make it clear that the interpretative exercise to which it points is one of comparison.... . How significant [is the provision] when it is seen in the context of the Act as a whole? If the removal has an end and purpose of its own, that will be one thing. It will be outside competence. If its purpose or effect is merely subsidiary to something else in the Act, and its consequence when it is put into effect can be seen to be minor or unimportant in the context of the Act as a whole, that will be another. It can then be regarded as merely incidental to, or consequential on, the purpose that the Bill seeks to achieve.

3.44 As we argue above, the clarification that “suppliers” applies to all landlords has no end and purpose of its own but is subsidiary to the purpose of reforming rental contracts. Thus it is incidental to, or consequential on the main purpose of the Bill - a housing purpose.

3.45 We consider that this approach to legislative competence is in line with the recent decisions from the Supreme Court. In both *Imperial Tobacco*<sup>20</sup> and in the *Byelaws* case<sup>21</sup> there is evidence of a certain resistance from the judiciary to interfering in the devolved Governments’ understandings of their powers, and a positive approach to legislative competence which focuses on making devolution work.

<sup>20</sup> *Imperial Tobacco Ltd v The Lord Advocate (Scotland)* [2012] UKSC 61; [2013] Scots Law Times 2.

<sup>21</sup> *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53, [2012] 3 WLR 1294.

## PART 4

# UPDATING RENTING HOMES

- 4.1 The purpose of this part of the report is to update the Renting Homes recommendations in light of developments in the law since the publication of the final report in 2006. We consider developments in human rights and developments in statutory provisions relating to anti-social behaviour.

### DEVELOPMENTS IN HUMAN RIGHTS

- 4.2 It is in the interaction between housing law and human rights that the most extensive developments have taken place since the publication of the final report. Our recommendations were informed by the Supreme Court decision of *Qazi v Harrow LBC*<sup>1</sup> described by Cowan et al as “the zenith of the supremacy of property rights over the interposer’s human rights”<sup>2</sup> and as a result we took a relatively robust approach to the relevance of article 8 to the eviction of insecure tenants.
- 4.3 However in a series of cases in the European Court of Human Rights, the Court made it clear that a person at risk of eviction is entitled to have the question of whether the eviction is a proportionate means of achieving a legitimate aim considered by an independent tribunal.
- 4.4 The Supreme Court resolved the inconsistency between its approach and Strasbourg in two recent and significant cases, *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)*<sup>3</sup> and *Hounslow London Borough Council v Powell (Secretary of State for Communities and Local Government intervening)*.<sup>4</sup>
- 4.5 In *Pinnock*, the Supreme Court decided that the jurisprudence of the European Court of Human Rights requires that a domestic court should be able to consider the proportionality of evicting that person from his home under article 8 and, in the process of doing so, to resolve any relevant factual disputes between the parties. It also decided that it was possible to interpret the demoted tenancy regime in a way which was compatible with the European Convention.<sup>5</sup>
- 4.6 Lord Neuberger took a pragmatic approach to the implications of article 8 being potentially in play in possession proceedings. Acknowledging that this introduces a potential obstacle in those cases where a local authority is seeking possession of a person’s home in circumstances in which domestic law imposes no requirement of reasonableness and gives an unqualified right to an order for

<sup>1</sup> [2003] UKHL 43, [2004] 1 AC 983.

<sup>2</sup> D Cowan, L Fox O’Mahony and N Cobb, *Great Debates in Property Law* (2012), p 148.

<sup>3</sup> [2010] UKSC 45, [2010] 3 WLR 1441.

<sup>4</sup> [2011] UKSC 8, [2011] 2 AC 186.

<sup>5</sup> Demoted tenancies are insecure tenancies which are created following court orders that “demote” the previously secure or assured tenancy because of anti-social behaviour.

possession he suggests “this is best left to the good sense and experience of judges sitting in the county court”.<sup>6</sup>

4.7 A further steer on the significance of article 8 was given by the Supreme Court in *Powell*. Here the court considered three evictions by local authorities where the relevant legislation provided no discretion to the court

4.8 Applying *Pinnock* the Supreme Court decided that:

(1) in all cases where a local authority sought possession of a property which constituted someone’s home, for the purposes of article 8, the court asked to order possession had the power to consider whether the order would be proportionate;

(2) where a local authority was intending to apply for an order for possession the person in lawful occupation had to be informed of the reason for the authority’s action so that he could attempt to raise a proportionality challenge; and

(3) the court would only have to consider whether the making of a possession order was proportionate if the issue had been raised by the occupier and it crossed the high threshold of being seriously arguable. In such a case the court would have to give a reasoned decision as to whether or not a fair balance would be struck for making the order.

4.9 In the overwhelming majority of cases there would be no need for the local authority to explain and justify its reasons for seeking a possession order, as it could be assumed that the authority was entitled to possession. The court need only be concerned with the occupier’s personal circumstances, any factual objections raised and whether making the order for possession would be lawful and proportionate.

4.10 Whilst we do not want to overstate the significance of proportionality defences to possession proceedings<sup>7</sup> the Supreme Court decisions open up possibilities for challenging what have previously been understood to be automatic grounds for possession.

4.11 By way of illustration, in a recent High Court case, *Southend-on-Sea Borough Council v Armour*,<sup>8</sup> Southend Council was refused a possession order in proceedings against an introductory tenant on the basis of admitted threatening and abusive behaviour.<sup>9</sup> Mr Justice Cranston upheld the decision of the recorder in the county court. He said that the recorder had balanced all the factors weighing for and against it being proportionate to grant possession, and had

<sup>6</sup> *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2010] UKSC 45, [2010] 3 WLR 1441 at [57].

<sup>7</sup> See D Cowan and C Hunter’s thoughtful analysis in “‘Yeah but, no but’ – Pinnock and Powell in the Supreme Court” (2012) 75(1) *Modern Law Review* p 78 to 91.

<sup>8</sup> [2012] EWHC 3361 (QB).

<sup>9</sup> Introductory tenancies are 12 month insecure tenancies which are granted prior to the grant of a secure tenancy.

provided a model judgement showing how these cases should be dealt with. For the recorder what had been of significance was the compliance of the tenant with the terms of his tenancy during the period following the issue of possession proceedings and the hearing. Because of this, and notwithstanding her finding that the council's decision to apply for possession was proportionate even though the tenant was suffering from a mental disability, she concluded that terminating the tenancy was no longer a proportionate decision.

- 4.12 This appears to have been the first case following the Supreme Court decisions in which a court on appeal has upheld a possession claim dismissal on the basis of the European Convention on Human Rights.<sup>10</sup>
- 4.13 At this stage it is difficult to predict how many possession claims will be refused because it would be disproportionate to make a possession order. There is no doubt however that any requirement to consider proportionality introduces a degree of uncertainty into mandatory grounds when they are deployed by public bodies.

#### **THE EQUALITY ACT 2012**

- 4.14 Mr Armour's disabilities were clearly relevant to the recorder's decision about the proportionality of the decision to evict. Anti-discrimination legislation places certain responsibilities upon public bodies not only not to behave in a discriminatory manner but also to take account of the need to eliminate discrimination when carrying out their functions.
- 4.15 Anti-discrimination provisions are now contained in the Equality Act 2010. This brings together into one statute provisions on unlawful discrimination which were previously set out in a number of statutes.
- 4.16 Section 15 of the Equality Act 2010 provides as follows;
- (1) A person (A) discriminates against a disabled person (B) if –
    - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
    - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
  - (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
- 4.17 Whilst section 15(2) might protect social landlords who are ignorant of a tenant's disabilities, it is likely that public law defences will be run which place an onus on the social landlord to make reasonable enquiries about disability.
- 4.18 The notion of indirect discrimination, set out in section 19 of the Equality Act 2010, also poses problems. A landlord can only defend itself from claims of indirect discrimination if it demonstrates that its actions are a proportionate

<sup>10</sup> N Dobson "A judicial chink?" (2012) 162(7541) *New Law Journal* 1524.

means of achieving a legitimate aim. The problem with the mandatory grounds for possession is that they provide no opportunity for the courts to check the proportionality of actions which impact upon disabled people.

4.19 The public sector equality duty, set out in section 149 of the Equality Act 2010, represents one of the most significant legal advances in combating inequality in recent years. It imposes a duty upon relevant organisations to consider how they could positively contribute to the advancement of equality and good relations. It requires equality considerations to be built into the design of policies and the delivery of services, including internal policies, and for these issues to be kept under review.

4.20 Recent cases on the public sector equality duty indicate its potential scope. In *Pieretti v Enfield*,<sup>11</sup> Mr Pieretti appealed against the decision of the county court to uphold the local authority decision that he was intentionally homeless because he had lost his private sector accommodation as a result of allowing arrears of rent to accumulate. Mr Pieretti produced evidence that he and his wife were suffering from depression. The Court of Appeal held:

- (1) that the duty imposed on local authorities by section 49A(1) of the Disability Discrimination Act 1995, the previous manifestation of the public sector equality duty, applies not only to formulation of policies but also to the application of those policies in individual cases;
- (2) for disability to play its rightful part in determinations made by authorities, there must be a culture of greater awareness of the existence and consequences of disability;
- (3) the carrying out of inquiries and making decisions about statutory homelessness duties are functions of authorities for the purposes of section 49A(1) of the 1995 Act, and an authority must have due regard to the need to take steps to take account of a disabled person's disabilities when making a decision under those duties; and
- (4) where an authority is not invited to consider an applicant's disability it is wrong to say that they should only consider the issue of disability if it is obvious, although authorities are not required in every case to make inquiries as to whether an applicant is disabled.

4.21 It therefore allowed the appeal against the decision of the local authority that it owed Mr Pieretti only limited duties under the Housing Act 1996.

4.22 What this indicates is that court scrutiny of decisions to evict disabled people may be required in order to demonstrate compliance with the public sector equality duty.

4.23 Our proposed secure contracts contain no mandatory grounds other than one which applies when the contract-holder gives the landlord notice to terminate the contract, but fails to give up possession of the premises.

<sup>11</sup> [2010] EWCA Civ 1104, [2011] PTSR 565.



- 4.24 However, the UK Government has proposed the introduction of a mandatory ground for anti-social behaviour into secure and assured tenancies. We argue that the developments in *Pinnock* and *Powell* as well as within equalities legislation cast doubt upon the suggestion that the use of such a ground by public bodies would provide the certainty that is a major objective of the changes. This is discussed further in Part 5 of this report where we consider Welsh housing policy objectives in the context of our recommendations. At this stage we reprise the law in relation to housing related anti-social behaviour and explain current reform proposals.

#### **THE DEVELOPING LEGAL FRAMEWORK IN CONNECTION WITH THE PREVENTION OF ANTI-SOCIAL BEHAVIOUR**

- 4.25 Since the introduction of the Housing Act 1996 and the implementation of the introductory tenancy regime there has been a steady accretion of powers available to social landlords to tackle anti-social behaviour. One significant effect has been to make the security of tenure of the local authority tenant increasingly conditional on the responsible behaviour not only of tenants, but of their family and visitors.
- 4.26 In addition to creating introductory tenancies, the Housing Act 1996 extended the discretionary grounds for possession, provided for an expedited notice for possession and introduced a free-standing injunction to provide local authorities with the power to restrain anti-social behaviour in connection with local authority housing.
- 4.27 The Anti-Social Behaviour Act 2003 developed and refined the tools provided in the Housing Act 1996, further reducing security of tenure for anti-social tenants and streamlining the procedures for obtaining injunctions. It is particularly relevant to this review of Renting Homes as it was enacted during the course of the Law Commission project and drew upon some of the proposals discussed in the Consultation Paper.
- 4.28 The Anti-Social Behaviour Act 2003 provides a mechanism for reducing the security of tenure of the secure tenant by enabling such a tenant to be demoted if he or she is responsible for anti-social behaviour. The Act inserted a new section 82A into the secure tenancy regime set out in the Housing Act 1985 which gives the court the power to make a “demotion order” in respect of a secure tenancy which becomes instead a demoted tenancy.
- 4.29 The court can only grant the order if the tenant, or another resident of or visitor to the tenant’s home, has used the premises for illegal purposes or has behaved in a way which is capable of causing nuisance or annoyance to any other person. The court must also be satisfied that it is reasonable to make the order.
- 4.30 The Act also developed the injunctive power within the Housing Act 1996. It provides for three different types of injunction to respond to the problem of anti-social behaviour by tenants.<sup>12</sup> The injunctions are:

<sup>12</sup> Anti-Social Behaviour Act 2003 s 13.

- (1) the anti-social behaviour injunction;<sup>13</sup>
  - (2) the injunction against unlawful use of premises;<sup>14</sup> and
  - (3) the injunction against breach of tenancy agreement.<sup>15</sup>
- 4.31 Powers of arrest and exclusion orders are available to restrain behaviour which threatens, or involves, violence.
- 4.32 The Anti-Social Behaviour Act 2003 also introduced closure orders. These enable the police to close residential premises being used for the supply, use or production of Class A drugs where there is a nuisance or disorder associated with the premises. Their scope was extended by the Criminal Justice and Immigration Act 2008 to cover the closure of premises associated with significant and persistent disorder or persistent serious nuisance to members of the public. These later orders are also available to local authorities.
- 4.33 The final legislative amendment to note is that the Housing and Regeneration Act 2008 introduced family intervention tenancies. This is a form of tenancy which incorporates behavioural support and which can be offered by social landlords to tenants who are at risk of eviction or have been evicted. There will be no difficulty in incorporating this tenancy form into the Renting Homes scheme. Indeed the requirement for support fits closely with the provisions within the Bill.

#### **THE CURRENT UK WHITE PAPER PROPOSALS - PUTTING VICTIMS FIRST**

- 4.34 In May 2012 the UK Government issued the white paper *Putting victims first: More effective responses to anti-social behaviour*.<sup>16</sup> Its aim is to simplify and streamline the legal tools available to the police, social landlords and local authorities to respond to anti-social behaviour.
- 4.35 The main point of interest in connection with Renting Homes is the development of a new mandatory ground of possession modelled on the process for terminating introductory tenancies. The ground is designed to apply where there is serious housing related anti-social behaviour.
- 4.36 The proposed possession order will be mandatory if:
- (1) a tenant, a member of their household or a visitor to the property has been convicted of a violent or sexual offence, an offence against property, or supplying drugs or production with intent to supply drugs where the offence was indictable and committed in the locality of the property in the previous 12 months;
  - (2) a court has determined that a crime prevention injunction obtained by or in consultation with the landlord had been breached by a tenant, member

<sup>13</sup> Housing Act 1996 s 153A.

<sup>14</sup> Housing Act 1996 s 153B.

<sup>15</sup> Housing Act 1996 s 153D.

<sup>16</sup> Cm 8367.

of their household or visitor to the property within the previous 12 months;

- (3) the property has been closed as a result of a court granting a community protection order (closure) for more than 48 hours; or
- (4) a tenant, member of their household or visitor has been convicted by a court for breach of a noise abatement notice in respect of the tenant's property under the statutory nuisance regime.

4.37 The crime prevention injunction referred to above will replace anti-social behaviour injunctions and will be available to a wider range of applicants. The burden of proof for such an injunction (as with anti-social behaviour injunctions) would be civil and breach would be contempt of court and carry serious penalties. One advantage cited is that the crime prevention injunction can include both prohibitions on behaviour and positive requirements to address underlying issues. An example provided in the white paper suggests its use against "nightmare neighbours" in the private rented sector. We understand that there is some concern amongst social landlords about the replacement of the anti-social behaviour injunction. This is a tool they have confidence in, and they are concerned that it will lose its focus on anti-social behaviour.

4.38 The Welsh Government has decided to follow the Westminster lead on this issue, but has also made clear that it will reconsider its position in the light of the Renting Homes recommendations, and in particular having considered the value of our recommendations to structure the discretion of the judges.

4.39 The introduction of a mandatory possession ground to a secure contract would require a substantial change to the principles underpinning the Renting Homes recommendations. What should be noted is that in order to be compliant with human rights and equalities legislation its use would have to be proportionate and its impact upon vulnerable individuals carefully considered. We consider that careful drafting of the structured discretion will mean that the outcomes of discretionary possession proceedings will be more certain than the use of the mandatory ground. This is discussed in Part 5 below.

## **PART 5**

# **WELSH POLICY PRIORITIES AND RENTING HOMES**

- 5.1 It is important that the Renting Homes recommendations facilitate or at least do not inhibit the Welsh Government in pursuing its housing goals.
- 5.2 We consider that the modernisation and streamlining we recommend provides a legislative framework which enables a greater integration of housing policy and legal tools and facilitates flexible and responsive policy implementation.
- 5.3 The following discussion focuses on anti-social behaviour, domestic violence and supported housing. We also consider possible implementation strategies.

### **ANTI-SOCIAL BEHAVIOUR**

#### **The Renting Homes recommendations**

- 5.4 The legal framework set out in the Renting Homes report was designed to meet the following objectives:
  - (1) speed of response;
  - (2) predictability of outcomes of legal proceedings;
  - (3) ability to protect witnesses; and
  - (4) appropriate protection of the rights of the alleged perpetrator.
- 5.5 The proposals in the consultation paper, as the final report explains at paragraph 15.5, proved very controversial. There was concern, particularly from lawyers who represent tenants, about adding to the legal powers of social landlords when, in their opinion, local authorities in particular were failing to utilise fully legal powers already available to them. These views were shared by voluntary sector organisations that represent tenants' interests. On the other hand responses from organized tenants' groups and many local authorities expressed great concern about anti-social behaviour.
- 5.6 Moreover the proposals in the consultation paper were superseded by legislation, in particular the Anti-Social Behaviour Act 2003, which incorporated some of the consultation paper proposals.
- 5.7 The final recommendations were therefore substantially modified. In brief, what was recommended was that:
  - (1) all occupation contracts should contain a prohibited conduct term;
  - (2) breach of the term will justify the institution of possession proceedings in the normal way;
  - (3) landlords can also seek injunctions for breach of the term;
  - (4) the granting of an injunction to a community landlord can be linked with

an order excluding the person enjoined from the premises, or from any area specified in the injunction, or requiring the person enjoined to exclude any other person from the premises; similarly a power of arrest may be attached to the injunction;

- (5) injunction proceedings and possession proceedings can be dealt with together;
- (6) landlords can seek the demotion of a secure contract-holder to a standard contract as an alternative to eviction; and
- (7) there should be a target duty placed upon social landlords to respond to anti-social behaviour.<sup>1</sup>

### **The prohibited conduct term**

5.8 The Law Commission recommends that all occupation contracts contain a fundamental term relating to prohibited conduct in and around the locality of rented housing. The term provides the equivalent to what is now a discretionary ground for possession. A judge would only order possession if, in addition to the term being breached, the judge considered it reasonable to do so. As explained above, the discretion would be structured.<sup>2</sup>

5.9 Breach of the term could trigger proceedings in the normal way. But in this case, exceptionally, proceedings could be started on the same day as the landlord gives the possession notice.

5.10 There are four elements to the term:

- (1) A contract holder may not use or threaten to use violence against a person lawfully living in the premises, or do anything which creates a risk of significant harm to such a person.
- (2) A contract holder may not engage or threaten to engage in conduct that is capable of causing nuisance or annoyance to:
  - (a) a person living in the locality of the premises; or
  - (b) a person engaged in lawful activity in, or in the locality of, the premises.
- (3) A contract holder may not use or threaten to use the premises, or any common parts that they are entitled to use under the contract, for criminal purposes.
- (4) The contract holder may not allow, incite or encourage others who are residing in or visiting the premises to act in these ways (or allow, incite or encourage any person to act as mentioned above).

<sup>1</sup> A target duty, that is one which is aspirational, was proposed because of the potential resource implications of a specifically enforceable duty.

<sup>2</sup> See para 3.38 above.

- 5.11 Unlike most other fundamental terms, this one may not be modified or varied by the landlord. The appropriate authority has the power to amend the fundamental provision by order.
- 5.12 During meetings with Welsh stakeholders it was noted that the term did not use the phrase “anti-social behaviour”. This was seen as potentially problematic as anti-social behaviour is a well understood term that has useful effects. This point could, if it were considered desirable, be addressed by using headings over the relevant clauses, so that clause 1 of the term could be headed violence in the home, clause 2 anti-social behaviour, and clauses 3 and 4 criminal purposes. In this way clear messages about prohibited behaviour can be communicated.
- 5.13 The term, it will be seen, describes conduct which may also be criminal. Its purpose, however, is not to police or punish crime. The term, rather, has a housing purpose, to deal with the *housing consequences* of the conduct, and relates directly to the provision of the housing in question. It replaces the “illegal or immoral user” clause traditionally included in tenancies, and the current domestic violence ground for possession.

***The scope of the term***

- 5.14 The first policy questions to be decided are whether the prohibited conduct term is appropriate in the current context and whether it reflects Welsh policy priorities. The term (unlike the white paper mandatory ground) includes violence perpetrated within the home. The following questions arise.
- (1) Should the term include violence within the home?
  - (2) Should it be expanded to cover other sorts of behaviour?
  - (3) Should it be redrafted to align more closely with the proposed mandatory ground for possession? In particular should it give the power to evict for breach of the proposed crime prevention injunctions and/or to obtain community protection (closure) orders?
- 5.15 The inclusion of domestic violence in the prohibited conduct term is more closely integrated into the Renting Homes scheme. The arguments in favour of the term covering domestic violence are three-fold. First, it sends a clear policy message that domestic violence is taken seriously as an issue of community safety. Secondly, it replaces the current rather poorly drafted ground for eviction for domestic violence. Thirdly, it provides a remedy to replace the practice of many social landlords in cases of domestic violence whereby they ask the victim to serve a notice to quit, thus terminating the joint tenancy, and then grant a new sole tenancy of the home to the victim.
- 5.16 The Renting Homes scheme provides that the service of a notice by a joint occupier should operate to terminate the occupation agreement in relation to that occupier only. As regards the other joint occupier(s), the agreement will be unaffected. Thus, the current method of responding to the continued occupation of the perpetrator of domestic violence will no longer be available to the social landlord. Potentially, therefore, the perpetrator could profit from his or her wrongdoing by gaining occupation of the whole property.

- 5.17 If the prohibited conduct term includes domestic violence then possession can be obtained on breach against an offending joint tenant. Social landlords will also be able to use the freestanding injunction power with exclusion orders and power of arrest in cases of domestic violence. In either case, social landlords will be able to seek a possession order in proceedings for breach of any injunction. The possession order will operate to terminate the joint tenant's rights and obligations in respect of the rental agreement.
- 5.18 The landlord will have two options, both of which seem more sensible outcomes than those available under the current domestic violence ground.
- (1) If the victim wishes to be re-housed elsewhere, the landlord will be able to re-gain possession of the property following a suitable offer to the victim.
  - (2) Where the victim wishes to remain in the current home then the landlord will be able to vary the agreement.
- 5.19 During the course of writing this report we have met with those who are responsible for developing policies to respond to domestic violence in Wales. They welcomed the inclusion of violence perpetrated within the home as part of a prohibited conduct term and considered that the options available to landlords provide appropriate choices for the victims of domestic violence.
- 5.20 However, there was discussion of the scope of behaviour included in the prohibited conduct term. There was some enthusiasm for widening the prohibited conduct to include economic, psychological, emotional and other abusive behaviour within the home. Whilst we agree that it is appropriate for a wide range of types of abusive behaviour to be included in policy responses to domestic violence, we do not consider that it is appropriate to widen the prohibited conduct term to include such behaviour.
- 5.21 Whilst a broader definition of domestic violence is a very useful statement of policy aspirations we do not think that failures to live up to such standards, other than where the abuse is physical, should result in termination of the rental contract. Moreover the evidential difficulties inherent in demonstrating for instance psychological or emotional abuse would be significant. We therefore recommend that there be no extension to the prohibited conduct term in relation to behaviour within the home.

***A mandatory ground?***

- 5.22 The second policy issue is whether breach of the term should be a mandatory rather than discretionary ground for possession. The approach taken in Renting Homes is to limit the availability of mandatory possession proceedings. In particular courts are required to take into account reasonableness when considering possession proceedings taken by social landlords against secure contract holders. This reflects the social nature of the secure contract.
- 5.23 As noted above, we are aware that the Welsh Government consulted on a new mandatory ground for serious housing related anti-social behaviour between

November 2011 and February 2012 and has decided to follow the proposals for England and introduce such a ground.<sup>3</sup> It has indicated however that it will reconsider its position when considering the Renting Homes proposals and in particular the use of the structured discretion which the proposals require from the judiciary when making decisions about possession.

- 5.24 The advantages of a mandatory ground are claimed to be certainty and speed – although the Renting Homes proposals provide for a speedy eviction process by enabling possession proceedings to commence on the same day as notice is served.
- 5.25 Moreover the consequence of *Pinnock*<sup>4</sup> is that in circumstances where article 8 rights might be raised there is no certainty that the possession order will be granted on a mandatory ground. In addition it is incumbent upon the social landlord to make careful checks when the tenant may be vulnerable. As we pointed out above, if the term includes domestic violence the court's consideration for the arrangement for rehousing the victim are a necessary part of the process.
- 5.26 Our observation is that, despite the superficial attractiveness of a mandatory ground, a robustly drafted discretionary ground may prove more effective in achieving policy objectives.
- 5.27 What is required of the judges is that they answer the question whether the interference with article 8 rights is really proportionate to the legitimate aim being pursued. We consider that structured discretion within Renting Homes is more likely to produce robust decisions than a mandatory ground with an unarticulated requirement on judges to consider proportionality. This structured discretion requires a judge to take into account all of the relevant circumstances surrounding the decision to evict, which include the likelihood of a recurrence of the breach and any action to prevent a recurrence of the breach before the application for a possession order was made. The probable effect of making a possession order on the occupier and his or her private or family life must then be balanced against the effects on the landlord and on other persons including neighbours and those on the housing waiting list.
- 5.28 The use of structured discretion would arguably have prevented, for instance, the district judge in *Thurrock Borough Council v West*<sup>5</sup> from misapplying the proportionality test. Here the Court of Appeal pointed out that there was nothing about the circumstances of a young couple with a child who have limited financial resources which distinguishes them from others on local authority waiting lists. Balancing their needs against those of the landlord to allocate its housing stock appropriately and against those on the housing waiting list, as the use of structured discretion would require, would be more likely to result in a decision in favour of the local authority.

<sup>3</sup> See paras 4.4 to 4.39 above.

<sup>4</sup> *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2010] UKSC 45, [2010] 3 WLR 1441 at [57].

<sup>5</sup> [2012] EWCA Civ 1435.



- 5.29 On the other hand the structured discretion provides the necessary opportunity for the court to consider the vulnerability of the occupiers of the home, as required by the Human Rights Act 1998 and equality legislation.

## **SUPPORTED HOUSING**

### **The Renting Homes recommendations**

- 5.30 The final report of Renting Homes set out our recommendations for a new scheme for the regulation of security within supported housing. We worked closely with supported housing providers, particularly those from Wales, in devising this scheme which is designed to facilitate the stepped progression of supported housing clients from housing dependency towards housing independence. It avoids providers having to choose between legally dubious licences and assured shorthold tenancies which may be inappropriate for supported housing.
- 5.31 The recommendations are set out in full in Chapter 10 of the final report.
- 5.32 In summary the recommendations:
- (1) define supported housing as housing where there is a direct link between the provision of accommodation and the provision of support services;
  - (2) exclude short term provision from the statutory scheme, providing a four month period for respite care, or to enable the provider to assess the housing and support needs of the client; and
  - (3) exclude supported housing accommodation from the requirement to enter into secure contracts for a period described as “the enhanced management period”. This exclusion is for a period of two years, which can be extended for further periods in particular circumstances. After the expiry of the enhanced management period the contract becomes a secure or standard contract as appropriate.
- 5.33 During the enhanced management period the client rents on a supported standard contract, which is a variant of the standard contract. This offers two specific management tools for providers. First, it gives supported housing managers the power to exclude an occupier without the need for any intervention by the court for a maximum period of 48 hours. This could be applied where the occupier has used violence against anyone on the premises, creates a risk of significant harm, or behaves in a way which seriously impedes the ability of another resident of supported accommodation provided by the landlord to benefit from the support provided. Second, managers are given the power to move occupiers within the accommodation provided.
- 5.34 Landlords will not be able to use the power to exclude more than three times in six months. If the behaviour persists, the landlord must seek possession.
- 5.35 Where there is a need for longer or permanent exclusion the landlord will have to go to court to obtain an injunction, which can last up to the length of the notice period for possession proceedings.

- 5.36 During the drafting of this report we met with supported housing providers. Whilst there was general support for the recommendations it was considered that the details, particularly of the time frames for exclusion and extension of the enhanced management period, needed careful consideration. Particular worries were expressed about the difficulties providers face in locating follow on accommodation within two years. We agree that the time frames need careful thought and consider that any reasonable extension of these periods would be consistent with the aims of our proposals. We therefore propose further public and stakeholder consultation on these details.

## **IMPLEMENTATION**

- 5.37 The Renting Homes report recommended a “big bang” approach to implementation. On a due date all existing tenancy agreements and licences are to be converted into either secure or standard contracts.
- 5.38 There is nothing however to prevent model contracts being available prior to the implementation date. Indeed we can see advantages to social landlords in particular in signing up new occupiers to the model contracts in advance of the implementation date and we recommend drafting legislative provisions to accommodate this.
- 5.39 Rent Act tenants are excluded from the automatic conversion process. Although there is no logical barrier to their conversion to secure contracts there was resistance from private sector Rent Act tenants to the proposals. We concluded that, in the particular circumstances of the relations between Rent Act tenants and landlords, that, alone among tenancy types, Rent Act tenancies should continue to exist (of course, no new tenancies could be created).
- 5.40 During the writing of this report a suggestion was made that Rent Act tenants who have housing association landlords should be brought within the scheme. It was pointed out that there is an extensive and expensive bureaucracy involved in the fair rent protection given to these tenants which is unnecessary because fair rents are higher than rents charged to housing association tenants. Moreover we can rely on housing association landlords accurately to inform such tenants of their continued security. We therefore think this is a sensible suggestion which could be incorporated into the statutory scheme.
- 5.41 The Law Commission would like to record its appreciation of the continuing interest of the Welsh Government and Welsh housing stakeholders in the Renting Homes proposals. Their contributions enriched the original proposals and have been extremely useful in this review. We are grateful for the opportunity that their enthusiasm for Renting Homes has provided for us to demonstrate the robustness and flexibility of our proposals and their ability to stand the test of time.

(Signed) DAVID LLOYD JONES, *Chairman*  
ELIZABETH COOKE  
DAVID HERTZELL  
DAVID ORMEROD  
FRANCES PATTERSON

ELAINE LORIMER, *Chief Executive*  
27 March 2013

## **APPENDIX**

The following meetings were held during the preparation of this report.

All-Wales Anti-Social Behaviour Group

Supported housing - organised by Cymorth Cymru

Domestic Abuse - Welsh Government policy leads

Council of Mortgage Lenders:

Registered Social Landlords - organised by Community Housing Cymru

Residential Landlords Association

Scottish Government

Scottish Federation of Housing Associations

Chartered Institute of Housing, Scotland

Association of Local Authority Chief Housing Officers, Scotland