HB 63
National Assembly for Wales
Communities, Equality and Local Government Committee
Housing (Wales) Bill: Stage 1
Response from: The Law Society

The Law Society

HOUSING (WALES) BILL

Evidence for the Communities, Equality and Local Government Committee of the Welsh Assembly

January 2014

The Law Society

1. The Law Society is the representative body for more than 166,000 solicitors in England and Wales ('the Society'). The Society negotiates on behalf of the profession, and lobbies regulators, government and others.

2. This response has been prepared by the Society's Housing Law Committee and reflects the expertise of solicitors with daily experience of putting housing law into practice. The Committee comprises practitioners who represent tenants and landlords, both in the private and social sphere. Our interest is to secure 'good law making', to provide clarity for tenants and landlords, and to avoid unintended consequences.

Housing (Wales) Bill

3. The two sections of the Bill which we are going to provide evidence on are:

- Introducing a compulsory registration and licensing scheme for private rented sector landlords and letting/management agents.
- Reforming homelessness law, including placing a stronger duty on local authorities to prevent homelessness and allowing them to use suitable accommodation in the private sector.

Compulsory registration and licensing

4. The Law Society supports the introduction of a compulsory registration and licensing scheme for private rented sector landlords and letting/management agents. This will help to improve standards in the private rented sector, a sector which will continue to grow substantially over the next few years.

5. By having such a scheme landlords are more likely to be aware of their responsibilities and tenants are more likely to trust that the property is being managed appropriately. It is positive that the scheme will be based on the current "Landlord Accreditation Wales" scheme run by Cardiff County Council. This makes it easier for landlords to know what will be expected of them.

6. The scheme has to be introduced in a proportionate way. It should provide clear guidance as to what is expected of landlords, and should be easily accessible and easily understood. The direct cost of the scheme and the cost of compliance should not be so large that it prohibits small landlords from offering housing. Small landlords must be included in the scheme as they are less likely to be aware of their legal obligations. The correct balance needs to be struck in order not to discourage single property landlords from entering the market.

7. It will be useful for there to be a comprehensive online database of all private landlords and letting/management agents that operate in the private rented market. This will allow interested parties to check whether a property and/or landlord or agent is licensed.

8. When considering what the sanctions should be imposed the Committee may find it useful to refer to the Housing Act 2004. The enforcement provisions for Houses in Multiple Occupation can be replicated in Wales. The relevant sections are in Annex A.

Reforming Homelessness Law

9. We welcome the Welsh Government's commitment to reforming homelessness law in Wales. While this part of the Bill reflects the Government's wish to put social justice at the heart of homelessness duties, it does not achieve all the goals proposed in the White Paper. It does not go as far as removing the concept of intentional homeless families unconditionally, nor does it remove the concept of priority need status. We accept that in light of the current economic climate the resources are not available to do this. Hopefully the Welsh Government will revive its ambitions once the economy improves.

10. Homelessness legislation is a difficult area of law. This is because many of those in need of homelessness assistance have complex health and social problems. The addition of the prevention duty, which is a positive inclusion in the Bill, may potentially give rise to challenge. The new Code of Guidance to accompany the legislation should provide a clear picture as to what are the reasonable steps that local authorities should consider.

Eligibility

11. Schedule 2 of the Bill sets out the provisions of those subject to immigration control and persons from abroad. The secondary legislation that exists in Wales in relation to eligibility is different to England as a result of different regulations being made in Wales[1]. The Welsh Code of Guidance on Allocations and Homelessness issued in 2012 makes several references to the fact that it is the intention of the Welsh Government to bring eligibility criteria in line with England as there is an overlap with UK immigration law, which is not a devolved power. This is sensible.

Duty to Assess (Clause 48)

12. This places a duty upon local authorities to assess a person's case if that person is homeless or threatened with homelessness. The clause sets out that the local authority does not have a duty to assess if they are satisfied that the person's circumstances have not changed materially since the last homelessness application. Clause 48(2) echoes the old common law position[2]. The Begum v Tower Hamlets 2005 Court of Appeal case sets out the current definition of when an application is a repeat application[3]. It also offers a clearer definition as to when a homelessness application is to be treated as a repeat application.

13. The corresponding current section 193 of the Housing Act 1996 includes the provision at section 193(9) that there is no bar on a person being owed a duty

[1] In respect of Part VI and VII of the Housing Act 1996.

[2] I.e. "material change".

[3] See the August 2012 Welsh Code of Guidance paragraph 12.56 that suggests appropriate wording for this provision.

under this section[4] from making a new homelessness application. This highlights that a person can make a new application provided it is not identical in facts to the original application. For clarity it would be useful if the Health and Social Care Committee were to include this provision in the Bill.

14. The Bill provides that a person is to be treated as being threatened with homelessness if that person becomes homeless within 56 days. There is inconsistency as to when a person is deemed to be homeless: is it at the point that a valid notice expires or is it the date that an eviction warrant is due to be executed?[5] Case law suggests the latter. The Welsh Code of Guidance 2012 recommends that where possible people requiring homelessness assistance should not be exposed to the risk of costs being awarded against them in possession proceedings as this can cause extreme anxiety and stress. Local authorities should provide assistance before claims are issued: they will have more success at preventing homelessness the earlier they intervene.

Duties to Help Applicants

15. The wording of Clause 50 should stipulate that it is a non exhaustive list of examples of how a local authority may secure suitable accommodation.

16. Clause 51(a) is too vague. It will be difficult for an applicant to challenge a decision. The applicant is not going to be in a position to know the resources of the local authority, thus will be unable to establish whether the authority has met its requirement.

Priority Need for Accommodation

17. The current arrangements in respect of priority need are transferred into Clause 55, save that the law in respect of prison leavers is amended so that prison leavers with a local connection with the authority to whom they present are no longer priority need status. The Bill proposes that prison leavers will only be priority need if they are considered vulnerable as a result of leaving prison and have a local connection with an authority. We appreciate that the Welsh Government will be keen to retain the local connection requirement, in light of the proposal for a new prison to be built in Wrexham. However, it would be better if some discretion was introduced. As the law currently stands in Wales prisoners who do not have a local connection anywhere in Wales, would not meet this definition and not be owed any duty. The Bill should provide discretion to local authorities when applying the local connection criteria.

18. The introduction of the requirement to satisfy the local authority that the former prisoner is vulnerable adopts the current position in England. This clause of the Bill should have the "vulnerability" test removed. Practice in England suggests that it is very difficult for this test to be met. In some cases it has been interpreted harshly by English local authorities. The test is based on the case of Pereira (R v Camden LBC exp Pereira). The applicant is required to satisfy the authority that he or she is less able to fend for

[4] I.e. the current main duty.

[5] Some applicants may not even have this level of security.

themselves in coping with the state of homelessness. The assessment required is a composite one and individuals are not vulnerable under the 'coping with homelessness' approach unless they suffer injury or detriment which an ordinary homeless person would not.

19. In respect of the priority need category for those persons who are vulnerable[6] the example omits mental health as being a condition. This should be included.

20. This part of the Bill is an opportunity to define in legislation "vulnerability" so that the test is applied more consistently and to avoid blanket policies being adopted.[7] The Committee may wish to look at this.

Notice that duties have ended

21. Clause 67(4) provides that when such a notice is not received by an applicant the applicant is treated as having been notified if the notice is made available at the authority's office for a reasonable period for collection by the applicant or on the applicant's behalf. In light of the sanction the applicant could face[8] the Welsh Government should be more definitive as to what a reasonable period of time would be. This would be fairer to those applicants who have no fixed abode. The authority could consider using texts media to communicate a decision's availability. This system is already adopted by the Department of Work and Pensions.

Reviews

22. The Bill reflects the current position in respect of Section 202 reviews and Section 204 appeals.

23. The Bill retains the provision at Clause 54(9) that the authority may continue to make accommodation available to the applicant whom the authority has reason to believe is eligible, homeless and in priority need during the review period. If the authority chooses not to exercise this discretion then the only remedy available to the applicant is judicial review. The Health and Social Care Committee may be aware that the Ministry of Justice has placed restrictions upon funding judicial review claims, to the extent that this may pose a barrier to some applicants seeking a remedy. It would be more sensible to allow a challenge to be made by way of a Section 204 appeal. Such appeals could adopt judicial review principles.

24. The Housing Act 1996 provides that an authority has the power to accommodate pending a Section 204; if the authority chooses not to exercise this power then a remedy is provided by way of a Section 204(A) appeal. There appears to be no reason why the County Court could not be given jurisdiction to deal with a refusal to accommodate an applicant pending a review of a homelessness decision.

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[6] Clause 55(c)(i).

[7] E.g. that an applicant is not on a high enough dose of anti depressant and therefore is not depressed enough to be considered as vulnerable.

[8] I.e. being out of time to request a review

Annex A

Housing Act 2004

S.61 provides a requirement for House in Multiple Occupation (HMO)'s to be licensed.

Ss.72-75 provides the sanctions for failure to licence as follows:
-s.72 provides for the criminal offence of failure to licence with a maximum fine of £20,000
-ss73 and 74 deal with rent repayment orders
-s.75 provides for restrictions on the termination of tenancies in unlicensed HMOs – no S.21 notice may be given.

Sections of interest can be found below. Section 21 notices and rent repayment order are used so I think the same should apply

73 Other consequences of operating unlicensed HMOs: rent repayment orders
(3) No rule of law relating to the validity or enforceability of contracts in circumstances involving illegality is to affect the validity or enforceability of–
(a) any provision requiring the payment of rent or the making of any other periodical payment in connection with any tenancy or licence of a part of an unlicensed HMO, or
(b) any other provision of such a tenancy or licence.
(4) But amounts paid in respect of rent or other periodical payments payable in connection with such a tenancy or licence may be recovered in accordance with subsection (5) and section 74.
(5) If–
(a) an application in respect of an HMO is made to [the appropriate tribunal] [1] by the local housing authority or an occupier of a part of the HMO, and
(b) the tribunal is satisfied as to the matters mentioned in subsection (6) or (8),
the tribunal may make an order (a "rent repayment order") requiring the appropriate person to pay to the applicant such amount in respect of the [relevant award or awards of universal credit or the] [2] housing benefit paid as mentioned in subsection (6)(b), or (as the case may be) the periodical payments paid as mentioned in subsection (8)(b), as is specified in the order (see section 74(2) to (8)).

74 Further provisions about rent repayment orders
(1) This section applies in relation to rent repayment orders made by residential property tribunals under section 73(5).
(2) Where, on an application by the local housing authority, the tribunal is satisfied–
(a) that a person has been convicted of an offence under section 72(1)in relation to the HMO, and
[
(b) that—
(i) one or more relevant awards of universal credit (as defined in section 73(6A)) were paid (whether or not to the appropriate person), or
(ii) housing benefit was paid (whether or not to the appropriate person) in respect of periodical payments payable in connection with occupation of a part or parts of the HMO,
during any period during which it appears to the tribunal that such an offence was being committed in relation to the HMO in question,
] [1]

the tribunal must make a rent repayment order requiring the appropriate person to pay to the authority [the amount mentioned in subsection (2A)] [1] .
This is subject to subsections (3), (4) and (8).
[
(2A) The amount referred to in subsection (2) is—
(a) an amount equal to—
(i) where one relevant award of universal credit was paid as mentioned in subsection (2)(b)(i), the amount included in the calculation of that award under section 11 of the Welfare Reform Act 2012, calculated in accordance with Schedule 4 to the Universal Credit Regulations 2013 (housing costs element for renters) (S.I. 2013/376) or any corresponding provision replacing that Schedule, or the amount of the award if less; or
(ii) if more than one such award was paid as mentioned in subsection (2)(b)(i), the sum of the amounts included in the calculation of those awards as referred to in sub-paragraph (i), or the sum of the amounts of those awards if less, or
(b) an amount equal to the total amount of housing benefit paid as mentioned in subsection (2)(b)(ii),
(as the case may be).
] [1]

75 Other consequences of operating unlicensed HMOs: restriction on terminating tenancies
(1) No section 21notice may be given in relation to a shorthold tenancy of a part of an unlicensed HMO so long as it remains such an HMO.
(2) In this section–
a *"section 21 notice"*means a notice under section 21(1)(b) or (4)(a)of the Housing Act 1988 (c. 50) (recovery of possession on termination of shorthold tenancy);
a *"shorthold tenancy"*means an assured shorthold tenancy within the meaning of Chapter 2 of Part 1of that Act;
*"unlicensed HMO"*has the same meaning as in section 73of this Act.