HSHAWB 21 Dave Cowan, Journal of law and Society Professor of Socio-Legal Studies; Barrister

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Senedd Cymru | Welsh Parliament

Y Pwyllgor Llywodraeth Leol a Thai | Local Government and Housing Committee

Bil Digartrefedd a Dyrannu Tai Cymdeithasol (Cymru) | Homelessness and Social Housing Allocation (Wales) Bill

Ymateb gan: Dave Cowan, Journal of law and Society Professor of Socio-Legal Studies; Barrister | Evidence from: Dave Cowan, Journal of law and Society Professor of Socio-Legal Studies; Barrister

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What are your views on the general principles of the Bill, and whether there is a need for legislation to deliver the stated policy intention?

(We would be grateful if you could keep your answer to around 500 words).

I have written a series of blog posts which extend beyond your word limits, I'm afraid. They can be found on my blog, Housing Law and Policy in Wales: https://blogs.cardiff.ac.uk/housing-law-wales/

For your convenience, I have pasted my posts so far here and in the sections below, but I will continue to add to them each week.

First post:

This Bill was published yesterday (I'm writing this on Tuesday as off to a conference later), and this is a holding note just to explain what looks like the outstanding features of the Bill – published on Tuesday as it is a pretty big moment. I will post on it more fully, taking individual clauses of interest (to me and anyone who is interested) when I return (but there will be a blog break on Friday and next week). Let me know if you would like me to look at any particular clause/point of interest. Here is my summary …

Although it is an amendment, the first point is that it seems to set a completely new direction for Wales. It retains the core structure of English homelessness law, which is a shame, but understandable; nevertheless, it does seem to want to change the culture of denial that we too often see in homelessness decision-

making, and seek to offer the wrap around service which was promised in the White Paper and other documents which underpin it. Jayne Bryant, the Cabinet Secretary for housing and local government, issued a statement isolating what for the WG are the main points (there is a long list of bullet points), and notes that it "builds on" the White Paper and the work of the outstanding Expert Group.

The most interesting and important provisions are the omission of priority need and intentionality. It is these provisions more than most which incite local authorities to enter into the kind of street-level bureaucracy which ends with a culture of denial operating. There is a brilliant piece by Caroline Hunter and colleagues, for example, about how local authorities see medical evidence, and regard GPs as not providing objective appraisals but advocating for their patients. And, as for intentionality, it was originally designed for people who might seek to take advantage of the munificence of the law – which tells you something about the coalition which produced the 1977 Act and their views about people. It is not a provision for which I have much, if any, time (as a matter of principle, although I have to engage with it in practice), and judicial decisions have tended towards the obscure and have made it pretty difficult to interpret/work.

Other important aspects are over the changes to homelessness prevention, provisions for greater co-operation, a modulated duty to allow an applicant to view accommodation before accepting it, and a nicely framed duty to "ask and act" on public bodies. All of these things are good. There are also provisions specifically addressing the accommodation needs of prisoners, which is brilliant. I suspect that is not something which will be given much publicity but given that homelessness is a cause of recidivist criminal behaviours, this is absolutely to be welcomed

I am less impressed by the wider use of local connection but I need to spend more time on those provisions than I have been able to do here. This is not a high profile thing, but can be quite problematic, and it would be helpful to be able to reflect on that.

On allocations, the Bill enables local authorities to have qualifying criteria (sensibly, I guess, but it does have consequential implications to which I will return), although those owed a reasonable preference can't be excluded. That last proviso reflects a more general approach than exists in England, where the Courts have adopted quite a contorted position, so that clearer statement is to be welcomed for Wales. I am less impressed – really quite unimpressed – by a provision which seeks to remove preference for people who manipulate the housing system. This re-introduces the intentional homelessness …

What are your views on the provisions set out in Part 1 of the Bill - Homelessness (sections 1 -34)? In particular, are the provisions workable and will they deliver the stated policy intention?

(We would be grateful if you could keep your answer to around 500 words).

This second deep dive post into the Bill concerns the duty to "ask and act" in clauses 21-2 of the Bill. [By the way, there is no particular method in my selection – more what people are talking to me about combined with my interest]

These clauses reflect a broader shift in the Bill, which underpinned the 2014 Act towards a wider prevention of homelessness agenda. The Expert Group (at p 63) were clear that "wider organisations" should take a firm approach in homelessness prevention. And, they "… would also wish to see these other public bodies and housing associations take direct action to prevent homelessness, where relevant, within the scope of their own competencies and responsibilities". The White Paper emphasised the importance of partnership across the public service in identifying and preventing homelessness early, and, to summarise a lengthy discussion, that homelessness is a public health issue. That document ([220]) suggested that these clauses were required

to prevent more cases of homelessness, enable intervention at the earliest possible opportunity and to create a more holistic, person-centred and trauma-informed response across the Welsh public service for people who are homeless or at risk of experiencing homelessness. … Where necessary, we also propose the creation of multi-disciplinary teams around people who are homeless or threatened with homelessness, to address the complexity of their needs

It is to be combined with a "national learning and development campaign" and will need information/document sharing by these agencies ([222]).

The Explanatory Memorandum to the Bill recognised the need to "widen responsibility for identifying and preventing homelessness across the Welsh public service" on the basis that early identification of homelessness will assist with effective prevention. And further:

The aim of the "ask and act" duty is to identify individuals at risk of homelessness as early as possible and to ensure local authorities can assist them earlier, standing them a greater likelihood of preventing homelessness from occurring. The joint emphasis on acting as well as asking about homelessness is in place to assure local housing authorities that their partner agencies will also do what they can

when referring an individual at risk, further strengthening the service on offer to that individual and increasing the likelihood of homelessness prevention.

It should be recognised that the aim here is to go beyond the referral duty provisions which now exist after the Homelessness Reduction Act in England.

Clause 21 of the Bill introduces two new sections into the 2014 Act, ss 94A and 94B. The latter sets out the public sector agencies incorporated. The former sets out the substance of the duty. The first part of s 94A mirrors the English duty. It's subsection (5) which is truly innovative, requiring the public authority also to

(a) provide the person with information about help available from other public authorities (or any other person) for people who are homeless or who may become homeless;

(b) consider whether there are any other steps it could reasonably take in the exercise of its functions to help the person secure or retain suitable accommodation and, if the authority considers there are any, it must take those steps;

(c) consider whether the opinion mentioned in subsection (1) affects the exercise of its functions in relation to the person regarding any matter.

The duty in (b) "does not affect any right of the specified public authority … to secure vacant possession of any accommodation" (cl 94A(6)). This is quite radical,, but the mandatory duty is only to "consider" and not to "provide". This is rather a weak duty, a kind of general duty which will lack any enforcement teeth. Assuming the authority has given that consideration, how could it be challenged unless the person has a legitimate expectation of something more or the consideration is Wednesbury unreasonable. …

What are your views on the provisions set out in Part 2 of the Bill – Social Housing Allocation (sections 35 – 38)? In particular, are the provisions workable and will they deliver the stated policy intention?

(We would be grateful if you could keep your answer to around 500 words).

So far in these posts, I have focused mostly on the homelessness stuff in the Bill. Today's post straddles both parts and deals with clauses 10 and 36. Or, more prosaically, it deals with intentional homelessness.

Lots of academics have written about intentional homelessness and its baleful effects. It was not in the original Bill in 1976-7 but introduced by amendment to deal with what was regarded as the problem of people making themselves homeless in order to take advantage of the new Act and "jump the housing queue" (the so-called "perverse incentive"). Even in Parliament, it was described (I think by Jack Straw) as "gobbledegook" and Courts have struggled to interpret it. In the earliest cases, they had to interpret it by reading different tenses in to the provision. Lord Denning described people found to be intentionally homeless as having "the mark of Cain" (in true-to-form Denning hyperbole). Most recently, the Supreme Court grappled with it in Haile v Waltham Forest LBC. I have read the judgment in Haile numerous times, and I still can't quite work out how they came to the outcome that they did. I guess I am making two points: it's a really hard provision to implement; and it's a really hard provision to interpret. Those two things add up to resource intensity. As a result, the provision was not used much in Wales, but it was used, and the Expert Group noted (at p 22):

Stakeholders and experts by experience expressed that the intentionality test is not trauma-informed and that it encourages judgement around who is or is not deserving of support. Many people drew upon experiences which align with the extensive body of research that shows people found to be ‘intentionally homeless’ usually have clear unmet support needs and are often the most excluded from services and support.

Not surprisingly, they recommended that the provision should be removed. However, they were also concerned that "some individuals may ‘actively worsen’ their situation or mislead the authority in order to gain priority access to social housing" and so they recommended that people who "deliberately manipulate" the system should not be given reasonable preference for an allocation of social housing. Similarly, the White Paper recognised that the cultural shift to prevention and relief of homelessness has meant that intentional homelessness has become of far less significance in Wales, although there was evidence of significant variation across Wales in its use (144-5).

Clauses 10 and 36 effectively do what the Expert Panel recommend. Clause 10 omits intentional homelessness as a key concept. Given the above, one might say that, although slightly controversial, it is unobjectionable. Indeed, frankly, along with (no doubt) most academics in this field and lawyers, I welcome it.

Clause 36, however, requires more thought. It introduces new subsections in to the allocation scheme provision of the Housing Act 1996: s 167. This is the provision which sets out what authorities have to do in their allocation schemes -

they have to give reasonable preference to certain groups; they can give additional preference to one of the groups; and they give the Cabinet secretary various regulation making powers (see Deep Dive 1 for discussion).

The provision is amended so that where the authority "is satisfied that the person is trying to manipulate the housing system", the person loses any preference that they might have for an allocation of social housing. A new section 167A sets out what "trying to manipulate the housing system" means - and, lo and behold, it is pretty much what intentionality was for homelessness:

… the person deliberately did or failed to do something in consequence of which the person ceases to occupy accommodation that was available for the person's occupation and which it would have been reasonable for the person to continue to occupy

…

What are your views on the provisions set out in Part 3 of the Bill – Social Housing Allocation (sections 39 – 43 and Schedule 1)? In particular, are the provisions workable and will they deliver the stated policy intention?

(We would be grateful if you could keep your answer to around 500 words).

What are the potential barriers to the implementation of the Bill's provisions and how does the Bill take account of them?

(We would be grateful if you could keep your answer to around 500 words).

How appropriate are the powers in the Bill for Welsh Ministers to make subordinate legislation, as set out in Chapter 5 of Part 1 of the Explanatory Memorandum)?

(We would be grateful if you could keep your answer to around 500 words).

This is the first of probably a few deep dives into the Homelessness and Social Housing Allocation Bill's clauses, and it is at the behest of somebody who asked me about certain provisions – more specifically, the range of powers retained by the Welsh Government. Now, I can fully appreciate that powers to issue guidance, make directions, and lay statutory instruments are not the most sexy parts of a Bill – the highlights of which were provided a couple of weeks ago (here).

In a way, that's the point. They are not sexy, but they will be absolutely critical to the way in which the Bill is implemented. Although it may pain the Office of Legislative Counsel (OLC), not many people are going to wade through the thickets of an Act. They will rely on Guidance as an authoritative (or quasi-authoritative, as only judicial interpretation can be so and may trump Guidance) interpretation of the Act which will indeed guide their practice. As English courts regularly remind us, housing officers are not lawyers and they do not write housing law assessments (unfortunately, one might say) and so, naturally, Guidance will be their first port of call. On the other hand, fewer still will consider secondary legislation (until it affects them or their case) and procedures for approval are often less rigorous than they are for primary statutes. That is why we should start our analysis with these powers.

These provisions divide in to three types: secondary legislation to edit categories; powers to issue Guidance; and a power to issue a Direction. In her great book, Quasi-Legislation, my former tutor and academic-I-most-admired, Professor Ganz drew attention to the variety of secondary and tertiary legislation, most of which exists without a statutory basis. And, more recently, legislation has become shell-like creating the means for Secretaries of State to make quasi-legislation. The constitutional battle over these kinds of points was lost in the 1920s after The New Despotism. So, we might say that this Bill, at least, is up front in the powers that it is giving to the WG.

The first thing to say is that the powers to make regulations by Statutory Instrument seem (to me) to be generally unexceptional and unexceptionable. Since the outset of homelessness law, these powers have existed, and it makes sense to retain these kinds of powers to meet various political moments or exigencies. For example, in relation to local connection, it makes sense to empower the Minister to amend the list of people to whom it does not apply, or to provide further detail about the existing categories. These kinds of powers enable the smooth running of the law (or implementation pathway). It also makes sense to be able to add to, or remove from, the list of public bodies subject to the co-operation duty – there are two notable absences from the published list, for example: primary care services; schools. One can imagine that a different government (or the same government) after the election might consider adding them.

As regards the powers to issue Guidance, going over it this morning with interested parties, I found it interesting how these powers are framed. More specifically – and this is really important given the significance of Guidance – the Bill employs what, at first sight, are different mandatory words regarding how that

Guidance is to be used. Social landlords must have regard to the guidance given on their duty to co-operate as must others under the “ask and act” duty; whereas, local authorities shall have regard to the Guidance that is issued. Is it too nerdy to draw attention to that difference? My experience of OLC is that they use their words carefully, but what is the difference between “must” and “shall”. The second point on Guidance is that there must be a concern that there is not going to be one central Guidance document but a range of Guidance documents – I would suggest that, if the latter is planned, that would not be helpful …

Are there any unintended consequences likely to arise from the Bill?

(We would be grateful if you could keep your answer to around 500 words).

What are your views on the Welsh Government’s assessment of the financial implications of the Bill, as set out in Part 2 of the Explanatory Memorandum?

(We would be grateful if you could keep your answer to around 500 words).

Are there any other issues you would like to raise about the Bill and the Explanatory Memorandum or any related matters?

(We would be grateful if you could keep your answer to around 500 words).

Housing