RH 08

Y Pwyllgor Cymunedau, Cydraddoldeb a Llywodraeth Leol/
Communities, Equality and Local Government Committee
Bil Rhentu Cartrefi (Cymru)/Renting Homes (Wales) Bill
Ymateb gan: Cymdeithas y Cyfreithwyr
Response from: The Law Society

The Law Society

The Law Society of England and Wales is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 159,000 members, promoting the highest professional standards and the rule of law.

This response has been prepared by the Law Society's Housing Law Committee and reflects the expertise of a broad spectrum of practitioners who represent tenants and landlords, both in the private and social sphere.

One of the Committee's objectives is to promote improvements in law and practice relating to residential letting in the public and private sectors. We supported the Law Commission's renting homes proposals published in 2006 and welcome the Welsh Government's aim to incorporate those recommendations into Welsh law.

Given the limited time available for commenting on the Renting Homes (Wales) Bill (the 'Bill'), this response predominantly focuses on the points raised in our response to the Renting Homes White Paper in August 2013[1]. We wish to highlight:-

- the difficulty in introducing new property rights for young people given the provisions of the Law of Property Act 1925;
- the practical implications of a 48 hour exclusion tool for vulnerable tenants; and
- the danger of placing landlords in circumstances where domestic violence is alleged.

Asylum Seekers

Schedule 2 of the Bill contains the exceptions to the types of tenancy agreements that fall within the scope of the Bill. Those exceptions do not include accommodation for asylum seekers which is listed in Schedule 3 of the Bill as occupation contracts which may be standard contracts[2].

Contracts with asylum seekers are standard occupation contracts. The effect of this is that they cannot be terminated unless there is a court order under s.201 of the proposed Bill. Local authorities which participate in consortia contract or sub-contract with the Home Office to ensure that the accommodation is vacated within a short period of time, usually by giving 14 days notice. There are strict financial penalties if local authorities cannot accommodate new asylum seekers because a failed asylum seeker is holding over after notice to terminate.

---

[1] 'Renting Homes White Paper - Response to the Welsh government's consultation - August 2013'

[2] Currently they are also excluded from being secure by virtue of Schedule 1 to the Housing Act 1985.

All standard and secure contracts can be terminated by notice, and subsequently by court order if the occupant does not vacate or is not forcibly detained by the enforcement section of the authority responsible for immigration. In our experience the latter seldom happens as removal directions are rarely issued at the time the application for asylum fails. Recovering possession through the court is a lengthy and costly process, and the cost has to be covered by local authorities.

We recommend that contracts for accommodation of asylum seekers be excluded from Schedule 3 of the Bill on social policy grounds and added as an exception to the occupation contracts in Schedule 2 Part 3 of the Bill.

Decant properties

The Law Society welcomes the provisions in the Bill which properly balance the interests of both the contract holder and the landlord.

Paragraph 14 of Schedule 3 of the Bill refers to '*Temporary Accommodation: accommodation during works'* (ie decant properties). Schedule 3 deals with occupation contracts that may be standard contracts rather than secure provided that the notice requirements are satisfied as set out in s.11 of the Bill. The new landlord will have to serve notice before possession can be recovered through the court; however, in all likelihood the contract holder will agree to return to their original home without the need for a court order, otherwise the contract holder may become liable for court costs.

The landlord should be properly directed by the original landlord as to when notice should be served to coincide with the completion of works. Under this provision the contract holder will need to be given sufficient notice of when they will be required to leave, bearing in mind they may have been at the temporary property for a relatively long period of time.

Addressing Antisocial Behaviour

We believe that s.55 of the Bill provides the right degree of flexibly and breadth, by covering other people living in the premises, neighbours, those engaged in a lawful activity in the area and members of the landlord's staff or contractors. It extends this responsibility to not only the contract holder but also to those who live with or visit them. We agree that this term must be incorporated into the standard contracts.

Breach of s.55 would entitle the landlord to apply to court for possession of the premises. This would be a discretionary ground for possession under which the court would have to consider the reasonableness of making any order, which would include the personal circumstances of the defendant and effect that the behaviour has had on others.

In England (and currently in Wales) the position is that landlords can use an "absolute ground" for possession for anti-social behaviour in certain serious circumstances. As the aim of the Bill is to remove that ability, some landlords may argue this will make obtaining possession in anti-social behaviour cases more difficult. When the absolute ground was first proposed in England the Law Society predicted that:-

- it would be used rarely and only in circumstances in which the discretionary ground would have very likely resulted in an outright order for possession in any event; and
- the tenant could always raise proportionality and Article 8 arguments.

Consequently, we do not believe that the loss of the absolute ground for possession will pose such a fundamental problem for landlords: the important point of principle for us is that the court's discretion is maintained.

The antisocial behaviour provisions can be against a person residing in the same property which extends their reach to domestic abuse cases. The Law Society reiterates its comments from 2013: it is not the landlord's responsibility to become involved in domestic abuse situations, other than in exceptional cases.

A tenant faced with domestic violence can seek a non-molestation and occupation order in family proceedings which has the same effect. If someone is at immediate risk, landlords can provide temporary alternative accommodation for the individual and seek an injunction if they cannot do that themselves.

What is being proposed in the Bill would involve the landlord effectively "taking sides" by exercising the power to exclude the person they believe to be the perpetrator. Domestic violence situations are rarely clear cut. At present, a tenant faced with domestic violence can seek a non-molestation and occupation order in family proceedings which has the same effect. Some landlords already have a ground for possession[3] to deal with domestic abuse situations but our experience is that, understandably, this power is rarely used as landlords do not wish to become embroiled in domestic situations.

To give an unmanageable responsibility to a landlord to deal with domestic abuse through the antisocial behaviour provisions appears unnecessary and could lead to challenges around whether a landlord is properly exercising their duties.

Abandonment of the property by a tenant

The current legislation puts requirements on landlords in terms of notice and making enquiries to satisfy themselves that the property is abandoned. The landlord should apply to court for a possession order following the service of a Notice to Quit[4]. It is widely acknowledged that landlords will often choose not to apply to court if they are satisfied that the tenant has abandoned the property, in an effort to save costs. This action is risky as a tenant may then issue unlawful eviction proceedings if indeed they have not abandoned the property but simply been away for a period of time e.g. visiting family or a hospital stay.

Section 234 of the Bill provides that notice may be given by leaving it at or posting it to the contract holder's last known residence or place of business, or any place specified by the contract holder for service of documents, and if the document is to be given to a person in their capacity as contract holder, the premises. Notice can be given electronically (including by text message), but only if the recipient has agreed. It therefore seems that the landlord can deliver notices under these provisions (ie

[3] Ground 14A of The Housing Act 1988
[4] In accordance with s.32 of the Housing Act 1988.

abandonment) to the premises, make some inquiries, end the contract after expiry of the warning period of four weeks and, if the inquiries do not result in any information, recover possession without a court order.

The Law Society supports this approach as it means that properties can be recovered and rent arrears minimised, subject to proper safeguards to prevent wrongful eviction. For example, if a contract holder goes abroad for two months with the intention of returning and still pays there rent during their absence it would not be right for the landlord to claim that the property had been abandoned. We suggest that the standard and secure contracts contain a requirement that a contract holder notifies their landlord (preferably in writing) of any absence exceeding 1 month to avoid this issue.A clear line of communication between landlord and tenant should be encouraged.

The contract holder can apply to court within six months of receipt of the second notice ending the contract on grounds the landlord failed to fulfil their duties or if the premises is not actually abandoned. If, after further consultation, the provision remains we would propose that the time limit be reduced to three months.

One consequence of these provisions is that the premises may have been re-let by the time of contract holder's application to court to overturn the eviction notice, and landlord may not have any suitable alternative accommodation. Even if alternative accommodation is provided, there would seem to be considerable injustice caused if, for example, the contract holder goes away for more than four weeks and does not receive the warning notice and loses their home as a result. The suggestion above (to give notice to the landlord of periods of absence exceeding 4 weeks) would go some way to addressing this concern.

The Bill does not provide sufficient safeguards to ensure that the system is not misused, and tenants particularly vulnerable tenants are not exploited under the proposed regime. We would advise that this proposal be examined more carefully and the potential consequences understood before a final decision is made. Guidance needs to be given as to how this proposal will align with case law, including what inquires would need to be undertaken in order for landlords to satisfy themselves that a property has been abandoned and they are not exposing themselves to a wrongful conviction claim.

Renting by young people

The Bill proposes that 16 and 17 years olds will be able to hold contracts on the same terms as adults. The intention is to ensure that 16 and 17 year olds are not disadvantaged in obtaining a tenancy. However, the proposal is contrary to well established existing law whereby a 16 and 17 year old is only capable of holding the equitable tenancy with the landlord holding the legal interest upon trust, unless the landlord has appointed someone else to act as trustee[5].

[5] s.1(6) and s.2(6) Law of Property Act 1925 and s.2(6) Trusts of Land and Appointments Act 1996

Property law is not a devolved area of law to the National Assembly for Wales, so there must be a question mark over whether s.230(5) of the Bill is effective as it appears to seek to disapply legislation that it does not have power to do so.

If this subsection is effective then further consideration needs to be given as to whether young people are being exposed to any risk holding a legal interest and having contract terms enforced against them when they are deemed as vulnerable and perhaps less likely capable of sustaining a tenancy.

Ground 8

Currently, Ground 8 allows a landlord to obtain possession of a property if they can demonstrate at the date of the notice seeking possession was served and at the date of the possession hearing that a tenant is more than eight weeks in arrears, the court has little discretion but to make a possession order. The threshold for getting an Article 8 defence beyond summary consideration is very high.

The Law Society supports the abolition of Ground 8 for secure contracts in order to provide the court with a wider discretion as to whether or not to make a possession order. However, we are in a time where welfare reform and universal credit is having a huge impact on collection of rent arrears. Local Authorities and Private Registered Providers are not-for-profit organisations and are dependant on rent collection. The courts should be issued with guidance that rent arrears should be treated seriously and not be allowed to accumulate to levels where repayment is not a viable option before seriously considering eviction.

The Law Society welcomes the fact that Ground 8 is to be retained for the standard contract so as not to deter the private rental market where there is a desperate shortage for housing. We believe that had the abolition of Ground 8 extended to the standard contract that it would have deterred landlords from renting their properties.

The Law Society therefore agrees with the proposals to retain the mandatory ground for the standard contract and abolish it for the secure contract.

48 hour exclusion tool

Schedule 2 part 5 of the Bill enables a landlord to exclude a contract holder from the premises for up to 48 hours in limited serious circumstances. As this provision applies to supported accommodation contracts, the contract holder is likely to be vulnerable, possibly disabled or have mental health problems, and, if excluded, is likely to be homeless for two days, and at serious risk of harm. They may find it very difficult to seek legal advice, access support or medication during this period.

An agent or employee officer of a landlord who may not be specifically trained in dealing with vulnerable people can exclude an individual without reference to the court. Whilst this may be an infringement of Article 8 rights, it is unlikely that a vulnerable person will seek legal advice within the period of exclusion to prevent them living on the streets. Indeed, if the individual does manage to access legal advice on enforcing their Article 8 rights is likely to be restricted given the limits of legal aid.

This power needs to be subject to further consideration about the safeguards to be put in place for vulnerable people, and specifically what alternative accommodation arrangements will be put in place if the power is exercised and who would be responsible for the accommodation arrangements. This power needs to be carefully balanced also with the impact the alleged behaviour has had on residents in the locality or staff which has resulted in the exclusion.

Retaliatory Evictions

We agree that retaliatory eviction damages the image of the private rented sector and dents tenant confidence. In England, provisions are being drafted into the Deregulation Bill to prevent possession being obtained against tenants on standard contracts in the private rented sector who make complaints about disrepair at the property.

The Bill proposes that where the court is satisfied that the landlord has not complied with their obligations, and that the landlord has issued a possession claim to avoid complying with them, it may treat the possession claim as discretionary, and therefore may refuse to make an order for possession.

The Law Society has concerns about the drafting of s.213(3)(b) of the Bill which states that the court has to be satisfied that the landlord has made the possession claim to avoid complying with those obligations. This will be a matter for judicial consideration at trial, having heard evidence from both landlord and tenant, but there can be many factors that would need to be taken into account when making the finding under s.213(3)(b) of the Bill. For example, whether the tenant has reported a repair but has then failed to give access; any mental health issues; or any unreasonable requests for repairs that do not fall within the repairing obligation of the landlord. Judicial consideration of the *intention* behind the landlord's actions would involve lengthy submissions, evidence and potentially expert evidence which may significantly delay, add cost and ultimately frustrate the landlord's claim even if validly made. It is inevitable that there will be costly appeals on the meaning of s.213(3)(b) which a private landlord is unlikely to be able to afford.

We believe that landlords, tenants and the judiciary would welcome guidance on this provision.

Tenancy Deposit Schemes

The Law Society welcomes the provision at s.45 of the Bill that requires landlords to place deposits within a protected scheme and deal with in accordance with an authorised deposit scheme. The same obligation is being incorporated into English law by way of amendment to the Deregulation Bill.

We recommend that the obligations in the Bill and the consequences for a landlord who fails to comply with those requirements should follow the drafting of the tabled amendment to the Deregulation Bill[6].

[6] http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0058/amend/su058-II-a.htm