**Briefing paper: Security stability and overcrowding in Southampton**

Southampton City Council Scrutiny Inquiry in the Private Rented Sector

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# Introduction

In this briefing paper we describe and evaluate the law governing security of tenure and overcrowding in the private rented sector. Legal security of tenure refers to the legal rights that protect a tenant from eviction and it is widely regarded as being of fundamental importance in housing law and policy. It underpins many other aspects of regulation in the private rented sector, such as regulation of housing conditions and licencing schemes. This is because where tenants are protected from arbitrary eviction, they are enabled to enforce rights of repair or maintenance and make complaints to the local authority about substandard house or unlicenced housing without fear of retaliatory eviction.

At present, private tenants lack effective security of tenure. This is largely because landlords can evict tenants without having to give a reason by using the 'no fault' ground under section 21 of the Housing Act 1988. The 'no fault' ground for possession was central to the deregulation of private renting which was based on the notion that the sector was primarily a source of housing for short term 'transitional' households. However, the revival of private renting has posed major challenges to this notion. Over the past two decades, the private rented sector has become home to growing numbers of families with children, low-income households and vulnerable single households. The persistent unaffordability of ownership and the shortage of social housing mean that these households tend to stay for longer in the sector. Furthermore, the insecurity in the private rented sector has significant implications for local authorities because the ending of an Assured Shorthold Tenancy (AST) has been recognised by the government as a 'significant cause of homelessness', bringing into play local authorities homelessness prevention and other duties with significant resource implications.[1] As a result of these developments, there have been growing calls for reform and there appears to be a political consensus in favour of the Renters Reform Bill which promises to abolish section 21 and expand security of tenure for tenants.

We begin by briefly outlining the wider legal and social context, drawing attention to how the revival of private renting has challenged the vision of 'private renting' that underpinned the Housing Act 1988. We then outline the importance of 'home' to private renters and how evictions from assured shortholds have become a significant cause of homelessness. We then outline the current legal framework governing security of tenure. We describe and evaluate the Housing Act 1988, the Protection from Eviction Act 1977 and the Renters Reform Bill. We conclude with a discussion of alternative approaches and instances of good practice.

[1] https://researchbriefings.files.parliament.uk/documents/SN06856/SN06856.pdf

# 1. Making homes in the 'revived' private rented sector

## 1.1 From vision to reality: The changing nature of the sector

In other briefing papers for this scrutiny, we have described the contested history of security of tenure in the private rented sector, and the shifts from the highly regulated private rented sector of the mid-20th century to deregulation following the implementation of the Housing Act 1988 and then moves towards reregulation following the Housing Act 2004. We suggest that the private rented sector can now be described as a site of regulated deregulation.

The 1988 deregulation of private renting was part of a broader shift in housing policy in which home ownership was presented as the 'nature' tenure of choice and aspiration that was integral to the vision of the 'property owning democracy'. By contrast, the private renter was reimagined as a 'transitional' household, moving through the private rented sector, rather than making a home there. The primary functions of the private rented sector were very much to do with its role as a private economic asset for the landlord, and as a short-term source of accommodation for those moving for work or saving to buy a home. In this vision, strong protections for tenants against eviction and rent increases were presented as unnecessary encumbrances that both undermined the function of housing as an economic asset to the landlord while also restricting the flexibility of the tenant moving for work.

However, as the revival of private renting took hold over the past two decades, the nature of the sector has changed in ways that call into question the assumptions that the sector is simply a source of housing for 'transitional' households, which underpins the Housing Act 1988. As discussed in our first briefing paper, the demand for private rented housing has been driven largely by the growing unaffordability of owner occupation and the undersupply of social housing. As more households have been channelled towards private renting, the nature of the sector has changed. There have been significant increases in households with children – accounting for 30% of households. Assuming the national averages are replicated in Southampton, it follows that there are approximately 8,400 families with children living in the private rented sector. The Department for Levelling Up, Housing, & Communities (DLUHC) estimates that a third of such families report difficulties paying the rent and have had problems with damp/condensation.[2]

The shortage of social housing has also meant that the private rented sector provides housing for increasing numbers of lower income households. DLUHC estimate that about one in six private rented households (726,000) are low-income savers while one in ten (473,000) are struggling families without savings and about half of whom report difficulty paying their rent.[3] Finally, the private rented sector has become a source of housing for vulnerable low-income households, often single people with a limiting illness or disability and/or have had problems with homelessness. DLUHC estimate that such households account for one in ten private rented households. Crucially, most of such households expect to remain in the private rented sector for the medium to longer term. Such attitudes are consistent with DLUHC statistics that show that the duration of private sector tenancies has increased in recent years as more households have settled into the sector for the longer term. In 2022, private renters had lived in their home for 4.4 years on average.[4]

[2] https://www.gov.uk/government/publications/a-fairer-private-rented-sector/a-fairer-private-rented-sector
[3] https://www.gov.uk/government/publications/a-fairer-private-rented-sector/a-fairer-private-rented-sector
[4] https://www.gov.uk/government/statistics/english-housing-survey-2021-to-2022-private-rented-sector/english-housing-survey-2021-to-2022-private-rented-sector

## 1.2. Homes and evictions: The private rented sector

Housing addresses the basic human need for a home. In the UK, and elsewhere, home is frequently understood in association with safety, a sense of belonging and self-actualisation. Housing and home are deeply intertwined with health outcomes, child development, poverty/wealth and opportunity in general.[5] While home is frequently understood as simply a physical structure, many including Lorna Fox-O'Mahony have pointed out that home amounts to much more than a physical structure.

For occupiers, home can be understood as a territory implying security, control and rootedness. It provides a place of identity for the occupier, signifying a continuing connection to geographical space place from which a person or household can access other services and amenities. It also operates as a social and cultural phenomenon, providing a base for relationships.[6] The significance of home is reflected in both domestic law and international human rights law which has long regarded home as involving 'rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others, and a settled and secure place in the community'.[7]

Research has found that where occupiers suffer home loss they frequently experience feelings of 'painful loss, continued longing, a general depressive mood, frequent symptoms of psychological, social or somatic distress, a sense of helplessness and occasional expressions of both direct and displaced anger'.[8] This experiences are often exacerbated where children and/or adult dependents are involved. Indeed, the loss of home and the experience of homelessness has particularly negative consequences for children as it can cause significant disruption to their education and social and physical development.[9]

While home is often recognised as being vitally important to homeowners, it has been pointed out that it is 'just as important to renters, particularly long-term renters'.[10] Despite this, the protections provided to the home in England are highly contingent on sectoral arrangement of tenure. For many households in private rented housing, particularly families with children and low-income households, such differential treatment can appear arbitrary. This is particularly the case where such households find themselves renting a home in the sector not by choice, but due to their inability to access ownership or social rented housing.

## 1.3. Private renting and homelessness

The revival of private renting is inextricably connected to the homelessness crisis that has worsened over the past decade. This is most clearly demonstrated by the fact that the ending of an Assured Shorthold Tenancy (AST) has been recognised by the government as a 'significant cause of homelessness'.[11] A recent (2022) House of Commons report outlines that 'In 2010/11, the end of an AST was given as a reason in 15% of cases, rising to a peak of 31% in 2015/16'.[12] This has had

[5] https://op.europa.eu/en/publication-detail/-/publication/0c16776d-1e4e-11e6-ba9a-01aa75ed71a1/language-en
[6] L Fox-O'Mahony, *Conceptialising Home: Theories, Laws and Policies* (Oxford: Hart, 2007).
[7] According to the ECtHR, whether accommodation is classified as a 'home' is a question of fact and does not depend on the lawfulness of the occupation under domestic law see *McCann and Others v the United Kingdom* [2008] ECHR 19009/04 (13 May 2008).
[8] L Fox-O'Mahony, *Conceptialising Home: Theories, Laws and Policies* (Oxford: Hart, 2007) p. 110. Fox points out that the personal consequences of evictions, such as attachment, grief or loss, are seen as intangible, immeasurable and difficult to articulate, which means that they are easily ignored in cost-benefit and legal approaches to evictions
[9] Ibid, pp 440-441.
[10] S Fitzpatrick & H Pawson, 'Ending Security of Tenure for Social Renters: Transitioning to 'Ambulance Service' Social Housing?' (2013) 29(5) *Housing Studies* 597, 605.
[11] https://researchbriefings.files.parliament.uk/documents/SN06856/SN06856.pdf
[12] https://researchbriefings.files.parliament.uk/documents/SN01164/SN01164.pdf

significant implications for local authorities which are, of course, subject to various statutory homelessness duties including the duty to secure accommodation for unintentionally homeless households who fall into a 'priority need' category.

The severe undersupply of public and social rented housing has meant that local authorities have turned to temporary accommodation (eg hotels, B&Bs) as a source of accommodation for households that come within the duty. Since 2010, the numbers of households in England living in temporary accommodation has increased by nearly 90% to approximately 95,000 households (including 120,000 children).[13] This has led to extraordinary increases in local authority expenditure on temporary accommodation. The Local Government Association estimate that councils spent £1.74 billion on temporary accommodation in 2023.[14] It is important to recall that temporary accommodation is a reactive, emergency measure and it not an appropriate long-term solution to homelessness. A study by Shelter found that 'almost half (47%) of families with school age children have been forced to move schools as a result of living in temporary accommodation'.[15] The findings underline the vital need for local authorities to increase the supply of public and social rented housing.

Recognising how the ending of an AST has become a major pathway into homelessness, the government reformed local authority homelessness duty in 2017 by placing additional duties on local authorities including the duty to take actions to prevent homelessness for all eligible applicants who are threatened with homelessness, ie likely to become homeless within 56 days.[16] In carrying out this function, the government Homelessness Code of Guidance suggests that a local authority should first focus on the steps which may enable the applicant to stay in their current home.[17] This can involve mediation with the current landlord, assistance with applying for social housing, or matching them with private landlords.[18]

Although many local authorities have taken positive action to prevent homelessness under this duty,[19] a 2020 report, commissioned by the Local Government Association, found that despite the new preventative duties 'Governments' homelessness policy has not yet focused on preventing homelessness upstream by addressing the key drivers of homelessness, including a lack of affordable housing, income-based unaffordability, and a lack of an integrated prevention approach'.[20] Developing such more proactive integrated homelessness prevention approaches arguable requires, as a first step, that local authorities recognise the important connections between private rented sector enforcement, licencing schemes and local authority tenancy relations and homelessness functions.

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[13] MHCLG, Live tables on homelessness, Statutory homelessness live tables, Table TA1.

[14] https://www.local.gov.uk/about/news/ps174-billion-spent-supporting-104000-households-temporary-accommodation#:~:text=Analysis%20from%20the%20LGA%20reveals,1.74%20billion%20in%202022%2F23

[15] https://england.shelter.org.uk/media/press_release/almost_half_of_children_who_become_homeless_forced_to_move_schools#:~:text=Shelter's%20research%20found%20that%20more,numerous%20times%20at%20short%20notice.

[16] Homelessness Reduction Act 2017.

[17] Homelessness Code of Guidance (MHCLG, Feb 2018), para 12.4.

[18] https://www.nhas.org.uk/news/article/local-authority-duties-to-prevent-and-relieve-homelessness#:~:text=The%20prevention%20duty%20requires%20an,matching%20them%20with%20private%20landlords.

[19] https://researchbriefings.files.parliament.uk/documents/SN01164/SN01164.pdf pp 37-39

[20] https://www.local.gov.uk/publications/re-thinking-homelessness-prevention

# 2 Legal security of tenure

## The Housing Act 1988

Under the Housing Act 1988 a landlord can only end an assured tenancy or assured shorthold tenancy, against the wishes of the tenant, by obtaining a court order which necessitates serving appropriate notice. For assured tenancies, s.8 provides that the grounds for possession are limited and comprise a list of discretionary grounds (eg breach of terms), where the court has discretion, and mandatory grounds (eg rent arrears), where the court must make the possession order once the formal requirements are met.[21] This regime also applies to assured shortholds however the vital difference is that tenants with assured shortholds can be evicted under s.21 of the Housing Act 1988 on two months' notice, whether or not they are in fault.

That deregulated position is slightly adjusted by, for instance, limits on situations in which s.21 notices can be served. The law is now quite complex and this chart from the Nearly Legal blog site gives a full picture of the limits on service of s.21 notices.[22] This complexity is problematic for landlords and tenants as ignorance of these legal complexities can and does lead to wrongful evictions. As we have discussed previously, the Renters Reform Bill intends to abolish s.21 no fault powers of eviction. They are to be replaced with a reformed court processes and an extended set of grounds for eviction under s.8. In particular, the government proposes adding a new mandatory ground for sale of the dwelling, family use or the dwelling and repeated rent arrears (ie where a tenant has been in at least two months' rent arrears three times within the previous three years, regardless of the arrears balance at hearing).

While ending 'no fault' evictions will increase security of tenure in the private rented sector, the other proposals in the Bill tend to strengthen landlords right to possession. In addition, the fact that rents are not to be regulated is problematic. It leaves the private rented sector in a state of regulated deregulation. For the law to provide the type of security enjoyed by homeowners it has to provide not only security of tenure but also predictable affordability. In other words, even if an occupier has the right to remain in their home as long as they pay their rent, if that rent can be raised then their security is compromised. The only current limit on payable rent is the market. In a situation where demand outstrips supply that is a very limited protection. In addition, there is a lack of data available to demonstrate what market rents are.

## Protection from Eviction Act 1977 (the PfEA)

The PfEA (as amended by the Housing Act 1988) provides a legal 'floor' for residential occupiers' rights. Behaviour which falls beneath that 'floor' is a criminal offence. In addition, residential occupiers can sue in the civil courts and/or apply for a Rent Repayment Order for breaches of the legislation. Its provisions are augmented by those in the Criminal Law Act of 1977 which criminalise prevents the use of violence in securing access to a property.

The first legislation to protect tenants from unreasonable eviction was passed 60 years ago, the Protection from Eviction Act 1964. It was designed as a temporary measure to prevent evictions pending the enactment of the Rent Act 1965. Crossman at the 2nd reading of that Act declared

> *For the first time in our history, any landlord who evicts without previously obtaining a court order will be doing a criminal act, which makes him liable to £100 fine or six months' imprisonment. That is progress . . .*

[21] Housing Act 1988, s. 8.

[22] Section 21 flowchart - Nearly Legal: Housing Law News and Comment

There was however scepticism about the Act because its success depending on the zeal with which it was enforced.

> *There are signs that some police forces continue to be reluctant to take cognisance of these offences on " private property." Nor can the police be entirely held to blame in so refusing. For to prosecute under section 1 involves unravelling the mysteries of section 3. That section is unambiguous in its effect, but the categories of property thereby excluded from the ambit of the Act are such that it would be hardly surprising if a policeman felt that he could not analyse the status of a letting accurately enough to make an arrest for breach of section 1.*

Levy *The Modern Law Review*, Vol. 28, No. 3 (May, 1965), pp. 336-338 (at page 337)

The current PfEA is a consolidation Act, pulling together provisions protecting tenants set out in previous Rent Acts and replacing and updating protection from eviction legislative provisions. . Whilst the provisions of the 1977 legislation do not replicate the current legislation, the concerns about the need for effective enforcement and the complexity of the legislative provisions remain.

## The impact of deregulation on the statute

Governments have, since the middle of the 20th century, been conscious that changes in the regulatory framework for renting leads to increased illegal evictions and harassment. Therefore, as part of the deregulation of private renting in Housing Act 1988, the legislation included provisions amending the PfEA. It was simultaneously strengthened – by extended the crime of harassment so that it can be committed where acts of harassment are **likely to** as opposed to **calculated to** interfere with the peace and comfort of a residential occupier and by the creation of a further crime of harassment which occurs when the landlord knew or had reasonable cause to believe that his or his agents conduct is likely to cause the residential occupier to give up the occupation of the whole or part of the premises -- and weakened – by creating categories of excluded residential occupiers who are excluded the protections against illegal eviction (see below).

In addition, and in order to further protect tenants against the scandalous repercussions of the decontrol of private renting subsequent to the Rent Act 1957 the Housing Act 1988 (at s.27) created a new tortious remedy for illegal eviction. One commentator (Stewart in her monograph *Rethinking Housing Law*) has however noted that instead of seeing the problem of illegal evictions as one caused by changes in regulatory regimes, it would be better to see it as endemic to private renting, a constant presence in a sector too frequently marked by ignorance, a mismatch of supply and demand and weak enforcement regimes.

## The provisions of the PfEA 1977

There are two offences contained within the PfEA, illegal eviction and harassment.

### *Illegal eviction*

The law is contained in s.1(2) of the Protection from Eviction Act 1977. Under this provision, an eviction will be lawful where the landlord follows the required legal procedure for eviction. For tenants these include following the requirements in the housing statutes or – for those excluded from that legislation – a requirement in s.3 of the 1977 Act for court orders to recover possession against tenants who are not otherwise protected.

Following the required legal procedure includes giving proper notice, including a notice to quit under s.5 of the 1977 Act. This provision is not limited to tenants, it protects residential occupiers the definition of which includes tenants and licensees, unless either are in an excluded category. It

provides that an effective notice to quit must give not less than 4 weeks' notice and must be in writing (and must contain such information as may be prescribed).

Excluded occupiers are defined in s.3A of the PfEA and includes occupiers who share with the landlord or a member of their family, holiday lets and those living in hostels. Excluded occupiers, who are generally lodgers, do have some protection from arbitrary eviction. Common law requires that they are given reasonable notice of the termination of their occupation. Reasonable notice will depend upon the circumstances, but it is difficult to imagine that changing the locks whilst someone is at work and not informing them of that, would ever be legal even when the landlord is a resident landlord.

### *Harassment*

There are two harassment offences in the 1977 Act. The first applies to 'any person' who does acts likely to interfere with the peace or comfort of the residential occupier or withholds services and which cause them to leave their home.[23] The word 'likely' was added by the Housing Act 1988, making the offence slightly easier to prove.

The same Act also added a second offence which applies to landlords/agents who does acts likely to interfere with the peace or comfort of the residential occupier(s) or persistently withdraws or withholds services and '(in either case) he knows, or has reasonable cause to believe, that that conduct is likely to cause the residential occupier to give up the occupation of the whole or part of the premises or to refrain from exercising any right or pursuing any remedy in respect of the whole or part of the premises'.[24] There is a defense where the landlord/agent proves they had reasonable grounds for doing the acts or withdrawing or withholding the services in question.

The combined impact of the provisions is not easy for a non-expert to unpick. In essence, the important difference is that when it comes to proving the subjective intention of the person who allegedly committed the offence (what is known in legal terms as *mens rea*) there is an easier test to meet if the offence is committed by a landlord. Non-landlords must intend to cause the residential occupier to give up occupation or their rights under s.1(3), while prosecutors only need to prove that a landlord (or their agent) knew, or had reasonable cause to believe, that their actions would have that result.

However, in many circumstances in practice proving that it was a landlord or their agent who took the action can be very challenging. Where it is not possible to establish it was the landlord or their agent, prosecutors have to establish the higher threshold requiring proof of intent, which is a very high bar to reach. This is also a context in which there are clear incentives on residential occupiers not to complain about potential harassment, due to the potential for retaliatory eviction.

## Criticisms of the Act

In a briefing note prepared by Carr, Hunter and Kirton-Darling for DHLUC, written to persuade the Department to include measures to reform the Protection from Eviction Act in the Renters Reform Bill, they wrote:

> *The law relating to harassment and illegal eviction contains significant challenges for prosecutors who wish to enforce the law (contributing to widespread inconsistency in prosecution), limited routes for redress for residential occupiers who experience illegal eviction or harassment, and little incentive for landlords to comply with the law.*

[23] Protection from Eviction Act 1977, s.1(3)
[24] Protection from Eviction Act 1977, s.1(3)(A), (inserted by Housing Act 1988).

*Complexity*

Whilst the broad range of occupiers protected by the legislation is to be applauded, there is complexity in the Act, particularly in relation to the category of excluded occupiers. Whilst there may be good policy reasons for excluding certain categories of occupiers it makes it difficult to communicate the message that there can be no unreasonable evictions. Moreover, there is a general misconception about the Act. Many people consider that excluded occupiers are excluded from both offences in the Act. That is not accurate; excluded occupiers are not excluded from the protection from harassment.

*Ignorance*

Closely connected with complexity is the problem of ignorance of the law. It is difficult to communicate in simple terms what occupiers' rights are under the Act. In addition, some landlords deliberately misinform occupiers of their rights by using for instance licences instead of tenancies or putting terms into the agreement stating that you must leave the property within 14 days of the service of a notice, or stating that the agreement is excluded from Protection from Eviction provisions. Ignorance is of course compounded by the fear of retaliatory eviction. It is difficult to complain of acts of harassment for instance if you know that you can be evicted legally on two months' notice.

*The challenge of enforcement*

There is no statutory duty on local authorities to enforce the legislation therefore, unsurprisingly, there is extensive evidence that enforcement is very limited. In answer to a Parliamentary question about prosecutions under the Act, asked in 2021, the answer revealed that, for illegal evictions:

> in 2016/17 there were 23 prosecutions; 19 convictions.
>
> in 2017- 18, there were 19 prosecutions; 15 convictions.
>
> in 2018/19 there were 30 prosecutions, 13 convictions.

The figures for unlawful harassment prosecutions for the same years were 34, 11 and 27 with 23, 9 and 5 convictions respectively. The figures for Hampshire during this period show there was one prosecution (which was successful) in the whole county in that period for unlawful eviction and no prosecutions for unlawful harassment. It is probably fair to say that the low level of prosecutions is not an indication of the scale of the problem. What it does reveal is local authority (un)willingness to take action. The data in the answer showed that around half of the prosecutions in England were being undertaken by just two areas, South Yorkshire and the Metropolitan Police.

There is no government data on the total number of illegal evictions. However Safer Renting a London housing charity which carries out an annual count, found that 8,748 cases of illegal eviction and harassment were logged by charities that support victims in 2022, a record high and 12% more than the 7,778 cases recorded the year before.[25] Safer Renting's suggests three longer term reasons for the increase:

- There has been an increase in the number of renters with vulnerabilities who are unable to secure access to a more limited social housing stock;

[25] PfEA-2022-offences-count-Safer-Renting-11-2023.pdf (ch1889.org)

- An uptick in the number of economic migrants and asylum seekers has created a growing pool of renters with limited knowledge of their housing rights;
- There is a higher proportion of renters reliant on welfare payments to cover some or all their rental costs; and heightened complexities around Universal Credit that landlords are less willing or able to negotiate.

It also suggest three more recent factors are at play.

- Court backlog post-emergency pandemic restrictions may be affecting landlord access to lawful evictions.
- Cost of living crisis: the current cost of living crisis emerged led by a surge in energy costs triggered by the Russian invasion of the Ukraine in February 2022. Domestic and other fuel cost increases is likely to have had a significant impact on the bottom end of the private rental market, particularly HMOs where landlords are more likely to be charging rent inclusive of fuel bills, sometimes without a mechanism for recovering increased costs. It is not possible to assess the scale of this impact.
- Interest rate increases: the sharp rise in inflation resulted in a series of increases in Bank of England base rate from 0.25% at the beginning of 2022 to 3% by the end. Some landlords' finances may have been impacted by consequent increases in Buy-to-Let mortgages interest. Financial difficulties may have provoked some to adopt unlawful ways to achieve vacant possession on their rental properties.

*The law and the lack of prosecutions*

The lack of prosecutions was considered by the High Court when the Public Law Project judicially reviewed the failure of Cardiff Council to investigate a landlord who changed the locks and moved new residents in whilst the tenant was staying at a friend's house, leaving the man homeless. During the case the council admitted that it had not investigated a single illegal eviction for at least ten years. An FOI request sent to all Welsh authorities found that the council had no policy in place for dealing with the issue. High Court judge Keyser KC issued a declaration that the council had acted unlawfully in its decision not to investigate the tenant's landlord, and that this unlawful decision had resulted from the council's "systemic failure since 2012 to resource itself adequately".

There are understandable reasons why there is a low prosecution rate by local authorities. They face a risk of costs if the prosecution is unsuccessful which may be particularly high if a landlord opts for a Crown court hearing. They frequently have limited access to expert legal advice in this area. Moreover, sentences for those convicted of offences under the legislation have traditionally been very light. There are calls for new sentencing guidelines to be issued.

*The role of the police*

Extensive concern has been expressed about the failures of the police in responding to incidents of illegal eviction and harassment. For instance they tell complainants it is a civil matter, or they fail to understand the situation and actually helping the landlord evict the tenant. The law has not been particularly helpful here. In *Cowan v Chief Constable of Avon & Somerset* [2002] H.L.R. 44, the Court of Appeal held that police officers who had been called to attend an unlawful eviction in progress, but failed to prevent the eviction, were not liable in negligence as there was no duty of care owed to the tenant. The police may be at greater risk when they actively assist a landlord to effect an unlawful eviction, it may make them liable in trespass : *Naughton v Whittle and Chief Constable of Greater Manchester Police* (2010) July Legal Action 29).

In *Jansons v Latvia* (Application no 1434/14) the European Court of Human Rights found the police's failure to ensure a tenant was not evicted from his accommodation was a breach of his rights under Article 8 of the Convention. This opens up the possibility of occupiers taking similar action in the UK if the police have facilitated an illegal eviction or failed to intervene. Thus, local authorities and the police have a lot to gain from working together in connection with the Act and there may be value in developing a local protocol.

### The Renters Reform Bill

The abolition of s.21 no fault evictions will make it easier for a tenant to complain of harassment. However, it may increase the risk of illegal evictions as it will increase the difficulty of legally evicting an occupier. Local authorities need to be aware of this and be ready for a potential spike of illegal evictions in the immediate aftermath of implementation.

There are several measures within the bill that are designed to enhance the role of the local authority in policing illegal evictions and harassment.

The bill

- Places a new duty on councils to enforce landlord legislation including the PfEA
- Amends the PfEA to introduce a power to impose Civil Penalty Notices as an alternative to prosecution for offences under s.1 of the Act
- It extends the investigatory powers of local authorities so that essentially they have the same investigatory powers as are available under consumer protection legislation

What is important at this point is that the new duties on local authorities will put their policies and practices under a great deal more scrutiny.

## 3 Overcrowding

Overcrowding has been a serious housing problem since England's urbanisation and industrialisation in the 18th and 19th century. Recent figures from the English Housing Survey show that overcrowding is more common in the social and private rented sectors and has, in recent years, risen in both. The pandemic saw an exceptional rise as families and friends shared their homes to create social bubbles. However the overall trend is upward, with the cost of renting being a particular incentive.

The House of Commons briefing paper on overcrowded housing dated November 2023 and available here SN01013.pdf (parliament.uk) summarises the current position as follows:

> The EHS estimates that over the three years to March 2022, an average of 8.1% of all social-renting households were overcrowded (325,000 households). 5.3% of all private renting households (237,000 households) were overcrowded in the same period, compared with 1.1% of owner-occupying households (170,000 households). Overcrowding in rented accommodation started to rise in the late 1990s and early 2000s, before dropping off somewhat in the early 2010s. Recent years have seen a further increase in overcrowding. Rates of overcrowding in the social and private rented sectors rose in 2019/20 to the highest levels seen since data collection began but have since fallen to rates of overcrowding seen in 2018/19 and 2017/18.

### Definition

Statutory overcrowding standards, last updated in 1935, are currently provided for in PartX of the 1985 Housing Act. The provisions set two standards: the room standard and the space standard,

either of which can be used to determine whether a house is overcrowded. Both standards are very low (ODPM, 2004) and neither has changed since 1935 when they were originally implemented.

The room standard provides that a house is overcrowded when there are so many people living there that two or more of them, who do not live together as husband and wife and who are aged ten or over and of opposite sexes, are forced to sleep in the same room. A room is any room normally used as either a bedroom *or* a living room and can include a kitchen if it is big enough to accommodate a bed. Moreover, the local authority has to consider possible use of the rooms rather than actual use, so if a couple with two children aged over ten of opposite sexes have a one- bedroom house with a living room, the room standard is not breached as the father can share a room with the son and the mother with the daughter.

The space standard limits the number of people permitted to live in any particular dwelling. This is done either by counting the number of rooms or by looking at room size. Two people can be accommodated in one room, three people in two rooms, five people in three rooms, seven and a half people four rooms and five rooms or more can accommodate ten people. Alternatively the space standard requires that a room to be occupied by two persons should be at least 110 sq ft in area (10.22 sq m), The corresponding minimum sizes for 1.5 persons, 1 person, and 0.5 persons are respectively 90, 70, and 50 sq ft (8.36, 6.50, 4.65 sq m). Under the space standard a child below the age of 1 does not count as a person and a child between the ages of 1 and 10 counts as half a person. Living rooms as well as bedrooms are included in the calculation, so even the increasingly small sizes of new build affordable housing discussed above are unlikely to fall below the standard.

## Enforcement

Breach of the overcrowding standards *may* trigger local authority action. Private and housing association landlords who rent out homes that fall below the standards can be prosecuted. Theoretically individuals could prosecute a local authority landlord who rented out a statutorily overcrowded property, but they would require the authority of the attorney general to do so and no such prosecutions have taken place. Local authorities have failed to use their powers under section 334 of the Housing Act 1985 to prepare and submit a report on the extent of overcrowding in their areas, nor have Governments used their powers to direct that such a report should be prepared.

There is an interesting interface between statutory overcrowding and the homelessness provisions of the Housing Act 1996. Under this legislation, if an applicant can demonstrate that they are homeless, that their homelessness is not intentional and that they are in 'priority need', a category that includes people with responsibility for children, pregnant women and those vulnerable because of old age or mental or physical poor health, a local authority has obligations to either provide or assist in the provision of accommodation. An applicant does not need to be roofless in order to be homeless; if the applicant has accommodation that it is not reasonable to continue to occupy, then they will be considered homeless. Statutory overcrowding has to be taken into account in decisions about whether it is reasonable for someone to continue to occupy their current accommodation. However, statutory overcrowding will not necessarily be determinative of statutory homelessness. Section 177 of the Housing Act 6 1996 allows a local authority to take prevailing local conditions into account when making its decisions about reasonableness. This might mean that if overcrowding is characteristic of the local area, then living in overcrowding conditions would not be unreasonable.

In addition, families who live in statutorily overcrowded housing may qualify for re- housing under Part 6 of the Housing Act 1996. Section 167 of that Act requires local authorities to set out priorities which include 'people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions'. Government guidance recommends that a higher standard, the

bedroom standard, should be used when assessing levels of overcrowding (DCLG, 2006). The bedroom standard, a statistical measure developed during the 1960s to provide a more realistic assessment of the prevalence of overcrowding, requires that homes have separate bedrooms for each of the following; a married or cohabiting couple, an adult aged 21 years or more, a pair of adolescents aged 10–20 years of the same sex, and a pair of children aged under ten years regardless of sex. But once again, breach of the standards, even the lower statutory standards, provides no guarantee of an allocation of housing. People in overcrowded housing have to compete with others in need of social housing and demand is high.

### Reform proposals

During the passage of the Housing Act 2004 there was a concerted effort by several MPs to update the overcrowding standards. The government introduced a clause to the Bill enabling the standards to be amended via secondary legislation. There has been no attempt since to introduce the necessary secondary legislation. Instead, reliance is placed upon the Housing Health and Safety Rating System. The problem with the HHSRS is that it is very difficult to get the necessary evidence that overcrowding is so severe that it causes a serious hazard to the occupiers. The other tool available to local authorities is licensing where they are assisted by prescribed minimum room standards for HMOS.

## 4. Reforming security of tenure in Scotland

The debates currently taking place about the abolition of 'no fault' evictions in the Renters Reform Bill are remarkably similar to the discussions in Scotland that preceded the passage of the Private Residential Tenancy (Scotland) Act 2016. In many ways this Act goes much further than the Renters Reform Bill in extending legal security of tenure for tenants. This is because it abolished no fault evictions, introduced indefinite tenancies and variable notice periods and made all grounds for eviction discretionary – thereby allowing a tenant to raise a defence in every eviction case. This reform operates in tandem with earlier reforms to the homelessness framework which place an obligation on landlords to inform the local authority where they plan to evict a tenant.[26]

The Scottish reforms were preceded by wide ranging debates involving the Scottish Association of Landlords (SAL), a national landlords association, and Living Rent, a national tenants' union, that were aired via an extensive government consultation process.[27] Concerns were raised that the changes, particularly the abolition of no fault evictions, would cause banks to stop lending to landlords, that it would cause landlords to 'leave the sector altogether, or sell their rental properties in Scotland and buy instead in England' and that the Tribunal system would be overwhelmed by the evictions case load.[28] Over seven years since the commencement of the Act, the evidence on these claims is mixed but suggests that these concerns were overstated.

There has been a decline in the size of the private rented sector which has declined from 15% (360,000 households) in 2017 to 13% (320,000 households) in 2022.[29] However, this cannot be simply attributed to the Act. During the same period, there have been increases in the size of the social rented sector, which reflects the abolition of the right to buy in Scotland and the increased

[26] The Homelessness etc. (Scotland) Act 2003

[27] E Walsh 'Security of tenure in the private rented sector in England: balancing the competing property rights of landlords and tenants' in B McFarlane and S Agnew (eds) *Modern Studies in Property Law, Volume 10* (Oxford: Hart, 2019) pp 212-214.

[28] Ibid, p 213.

[29] https://www.gov.scot/publications/scottish-household-survey-2022-key-findings/pages/3/

rates of construction of social housing in Scotland.[30] There are signs that landlords have exited the market through sales but it also appears that many landlords have exited the market by changing the use of their property to short term lets eg, via AirBnB, which are not subject to Private Residential Tenancy (Scotland) Act 2016.[31] In response, the Scottish government introduced the Short Term Lets Licensing Scheme which took effect in 1 October 2023. This requires operators to apply for a licence before accepting bookings and demonstrate compliance with mandatory conditions including the requirement of applying for planning permission where they operate in a short term let control arear.[32]

There is no evidence that banks have stopped offering Buy-to-Let mortgages to Scottish landlords, nor are there signs that such mortgages have become much more difficult to acquire. Indeed, it appears that such mortgage products continue to be offered in much the same way as before.[33] Equally, concerns that the new Tribunal system would be overwhelmed by the volume of eviction cases has not come to pass. Indeed, in an early study of the Tribunal, Malcolm Combe found that while the workload of the First Tier Tribunal has been high, there were positive signs 'about the transparency and clarity of reasoning in the published decisions, and the case management discussion do seem to provide a welcome opportunity for parties and indeed the FTT to address matters when they are usefully engaged'.[34]

## Conclusion

As the revival of the private rented sector has taken hold in England, the features of the sector have changed significantly. Many of these changes contradict the vision of private renting which underpinned deregulation by the Housing Act 1988. Far from a source of short-term housing to 'transitional' households, the private rented sector has become home to growing numbers of families with children, low-income households and vulnerable single households. The persistent unaffordability of ownership and the shortage of social housing mean that these households tend to stay for longer in the private rented sector.

The revival of the private rented sector has significant political implications, both nationally and at the local level. Approximately 19% of all households in England, and 29% in Southampton, now live in the private rented sector. The fact that there is a substantial constituency of voters now living in the private rented sector is reflected in the cross party consensus that has developed around the Renters Reform Bill which proposes to abolish 'no fault' evictions and extend security of tenure for renters.

In many ways the debates about the Renters Reform Bill in England echo the debates that took place in Scotland around the passage of the Private Residential Tenancy (Scotland) Act 2016. It is now nearly seven years since that reform was implemented and the evidence suggests that abolishing no fault evictions and extending legal protections against eviction did not bring about a collapse in the private rental sector, buy-to-let mortgage lending, or the workings of the First-tier Tribunal. However, the evidence suggests that national and local policy makers should be aware that reforms that strengthen security of tenure in the private rented sector will likely have wider implications – for

[30] https://www.gov.scot/publications/scottish-household-survey-2022-key-findings/pages/3/
[31] https://www.gov.scot/publications/short-term-lets-licensing-statistics-scotland-to-30-june-2023/
[32] https://www.mygov.scot/short-term-let-licences/legal-requirements-for-short-term-let-licences
[33] https://www.onlinemoneyadvisor.co.uk/buy-to-let/scotland/
[34] https://pure.strath.ac.uk/ws/portalfiles/portal/94892024/Robson_Combe_JR_2019_The_first_year_of_the_First_tier_private_residential_tenancy.pdf

instance there may be a rise in illegal evictions, new calls for regulation of short term lettings and demands for more supply of public and social housing.

The revival of private renting is inextricably connected to the homelessness crisis, that has worsened over the past decade, and has had major implications for local authorities. The ending of an assured shorthold tenancy is the main pathway into homelessness. The severe shortage of public and social rented housing means that local authorities have increasingly turned to temporary accommodation to meet their homelessness duties and expenditure by local authorities has risen to £1.74 billion by 2023. It is important to recall that temporary accommodation is a reactive, emergency measure and it not an appropriate long-term solution to homelessness. There is a vital need for local authorities to increase the supply of public and social rented housing.

The sharp increases in expenditure on temporary accommodation by local authorities in recent years demonstrates that there are major cost implications for local authorities that do not take proactive action to improve stability for private tenants. Of course, adopting a more proactive regulatory approach involving stock condition surveys, enforcement action at each level of the regulatory pyramid, and supporting tenant relation and homelessness officers preventing evictions and ensuring tenancies continue involves significant initial expense. However, once an integrated proactive approach is up and running, it can reduce costs for the local authority, particularly in terms of expenditure on temporary accommodation. Furthermore, private sector enforcement is self-financing in that fines raised are ring fenced for further enforcement activity. Finally, and most importantly, a proactive approach can help ensure greater stability for private tenants which can in turn lead to better educational and health comes for growing numbers of children living in the sector.