

Consultation response
Shelter Scotland
response to the
Scottish Executive
consultation on
'Regulations under
section 7 of the
Housing Scotland Act
2001'

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Shelter

Shelter Scotland response to the Scottish Executive consultation on 'Regulations under section 7 of the Housing Scotland Act 2001'

Introduction

Shelter welcomes the consultation on minimum rights for hostel dwellers. In this response, we answer specific questions asked in the Scottish Executive consultation paper, and follow this with a short section dealing with other issues relevant to the consultation.

Summary of main points

The regulations are a welcome strengthening of the rights of the thousands of people who live in temporary accommodation across Scotland. These new rights must be balanced with the safety of staff working in hostels and other forms of temporary accommodation.

We have concerns over the draft regulations, regarding:

- confusion over circumstances in which the regulations apply
- balancing the safety of staff with a realistic approach to behaviour that is acceptable from occupiers with support needs
- enforcement of the regulations
- lack of attention to the issue of abandonment
- issues relating to termination of occupancy
- circumstances where there has been a breach of the terms of occupancy either by the provider or the occupier.

Types of occupancy: regulations 3 and 4 and Terms of Occupancy and Written Agreements: regulations 7 and 8

Section 7 of the Housing (Scotland) Act 2001 and the consequent regulations were conceived as a response to the confused and unsatisfactory state of the law in relation to the rights of persons occupying hostels or other forms of temporary accommodation. In order to address this problem, the legislation provides that terms of occupancy agreements are to have certain minimum conditions, particularly in relation to termination of the right of occupation.

However, Shelter is concerned that the regulations and guidance (as drafted) fail to address the main issue in both *Conway* and *Denovan*¹: whether the hostel occupiers in those cases were to be regarded as occupying as tenants under a lease, or merely as licensees under an 'occupancy agreement'. Section 7(2) indicates that the regulations are not to apply in relation to occupation by the owner of the property, or by a tenant under the Housing (Scotland) Act 1988 or the Housing (Scotland) Act 2001. However, the Specified Occupancy regulations go further, by providing, at regulation 4(2)(b), that the new Occupancy Terms regulations are not to apply to cases where occupation is in terms of a lease.

Paragraph 18C of the consultation paper indicates that this is due to a desire to ensure that the regulations do not undercut the rights which tenants may have at common law. On one view, that is a logical approach. However, without any provision in relation the lease / licence distinction, it could be said that the legislation fails to tackle the main legal question: 'Where a person occupies accommodation under an contract with the accommodation provider which has some, or all, of the essential requirements of a lease at common law, but in circumstances which suggest that the agreement is not a lease, but merely a licence to occupy, what is the status of the parties' contract?' The law in this area is not at all clear, and the regulations do not resolve the existing confusion.

Beyond these general concerns, we believe there are a couple of potentially confusing issues relating to:

- the application of the Specified Occupancy Regulations and the related guidance
- the definition of an accommodation provider.

Application of the Specified Occupancy Regulations and the related guidance

Firstly, at paragraph 20 of the guidance the consultation states:

'It should also be noted that people living in a [sic] separate self contained houses will not come within the scope of the regulations unless the occupancy has come about as a result of a local authority discharging its duty under the homelessness legislation;'

This statement is misleading: most homeless applicants in self-contained accommodation are given leases (which are simply tenancies at common law because they are excluded from coverage under the 1988 and 2001 Acts) and would therefore not come under the scope of the regulations. In our view, the confusion is symptomatic of the difficulty created

¹ The issue of tenancy rights were raised in two separate cases in Glasgow in 1997: *Conway v Glasgow City Council* and *Denovan v Blue Triangle Housing Association*. Judgements in both cases were handed down in 1999.

by the fact that regulations 3 and 4 of the Specified Occupancy Regulations extend or exclude coverage in relation to various different aspects of the accommodation. If the regulations applied to a series of categories which all related to the legal relationship between the provider and the occupant, this would be more straightforward. However, in regulations 3 and 4 coverage is extended or excluded on the basis of (a) the legal duties of the provider; (b) the legal status of the occupier; (c) the nature of the accommodation; (d) the legal status of the contract between the parties; (e) the occupiers relationship, in fact, with the accommodation (main residence) etc. This creates a problem of overlapping categories and resulting confusion. We accept that to some extent this is unavoidable, but it is important that the guidance makes absolutely clear that the regulations should be read together and that certain cases, which appear to be covered by regulation 3, are excluded by regulation 4.

This confusion is revealed when we consider that the regulations fail to cover scatter flats. As written the regulations do not cover scatter flats because they are caught by the exception in Article 4(2)(b) – occupancy secured by a lease. Scatter flats as self-contained accommodation are common law tenancies whose terms are commonly defined by occupancy agreements as well as implied common law terms (eg minimum notice periods). They also attract the protections from illegal eviction contained in the Rent (Scotland) Act 1984. Is the intention to prevent scatter flats from being covered by the legislation? If not the regulations need to be amended in such a way as to include them. As written Para. 20 of the consultation guidance is misleading as it states that self-contained scatter flats provided in lieu of homelessness duties are covered by the regulations.

Secondly, the guidance must make clear that the exclusions in terms of regulation 4 should only be applied at the point when the accommodation commences. For example, the accommodation should not cease to be covered by the standard conditions because, in the view of the provider, the occupier is not using the accommodation as his main residence, at some point after the commencement of the accommodation.

Thirdly, according to the consultation, the Regulations cannot apply where the temporary accommodation is not the occupiers 'only or main residence'. The consultation guidance says that this is to avoid occupancy of a hotel or B&B for business purposes being caught by the definition of 'hostel' in Section 111 of the Housing (Scotland) Act 2001. There may be instances where a homeless applicant in temporary accommodation still has their 'main' residence elsewhere. For example where they are re-accommodated as a result of a flood or fire, or have fled their accommodation due to domestic violence and are unable to occupy the house in the short term only. In both cases their original accommodation could still be considered to be their main residence until it was clear that they could never return there. It is not inconceivable that a victim of domestic abuse would require

temporary accommodation until the Police have dealt with the perpetrator and that while this is being done their main residence is still the home they have fled from. This would render them ineligible for protection from the proposed regulations. This issue could be dealt with in the guidance or by amending the legislation to clearly detail the classes of occupancy you want to avoid being covered by the rather wide definition of hostel in Section 111. If the intention is to avoid inclusion of hotels and overnight business accommodation these should be explicitly mentioned as excluded categories or even more simply tie in the hostel category in Article 3(2)(c) to hostels provided in lieu of homelessness duties only.

The definition of an accommodation provider

The regulations provide that the occupant has certain rights owed to him by the 'accommodation provider'. This is defined in Article 6 as the 'individual or body providing the accommodation to the occupier'. This definition is a little vague given how certain kinds of homeless temporary accommodation are owned and managed. For example are the statutory terms enforceable against the council who has made a homelessness assessment and sought accommodation for the homeless applicant? In some sense have they not 'provided' the accommodation by securing it in lieu of their duties under Part II of the Housing (Scotland) Act 1987? Likewise accommodation may be managed by an organisation on behalf of the owner of the accommodation. The owner may have no active day-to-day part in the running of the accommodation. Clarification is required on whether the owner or the managing agency is deemed to be the provider.

Information: regulations 9 and 10

Shelter believes the regulations as drafted put too much onus on the *occupier* to proactively seek out sources of information and advice. Many occupiers have support needs or other factors making it more difficult for them to take the initiative in seeking out advice options. Instead there should be a requirement on all housing providers to ensure that adequate information is provided on independent advice, advocacy and legal services if termination of occupation is being considered.

Personal possessions: regulation 11

The effectiveness of this provision depends on the condition of the property. Guidance should therefore state that the provider works to ensure there is adequate secure storage area for the occupier's possessions.

The regulations make no reference to the provider's responsibilities to protect the occupier's property after termination of their right to occupy. Guidance should recommend that the provider protect the possessions of an occupier until they have been suitably rehoused. In cases of lost contact with former occupiers the provider should, in adherence

with best practice, retain personal possessions for up to three months from the termination of a notice.

Condition of accommodation: regulation 12

See our general comments under 'Breach by Provider'.

Use of Accommodation and Conduct of the occupier: regulations 13, 14 and 15

See also the concluding section on further terms/guidance required.

These regulations relate to the behaviour of dwellers, and set out standards of behaviour. However, the regulations must strike a balance between behaviour that is unacceptable in that it puts others at risk, while also reflecting the nature of hostel provision. Residents' need for short-term accommodation means that some individuals have high levels of support needs and exhibit challenging behaviour. In some cases, there is a responsibility on the provider to ensure that adequate support (from properly trained workers) is being given to the occupier, as such agencies are being funded to provide support/assistance to people with at times challenging behaviour. At present, the threshold for unacceptable conduct is unrealistic, and may unwittingly restrict the ability of providers to provide support and other services.

It is unclear what the Executive means by its use of the term 'immoral purposes' in this context. It is unclear what kind of behaviour it could be referring to, as it is distinguished from illegal activity. We are aware that such a term is used in relation to statutory tenants but remain unsure as to why it is being used in this context. We are concerned that some providers could wittingly or unwittingly, apply this term inappropriately. In the interest of fairness to occupiers we recommend that the term 'immoral purposes' is removed from the regulations, as it is both ambiguous and subjective in this context, and could be applied inconsistently across Scotland.

Conduct of the provider: regulation 16

Similarly, it is unclear in what circumstances it would be reasonable to restrict an occupier access to visitors, mail, telephone or personal possessions. Shelter believes that the current drafting of this regulation puts an unfair onus on the person occupying the accommodation to demonstrate that the provider is acting unreasonably.

It is our view that some large providers seek to restrict visitors and access to mail, telephone etc because of understaffing. In this context, we are concerned this regulation might formalise bad practice by some providers. Shelter accepts there may be genuine

concerns by some providers regarding criminal activity by occupiers. However, it should be the role of the police rather than hostel staff to investigate and monitor criminal activity.

It is not acceptable for providers to be given this degree of influence over an occupier's access to their own mail, etc. Moreover, it is unclear what redress an occupier would have to appeal such a restriction of their rights. The regulations do not outline any legal mechanism for the occupier to challenge such restrictions.

Entry: regulation 17

In relation to entry, the regulations give the balance of rights to the provider over and above those of the occupier. Again, we recommend that the term 'immoral purposes' be deleted from the regulation, as it is unclear how this is distinct from illegal behaviour. Without clarity on this point occupiers are likely to receive inconsistent treatment by providers.

In terms of access to an occupier's accommodation, the regulations as proposed would substantially restrict an occupier's right to privacy. We appreciate there may be a genuine conflict here between the duty of care imposed by support arrangements and the right to privacy of the occupier. However, we believe the intention of the regulation should be for an occupier to enjoy an equivalent right to quiet enjoyment of a property as a tenant, where twenty-four hour's notice is required before the landlord can gain access.

We are also concerned at the low threshold required for providers to enter an occupier's accommodation when there is 'reasonable cause to believe' the occupier is using the accommodation for illegal activity or there is serious danger of damage. The regulation in its current form appears to give more power of entry to hostel staff than to the police.

Termination of occupancy: regulation 18

Shelter has carefully considered the Executive's proposal for a sliding scale of notice periods for termination but we believe that termination should instead be related to the behaviour of the occupant. While specific grounds for termination may seem more complicated, the priority for the occupant is not so much simplicity as some degree of security. Furthermore, a subjective test regarding behaviour still exists, as the provider must decide where it is appropriate to evict without notice because of risk to others etc.

Occupiers require some minimum level of security linked to grounds for eviction. It does not seem reasonable that in normal circumstances providers should be able to end an occupancy agreement by a prescribed notice without any ground or reason. For this reason, an occupier should get a longer period of notice if there has been no breach of the agreement.

We therefore recommend the following:

- That where no breach of the occupancy agreement has occurred, an occupier should be given twenty-eight days notice period.
- Where breach of an occupancy agreement has occurred, notice period should be on a sliding scale, dependent not on the length of stay but on the severity of the behaviour.
- In addition we believe that the guidance to accompany this regulation should clearly stipulate that notices could only end during the daytime and never at night. Case law has previously established the principle that no *occupiers* should be evicted at night and we wish to see this clearly set out in the guidance on this regulation.

Linked to this issue are the occupier's need for suitable alternative accommodation and the need to inform the local authority so a homeless application/advice and assistance can be delivered. The regulations should prescribe that where a provider gives notice to the occupier (or summarily terminates occupation) the provider must formally refer the occupier back to the local authority for re-accommodation. This is in line with policy on homelessness prevention, and in particular with the policy intention of the provision in 2003 Act which places a duty on providers to inform the local authority where possession proceedings have occurred. It would ensure that every applicant gets a homelessness assessment and access to housing advice at the earliest opportunity.

Under the current proposals providers can serve a notice without any required explanation of why they are seeking to evict an occupier. In reality notices will often be served due to the perceived behaviour of the occupier but as it is not required that this be explicitly set out the occupier has no opportunity to challenge the basis of a notice served by the provider. We believe that the right to appeal a notice should be inserted in the regulations to give the occupier an opportunity to present their case, should they wish to do so, and also allow them the opportunity to be represented by an independent adviser or representative. As in homelessness appeals the matter would need to be considered by a person not directly involved in the original decision to serve a notice.

In cases of immediate eviction without the minimum notice period occupiers should be issued with a special notice explaining the reason for their eviction and outlining advice and information including the local authority homelessness section and an out-of-hours number.

Application to court and Notification: regulations 19 and 20

The effectiveness of the regulations relies on their enforcement. This section raises a number of questions about the ability of an occupant to challenge an eviction where a notice period has not been granted. It is not clear how the occupier or the accommodation provider can enforce their rights under the regulations in a practical and

efficient manner. Where a provider fails to adhere to the terms laid down by the regulations only criminal sanctions exist (Section 7(7) of the 2001 Act). Where an occupant is aggrieved by the provider's performance of the statutory terms they would have to report the issue to the Police, even for such minor transgressions as failure to provide a written agreement. It would then be for the Police to investigate and refer the matter to the Fiscals office for possible prosecution. This is the only mechanism for enforcement provided for by the act.

Shelter is aware of how few prosecutions occur under the criminal sanctions that apply to Illegal Eviction in the Rent (Scotland) Act 1984 and the lack of priority afforded to these offences by the Police. Relying on the Police and the Procurator Fiscal to enforce the (some times minor) terms of occupancy may be considered overly optimistic given the experience of private sector tenants in this regard, as well as disproportionate in regard to minor transgressions by the provider.

Section 7 has not created an adequate link to more accessible civil law remedies for either party to an occupancy agreement. (eg specific implement and damages). Ideally Section 7 requires to be amended to provide for civil remedies upon breach by the provider. These could be similar to Section 36 Housing (Scotland) Act 1988 - the right to sue for damages where an unlawful eviction has occurred.

A summary application to the Sheriff is likely to take up to 6 months to be heard. In practical terms the applicant will need to access alternative accommodation through the local authority under the Housing Act Scotland 1987 Part II before a Sheriff can hear the appeal.

Shelter seeks clarification on a number of issues here. Firstly, where the Sheriff finds that the provider did not have reasonable grounds to believe the occupier represented a serious danger, whether the Sheriff will be able to make an order for the defender to provide accommodation to the applicant. Secondly, where the Sheriff does not uphold the reasons given by the provider for the eviction, whether s/he should be able to order the provider to pay financial compensation to the applicant.

Further Terms/Guidance required

The following section raises some general legal issues in relation to the regulations that are not treated in the current consultation format.

Abandonment of accommodation

The regulations do not deal with the issue of alleged abandonment. This is a key concern for both providers and occupants in situations where an occupier may be away from the accommodation for a short period. In such a situation some providers may assume the occupant has vacated and re-let the accommodation to someone else. It would be useful for both providers and occupants if clarity is given on this issue, e.g. how long an occupant can be away from the accommodation before it is assumed they have quit, how an aggrieved occupier can take action where necessary, whether there should be an obligation on the provider to make enquiries, and how the provider would actually terminate in such a situation. Legal clarification is required on these points for the sake of providers and occupiers.

Breach by provider

In terms of section 7(7) of the 2001 Act, the provider is guilty of an offence if he fails, without reasonable excuse, to comply with any of the standard occupancy terms specified in regulations by the Scottish Ministers. This means, for example, that the provider will be guilty of an offence if he fails without reasonable excuse to provide accommodation that is wind and watertight both at the commencement of the occupancy and throughout the occupancy.

It seems appropriate at this point to make a comparison between the existing statutory provisions applying to leases (and other forms of occupancy), and the provisions for temporary accommodation now proposed by the executive, in relation to the effect of the breach of those provisions. As matters currently stand, there are criminal provisions in relation to illegal eviction (section 22 of the Rent (Scotland) Act 1984), the provision of tenancy agreements and rent books (section 30 of the Housing (Scotland) Act 1988). [There are other obligations on landlords giving rise to criminal liability (such as section 327 and 328 of the Housing (Scotland) Act 1987), but we draw attention to these two provisions in particular, because they are analogous to two of the regulations currently proposed.] The point is however, that there are existing obligations on landlords giving rise to civil liability, which are equivalent to obligations in the proposed regulations, breach of which would give rise to criminal liability, such as regulation 8, as noted above. We have two points to make in this respect:

The provision of substandard accommodation under a lease gives rise to civil liability, but provision of the same accommodation under an occupancy agreement subject to the

proposed regulations would give rise to criminal liability. The logic for this is difficult to follow. Shelter suggests that criminal liability should only arise in relation to actions that are analogous to existing criminal offences: i.e. illegal eviction, failure to provide a written agreement, and perhaps entry without consent.

By making a breach of the standard terms a matter of criminal, rather than civil liability, the Executive runs the risk of making the provisions less effective. Prosecutions in relation to the existing statutory offences by landlords and accommodation providers noted above are extremely rare. Accordingly, we do not anticipate that there will be many prosecutions under section 7(7) of the 2001 Act. We believe that it is essential that breach of any of the standard conditions should give rise to civil liability, being a claim for damages for breach of contract. This, together with the criminal liability attaching to breach of some of the regulations, would operate as a more effective deterrent against breach of the standard conditions.

Breach by occupier

The effect of breach by the occupant is even more problematic. There is no provision that indicates the effect of breach of regulations 9-11 by the occupier. The guidance tells us that the agreement can take up the issue of consequences of breach. In our view this fails to recognise that as the provider will frame the contract, he will naturally want to afford himself a number of options in the event of breach by the occupant. Therefore, practically speaking, the sanction for breach will inevitably be an option for the provider to terminate, being a provision analogous to an irritancy clause in a lease contract.

Before considering the imposition of obligations on the occupant as to conduct or use of the accommodation, it is important to appreciate the context in which that imposition is made. The important aspects of that context are as follows.

- Like leases, occupancy agreements usually have provisions in relation to duration, and provisions allowing termination, in the event of breach, prior to the expiry of that duration (irritancy clauses).
- Where demand for accommodation outstrips supply, it is in the interests of the accommodation provider to make the duration of the contract as short as possible, say a week. This is because: (a) the provider won't have difficulty finding another occupier / tenant if the existing occupant leaves; (b) short duration gives him more options in relation to termination. In particular, where he wants to end the agreement because he thinks the occupier is in breach of contract, he can terminate at the end of the next weekly period without having to give any reason, or having to satisfy anyone that there has been a breach of contract. This is why, for example, nearly all local authority leases for homeless persons in self-contained temporary accommodation (being excluded from the 2001 Act) are for duration of one week, or one fortnight. It should

hopefully be clear from this analysis that where an agreement is for a very short duration, irritancy clauses (or any other clause which allows termination in response to a breach) are, to some extent, superfluous.

- Therefore, where the occupancy agreement is going to be for a very short duration in any event, it is debatable whether the inclusion of obligations as to conduct or use on the part of the occupant make any significant difference to the parties' position.

A further problem is the effect of section 7(3) on regulations as to conduct.

- Section 7(3) says that the regulation will specify the terms that are to have effect in agreements of this type.
- Section 7(3) also says that any agreement has no effect so far as it is inconsistent with the terms provided by the regulation.
- Regulations 9-11 are headed 'Use of accommodation' and 'Conduct of Occupier'. They specify the extent of the obligations incumbent on the occupier as to use and conduct.
- Therefore, any obligation as to use and conduct which places a further, or more onerous obligation on the occupant, must be inconsistent with the regulations, and therefore of no effect.
- Accordingly, any term which requires that, for example, the occupant co-operates with support; does not damage his room; returns and leaves the accommodation before or after certain times of the day etc; being rules in relation to use and conduct which are not specified in regulations 9-11, are of no effect.

This argument, the force of which clearly depends on one's interpretation of the word 'inconsistent' as it appears in s.7 (3), would also be applicable to terms of the occupancy agreement which relate to the conduct of the provider.

The conclusion we draw from these considerations is that standard provisions as to the conduct of the occupier may raise more problems than they solve. The issue of these conditions needs to be reconsidered, so that, in particular, the relationship between breach by the occupant and termination by the provider is clear, and the extent of further obligations that might be imposed on the occupant is resolved.

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