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TENLAW: Tenancy Law and Housing Policy in Multi-level Europe

Intra-team Comparison Report for ENGLAND & WALES, REPUBLIC OF IRELAND, SCOTLAND

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1. The current housing situation

1.1. General Features

Housing is central to the life of every person. Everyone needs somewhere to live whether the accommodation is owner occupied or rented. This comparative report examines the housing situation in England and Wales, Scotland and the Republic of Ireland. One hundred years ago these countries formed a single political union governed directly from Westminster. This gave rise to much commonality in housing matters however since then there has been a diaspora of political autonomy from Westminster, first to Ireland which separated in 1922 and became increasingly independent, then later to Scotland and Wales through devolution since 1998. This has had far more radical effects than could have been imagined as increased political autonomy from the United Kingdom has been exercised first in Ireland, then Wales and Scotland especially in the housing field.

In describing the development of the housing situation across Great Britain and Ireland five strands can be drawn together. Beginning with the development of public housing powers which can be traced to the response to the mass industrialisation, which occurred in Great Britain during the 18th and 19th centuries, when the population began to expand at an unprecedented sustained growth.¹ Factors motivating the public intervention were both a desire to improve public health and a paternalistic concern to improve the appalling standards of housing endured by the working classes in the major industrial cities as to overcome the chronic overcrowding.² These evolved, first in Great Britain then later in Ireland, into comprehensive powers for modern local authorities including for example powers to close uninhabitable properties, relief of overcrowding and the licensing of Houses in Multiple Occupation.³ The second strand is the influence of private sector security of tenure contained in the Rent Acts from 1915 to the 1980s. The First World War can be seen as the origin of modern housing law throughout Britain and Ireland. At this time the vast majority of the population lived in rented accommodation. The war effort led to further industrialisation which resulted in severe housing shortages in parts of the United Kingdom. In response to civil unrest the Government introduced a system of rent regulation which capped rents at below market rate and granted tenants strong security of tenure. Details fluctuated over the years as political control changed hands however by the 1970s more people owned than rented. The controls on the rented sector restricted the rent a landlord could charge and this contributed to the reduction in value of property subject to residential tenancies. Arguably, this caused the decline over the years of many properties into slum condition, as landlords were increasingly unable to get a sufficient return on their investment to fund repairs. The third strand is the development of mass public sector provision from the early 20th century through to the 1980s. During the early 20th century Governments came under increasing pressure to intervene on behalf of those households unable to afford their accommodation. Both Britain and Ireland started with the direct provision of housing by public authorities. The dominance of the public rented sector began to give

¹ D. Mullins & A. Murie, *Housing Policy in the UK* (New York: Palgrave Macmillan, 2006), 13.

² J.F. Kitto, 'One-roomed Homes', a paper given at a meeting of the Church of England Sanitary Association, (Manchester, 1893).

³ Housing Act 1985, a consolidation of earlier powers, widely amended since. In Ireland these powers were contained in the Housing Acts (1966-2011).

way however after the mid-1970s. This was compounded by the large take up of tenant purchase schemes, in Ireland in 1966 and in Great Britain the late 1980s. These gave tenants of local authorities the opportunity to purchase their home at a discounted rate. Fourthly, modern tenancy law in Great Britain begins, essentially, with the Thatcher Government of the 1980s. Market reforms in the private rented sector led to the introduction early in 1989 of the assured tenancy under which the landlord could charge market rents.⁴ The default form of tenure is now the assured shorthold, under which the tenant has a short contractual fixed term of at least six months but the tenant does not enjoy long term security of tenure. In Ireland the system of rent regulation came to an end in 1982 after it was declared unconstitutional by the Supreme Court.⁵ While market rents prevailed once again it was not until the introduction of the Residential Tenancies Act 2004 (RTA 2004) that the current syntax of Irish tenancy law was established, based on implied terms, market rates and security based on rolling four year cycles.

The final strand concerns the introduction of local authority tenant purchase schemes and the social provision of affordable housing. The former occurred earlier in Ireland with the passing of the Housing Act 1966 however unlike Great Britain where the tenant purchase scheme was underpinned by the secure tenancy (which carried full residential security of tenure and succession rights) the introduction of the tenant purchase scheme in Ireland was not underpinned by a dedicated tenancy which carried full residential security or succession rights and instead local authorities operated a discretionary power to sell.⁶ In Great Britain the secure tenancy was crafted in the 1980s in order to provide tenants with the Right to Buy. In spite of the differences both schemes proved highly popular. In spite of the large scale sale of housing stock local authorities continue to play a key role in the social provision of affordable housing. In this respect allocation arrangements have been formalised and in Britain a right to housing has been conferred on those who were homeless in 1977 with functionally comparable though not justiciable homelessness legislation following in Ireland in 1988.⁷ In Britain Government policy has shifted since that time to the provision of affordable housing through the social sector. Funding for new housing was focussed on housing associations and encouragement was given to mass transfers of public sector stock to housing associations. Ireland provides a strong contrast since local authority housing remains the main provider of housing with a public task although the social housing sector has been identified as being of key importance in future provision of social housing supports. Across both Islands the public and social sectors have been affected very substantially by the direct incorporation into English and Irish law of the European Convention on Human Rights,⁸ public landlords are directly affected and social landlords more peripherally.⁹

⁴ Housing Act 1988.

⁵ *Blake and others v Attorney General* [1982] IR 117.

⁶ Kenna, *Housing Law Rights and Policy*, pp. 798, 799.

⁷ In the UK this legislation engenders innumerable reported cases each month about issues such as the suitability of the accommodation offered and has proved highly controversial in the UK.

⁸ Human Rights Act 1998, European Convention on Human Rights Act 2003 (Ireland).

⁹ Incorporation has provoked a tidal wave of litigation disproportionate to the actual changes to the land brought about by human rights arguments. Also see *Donegan & Gallagher v. Dublin City Council* [2012] IESC 18 where a declaration of incompatibility was made in respect of a local authority eviction procedure.

1.1.2. Current situation

In 2011 across Britain and Ireland there were approximately 28.2 million dwellings, of which the vast majority were owner occupied (18.3 million) while the remainder was rented (9.9 million). The majority of rented dwellings were in the private rented sector (4.9 million), followed by the social rented sector (2.7 million) and finally the public rented sector (2.3 million). These trends are largely followed across the jurisdictions of England and Wales, Scotland and the Republic of Ireland with one major exception being that public renting remains dominant in Ireland, far outstripping social renting.¹⁰ In a number of important respects the housing situation is unsatisfactory from a tenant's perspective. In particular, there is a gross undersupply of various forms of dwellings with a public task across Britain and Ireland (see section 4.3.1 below). While concerted efforts have been made to improve housing quality in the rented sectors, most notably in Scotland and England and Wales, there remains significant housing quality concerns (most notably enforcement of repairing obligations) which have not been adequately addressed in both Islands (see section 3.1.1 below).

1.1.3. Types of housing tenures

At this most basic point of housing law there is no longer a commonality across England, Wales, Scotland and Ireland:

In England classification is based on the purpose for which housing is provided. This is a by-product of the reorganisation of the regulation of social providers recommended by the Cave Report, implemented and already largely undone in the recent bonfire of the Quangos.¹¹ The crux of the new classification scheme appears in sections 68 and 69 of the Housing and Regeneration Act 2008, where three concepts are introduced: public/social housing – low cost accommodation consisting of the following two sub-categories; low cost rental accommodation (accommodation made available to rent below the market rate and to people selected because their needs are not met adequately by the commercial housing market); and low cost home ownership accommodation – consisting of various forms of tenure intermediate between full ownership and rental. The classification imposed in 2008 needs to be superimposed onto the traditional classification by which tenures were classified solely by the character of the landlord. England has four categories: Private landlords (18.5% of total households): these operate in a regime of market rents and grant assured tenancies, almost always in fact assured shortholds which lack long term residential security. Housing associations (when acting as private landlords); a small percentage of housing association stock is let at market rents using assured shortholds. Public landlords (7.6% of total households) – local housing authorities letting publicly owned housing stock; they grant secure tenancies with long term residential security at affordable rents and finally social landlords (9.9% of total households) – these were formerly known as Registered Social Landlords and now as Private Registered Providers of Social

¹⁰ 'Housing Statistics 2013' (London: Department for Communities and Local Government, 2011) Table 104 Dwelling Stock by Tenure (Historical Series), England and Table 106; Central Statistics Office, *Census 2011: Profile 4 The Roof over our Heads - Housing in Ireland* (Dublin: Stationery Office, 2011), Table 4.

¹¹ Respectively *Cave Review of Social Housing Regulation* (London: Department for Communities and Local Government, 2007); Housing and Regeneration Act 2008 Part 2; Localism Act 2011 ss 178-179.

Housing; they grant assured tenancies with full residential security but at affordable rents. So in essence the two sectors are characterised by market rents (the private sector) and low cost or affordable rents with a maximum of 80% of the open market rent (public/social housing).

The restructuring of the public/social housing market that took place in 2008 does not apply to Wales,¹² so the framework established in the Housing Act 1996 continues to apply. This creates basic sectoral divisions based on the character of the owner and of landlords. In Scotland, as in Wales, the basic sectoral divisions are based on the character of the owner and of landlords. The rented sector is divided private landlords (14% of total households); these operate in a regime of market rents and grant assured tenancies, almost always in fact short assured tenancies which lack long term residential security. Local authorities, New Towns, Scottish Homes (13% of total households); local housing authorities letting publicly owned housing stock; they grant secure tenancies with long term residential security at affordable rents and finally housing associations/Registered Social Landlords (11% of total households); (when acting as private landlords); a small percentage of housing association stock is let at market rents using short assured tenancies.

This is roughly the same in Ireland where the rented sector is divided into private landlords (19% of total households) which operate in a regime of market rents and grant tenancies which are almost universally governed by the Residential Tenancies Act 2004. After 6 months continuation without a valid notice of termination being served, such tenancies become Part 4 tenancies with security for a further 3 and a half years which will automatically renew at term without further action. Next, there are local authorities (7.8%), which grant local authority tenancies with differential rents linked to the tenant's ability to pay, periodic tenancies are common and security is limited. Finally, there are voluntary and co-operative housing bodies (0.1%). These may grant tenancies governed by the Residential Tenancies Act 2004 or non RTA tenancies, in the case of non RTA tenancies a below market rent is charged and security is limited.

In terms of housing types, these are common across both Britain and Ireland, but the prevalence of certain housing types within the various housing systems varies widely. In 2011 in England and Wales over half of all homes in England were terraced or semi-detached houses, a fifth were detached houses and a tenth were bungalows. The remaining fifth were flats, mainly purpose built low rise flats. This trend is exaggerated in Ireland where about nine tenths of housing units were houses,¹³ whether detached, semi-detached or terraced, while a tenth were flats or apartments in a purpose built or converted block.¹⁴ In contrast to England and Wales and, particularly, Ireland, While Scotland's housing situation continues to be characterised by the presence of high levels of flats or apartments (about two fifths) and the low levels of detached housing units (a fifth).¹⁵

¹² Housing and Regeneration Act 2008 ss 59-60.

¹³ On average in Ireland detached housing contain 6.3 rooms per households, while flats or apartments contain 2.9 rooms per households.

¹⁴ Central Statistics Office, *Census 2011: Profile 4 The Roof over our Heads - Housing in Ireland* (Dublin: Stationery Office, 2011) p. 10.

¹⁵ *2011 Census: Key Results on Households and Families, and Method of Travel to Work or Study in Scotland - Release 2C* (Edinburgh: Scottish Government, 2013), p. 7.

In England and Wales the profile across the tenures varied considerably: some quarter of owner occupied homes were detached houses, while one tenth of private rented sector dwellings were converted flats. In the local authority sector, about a half of dwellings were purpose built flats. The prevalence of renting in flats or apartments is common to both Ireland and Scotland. In Ireland renting has long been the most common tenure category for both apartments and bedsits. Around three fourths of apartments in 2011 were rented. This far surpasses the rental rate for other types of housing – about a tenth of detached houses and roughly a third of semi-detached and terraced houses were rented in 2011.¹⁶ In Scotland this is also the case, roughly two thirds of private rented dwellings and housing association dwellings were flats, while local authorities own roughly equal numbers of houses and flats.¹⁷

The age profile varies by tenure type with private rented sector having the largest proportion of pre-First World War stock and local authority stock falling into the post-Second War period up to 1980, and housing associations having by far the greatest proportion of post-1990 stock.¹⁸ This is comparable to the situation in Scotland where almost all properties owned by local authorities were built between 1920 and 1982, while about half of housing association dwellings were built in this period and around 40% are more recent. By contrast, more than half of private rented flats were built before 1919.¹⁹ However, in contrast to Britain, Ireland has a much higher proportion of newer dwellings. Roughly one third of the national housing stock has been constructed since the turn of the 21st century and just under half of all stock has been constructed since 1991. As such the high levels of housing construction which took place from the 1950s onwards resulted in Ireland having a high proportion of new housing.²⁰ The average dwelling size varies across Britain and Ireland. In England the average dwelling had a total usable floor area of 91m². However, this varied by tenure, from an average of 103m² in the owner occupied sector to 74m² for private rented dwellings and 63m² across the social rental sector. On average, those built before 1919 were the largest dwellings, with a mean useable floor area of 102m².²¹ In Scotland the average flat has an internal floor area of 84 m².²² In Ireland the average (useful floor area) size of an Irish dwelling was 104 m² in 2003.²³

¹⁶ Central Statistics Office, *Census 2011: Profile 4 The Roof over our Heads - Housing in Ireland* (Dublin: Stationery Office, 2011) p. 11.

¹⁷ 'Scottish House Conditions Survey 2012 - Key Findings' (Edinburgh: Scottish Government, 2013), para 29.

¹⁸ 'English Housing Survey: Homes 2011' (London: Department for Communities and Local Government, 2013) para. 1.2 and fig. 1.1.

¹⁹ 'Scottish House Conditions Survey 2012 - Key Findings' (Edinburgh: Scottish Government, 2013), para 29.

²⁰ Central Statistics Office, *Census 2011: Profile 4 The Roof over our Heads - Housing in Ireland* (Dublin: Stationery Office, 2011) p. 10.

²¹ 'English Housing Survey: Homes 2011' (London: Department for Communities and Local Government, 2013) para. 1.2 and fig. 1.1.

²² 'Energy Use in the Home Measuring and Analysing Domestic Energy Use and Energy Efficiency in Scotland' (Edinburgh: Scottish Government, 2012), para 62.

²³ 'Ahern, C., et al., State of the Irish housing stock—Modelling the heat losses of Ireland's existing detached rural housing stock & estimating the benefit of thermal.... Energy Policy (2013), p. 2.

1.1.4. Other general aspects of the current housing situation in comparative perspective

Across Britain and the Republic of Ireland there are established national associations representing providers of private rented accommodation. Landlords in England and Wales are represented by the National Landlords Association, in Scotland by the Scottish Association of Landlords and the Republic of Ireland by the Irish Property Owners Association. The situation is markedly different with regard to tenant representation as there are no national associations in Britain and Ireland to represent the interests of private rental tenants. This is particularly unusual in a European context and sets these Islands apart as having perhaps the least developed tenant representation framework in Western Europe.

Vacancy rates are broadly similar across Great Britain but the picture is radically different in Ireland. Taking Britain first; in 2011 about 3.9 per cent of dwellings in Scotland²⁴ were vacant compared to 3.1% in England and Wales.²⁵ This is in sharp contrast to the high vacancy rate in the Republic of Ireland in recent years: In 2011 the vacancy rate, including holiday homes, was recorded as 14.5% of total housing units. If holiday homes are excluded then the vacancy rate dropped to 11.5%.²⁶ Following the onset of the economic crisis new property taxes, the main one being the Local Property Tax, have been introduced making it more expensive to hold a second property or leave a dwelling vacant.

It is difficult to provide a definitive picture on the presence of informal economies in the British and Irish rental markets. Black market phenomena do not appear to be particularly prevalent but the absence of meaningful statistics do not allow for a more detailed examination of the extent of real market activity. In England and Wales there appear to be two particular problems which might be described as black market phenomena. First, there is a problem of severe overcrowding of low-quality rental properties in defiance of Houses in Multiple Occupation controls, as well as the phenomenon of 'beds in sheds'; ie turning garages, sheds etc into very basic dwellings.²⁷ Second, there is unauthorised sub-letting of social sector housing, whereby the tenant charges sub-tenants a significantly higher rent than s/he is paying. New offences have been introduced by the Prevention of Social Housing Fraud Act 2013 as of October 2013, in respect of subletting without consent. In Scotland there have been a number of reports which suggest that various informal economic activities take place in the Scottish rental market. Perhaps the most pressing instance of an "informal economy" is the letting of substandard accommodation and the practice of letting agents requiring unlawful pre-tenancy payments.²⁸ In Ireland various informal economy activities have

²⁴ 'Housing Statistics for Scotland - Key Information and Summary Tables' (Edinburgh: Stationery Government, 2013), see chart for estimated stock of dwellings by tenure: 1993 to 2011.

²⁵ 'English Homes Survey 2013' (London: Department of Communities and Local Government, 2013), para. 1.12.

²⁶ Central Statistics Office, *Census 2011: Profile 4 The Roof over our Heads - Housing in Ireland* (Dublin: Stationery Office, 2011), p. 7.

²⁷ www.gov.uk/government/news/major-clampdown-launched-on-beds-in-sheds. In the nature of things data on the size of the problem are not available.

²⁸ Imposition of a prohibited premium can have both civil and criminal consequences: Rent (Scotland) Act 1984 Part VIII and the Housing (Scotland) Act 1988 s 27, but amended and considerably strengthened by the Private Rented Housing (Scotland) Act 2011 s. 32 and the Rent (Scotland) Act 1984 (Premiums) Regulations 2012. See section 6.2 below..

been reported in the rental market, including the payment of “supplementary rent payments” by private tenants in receipt of rent supplement as well as letting of substandard accommodation.²⁹

1.2 Economic factors in comparison

1.2.1. Comparative view of the housing market

Taking a long term view the housing market in England is characterised by steadily rising prices, and this is true to a lesser extent of Wales and Scotland. The development of the housing market in the Republic of Ireland in recent years is characterised by a period of rapidly rising prices followed by a dramatic house price crash in 2007 with prices continuing to fall until about 2013 when prices began to increase once again. Between 1997 and 2007 the average price of a house increased almost three-fold in England, Wales and Scotland³⁰ and four fold in Ireland.³¹ The banking crisis of 2006 and 2007 produced a sharp correction after which prices continued to fall, but in 2013 growth resumed in England, Wales and Scotland, stimulated in part by the Help to Buy scheme. In the Republic of Ireland growth was slower to return and it was not until 2014 that it became clearly apparent that house prices were increasing consistently in certain parts of the country, most notably Dublin. In the late 1990's and early 2000's there was significant economic growth in Great Britain and Ireland. This was a period when there was intense competition between mortgage lenders for revenue and market share, as well as easy credit conditions resulting in subprime lending. This was accompanied by growth in the housing market across both islands, prior to the economic crunch that followed from 2007.³² The decline in house prices was a response to reduced mortgage availability and stricter lending criteria, a major reason for the low level of housing transactions. The sharp drop in house prices at the onset of the housing crisis in 2007 was accompanied by a sharp drop in market activity. This was particularly exaggerated in Ireland where from 2007 the Irish economy declined sharply and nationally property prices fell by about a half from 2007 to 2012³³ while the supply of new dwellings dropped from 80,000 units a year in 2006 to just over 10,000 units in 2012. However, since 2013 property prices stabilised with certain urban areas, particularly in Dublin, recording

²⁹ Threshold, *Annual Report 2012*, (Dublin, Threshold, 2012), p. 22.

³⁰ There is a huge quantity of data on house prices, including indices provided by the Land Registry, the National Statistics Office, Her Majesty's Revenue and Customs and the Nationwide Building Society. Much of the data is contradictory and very different 'averages' are obtained from different methods of sampling. National figures are largely meaningless because of the wide regional variations. General house prices lie outside the scope of this study. For Scotland see 'Scottish Housing Market Review' (Edinburgh, Scottish Government, 2012), pp. 1. The former is mix adjusted whereas the latter takes the raw unadjusted data. The mix adjusted figure for the UK was £233,000.

³¹ Central Bank of Ireland, *Address by Deputy Governor Stefan Gerlach at the Berlin Finance Lecture, Berlin, 14 January 2013, Ireland: From Crisis to Recovery* (Dublin, Stationery office, 2013), p. 3.

³² R. Barrell, S. Kirby & R. Riley, 'The Current Position of UK House Prices', *National Institute Economic Review*, 189 (2004), 1: 57-60; G. Cameron, J. Muellbauer & A. Murphy, 'Was There A British House Price Bubble? Evidence from a Regional Panel' (London: Centre for Economic Policy Research, Discussion Paper 5610, 2006).

³³ Central Bank of Ireland, *Macro-Financial Review 2012* (Dublin, Stationery office, 2012), p. 16. A. Kennedy & K. McQuinn, *Why are Irish house prices still falling* (Dublin, Central Bank of Ireland, 2012), p. 8.

property price and rent increases.³⁴ In England and Wales, but not Scotland and Ireland, repossessions increased in proportion to the economic downturn reaching its peak in 2009,³⁵ and many homeowners lost their homes. A spike in repossessions did not appear in Ireland mainly due to inadvertent repeal of certain mortgage laws,³⁶ reform of the lenders' voluntary codes of practice on arrears management which gave indebted homeowners extended periods of grace. In Great Britain the fall in house prices was mitigated to some extent by government measures to stem the tide of fall in house prices. The Bank of England sought to extend liquidity to lenders³⁷ and a review of the lenders' voluntary codes of practice on arrears management as part of the efforts of the state to stabilise the market.

There is a gross under supply of housing with a public task across Britain and Ireland. In England and Wales there were around 1.85 million households on local authority waiting lists on 1st April 2012 across the UK³⁸, a figure which has risen consistently every year since at least 2001.³⁹ The numbers on the Scottish housing waiting list also indicate that housing supply does not meet demand. In Ireland both rents and house prices increases in the last year have been attributed to insufficient housing supply.⁴⁰ Both indicators have been taken to suggest that the current supply of housing may not be sufficient to meet existing demand.⁴¹ Indeed there have been calls for a threefold increase in the supply of housing to meet the high demand for housing.⁴²

1.2.2. Comparative view on price and affordability

Across Britain and Ireland outlay on housing was highest in the private renters, followed by owner occupiers and then social renters.⁴³ There have been sharp increases in average rents across these islands with particularly rapid increases recorded in London. Currently (2014) the average private sector rent in England and Wales is £707 per month, but average rents in the capital were £1417 a month. Rents across England and

³⁴ Central Statistics Office, *Residential Property Price Index September 2013* (Dublin, Stationery Office, 2013), p. 1. However, property prices may not yet have stabilised in the rest of the country. See Daft.ie, *The Daft.ie House Price Report 2013 in review* (Dublin, Daft.ie, 2013), p. 6. Also see Private Residential Tenancies Board/ESRI, *Rent Index 2013 Q4* (Dublin: Stationery Office, 2014).

³⁵ C. Randall, *Housing* (Office for National Statistics, 2011), 22; C. Whitehead, *Private Rented Sector in the New Century: A Comparative Approach* (Cambridge: University of Cambridge, 2012), 115-116.

³⁶ *Start Mortgages & Ors v Gunn & Ors* [2011] IEHC 275. See 'Report of the Expert Group on Repossessions' (Dublin: Department of Justice, 2013), p. 5. The Land and Conveyancing Law Reform Act 2013 was enacted to ensure the continued application of certain repealed provisions.

³⁷ Bank of England 'Special Liquidity Scheme: Information', www.bankofengland.co.uk/publications/Pages/news/2008/029.aspx, 22 January 2013.

³⁸ "Government releases housing statistics for 2011-12: so what's new?", <http://socialhousingwatch.co.uk/government-releases-housing-statistics-for-2011-12-so-whats-new/>, 13 August, 2013.

³⁹ 'Local Authority Housing Statistics 2010-11' (London: Department for Communities and Local Government, 2013).

⁴⁰ Central Statistics Office, 'CSO Residential Property Price Index December 2013' (Dublin: Stationery Office 2014). *The Private Residential Tenancy Board Rent Index 2013*, (Dublin: Stationery office, 2013)

⁴¹ Economic and Social Research Institute, 'Quarterly Economic Commentary – Winter 2013' (Dublin: Stationery Office, 2013), p. 8.

⁴² Economic and Social Research Institute research professor John FitzGerald called for a return to construction of 25,000 houses per year at the Trinity Economic Forum in February 2014.

⁴³ 'English Housing Survey 2011-12 (London: Homes and Communities Agency, 2013); H. Meyer, 'Cost of Renting Outstrips Inflation in England and Wales', *Guardian*, 21 June 2013. See also 'Review of the Private Rented Sector Volume 1' (Edinburgh, Scottish Government Social Research, 2009).

Wales are rising quicker than the rate of inflation; the average is forecast to rise to £800 a month by the middle of 2015 which would represent a 21% rise on 2010. The Scottish Household Survey (2009)⁴⁴ found that the average rent paid by a private renter in Scotland in 2008 was £403 per month.⁴⁵ In the past four years rents have increased significantly. Citylet is one of the largest property marketing services in Scotland and provides a quarterly review of the private rental market in Scotland. In the first quarter of 2013, Citylet recorded that the average Scottish rent nationwide was £675.⁴⁶ In Ireland after the onset of the economic recession rents nationally fell by about a quarter until early 2011 when rents began to stabilise. From then on rents were relatively flat until late 2013 when rents began to increase again, albeit at a low level. The average monthly rent paid by a private renter nationally in the fourth quarter of 2013 was €772.⁴⁷ Rents have been consistently higher in Dublin (€1059 in 2013) than rents in the rest of the country and indeed rents in Dublin have recovered much quicker than rents in the rest of the country.⁴⁸ Across Britain and Ireland it would appear that most renters wish to purchase.⁴⁹ Since house prices have risen strongly there has been an overwhelming incentive to buy whenever this was possible in order to participate in the capital gain that arises on most houses over time. Those who choose not to, or are unable to, buy find themselves locked out of the housing market permanently. At the height of the property boom in 2007 the Scottish Government commissioned a study on the housing aspirations of Scottish households.⁵⁰ The study found that just 10% of respondents would ideally prefer to rent their home and the overwhelming majority said they would prefer to own. Almost all owner-occupiers, four in five private renters and three in five social renters said they would prefer to own their home.⁵¹

1.2.3. Tenancy contracts and investment

Residential investment seeks both capital appreciation and, rental yields. According to one commercial Buy to Let index, gross yields on a typical rental property in England are 5.3%, but taking into account capital accumulation and void periods total returns rose to 8.9% in November 2013.⁵² Potential yields vary regionally. They fluctuate wildly over time especially when capital appreciation or depreciation is taken into account. With the strong house price inflation recorded during the late 1990s and early 2000s, rental dwellings proved to be a highly attractive in this respect. However with the onset of the economic crisis the potential for capital appreciation was severely curtailed as the

⁴⁴ 'Review of the Private Rented Sector Volume 1' (Edinburgh, Scottish Government Social Research, 2009).

⁴⁵ *Ibid.*

⁴⁶ 'Maximising Yields and Happier Tenants: Working smarter in Scotland's Rental Sector' (Edinburgh, Citilets, 2013), p. 3. (data is mix adjusted).

⁴⁷ *The Private Residential Tenancy Board Rent Index 2013*, (Dublin: Stationery office, 2013) p. 12 .

⁴⁸ Private Residential Tenancies Board/ESRI, *Rent Index 2013 Q4* (Dublin: Stationery Office, 2014), p. 6.

⁴⁹ See below 2.7, pp 48-50.

⁵⁰ S. Clegg, A. Coulter, G. Edwards & V. Strachan, 'Housing Aspirations' (Edinburgh, Scottish Government, 2007).

⁵¹ *Ibid.*, para 4.3.

⁵² LSL Buy-to-Let Index, 20 December 2013; the average return in gross terms was £14,592, with rental income of £8,243 and a capital gain of £6349. Clearly the picture would be very different if house prices were not rising so sharply. Earlier versions of the index show the changes over time. Another survey by BM Solutions reported in the *Guardian* 26 February 2014 suggests 5.5 throughout 2013. A figure of 2.8% for 2010 is given in C. Whitehead, *Private Rented Sector in the New Century: A Comparative Approach* (Cambridge: University of Cambridge, 2012).

property price and construction booms ended with falls in property prices eroding some of the value gained in the last 10 years.⁵³ However in recent years house prices have once again begun to increase across these islands with particularly strong growth in England. The liberal regulation of the private rented sector in Britain increases the attraction of the sector as this scheme allows landlords charge market rents and does not provide strong security to the tenant.

1.2.4. Other economic factors

The role of estate agents is broadly the same across Britain and Ireland though the extent to which they are regulated varies greatly. Different types of agencies operate in the housing market, ranging from those that find tenants for properties or connect tenants to landlords, and manage properties to those involved in sales. Agents whose primary business is connecting landlords to potential tenants are called letting agents. Their services include drawing up tenancy agreements, collecting references etc. The only regulations for rental agents in England may be for those who are members of the Property Ombudsman Scheme or who have registered with the Property Ombudsman Scheme under the Office of Fair Trading Approved Estate Agents Redress Scheme. Firms who are members follow the Property Ombudsman Scheme Code of Practice for Residential Sales. Lack of regulation of lettings agents is a significant problem, particularly in respect of the excessive charges for basic administration.⁵⁴ In Scotland regulation of letting agents is largely centred on voluntary codes of practice and rules of conduct. All private landlords operating in Scotland must register themselves, and each of the properties they are renting, with the relevant local authority under the landlord registration scheme. Under this scheme landlords, and any agent appointed to manage the property, must pass a fit and proper person test. The charging of illegal premiums has contributed to the Scottish Government decision to reconsider regulation of letting agents.⁵⁵ In Ireland the Property Services Regulatory Authority was set up in April 2012,⁵⁶ to regulate, control and supervise auctioneers, estate agents, letting agents and management agents and to enforce standards within the property industry. When evaluating the different systems regulating estate agents it is clear that the system in England falls behind those operating in Scotland and Ireland particularly with regard to registration and dealing with illegal fees.

Effects of the current crisis in comparative perspective

In Britain and, particularly, Ireland the mortgage market expanded during the early 2000s, as low interest rates in combination with financial innovation by lenders combined to reduce barriers to accessing credit. The proportion of homeowners who own with a loan or mortgage is remarkably similar across both islands. In 2011 just over a half of owner occupiers in England and Wales,⁵⁷ Ireland⁵⁸ and Scotland⁵⁹ held their

⁵³ Access to credit has been constrained while the supply of new houses has halved since the onset of the recession. See above section 1.4 above.

⁵⁴ W. Wilson & C. Fairbairn, 'Regulation of Private Sector Letting and Managing Agents' (House of Commons, Library Standard Note SN 060000).

⁵⁵ 'A Place to Stay, a Place to Call Home - A Strategy for the Private Rented Sector in Scotland' (Edinburgh, Scottish Government, 2013), p. 18.

⁵⁶ By order under the Property Services (Regulation) Act 2011.

⁵⁷ 'A Century of Home Ownership and Renting in England and Wales' (London: Office for National Statistics, 2013), 22.

property with the aid of a mortgage or loan. Since the onset of the recession there has been a substantial reduction in the availability of credit across both Islands. In England and Wales and Scotland gross lending in 2013 was just half the level recorded in 2007.⁶⁰ Since the advent of the financial crisis interest rates have been cut and while this has improved affordability, deposit requirements – especially for first time buyers across both Islands, have become much stricter with the average deposit in Scotland being approximately equivalent to 69% of average annual income for first time buyers. The reduction in credit is particularly dramatic in Ireland where according to the Irish Banking Federation mortgage lending fell from a peak in excess of 200,000 residential loans in 2008 to less than 15,000 in 2011 though one feature is the increasing proportion of first time borrowers. In addition, the number falling into arrears or calling upon the social welfare support schemes for indebted homeowners has increased across both islands however the increase has been particularly dramatic in Ireland.⁶¹

Private rental properties may also be the subject of a mortgage arrangement when the properties are under the structure of ownership typically described as Buy to Let. Across Britain and Ireland a few landlords are professional landlords owning multiple investment properties. Tenants face difficulties if the landlord defaults on the payment of the loan.⁶² Buy to let lending covers about 6% of all UK households, contributing around £30 billion to the economy and making up around 50% of the entire private rented sector. In the UK the Buy to Let market currently provides accommodation for about 2.5 million households, about 12 per cent of the total.⁶³ Some limited protection is provided in England and Wales by the Mortgage Repossessions (Protection of Tenants etc.) Act 2010. Across Britain buy to let lending continues to increase year-on-year, accounting for 11.4% of gross lending in the second quarter of 2012.⁶⁴ The situation in Ireland was quite different, because a dramatic reduction in mortgage lending of all forms has taken place in Ireland since the onset of the economic crises. There is a relatively limited amount of research profiling landlords.⁶⁵ However about a third of investors in the residential letting sector were in 2013 at risk of default.⁶⁶

Across Britain the number of mortgage possession claims in County Courts increased from 2003 to a peak in 2008, but has fallen 60 per cent since then to 14,375 in the first

⁵⁸ Central Statistics Office, *Census 2011: Profile 4 The Roof over our Heads - Housing in Ireland* (Dublin: Stationery Office, 2011), 12.

⁵⁹ Scottish Household Survey Quarterly Data Trends (Edinburgh: Scottish Government, 2012), 1.

⁶⁰ 'Gross mortgage lending table - September 2014' (London: Council of Mortgage Lenders, 2014); 'Scottish Housing Market Review November 2013' (Edinburgh: Scottish Government, 2013), p. 3

⁶¹ Department of Social Protection *Residential Mortgage Arrears and Repossessions Statistics: Q3 2013*, p. 5, *Annual SWS Statistical Information Report 2012* (Dublin: Stationery Office, 2012), Section G.

⁶² M. Ball, 'Buy to Let: The Revolution 10 Years On' (London: Association of Residential Letting Agents, 2006) p. 1.

⁶³ A. Leyshon & F. Shaun, 'We All Live in a Robbie Fowler House: The Geographies of the Buy to Let Market in the UK.' *The British Journal of Politics & International Relations* 11.3 (2009): 441.

⁶⁴ Council of Mortgage Lenders, *Housing Finance at a Glance*, September 2012, 1.

⁶⁵ D. Rae & P. Van den Noord, 'Ireland's Housing Boom: What has Driven it and Have Prices Overshot?' (OCED: OECD Publishing, Economics Department Working Papers, 2006) para. 492. 'Mortgage Market Profile - Data Series 2005-2012' (Dublin, IBF/PwC, 2012); J.Kelly and A. Menton, "Residential Mortgages: Borrowing for Investment", *Quarterly Bulletin, CBFSAI*, (2007), No. 2, pp. 129-145.

⁶⁶ 'Evidence Review of the Private Rented Sector in Scotland' (Edinburgh: Scottish Government, 2012), para. 2.1.

quarter of 2013.⁶⁷ The fall in the number of mortgage possession claims since 2008 coincides with lower interest rates, an approach from lenders in managing consumers in financial difficulties and other interventions from the government, such as the Mortgage Rescue Scheme. Although Ireland has the highest level of arrears and might be expressed to have a comparatively high number of repossessions however this is not the case. Instead, many non-performing mortgages have been restructured by private agreement between lender and borrower.⁶⁸ This is largely due to combination of legal and policy measures. In the first place the Land and Conveyancing Law Reform Act 2009 played a significant role in reducing the amount of repossessions in Ireland. By inadvertently repealing certain legislation the Act made it more difficult for a lender to secure a court order for possession. Further mortgage instruments were introduced including the Mortgage Arrears Resolution Process which imposed standards of behaviour on lenders and borrowers further encumbering the ability of the lender to take possession.

In Scotland the Home Owner and Debtor Protection (Scotland) Act 2010 reformed the law relating to repossessions in Scotland. Those at risk of repossession are protected because prior to going to court the lender must comply with certain Pre-action Requirements including engaging with the borrower and maintaining records of actions in this regard. The Scottish Government provides additional supports for homeowners who have mortgage difficulties; the Mortgage Rights (Scotland) Act 2001 provides statutory protections for homeowners who are experiencing difficulty in meeting their mortgage obligation.⁶⁹ The debtor may apply to the court for a stay of repossession proceedings of their home in order to repay arrears or to allow them secure alternative accommodation.⁷⁰ There are also distinctive Scottish mortgage 'rescue' schemes, in particular the Home Owners' Support Fund which provides support to struggling home owners through the Mortgage to Rent and Mortgage to Shared Equity schemes.⁷¹

A raft of new housing or housing-related legislation has been introduced in response to the crisis across Britain and Ireland. The Help to Buy scheme across Britain has been focused on reinvigorating the property market but the general drift of the main pieces of legislation has been directed at protecting homeowners struggling to pay their mortgage and the reform of welfare supports. The Personal Insolvency Act 2012 introduced three new debt-resolution mechanisms and has reformed the law relating to bankruptcy.⁷² Across both Islands the growth in the numbers living in the private rented sector has been accompanied by a dramatic increase in the number of households accessing welfare supports to meet their accommodation costs. In Ireland the Housing Assistance Payment has reformed income support for private tenants experiencing difficulty paying

⁶⁷ 'Mortgage and Landlord Possession Statistics' (London: Office of National Statistics, 2013).

⁶⁸ *Mortgage Arrears and Repossessions Statistics: Q3 2013*, p 8; at end September 2013 there 21,607 BTL mortgage accounts that were categorised as having been 'restructured'.

⁶⁹ Further protections are provided under the Home Owner and Debtor Protection (Scotland) Act 2010.

⁷⁰ Mortgage Rights (Scotland) Act 2001. This part of the Mortgage Rights (Scotland) Act 2010 has been repealed by the Home Owner and Debtor Protection (Scotland) Act 2010.

⁷¹ 'Evaluation of the National Mortgage to Rent Scheme' (Edinburgh: Scottish Government Social Research, Scottish Government, 2008), pp. 2-3

⁷² Referred to as the Keane report see *Inter-Departmental Mortgage Arrears Working Group* (Dublin: Stationery Office, 2011).

rent and allows for tenants in need of long term income support to take on employment while retaining a portion of their income support. Across Britain recent changes have been made to Housing Benefit, with respect to both applicants' eligibility and the maximum amount that can be made. Specific benefits are being replaced by a Universal Credit, which will draw together existing means-tested benefits and will include a housing costs element.⁷³

Housing was at the root of the crisis across both islands and it has been at the centre of the various policy attempts to remediate the unprecedented challenges thrown up during the best part of the last ten years. In responding to the crisis States were confronted with multifaceted legal, economic and social challenges affecting all tenure groups, many of which have not been resolved. For instance, the numbers on housing waiting lists or accessing welfare supports to help pay the costs of accommodation indicate there is an ongoing affordability crisis across both Islands. The sustained neglect of the public rented sector and failure to reinvest proceeds raised from the sale of public housing in new stock has resulted in an inadequate supply of housing across Britain and Ireland. Measure aimed at addressing this matter, such the introduction of hybrid public private leasing arrangements in Ireland, have so far failed to make significant inroads and demand for affordable housing far exceeds supply. There are also substantial challenges in the private rented sector where demand exceeds supply across both Islands. The legal regulatory system in Britain allows upward pressure on rents and a whole generation have to move all of the time or have to move into house sharing arrangements with friends or family. While in the owner occupier sector the steep increases in house prices across England continue to place homeownership out of the reach of whole swathes of the population while in Ireland the numbers in arrears remain at unsustainable levels. There are signs that growth is returning to the housing markets however given the difficulties still present in the national housing systems some of which are outlined above it would be misleading to conclude that these factors signal that the crisis has been overcome.

1.3. Urban and social aspects of the housing situation in comparison

1.3.1. Urban aspects in comparative perspective

In England and Wales the majority of homes were located in suburban areas (62%) and other urban centres (17%). Only a small proportion of homes were located in city centres (3.4%) and hamlets or isolated rural areas (2.9%).⁷⁴ With regard to dwelling type and location this is much as one would expect, detached houses in the suburbs and flats and high rise in inner city areas.⁷⁵ Social housing (30%) tends to be more common than private housing (20%) in city centres and other urban centres. This trend is also apparent in Scotland where private renting is currently experiencing a renaissance of sorts. From 2001 to 2012 the private rented sector in Scotland has almost doubled in size, growing from 6% to under 12% during this period. A large part of this growth

⁷³ Welfare Reform Act 2012 s. 11; see below, 3.6, pp 80-82.

⁷⁴ English Housing Survey: Homes 2011 (London: Department of Communities and Local Government, 2013) ch. 1.

⁷⁵ English Housing Survey: Homes 2011 (London: Department of Communities and Local Government, 2013) ch. 2.

derives from increases in the size of the private rented sector in large urban areas.⁷⁶ In contrast to Scotland and England only about two thirds of the Irish population live in urban areas while one third live in rural areas. Rates of homeownership are higher in rural areas (84%) than urban areas (62%) however with regard to renting the converse is the case with renting in urban areas (37%) almost twice as common as renting in rural areas (17%).

Gentrification is the process by which minority groups are forced out of the mainstream housing, usually by cultural and socio-economic forces. Much of the inner parts of the big cities in England and Wales and Scotland, particularly London, Liverpool, Newcastle, Manchester, Glasgow are undergoing gentrification of some sort.⁷⁷ Gentrification on its own would not be unlawful, but in the context of administering government policy the circumstance in which gentrification occurs might give basis for judicial interference.⁷⁸

Ghettoization is associated with high density council housing, particularly in cities such as London, Glasgow and Birmingham, in that, by definition, those people who qualify for social housing are those in greatest need (and often vulnerable in multiple respects). Accommodation in high-rise blocks of flats is often constructed to poor standards and poorly maintained contributed to the problem. Historically these problems have been particularly acute in Scottish cities and this remains the case in certain areas.⁷⁹ Ethnic minorities are represented disproportionately in all rental sectors across both islands. In England 16 per cent of tenants are from minorities, as against 10% of the general population and 8 per cent of owner occupiers.⁸⁰ In Ireland the local authority rented sector underwent dramatic changes in the last fifty years. For much of this period the size of the sector decreased consistently due to the introduction of the tenant purchase scheme in 1966. As a result of this scheme the number of higher income households living in local authority housing reduced consistently and local authority housing became increasingly residualised and segregated.⁸¹ Local authority households are among the poorest in Irish society and are disproportionately affected by unemployment, with this sector experiencing higher levels of unemployment.⁸²

Squatting occurs across both Islands however it is only in Ireland, England and Wales that the legal system allows for a squatter to gain title to the land. The common law departs from civilian systems completely in its approach to adverse possession. It is no

⁷⁶ 'Note on Tenure Change in Glasgow City' (Glasgow: Glasgow City Council, 2012), p. 1.

⁷⁷ Butler and Lees, described this as "super-gentrification", different from the traditional gentrification because of the significantly higher income bracket involved in this – 'Super-gentrification in Barnsbury, London: globalization and gentrifying global elites at the neighbourhood level' at <www.kcl.ac.uk/sspp/departments/geography/people/academic/butler/SupergentrificationinBarnsbury.pdf>, 2 January 2013.

⁷⁸ *Porter v. Magill* [2001] UKHL 67.

⁷⁹ 'Scottish Household Survey 2012' (Edinburgh: Scottish Government, 2013), p. 18. For local examples see 'The Impact of Local Antisocial Behaviour Strategies at the Neighbourhood Level' (Edinburgh: Scottish Government, 2007), pp 94.

⁸⁰ 'English Housing Survey Headline Report 2012-13' (London: Department for Communities and Local Government, 2014) paras 1.17-1.19.

⁸¹ On the residualisation of local authority housing see: National Economic and Social Council *Housing in Ireland, Background Analysis, Paper 6: The Provisions of Social and Affordable Housing* (Dublin: National Economic and Social Council, 2004), Box 6.3.

⁸² *Ibid.*

use here thinking of *usucapio* and the requirement of non-forcible possession in good faith, a process which draws title from the person dispossessed and transfers it, at length, to the possessor. In this respect the common law jurisdictions of England and Ireland stand in contrast to the hybrid common law – civil law jurisdiction of Scotland when it comes to adverse possession. In Scots law, unlike English and Irish law, title of an owner may not be lost by limitation rather an interest in land may be acquired through the legal process of prescription as set out in the Prescription and Limitation (Scotland) Act 1973. In order for a person to acquire an interest in land they must fulfil the three criteria set out in the first section of that Act. That is, the interest at issue must be possessed for 10 years, that possession must be open, peaceable and without judicial interruption and must be founded on and follow the recording or registration of an *ex facie* valid title to the land in question.⁸³ For most of the last century the systems governing the acquisition of title to land based on adverse possession were broadly the same in England and Wales and Ireland in that 12 years of adverse possession was required before a claim to the title of registered or unregistered land could be successful however English law underwent a major change when the Land Registration Act 2002 effectively curtailed the acquisition of title through adverse possession when, as is usual, title is registered.⁸⁴ The long standing basis of English law that squatting was only a civil trespass has recently been reversed. Squatting in residential buildings was criminalized by the (inelegantly titled) Legal Aid, Sentencing and Punishment of Offenders Act 2012.⁸⁵ It would appear that this provision is mainly a policing measure and has not resulted in the abolition of adverse possession.⁸⁶ In Ireland trespass generally remains a civil offence however this is not the case with respect to public land since the Housing Act 2002,⁸⁷ in amending the Criminal Justice (Public Order) Act, 1994, introduced criminal liability for trespass on public land in certain circumstances.⁸⁸ While of general scope this provision restricts unauthorised encampments of members of the Traveller Community on public land and as a result the provision has drawn criticism from a number of sources.⁸⁹ It is also submitted that this provision is mainly a policing measure and has not resulted in the abolition of adverse possession.

1.3.2. Social aspects

Public opinions on various tenures are predominantly fashioned by the population spread of classes of people in the different tenures. This is often a reflection of the

⁸³ T. Guthrie *Scottish Property Law* (Edinburgh: Bloomsbury, 2ndedn, 2005) chapter 3; D. J. Cusine 'Adverse Possession of Land in Scots and English Law', *International and Comparative Law Quarterly*, (1996), 45(3) pp. 667; F. M. McCarthy (2008) Positive prescription in the human rights era, *Scots Law Times* 15.

⁸⁴ Land Registration Act 2002 s. 97; N. Cobb & L. Fox, 'Living Outside the System: The (Im)morality of Urban Squatting after the Land Registration Act 2002', *Legal Studies* 27(2) (2007): 236-260.

⁸⁵ Although the Act does not use the word 'squatter', its purpose is betrayed by the title of section 144 'Offence of squatting in a residential building'.

⁸⁶ *Best v Chief Land Registry* [2014] EWHC 1370.

⁸⁷ Criminal Justice (Public Order) Act 1994 s. 19C, inserted by Housing (Miscellaneous Provisions) (No. 2) Act 2002 s. 24.

⁸⁸ Criminal Justice (Public Order) Act, 1994 s. 19C(1)(b).

⁸⁹ *Progressing the Provision of Accommodation to Facilitate Nomadism*, (Dublin: Irish Traveller Movement, 2007) p. 4; P. Watt & K. Charles, *Housing Conditions of Roma and Travellers*, (Dublin, European Union Agency for Fundamental Rights, 2009) p. 18.

economic class or social status, as perceived from the great majority of tenure occupiers. Some of these are also researched findings as the National Wellbeing Survey put it - an individual's housing tenure and the level of their overall satisfaction with life are linked.⁹⁰ A measure of life satisfaction across the three major tenures from a survey conducted by the Office of National Statistics shows that there are more owners who have high to medium levels of life satisfaction than people on rental. Stigmatization of social estates and their residents, particularly tenants of local authorities, is widespread, one example being during the outbreak of riots in London in August 2011;⁹¹ responses in the media and in Parliament were generally linked to the areas affected by the riots and the social class of occupants of the social properties in the areas.⁹² In Scotland a 2007 study found that external perceptions of social housing were largely negative. The sector was viewed as housing of need rather than choice, for benefit claimants and low income families. Furthermore those with previous experience of living in social housing were found to hold the belief that the sector had declined over time, with social and structural changes resulting in greater concentrations of social deprivation in this tenure. In addition, social landlords were viewed as bureaucratic and unhelpful, while paying rent was seen to be a waste, particularly when mortgage rates could be similar or even lower.⁹³ Private tenants are often those who cannot access social security because of their fairly stable financial circumstances or ineligibility owing to connection with the country – like immigration status. On the property spectrum they are those in the middle – not wealthy enough to afford a mortgage; and no cogent circumstances meriting social housing. Consequently, decrease in the number of owner occupiers results in increase in the number of private rented households.⁹⁴ Most tenants in the private rented sector (61%) would buy if they could, though many expect to have to wait many years to be able to afford to do so. Only 23% of public/social sector tenants expect to buy eventually, many of those presumably anticipating taking advantage of the Right to Buy.⁹⁵

2. Housing policies and related policies in comparison

2.1. Introduction

No single policy stance informs housing policies across England and Wales, Scotland and Ireland today.⁹⁶ However, there is a broad consensus on key components, such as:

⁹⁰ A. Self, J. Thomas & C. Randall, 'Measuring National Well-being: Life in the UK, 2012', (London, Office for National Statistics 2012), 50.

⁹¹ Like Manchester, Birmingham and Liverpool.

⁹² The broken society narrative emerged from the Prime Minister, Mr David Cameron: certain urban places were represented as problematic, with caution applied in not offsetting the balance of discrimination in any suggestion.

⁹³ S. Clegg, A. Coulter, G. Edwards & V. Strachan, '*Housing Aspirations*' (Edinburgh: Scottish Government, 2007), para 4.28.

⁹⁴ For example, the number of owner occupied households has continued to decrease from the peak of 14.79 million in 2005, to 14.45 million in 2010-11. In contrast, there continued to be a rise during the same period of private rented households, which is now at 3.62 million compared to 2.45 million in 2005. See Annual Report on England's Households, 2010–11, 11 December 2012, <www.gov.uk/government/uploads/system/uploads/attachment_data/file/6739/2173283.pdf>.

⁹⁵ English Housing Survey Headline Report 2012-13' (London: Department for Communities and Local Government, 2014) paras 1.67-1.69.

⁹⁶ N. Barr, *The Economics of the Welfare State*, (California: Stanford University Press, 1993); V. George & P. Wilding, *Welfare and Ideology*, (Hemel Hempstead: Harvester Wheatsheaf, 1994).

accommodation should be made available to the homeless; public/social sector accommodation should be subsidised so as to be available to those unable to afford accommodation provided in the private market; public/social accommodation should be low cost; and housing supports should be paid to those unable to afford accommodation.

The constitutional framework of housing varies from State to State. In the first place the United Kingdom does not have a written constitution in this sense however that is not to say that housing interests have not been protected in law. Likewise although the Irish Constitution does not contain a fundamental right to housing, there are various housing interests protected under the law.⁹⁷ In particular various rights exist within Britain and Ireland in terms of the allocation of social housing and the duty to house those threatened with or experiencing homelessness. In practice the right to housing introduced across the UK in 1977 has been extended under the auspices for the Scottish Executive in the post devolution era. In Scotland from the end of 2012⁹⁸ all persons assessed as unintentionally homeless are entitled to settled accommodation as a legal right. In Ireland the Housing Act 1966 and the Housing Act 1988 come closest to providing statutory rights to housing. Under the Housing Act 1966 local authorities are under a duty to make inspections and to assess adequacy of supply and condition of housing in their operational area. The Housing Act 1988 did not place an obligation on local authorities or State agencies to provide accommodation and much provision is undertaken by voluntary and charitable bodies.⁹⁹ This is in stark contrast to the approach of the UK. Across Great Britain a local authority is under a duty to provide accommodation when an applicant is (a) homeless, (b) not intentionally homeless, and (c) with a priority need for accommodation. The duty is to 'secure that accommodation becomes available for his occupation', first on a temporary basis and then as soon as possible afterwards permanent accommodation.¹⁰⁰ Lesser duties apply to those threatened with homelessness or becoming homeless intentionally, but in all cases a careful enquiry must be carried out into the circumstances of a person presenting themselves as homeless. This legislation is structured in such a way as to create justiciable rights for homeless people since duties are imposed throughout on local authorities, who may require social landlords to cooperate by making accommodation available to a person qualifying as homeless. Review procedures are laid down,¹⁰¹ but the ultimate decisions remain susceptible to judicial review and to human rights arguments.¹⁰² This legislation engenders innumerable reported cases each month about issues such as the suitability of the accommodation offered.¹⁰³

⁹⁷ J.M. Kelly, *The Irish Constitution* (Dublin: Tottel Publishing, 4th edn, 2006); G. Hogan, *Origins of the Irish Constitution 1928-41* (Dublin: Royal Irish Academy, 2012); P. Kenna, *Housing Law Rights and Policy*, ch. 8.

⁹⁸ Homelessness (Abolition of Priority Need Test) (Scotland) Order 2012.

⁹⁹ Kenna, *Housing Law Rights and Policy*, p. 262-264.

¹⁰⁰ Housing Act 1985 s. 65.

¹⁰¹ Housing Act 1985 s. 64.

¹⁰² It may help readers to observe that a public law challenge asking for judicial review in the name of the Queen (*Regina = R.*) by X against the activity of public body Y was named until about 2000 as *R. v. Y ex parte X* and since then as *R. (X) v. Y*; at about the same time citations neutral of place of publication were introduced based on the year of decision and the court; those important for this report are: UKHL – the Judicial Committee of the House of Lords; UKSC – the Supreme Court which took over from the House of

In addition to domestic legislation both the United Kingdom and Ireland have acceded to a number of international human rights measures with housing rights, notably Article 16 of the European Social Charter 1961, but this is not justiciable in the domestic courts. By contrast the Human Rights Act 1998 (UK) Human Rights Act 2003 (Ireland) incorporated the provisions of the European Convention on Human Rights into domestic law. Actions of all public bodies must be compatible with the European Convention. This does not expressly confer a right to housing, but housing rights can be defended indirectly via the protection of property expressed in Article 1 Protocol 1, the trial rights in Article 6, and the respect for a person's home required by Article 8. This has affected most litigation affecting housing rights.¹⁰⁴ In the local laws of England and Wales, Scotland and Ireland the provisions of human rights laws are applied in measuring the legality of conducts during possession proceedings.¹⁰⁵ Possession proceedings must respect the human rights of those being evicted.

2.2. Policies and actors

A. The United Kingdom and Republic of Ireland, devolved authority to Scotland and Wales

The United Kingdom was made up of England, Wales, Scotland and Ireland from the Act of Union 1800 until the Government of Ireland Act 1922. From the point of political separation onwards Ireland's housing law became increasingly distinct. The United Kingdom and the Republic of Ireland both joined the European Economic Community in 1973. So too did both accede to the European Convention on Human Rights (ECHR), the United Kingdom acceded in 1950 and Ireland acceded in 1953; the provisions of the ECHR were incorporated directly into domestic law by the Human Rights Act 1998 in the UK and the Human Rights Act 2003 in Ireland. Responsibility for effecting Westminster policy has been devolved to Scottish authorities for over one hundred years. But much more recently government powers have been devolved to Wales in 1998.¹⁰⁶ In the context of the current comparison, the vital point is that housing is one of the devolved areas in which the Welsh Assembly and Scottish Parliament has legislative competence, but finance is not devolved.¹⁰⁷ Thus legislative authority in relation to housing in England resides in the Westminster Parliament, in Ireland resides in Dail Eireann, in Scotland resides in the Scottish Parliament and in Wales in the Welsh Assembly.

B. Local Government in housing

Lords in 2009; EWCA Civ – the Civil Division of the Court of Appeal; EWHC – the High Court; EWUT – the Upper Tribunal.

¹⁰³ UK wide legislation dating from Housing (Homeless Persons) Act 1977 was re-enacted as Part 6 of the Housing Act 1996, Part III, ss. 58-78; as amended by the Homelessness Act 2002 and the Localism Act 2011. The law in Wales is beginning to diverge from that in England see Housing (Wales) Bill 2013 Part 2, cls 36-83.

¹⁰⁴ *Donegan & Gallagher v. Dublin City Council* [2012] IESC 18.

¹⁰⁵ *R. (JL) v. Secretary of State for Defence* [2013] EWCA Civ 449.

¹⁰⁶ Government of Wales Act 1998.

¹⁰⁷ R. Deacon, *Devolution in Britain Today* (Manchester University Press, 2006). The Scotland Act 2012 has set in motion the devolution of certain taxation powers from Westminster to the Scottish Parliament.

Across Britain and Ireland local authorities play a crucial role in housing, primarily at the lower tier of district, borough or city councils; in parts of the country with a single tier of local government housing functions reside in these 'unitary' authorities.¹⁰⁸ Local authorities have a strategic role as well as a more direct role as landlord when providing housing to tenants. In England and Wales the responsibility of the local authority has increased under the Localism Act which will now allow local authorities to do more in creating wealth and diversify the opportunities it can explore to meet its housing targets.¹⁰⁹

C. Regulation of local authority housing

For a public tenant (Local Authority) faced with a tenancy related issue such as carrying out repairs etc. the first port of call is the complaint mechanism of the local authority, failing this the tenant can contact the relevant body with responsibility for regulating public housing. In England and Wales until the single housing Ombudsman provisions are brought into force, council tenants must continue to refer complaints to the Local Government Ombudsman, and tenants of other registered providers to the Housing Ombudsman. In Ireland this function is carried out by the Office of the Ombudsman. In Scotland the Scottish Public Services Ombudsman is the office of last resort, after the Scottish Housing Regulator, for complaints concerning public services in Scotland.

D. Control of Registered Social Landlords/Registered providers of social housing/ the voluntary and co-operative housing sector

Across Britain and Ireland there is considerable disparity in the regulation of non-public social housing. In England regulation of registered providers of social housing is the preserve of the Committee of the Homes and Community Agency.¹¹⁰ The regulator has powers to set standards for registered providers of housing as to the nature, extent and quality of accommodation, facilities or services provided by them in connection with social housing, and the methods of assisting tenants to exchange tenancies'.¹¹¹ Registered providers must comply with specified rules about allocating accommodation, terms of tenancies, etc.¹¹² The Welsh Ministers regulate housing associations in Wales.¹¹³ In Scotland the Scottish Housing Regulator, established on 1 April 2011 under the Housing (Scotland) Act 2010, is the independent regulator of Registered Social Landlords and local authority housing services in Scotland.¹¹⁴ The Regulator is directly accountable to the Scottish Executive but is an independent non-ministerial department.¹¹⁵ The Scottish Ministers formulate and implement housing policy,

¹⁰⁸ Localism Act 2011.

¹⁰⁹ Localism Act 2011 s. 1. For Ireland local authorities are governed by the Local Government Acts, the most recent of which was the Local Government Act 2001. The Housing Acts govern the housing functions of local authority's in Ireland.

¹¹⁰ Localism Act 2011 ss.178-179, sch. 17.

¹¹¹ Housing and Regeneration Act 2008 ss 193 and 194 as amended by Localism Act 2011 s. 176.

¹¹² Housing Act 1996 s. 218A.

¹¹³ 'Regulatory Framework for Housing Association Registered in Wales', (Welsh Government, 2011).

¹¹⁴ 'Framework Agreement between Scottish Ministers and the Scottish Housing Regulator' (Edinburgh, Scottish Housing Regulator, 2012).

¹¹⁵ The Regulator replaced a previous agency: 'Scottish Housing Regulator – About' (Edinburgh, Scottish Housing Regulator, 2012).

including social housing.¹¹⁶ Ministers appoint the Regulator and supervise some functions: The Regulator maintains a register of all Registered Social Landlords in Scotland, and assesses and reports on the activities of social landlords in carrying out their housing services, their financial health and standards of governance. In Ireland voluntary and co-operative housing bodies are registered under section 6 of the Housing Act 1992. In 2013 the Voluntary Regulation Code was launched which provides a framework within which statutory regulation of the voluntary or co-operative housing body sector will be developed.

E. Regulation of private rentals

Regulation of private rentals differs across Britain and Ireland. Across Scotland, Wales and Ireland there is a clear trend of developing purpose built regulatory bodies in stark contrast to the approach in England where there is no overarching statutory regulation of private sector letting or managing agents in England. In some respects Ireland could be considered to be leading the charge. The RTA 2004 has substantially reformed the law regulating the relationship of landlord and tenant with respect to private residential tenancies. In particular, the Act established the Private Residential Tenancies Board which was charged with primary responsibility for regulating the residential tenancies sector i.e. registration of landlords, dispute resolution etc. Since devolution regulation of the private rental market in Scotland has been substantially overhauled. These reforms included the institution of a purpose built regulatory body, the Private Rented Housing Panel in 2007. The Panel is responsible for upholding the Repairing Standard, introduced in the Housing (Scotland) Act 2006, which is aimed at improving physical conditions in private rented housing. With regard to rent, the Panel is responsible for assessing rents in order to determine whether the rent rate is reasonably in line with prevailing market forces.¹¹⁷ The Welsh Assembly have signalled a clear intention to implement heightened regulation of the private rented sector in line with the Scottish approach.¹¹⁸

2.2.2. Housing policies

Across Britain and Ireland the greatest focus has been on extending owner-occupation through the various Low Cost Home Ownership schemes. The focus in the social housing sector has been to ensure that it is used optimally, for example through the introduction of the flexible tenancy. At the other end of the homeowners' spectrum, the introduction of the Mortgage Rescue Scheme¹¹⁹ allows homeowners facing repossession to sell all or part of their property to a housing association. A new mortgage guarantee scheme to help people take the first step onto or to move up the property ladder was rolled out in the spring of 2013.¹²⁰ Government efforts to balance

¹¹⁶ 'Framework Agreement between Scottish Ministers and the Scottish Housing Regulator' (Edinburgh, Scottish Housing Regulator, 2012).

¹¹⁷ 'Private Rented Housing Panel – Press Release' (Edinburgh, Scottish Government, 2011).

¹¹⁸ <http://wales.gov.uk/topics/housing-and-regeneration/legislation/housingbill/specific-elements/private-rented-housing/?lang=en>

¹¹⁹ Introduced by the Welsh Assembly Government as an emergency measure during the economic downturn. £14.1 million has been spent on the scheme to date and it has been successful in helping to prevent homelessness through repossession. 'Written – Mortgage Rescue Scheme' www.wales.gov.uk/about/cabinet/cabinetstatements/2010/100610mrs/?lang=en, 17 January 2013.

¹²⁰ 'Mortgage Guarantee Boost for Potential House Buyers and Builders'

demand and supply in the housing market seem to revolve on three areas of policy: the house building industry, financial incentives for private sector development and the supply of affordable/social housing. A distinctive feature of the current building slump is the tightening of credit availability and the terms on which it is made available to both building companies and house purchasers.¹²¹ The New Home Bonus has been devised to provide local authorities with an incentive to permit new building by matching the council tax on each additional unit for a fixed period of six years; a larger bonus is provided for affordable homes. The government's stated intention is to increase supply, but with the abolition of targets.¹²² Already there is considerable evidence that the abolition of regional targets has led to reductions in the number of homes planned by local authorities.¹²³

After devolution Wales began operating a housing policy distinct from that generated at Westminster, resulting in notable developments and a distinctive approach.¹²⁴ The Welsh policy has been channelled to meet housing need through the improvement of access to housing and increase in the supply of affordable housing, seeking to ensure the availability of modern housing.¹²⁵ The vision for housing in Wales touches on the various tenures but social housing seems to get the greatest of attention. In a bid to meet the Welsh Housing Quality Standard by local authorities stock transfer to housing associations and co-operatives continues to be promoted by the Assembly.

Scottish national housing policy is directed towards developing "a housing system which provides an affordable home for all."¹²⁶ Current Government housing policy does not express a preference for a particular tenure but rather adopts a tenure neutral approach,¹²⁷ the key policy being to increase the supply of housing across all tenures. Indeed, the policy takes account of the growing numbers of people whose housing needs are not met by the traditional tenures and certain housing policies are directed towards expanding mid-range housing products, including shared equity and intermediate renting.¹²⁸ While there are still major supports available to homeownership the overall housing policy of the Scottish Government is not as generous in its support compared with the support directed to that tenure south of the border. Amongst the policy changes made in Ireland in the wake of the economic crisis perhaps the most

www.wales.gov.uk/newsroom/housingandcommunity/2012/121113ms/?lang=en, 17 January 2013.

¹²¹ M. Ball, *The Housebuilding Industry: Promoting Recovery in Housing Supply*, (London: Communities and Local Government, 2010).

¹²² *The Coalition: our programme for Government*, (London: Cabinet Office, May 2010), p. 11.

¹²³ Research for the National Housing Federation suggests that plans for some 160,000 homes have been dropped and this was expected to rise to 280,000–300,000 by October 2011. Such examples may be the result of uncertainty – a gap in planning has been identified by the Communities and Local Government Committee. NHF (National Housing Federation) 'Government policies killing off 1300 planned new homes every day', *News Release*, 4 October 2010.

¹²⁴ Government of Wales Act 2006 sch. 7.

¹²⁵ *One Wales: A Progressive Agenda for the Government of Wales*, (Welsh Assembly Government (WAG), June 2007). *The Welsh Housing Quality Standard, Revised Guidance for Social Landlords on Interpretation and Achievement of the Welsh Housing Quality Standard*, (Welsh Assembly Government, July 2008).

¹²⁶ 'Homes Fit for the 21st Century - The Scottish Government's Strategy and Action Plan for Housing in the Next Decade: 2011-2020' (Edinburgh: Scottish Government, 2011), p. 2.

¹²⁷ *Ibid.*, p. 33.

¹²⁸ *Ibid.*, p. 7.

notable change has been a shift in favour of tenure neutrality. Firstly, housing policy with regard to owner occupation has been overhauled in recent years with the Government's *Housing Policy Statement (2011)* laying bare the role which previous housing policy which promoted homeownership has had in contributing to the economic crises.¹²⁹ The policy document promotes tenure neutrality. A more equitable balance between the tenures had been encouraged by changes to taxation, subsidisation and regulation. Amongst the major policy changes, all affordable housing schemes have been stood down, while tenant purchase has been restrained. In addition, the local property tax has been introduced on owner occupiers.

Secondly, the introduction of a deposit protection scheme has been proposed. Government housing policy and legislation continues to regard the private rented sector as a key means by which to provide housing to those experiencing housing need. Thirdly, Government policy with regard to local authority housing has been reformatted in the Housing (Miscellaneous Provisions) Act 2009 from the traditional provision of housing to the provision of social housing supports. This shift is readily identifiable from the emphasis placed in the 2009 Act on the use of public private leasing arrangements to provide housing support to those in need. With regard to existing local authority housing, Government policy has had to respond to the residualisation of the sector arising from the tenant purchase schemes and the persistent incentivisation of owner occupation. This has led to a broadening of the housing management function of local authorities. Fourthly, Government policy with regard to the voluntary and co-operative housing sector has developed substantially in recent years. In particular the Housing policy statement 2011 places particular emphasis on the role which voluntary and co-operative housing associations may play in meeting traditional social housing need. Indeed, a voluntary regulatory code has been introduced ahead of a proposed statutory code.

In Ireland special housing policies have been developed in response to the housing needs of Irish Traveller community who have faced considerable disadvantage and discrimination since the foundation of the State. The first statutory reference to the Irish Traveller Community was in the Housing Act 1988 and since then housing policy with regard to Irish Travellers has developed significantly, leading in particular to the Housing (Traveller Accommodation) Act 1998. Travellers within the Act are those belonging to the class of persons who traditionally pursue or have pursued a nomadic way of life. The Act required local authorities to carry out a process of consultation, and then to prepare and adopt accommodation programmes to meet the existing and projected accommodation needs of Travellers in their areas. These plans form the basis of the Government response to the housing needs of the Traveller community.

¹²⁹ In detailing the role which housing has played during the economic crises, the Statement sets out that 'over-stimulation of the housing market is accepted as a key causal factor in the scale of the economic downturn': Department of the Environment, *Housing Policy Statement (2011)* (Dublin: Stationery Office, 2011), p. 1.

2.3. Urban policies

The United Kingdom and Ireland have systems of town and country planning, which makes no formal differentiation of urban areas or policies for such areas. Population growth in urban areas exceeds that in rural areas and this has resulted in increased pressure on housing. It is reckoned that approximately 3 million new homes are needed by 2030 in the UK to meet current need while approximately 20,000 new houses are needed each year in Scotland and Ireland¹³⁰. Major factors in demand are increased birth rates and greater life expectancy and movement to the cities. There has been a shortfall in the rate of house building and the general supply of housing, exacerbated by the privatization of much of the public housing stock.

Planning policy across the UK and Ireland has also sought to create tenure mix and at the same time boost affordable housing supply through facilitating homeownership. In Ireland the most significant piece of legislation concerning pepper potting and tenure mix is the Planning and Development Act 2000 which, in Part V, provides a scheme designed to encourage planning of housing in a way that avoids undue social segregation.¹³¹ The planning authority, *An Bord Pleanála*, may impose conditions on the grant of planning permission¹³² that the applicant enters into an agreement with the planning authority for development of the land so as to promote social inclusion.¹³³ A 2012 Government review concluded that Part V 'delivered below its potential and only began to make a real contribution around the time the property market crash commenced.'¹³⁴ In 2011 Government stopped all affordable housing schemes. Part of the reason for the low effectiveness of Part V agreements is a result of the removal of the requirement to include a proportion of social housing in housing developers.¹³⁵

Mixed tenure has become a predominant development and regeneration strategy over the past 15 years. In Ireland the incremental Purchase Scheme is an example of a mixed tenure housing policy approach and by its design and operation the scheme encourages a tenure mix.¹³⁶ This scheme allows persons who qualify for social housing

¹³⁰ "Projected Population Change and Housing Demand: A County Level Analysis" (Dublin: Economic and Social Research Institute, 2014). 'Evidence Review of the Private Rented Sector in Scotland' (Edinburgh: Communities Analytical Services, Scottish Government, 2012), p. 6

¹³¹ Three key objectives were: to promote more socially integrated communities, to ensure adequate housing supply to meet the demand from all sectors of the market; and to accommodate those unable to purchase a home due to affordability constraints in the face of rising house prices. See Brady Shipman Martin, *Review of Part V of the Planning and Development Act 2000* (Dublin, Housing Agency, 2012), p. ii.

¹³² *Ibid*, s. 96(2).

¹³³ *Ibid*, s. 95(1)(b).

¹³⁴ 'Part V delivered 15,114 units in the period 2002-2011 (62.1% affordable and 37.9% social). This total represented just 3.8% of all dwellings excluding one-offs delivered over the period 2002-2011 which was a relatively small contribution. However over the entire period 2002-2011 it delivered below its potential and only began to make a real contribution around the time the property market crash commenced. An estimated 44,654 social housing units were constructed in the period 2002-2011 of which Part V contributed around 13% (5,721 units),' Brady Shipman Martin, *Review of Part V of the Planning and Development Act 2000* p. 26.

¹³⁵ Gore-Grimes, 'Change of Plan', *Law Society Gazette*, Jan/Feb 2003, pp. 18-23. The Planning and Development Act (Amendment) 2002 facilitated developers making a compensation payment in lieu of transfers of sites and thereby reduced the promotion of social integration.

¹³⁶ See section 1.4 above for an overview of intermediate tenure in Ireland.

to buy designated newly built houses from a local authority or an approved housing body at a discount.¹³⁷

Since devolution the Scottish Government has an active mixed tenure policy.¹³⁸ Under the 'Planning Policy on Affordable Housing' local authorities can require developers to ensure that a proportion of new housing developments are 'affordable' and sets a benchmark figure of 25 per cent to apply in most cases.¹³⁹ Affordable is defined broadly to include housing build without subsidy such as entry level housing for sale, as long as it is affordable to groups identified in a local housing needs assessment. This mechanism therefore sets out a process both for the subsidy of affordable housing through the market, and also for ensuring that new developments include a mix of affordable and market housing, which may well include a tenure mix. Scottish housing policy on mixed communities has been criticised by McIntyre and McKee who have argued that policies of mixed communities in Scotland have acted to promote home ownership to marginal groups for which home ownership may not be economically viable.¹⁴⁰

2.4. Energy policies

Across Britain and Ireland energy policies form part of the national housing policy and are embedded into various housing regulatory systems. In the first place energy policies are ingrained in the national building control system in Britain and Ireland.¹⁴¹ This system provides for a scheme of regulation to control matters relating to the construction of buildings, including standards, workmanship, design, etc. Certain technical specifications include harmonised European Standards.¹⁴² Energy policies are embedded into national housing standards. The Building Energy Rating Scheme was established under the Energy Performance of Buildings Directive (in its original form).¹⁴³ In the late 2000s, a Building Energy Rating certificate became compulsory for all homes being sold or offered for rent and a seller or landlord is required provide a Building Energy Rating certificate to prospective buyers or tenants when a home is constructed, sold or rented across Britain and Ireland.¹⁴⁴ Across Britain the Standard Assessment Procedure is used to calculate the energy performance and efficiency of a dwelling while in Ireland the Dwelling Energy Assessment Procedure is used. In general a standard heating regime is assumed which allows for a calculation of the amount of fuel required

¹³⁷ Department of the Environment, Incremental Purchase Scheme.

¹³⁸ The Scottish Sustainable Communities Initiative was launched in 2008. It focuses on both the environmental and social sustainability of new development

¹³⁹ 'Planning Policy Advice Note 74: Affordable Housing' (Edinburgh: Scottish Government, 2005).

¹⁴⁰ See Z. McIntyre, & K. McKee, 'Creating sustainable communities through tenure-mix: The responsabilisation of marginal homeowners in Scotland', *Geojournal* 77(2) (2012), p. 245.

¹⁴¹ This was established by the Building Control Act 1990. In Britain the relevant Act is the Building Act 1984.

¹⁴² Construction Products Directive, Directive 89/106, as amended by Construction Products Directive, Directive 93/68 of 22 July 1993; these are transposed by European Communities (Construction Products) Regulations 1992, SI No. 198/1992 as amended by SI No. 210/1994.

¹⁴³ Directive 2002/91/EC, implemented into Irish law by the European Communities (Energy Performance of Buildings) Regulations 2006 (SI No 666 of 2006) and Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings (recast), implemented into Irish law by the European Union (Energy Performance of Buildings) Regulations 2012 (SI No 243 of 2012).

¹⁴⁴ A Building Energy Rating certificate is only an indication of the energy performance of a house and actual energy usage will depend on how the occupants live in the house.

to heat certain dwellings to this standard. In addition to the Standard Assessment Procedure model and the related Energy Performance Certificates, the National Housing Energy Rating is also used to assess the energy efficiency of housing in Scotland. Typically a house in Scotland, in an average year, will require almost 50% more energy to maintain a given temperature than the same house in the South West of England.¹⁴⁵ Therefore there was a need for a model which accounted for regional variations in climate.

With regard to policy initiatives in Britain and Ireland the Supplier Obligation appears to be the most important instrument to deliver energy and carbon savings in the domestic sector.¹⁴⁶ Here the Government imposes a savings target on energy companies that has to be achieved at the customer end. The energy companies arrange for energy saving measures that carry out the work in homes according to a defined standard and with a certain benchmark for energy and or carbon savings. Alternatively, energy companies may choose to work with the occupants of homes directly.¹⁴⁷ In social housing the attention for energy efficiency among landlords has been stimulated among others by the introduction of the Decent Homes Standard in England and Wales and the Scottish House Quality Standard.¹⁴⁸ In the majority of cases, social landlords may not see, or realise, the benefits of making their housing stock energy efficient due to lack of clear market signals.¹⁴⁹ Better energy management is seen as a key aspect of improved energy efficiency going forward across both Islands.¹⁵⁰ A key aspect of empowering consumers is through the labelling of products, such as white goods, to encourage them to buy products which are more energy efficient.

2.5 Subsidization

The UK and Ireland are unusual in European terms in offering large scale demand subsidies in the subsidised rental sector.¹⁵¹ The Scottish Government and indeed Welsh Government are tightly constrained by the fact that full fiscal authority has not been devolved and so continues to be directed from Westminster.

¹⁴⁵ 'Domestic Energy Fact File 2008' (London, Department of Energy and Climate Change, 2014), p 21.

¹⁴⁶ Both the 2004 and 2007 Energy Efficiency Action Plans highlight the Supplier Obligation as the principal policy mechanism to deliver energy savings in the domestic sector. In Ireland see the European Union (Energy Efficiency Obligation Scheme) Regulations 2014 (SI No. 131 of 2014).

¹⁴⁷ Businesses and industrial end-users are not covered by the scheme; they are covered by other policy instruments such as the Climate Change Levy and Climate Change Agreements as well as the recently introduced Carbon Reduction Commitment. J. Rosenow, 'Different Paths of Change: Home Energy Efficiency Policy in Britain and Germany', In *European Council for Energy Efficient Economy Summer Study*, 2011: 261-272.

¹⁴⁸ Delivering decent homes is a commitment in the national strategy for neighbourhood renewal and has a key role to play in narrowing the gap between deprived neighbourhoods and the rest of the country. The Decent Homes standard is a minimum standard that triggers action below which no social housing should fall below by 2010 or other renegotiated deadline.

¹⁴⁹ J. Hulme, 'England: Lessons from Delivering Decent Homes and Affordable Warmth', in N. Nieboer, S. Tsenkova, V. Gruis, (eds) *Energy Efficiency in Housing Management: Policies and Practice in Eleven Countries*, (London: Routledge, 2012), 97-115.

¹⁵⁰ This approach is behind the UK Government commitment that 'smart' meters are to be installed in every home by 2020 to encourage better household energy management.

¹⁵¹ M. Stephens and C. Whitehead 'Rental Housing Policy in England: Post Crisis Adjustment or Long Term Trend?' *Journal of Housing and Built Environment 2014*: (in press), 1.

Subsidy of public/social housing

In England the system of support for local housing authorities was introduced in 1988 while in Ireland a system of support was introduced in 1966. In Ireland about 42% of local authority income comes from central government, which is divided almost evenly between general-purpose grants from the Local Government Fund and specific grants and subsidies. In England the Housing Revenue Account subsidy is paid each year¹⁵² at a level set by the Secretary of State with a width of discretion judicially described as 'remarkably wide'.¹⁵³ Housing Revenue Account subsidy was a grant made by central government to each authority covering the amount each authority needed to spend on its council housing. This determination was based on notional calculations of rental income, housing expenditure and housing debt. Legislation provides for the abolition of Housing Revenue Account subsidy in England¹⁵⁴ and the transfer of competence for Wales to the Welsh Government and the Welsh Assembly.¹⁵⁵ The year 2012 also saw the ending of the housing subsidy regime for council housing in England as part of the government's programme of deficit reduction.¹⁵⁶ Across Britain and Ireland subsidy has been increasingly concentrated on housing associations in order to provide new build social housing. By the mid-1990s they had become the main providers of social housing across Britain. Funding is provided by the Homes and Communities Agency except in London where it is through the Greater London Council and Wales where it is the Welsh Government. Housing subsidy is important in securing the aim of affordability in areas where people with low or modest incomes can afford to live in areas that people with high income may also live, and reaping the benefits of the population mix. In England Wales and Scotland very substantial sums have been invested in the Decent Homes programme and the Scottish Social Housing Charter.¹⁵⁷

In England and Wales the Grant is to be channelled towards social housing providers in two phases. The first is the Affordable Homes Programme running from 2011 to 2015. This provided £4.5 billion to 80,000 registered providers. It will be followed by the removal of the supply subsidy in 2015. Housing associations will then be expected to provide new housing through market mechanisms, charging 'affordable' rents at up to 80% of market levels. For the future there will be a move to affordable rents, set at up to 80% of market levels. At present average social rents are well below 80% in most parts of the country and the areas where they are in the north this is because private sector rents are very low. So rents for new supply will have to increase very substantially.¹⁵⁸

¹⁵² Local Government and Housing Act 1989 s. 79.

¹⁵³ *R. v. Secretary of State for the Environment ex p. Greenwich LBC* (1990) 22 HLR 543, 546, Farquharson L.J.

¹⁵⁴ Localism Act 2011 s. 167 (not yet in force/ abolishes requirement to pay Housing Revenue Account subsidy for financial year 2012-2013). Sch. 15 excludes Wales and transfers is a technical measure to ensure that the reform relates to England alone.

¹⁵⁵ Public Bill Committee, 22nd Sitting, (Hansard, House of Commons, March 8, 2011) col. 866.

¹⁵⁶ H. Pawson and S. Wilcox, *UK Housing Review 2013*, (London: Chartered Institute of Housing, 2013).

¹⁵⁷ However, comparable schemes are lacking in Ireland.

¹⁵⁸ M. Stephens and C. Whitehead 'Rental Housing Policy in England: Post Crisis Adjustment or Long Term Trend?' *Journal of Housing and Built Environment* 2014 (in press), 3.

The Scottish Executive has also used various subsidies to promote council house construction e.g. Council House Building Fund.¹⁵⁹ Several subsidies operate through the housing association sector for instance the Housing for New Supply Shared Equity is financed through the Housing Association Grant and is geared towards assisting people on low to moderate incomes who want to own their own homes but are unable to afford the purchase.¹⁶⁰ The shared ownership scheme is a similar scheme and is directed towards assisting people with below average income who aspire to become homeowners.¹⁶¹ In addition the Housing for Rent scheme is operated by registered social landlords through the Housing Assistance Grant. In Ireland the provision of social housing in Ireland by approved voluntary and co-operative housing bodies is generally funded under two Department of the Environment Community and Local Government funding schemes: the Capital Assistance Scheme (CAS) and the Capital Loan and Subsidy Scheme (CLSS)¹⁶² The scheme is administered by local authorities and provides social rental accommodation for general family type needs and persons with specific categories of need. .

Subsidy of the private sector

Traditionally across Britain and Ireland home ownership was encouraged by various means and to varying extents across the Islands. This is reflected in 2011 by the high rates of owner occupation across England (64%)¹⁶³, Wales (70%)¹⁶⁴ Scotland (65%)¹⁶⁵ and Ireland (70%).¹⁶⁶ Across both Islands the support was expressed through various direct and indirect subsidies, taxation schemes and the operation of various tenant purchase schemes. A major contributor to the high homeownership rate was the tenant purchase schemes extended to local authority tenants in Ireland mainly during the 1960s and in Britain during the 1980s.¹⁶⁷ Across Britain and Ireland home ownership was encouraged by providing income tax relief on mortgage payments, but this had been removed in Britain in the 1980s and in Ireland in 2012. A substantial gap has opened up between Britain and Ireland in the approach to providing subsidies of the private sector. In Ireland all affordable housing schemes have been removed as part of the wider Government reformulation of housing policy towards a more tenure neutral

¹⁵⁹ 'Housing Statistics for Scotland 2012: Key Trends Summary 2011-12' (Edinburgh, Scottish Government, 2012).

¹⁶⁰ 'New Supply Shared Equity Scheme – Information for Buyers' (Edinburgh: Scottish Government, 2012).

¹⁶¹ 'The Evaluation of Low Cost Initiative for First Time Buyers' (Edinburgh: Scottish Government, 2011).

¹⁶² D. Silke & C. Farrell, 'Study to examine the implications of including the voluntary and co-operative sector under the PRTB registration and dispute resolution services' (Housing and sustainable communities agency: Stationery Office, 2011), p. 4.

¹⁶³ 'Dwelling Stock by Tenure: England (Historical Series)' in 'Housing Statistics', (Department for Communities and Local Government, <www.communities.gov.uk>, 2012) Table 104; figures rounded and in millions with figures for 1986 extrapolated; sectors as defined by the Department.

¹⁶⁴ R. Caunt, *Dwelling Stock Estimates for Wales, 2010-11, SDR 25/2012*, (Cardiff: Welsh Government, 2012), 2.

¹⁶⁵ Housing statistics for Scotland 2013: Key Trends Summary (Edinburgh: Scottish Government, 2013) p. 10.

¹⁶⁶ Central Statistics Office, *Census 2011: Profile 4 The Roof over our Heads - Housing in Ireland* (Dublin: Stationery Office, 2011), p. 12.

¹⁶⁷ T. Fahey & B. Maitre, 'Home Ownership and Social Inequality in Ireland', in K. Kurz & H. Blossfeld (eds.), *Homeownership and Social Inequality in Comparative Perspective* (Palo Alto, CA: Stanford University Press, 2004), p.284.

policy in response to the onset of the economic crises. However, in Britain new subsidies have been introduced which promote home ownership. Encouragement to the private sector is now provided through the Help to Buy scheme, by which the government guarantees (part of) mortgage loans provided in the commercial market. Across both Islands the private rental sector has largely been left to fend for itself in terms of the supply of rental housing, but the coalition has provided £1 billion support for a 'Build to Rent' programme.¹⁶⁸ In addition the Scottish Government has developed a number of subsidies which promote access to the rental market including the Grant for Mid-Market Rents and the Rural Empty Properties Grant.¹⁶⁹

Welfare supports for renters

Welfare supports are available to lower income tenants across Britain (Housing Benefit) and Ireland (Rent Supplement and the recently introduced Housing Assistance Payment). As from October 2013 it is gradually being phased out in favour of a universal credit across Britain. However this is controversial as both the Scottish and Welsh Governments have signalled their opposition to the changes.¹⁷⁰ Across both Islands these schemes are essentially means tested benefits provided by the state and administered by local authorities. In Britain housing benefit, is paid to tenants irrespective of the sector in which they are renting while in Ireland both Rent Supplement and the Housing Assistance Payment are targeted at households living in the private rented sector. Currently two thirds of social renters and a quarter of private renters receive housing benefit, with claims increasing¹⁷¹ while in Ireland approximately two fifths of private renters are in receipt of rent supplement.¹⁷² Housing benefit expenditure has risen as a result of the sustained policy choice to direct subsidy towards individuals with low incomes at a time when housing costs have increased across all tenures. Demand side subsidies tend to be efficient and progressive, being targeted at an individual and means-tested, and have the additional advantage that they are portable. A household is enabled to move without losing its subsidy, assisting in mobility to secure work, and people who may need care are enabled to move nearer to support networks. In both Britain and Ireland there is a cap¹⁷³ on housing benefit. In Britain the under occupancy charge (or to the political opposition the 'Bedroom Tax'), will reduce the amount of Housing Benefit that is paid to those considered to under-occupying their home.¹⁷⁴ Further controls are proposed on EU migrants; they will have to have earned

¹⁶⁸ M. Stephens and C. Whitehead 'Rental Housing Policy in England: Post Crisis Adjustment or Long Term Trend?' *Journal of Housing and Built Environment* 2014: (in press).

¹⁶⁹ *Ibid.*

¹⁷⁰ 'The Benefit Cap - Assessment of Impact in Scotland' (Edinburgh: Scottish Government, 2013); 'Impact of Planned Benefit Changes on Under-Occupied Disabled Households in Scotland' (Edinburgh: Scottish Government, 2013). For Wales see <http://wales.gov.uk/newsroom/communities/2014/black-hole-universal-credit-should-be-stopped/?lang=en>

¹⁷¹ 'English Housing Survey Headline Report 2012-13' paras 1.35-144; the gross annual income of a couple claiming the benefit is £12,000.

¹⁷² Department of Social Protection, *Annual SWS Statistical Information Report 2012* (Dublin: Stationery Office, 2012), Section G.

¹⁷³ Benefit Cap (Housing Benefit) Regulations 2012. In Ireland the Social Welfare (Consolidated Supplementary Welfare Allowance) (Amendment) (No. 2) (Rent Supplement) Regulations 2007.

¹⁷⁴ 'Benefit changes: Who will be affected?' www.bbc.co.uk/news/uk-21706978, 15 April, 2013.

£150 a week for more than three months before they can claim housing benefit and most other benefits.¹⁷⁵

2.6. Taxation

Housing occupies a prominent position in the taxation systems across Britain and Ireland and is a major contributor to national revenue. Housing taxation has a large remit which draws from a range of distinct tax models. The tax system does not directly subsidise any particular tenure but it does create market distortions. In the past there was a more direct subsidy of the owner occupation market by allowing the deduction from taxable income of mortgage interest payments on the principal home; this however was phased out in the late 1990s in Britain and 2010s in Ireland.

Stamp Duty Land Tax (SDLT) is charged on transactions with land in the UK and Ireland. The tax is paid by the purchaser at the following rates on residential property. In Ireland Stamp Duty Tax applies at a rate of 1% on properties with a value up to €1,000,000 while transfers of properties with a value above this threshold are taxed at 2%.¹⁷⁶ In the UK the taxation rate ranges¹⁷⁷ from 0% on properties purchased for less than £125,000, up to 7% on properties worth over £2,000,000.¹⁷⁸ Stamp duty has been used by the government as a tool to stabilise the housing market, including the use of stamp duty holidays and raising the threshold to accommodate first time buyers.

Rental income of individual landlords is chargeable to income tax. This is charged on the net income from a property that is let, so that various expenses incurred in letting the property may be deducted from the rent received.¹⁷⁹ Allowable deductions include management fees, repairs, insurance, ground rent, wear & tear allowance, professional fees, and loan interest. Landlords are required to declare this rental income on a self-assessment tax return. If the landlord is a company it will pay corporation tax instead.¹⁸⁰ Landlords which are companies are required to pay tax on profits in the form of corporation tax.¹⁸¹ This form of taxation does not apply to owner occupiers; there is no income tax charge on a principal private dwelling or any secondary dwelling.

Value Added Tax is charged at the standard rate - currently 20% in Britain, 23% in Ireland - on all repairs, renovation and maintenance work whatever the status of the building concerned. In Britain the construction of new buildings is charged a zero rate, provided the supply in question is for a social purpose.¹⁸² Landlords are required to pay the full rate of VAT for all goods and services, as owner-occupiers are for repairs, renovations, extensions and professional fees.

Capital Gains Tax is a tax on the profit or gain made upon sale or disposal of an asset. For landlords the sale of a property which has been held for investment is liable for

¹⁷⁵ *Guardian* 19 February 2014.

¹⁷⁶ *Irish Tax Guide 2015*, part 6.

¹⁷⁷ www.gov.uk/stamp-duty-land-tax-rates, 25 January 2013. Different rates apply to non-residential and mixed use property.

¹⁷⁸ Or 15% if the purchaser is a corporate body.

¹⁷⁹ Income is taxable whether derived from a lease or a licence or any other occupation arrangement.

¹⁸⁰ Income Tax Act 2007 part 2 chap, 3; *UK Tax Guide 2013-14*, Part II. *Irish Tax Guide 2015*, part 2.

¹⁸¹ Corporation Tax Act 2010; *UK Tax Guide 2013-14*, Part IV. *Irish Tax Guide 2015*, part 2.

¹⁸² Value Added Tax Act 1994 sch. 8; *UK Tax Guide 2013-14*, Part V.

Capital Gains Tax at 33%¹⁸³ in Ireland, while in the UK the rate payable is between 18% and 28% for individuals depending upon the taxpayer's total taxable income.¹⁸⁴ This tax applies only to the gain in value of the property (i.e. the rise in the property's price). Owner-occupier are not liable for pay Capital Gains Tax when they sell the dwelling forming their principal home. When a landlord dies, the value of his rental properties will be included in the estate on which Inheritance Tax is levied. Rented property will be included at its market value. Inheritance Tax is levied at 40% in Britain and 33% in Ireland.¹⁸⁵ No tax is paid when a spouse dies and leaves their property to their spouse and there are large zero bands.¹⁸⁶

In Ireland the local property tax is an annual tax charged on the market value of all residential properties in Ireland.¹⁸⁷ The new tax came into effect from 1 July 2013. In practice the owner of a residential property will be liable to pay the tax and this includes the landlord of property which is rented on a normal short term period. Lessees are only liable if they hold long term leases for a term of more than twenty years. Those liable to pay will be required to complete a self-assessment form and return it to the Revenue. This self-assessment form will include a valuation of the property by Revenue. However, this valuation is not conclusive and may be contested.¹⁸⁸ In contrast to Ireland, council tax in Britain which fulfils the same function as the local property tax in Ireland, is chargeable on the occupiers of residential property and will usually be billed to the tenants directly; alternatively the landlord may collect the tax and pay it over to the council. Each year the local council sets the level of council tax for each band. Dwellings are charged on the basis of two adult occupiers, and there is a reduction for a single occupier. Students are ignored, so any property occupied exclusively by students will not be charged. Carers and those cared for are also ignored for six months after being required to live elsewhere. There are some exemptions of which the most important and controversial is for vacant dwellings. Help with council tax bills is available in the form of Council Tax Benefit. The value of occupying a home is not (and has not for many years past) been considered a form of taxable income. Gains made on a person's principal private residence are exempt from capital gains tax charge.

Taxes on housing and rentals can be a significant source of revenue for the government, but also threatened with the illegal acts of tax evasion. In the UK buy-to-let landlords paid £2 billion income tax on their rental income in 2010-11,¹⁸⁹ but private landlords are reported to be evading over half a billion pounds in tax due on their rental income.¹⁹⁰ The route to tax evasion is often from the allowances given to property owners in computing their expenses while working out their profits for tax purposes.

¹⁸³ Taxes Consolidation Act 1997, chapter 3. The rates of Capital Acquisitions Tax and Capital Gains Tax increased to 33% from 30% as from 5 December 2012.

¹⁸⁴ 28% for trustees or personal representatives of someone who has died; corporate landlords will pay corporation tax on chargeable gains.

¹⁸⁵ Inheritance Tax Act 1984; *UK Tax Guide 2013-14*, Part VII.

¹⁸⁶ This includes a civil partner.

¹⁸⁷ See Finance (Local Property Tax) Act 2012, s. 17 for the scheme of valuation to be applied. The rate of taxation in the first year the LPT was introduced was 0.18% of the estimated value of the property.

¹⁸⁸ *Ibid.*

¹⁸⁹ T. Mannan, 'HRC closing in on tax-evading expat landlords', <http://www.yourmoney.com/your-money/news/2283950/hmrc-closing-in-on-taxevading-expat-landlords>, 15 August, 2013.

¹⁹⁰ 'Private landlords evading at least £550 million tax on rental incomes', *The Independent*, 14 November, 2012.

There could be some deliberate misrepresentation of a business's or an individual's financial affairs to the tax authorities to reduce tax liabilities. A landlord can claim expenses for running their rental business and the associated costs of running an office at home because in calculating rental business profits a taxpayer can deduct business expenses so long as they are incurred wholly and exclusively for business purposes. If a buy-to-let property is empty for any period of time, the expenses such as utilities or council tax incurred when the rental property is empty can be claimed as a letting expense.¹⁹¹ In relation to council tax/local property tax, benefit fraud and manipulation of the various exemptions are means of evading taxes.

¹⁹¹ 'Deductions: General Rules' (London: Her Majesty's Revenue and Customs, PIM2005).

2. Comparison of tenures without a public task (Regulation in Private Markets – points 3 and 4 have been exchanged as private tenancies work as default solutions in many national systems)

3.1. Evaluative criteria for the landlord

Statute has overlaid the common law of leases so completely in the field of residential tenancies across both Islands that it is necessary at the outset to differentiate the key types of tenancy before detailing the issue of profitability.¹⁹² In Britain the Housing Act 1988 introduced statutory tenancies which have become the default tenancy across the Island however the approach taken in Ireland is different in that no default statutory tenancy was introduced rather the vast majority of tenancies are governed by the Residential Tenancies Act 2004. Thus in Britain the private rented sector is dominated by the assured shorthold tenancy¹⁹³ while in Ireland the private rented sector is dominated by tenancies governed by the Residential Tenancies Act 2004.¹⁹⁴ Britain and Ireland differ greatly with regard to how the tenancy is governed. The assured shorthold tenancy will be governed by contractual rules for its duration while in Ireland a range of statutory rights and duties are implied into every tenancy subject to the Residential Tenancies Act 2004 which cannot be contracted out and these affect fundamental matters such as security of tenure, setting of rent, termination etc.

Across Britain and Ireland the rent is a matter for free market negotiation, but if a welfare support such as housing benefit or rent supplement is relied on by the tenant then housing benefit is used to cover any of the rent payment, there will be limits on the rent level accepted for benefit claims. In Britain the landlord can increase the rent payable under a shorthold most easily by granting a series of short contractual terms, thus reserving the possibility of increasing the rent at each contractual renewal. In Ireland the maximum a landlord can charge is the market rate. This essentially means the rent which a willing tenant not already in occupation would be willing to pay and a willing landlord would accept in respect of the dwelling.¹⁹⁵ In practice a landlord is prohibited from setting the rent higher than an open market level and can only raise the rent rate once a year. A tenant may apply to the Private Residential Tenancy Board for a review of the rent which may result in a reduction or increase in the rent level. In considering a market rent the Private Residential Tenancy Board carry out an assessment of what similarly placed landlords and tenants would agree with regard to the dwelling in question. Thus the system of rent regulation across Britain and Ireland does not prevent the landlord charging a market rate. Across both Islands there is a gross undersupply of housing with a public task and this has resulted in upward pressure on rents, particularly in London and Dublin. As set out above the landlord's rental income is taxable¹⁹⁶ and while the landlord is primarily responsible for carrying out repairs to the dwelling any expense incurred in maintenance or repair work is tax deductible. All in all there remains strong potential for profitability in the private rented sector. According to one commercial

¹⁹² 'Lease' and 'tenancy' are interchangeable, but 'tenancy' is used for shorter arrangements.

¹⁹³ Arden and Dymond, *Manual of Housing Law*, 9th edn, para. 1-237 ff; S. Garner & A. Frith, *A Practical Approach to Landlord and Tenant*, 7th edn, (Oxford: University Press, 2012), 250ff.

¹⁹⁴ For a discussion of the indicia of a lease/tenancy see section 3.2.1.

¹⁹⁵ Market rent is defined in s. 24 of the RTA 2004.

¹⁹⁶ See section 2.6 on taxation.

Buy to Let index, gross yields on a typical rental property are 5.3%, but taking into account capital accumulation and void periods total returns rose to 8.9% in November 2013.¹⁹⁷ Potential yields vary regionally. They fluctuate wildly over time especially when capital appreciation or depreciation is taken into account. Private landlords will be taxed on any income from rent.¹⁹⁸

Across Britain and Ireland the primary duty to repair the dwelling will generally lie with the landlord however the tenant must be alert to the fact that he must also undertake certain obligations with regard to maintenance of the property.¹⁹⁹ For instance in Scotland the tenant is also required to do their part. In particular, the tenant is under a common law obligation to keep the property “aired and fired”²⁰⁰, this means that the tenant must use the heating system which is provided.²⁰¹ However, this must be an efficient system and must not involve undue or excess expenditure on the tenant.²⁰² In addition across Britain and Ireland the tenant will be liable for any damage caused to the dwelling which is beyond normal wear and tear.

Throughout both Islands legal minimum standards apply to rented dwellings, in both England and Wales and Scotland additional and distinct standards have been introduced in the social and private rented sectors. However, the extent of the repairing obligation and the overarching scheme for regulating housing conditions varies widely across both Islands and indeed across rental sectors giving rise to widely different outcomes. While common law duties to the effect that the house be reasonably fit for human habitation apply in all jurisdictions,²⁰³ by far the most important duties are imposed by statute.

With respect to the basic standard which applies to all rented housing – in England this was the fitness standard²⁰⁴ which has been overhauled by the Housing Health and Safety Rating System.²⁰⁵ In Scotland this is the tolerable standard as set out in the Housing (Scotland) Act 1987 (as amended)²⁰⁶ while in Ireland the Housing (Miscellaneous Provisions) Act 1992 and subsequent regulations set out the housing quality standard which all landlords must meet to ensure that their properties were of a

¹⁹⁷ LSL Buy-to-Let Index, 20 December 2013; the average return in gross terms was £14,592, with rental income of £8,243 and a capital gain of £6349. Clearly the picture would be very different if house prices were not rising so sharply. Earlier versions of the index show the changes over time. Another survey by BM Solutions reported in the *Guardian* 26 February 2014 suggests 5.5 throughout 2013. A figure of 2.8% for 2010 is given in C. Whitehead, *Private Rented Sector in the New Century: A Comparative Approach* (Cambridge: University of Cambridge, 2012).

¹⁹⁸ See section 2.6 above.

¹⁹⁹ McAllister, *Scottish Law of Leases*, ch. 19. In Ireland certain obligations in relation to repair are placed on the tenant through RTA 2004 s. 16(f).

²⁰⁰ *Boyle v. Waddell* 1870 11 M. 223.

²⁰¹ *Dover District Council v Farrar* (1980) 2 Hous LR 32.

²⁰² *McArdle v Glasgow District Council* 1989 SCLR 19.

²⁰³ In England and Wales there is no requirement that a property let should be fit for human habitation, unless the letting is furnished.

²⁰⁴ Housing Act 1985.

²⁰⁵ Housing Act 2004, s. 7.

²⁰⁶ Housing (Scotland) Act 1987 s. 86; the Housing (Scotland) Act 2006 s. 11 amends the definition of tolerable standard to require satisfactory thermal insulation.

certain standard.²⁰⁷ These standards essentially amount to a legal minimum quality threshold below which a rented dwelling must not fall and shows when it may be condemned as unfit for human habitation. Each of these standards contains detailed provisions on various aspects of the condition of the dwelling including structural condition, sanitary facilities, heating facilities, cooking facilities, water facilities, insulation and energy efficiency, ventilation etc. The landlord is responsible for ensuring that the dwelling meets these standards however where the landlord is failing in this duty any tenant across Britain and Ireland may contact the local authority which is primarily responsible for enforcement of these housing condition standards.²⁰⁸ Where a tenant feels that the local authority has not adequately responded to a complaint about the housing standard they can lodge a complaint to the Ombudsman.²⁰⁹ In recent years there have been efforts across both Islands to improve the condition of rented accommodation. In addition to introducing the Housing Health and Safety Rating System in In England and Wales, the Decent Homes Standard has been introduced in social housing. A social home is described as decent²¹⁰ when it meets the current statutory minimum standard²¹¹ for housing – be in a reasonable state of repair, has reasonably modern facilities and services, and provides a reasonable degree of thermal comfort.²¹² Part 1 of the Housing Act 2004 puts in place the framework for the Housing Health and Safety Rating System (HHSRS) by which local authorities have powers to regulate housing conditions. Although local authorities cannot take statutory enforcement action against themselves in respect of their own stock of housing they will be expected to use the HHSRS to assess the condition of their stock and to ensure their housing meets the Decent Homes Standard.²¹³

²⁰⁷ The Housing Act 1966 s. 114 implied into every contract for letting, a condition that the house was at the commencement of the tenancy 'in all respects reasonably fit for human habitation'; s114 was repealed by Housing (Miscellaneous Provisions) Act 1992 s. 37. *Siney v. Dublin Corporation* [1980] IR 400 held that s.114 did not apply to housing authorities but that housing authorities were liable in damages for breach of contract based on the implied warranty as to fitness for human habitation. See Housing (Standards for Rented Houses) Regulations 2008 (SI No. 534/2008) as amended. See: M. Jordan, M. 'The Rented Accommodation Sector in Ireland: Increased Demand amid Regulatory Transition - Housing Standards in Focus' (2012) 17(3) *Conveyancing and Property Law Journal* 42.

²⁰⁸ Housing (Miscellaneous Provisions) Act 1992 ss. 18A and 18B, inserted by the Housing (Miscellaneous Provisions) Act 2009 sch.2, part 4. In Scotland repair notices, improvement notices, maintenance notice, closing and demolition orders are available under the Housing (Scotland) Act 1987 Part VI, s. 114. In England and Wales see the Housing Act 2004, part 1 which introduced the framework for the Housing Health and Safety Rating System.

²⁰⁹ In England it is the Local Government Ombudsman, in Scotland it is the Scottish Public Services Ombudsman and in Ireland it is the Government Ombudsman.

²¹⁰ A technical standard for public housing introduced by the government aimed to provide a minimum standard of housing conditions for all those who are housed in the public sector.

²¹¹ Dwellings which fail to meet this criterion are those containing one or more hazards assessed as serious ('Category 1') under the Housing Health and Safety Rating System.

²¹² Department for Local Government and Communities, *A Decent Home: Definition and Guidance for Implementation, June 2006 – Update*. The definition of what is a decent home has been updated to reflect the Housing Health and Safety Rating System (HHSRS) which replaced the Housing Fitness Standard under section 604 of the Housing Act 1985.

²¹³ 'Regulatory Framework for Social Housing in England from April 2012' (London: Homes and Communities Agency, 2012).

In addition to the tolerable standard in Scotland, housing in the private rented sector must also meet the 'repairing standard'²¹⁴ which the landlord must ensure that the dwelling meets the repairing standard at the start of the tenancy and at all times during the tenancy.²¹⁵ This standard goes above and beyond the basic tolerable standard in various respects.²¹⁶ Once the landlord becomes aware of a defect in the dwelling which requires repair or maintenance work he is under a duty to act within a reasonable time. Essentially this means that the time in which the landlord should carry out the repairs depends on the nature of the defect in question with more material defects requiring prompt attention. When carrying out repairs the landlord will be responsible for any damage caused and he must make good any damage caused while carrying out any work.²¹⁷ Where the defect requiring maintenance work is down to the fault of the tenant the landlord will not be under a duty to carry out repairs. Furthermore, the landlord will not be liable for failure to carry out maintenance or repairs where the only reason for that failure was the tenant's refusal to grant access. The landlord is expressly prohibited from contracting out of the repair and maintenance obligations and any lease which purports to shift responsibility onto the tenant is prohibited.²¹⁸

The Private Rented Housing Panel is primarily responsible for enforcement of repair and maintenance obligations²¹⁹ in the private rented sector.²²⁰ The tenant may apply to the panel for a determination that the landlord has breached his repairing duty. However, in order to make such an application the tenant must first have notified the landlord of the defect which requires attention and allowed the landlord a reasonable amount of time to carry out the maintenance or repair in question.²²¹ The committee can order the landlord to carry out certain works to bring the defect into order so that the dwelling meets the repairing standard.²²² Should the landlord fail to carry out the repairs in the manner required then the Committee may impose a rent relief order allowing the tenant to pay less rent while awaiting repair.

The Housing (Scotland) Act 2001 sets out the repairing obligation of landlords in relation to Scottish secure tenancies.²²³ In general the statute restates the common law obligation of the landlord to meet the tolerable standard and the extent of the landlord's obligation closely resembles the repairing standard in the private rented sector i.e. duty to act within a reasonable time, duty to give notice, liability for damage caused carrying out repairs, etc. Certain small urgent repairs, so called qualifying repairs, which might affect a tenant's health, safety or security, have to be done quickly.²²⁴ Where the landlord is unable to carry out such repairs within the time limit then the tenant may be

²¹⁴ This is dealt with in detail in Part 2.

²¹⁵ Housing (Scotland) Act 2006 s. 14(1).

²¹⁶ Housing (Scotland) Act 2006 s. 13(1) (a).

²¹⁷ Housing (Scotland) Act 2006 s. 14(2); this follows the Sheriff's decision in *Little v. Glasgow District Council* 1991 1 SHLR 195 at 199.

²¹⁸ Housing (Scotland) Act 2006 s.17.

²¹⁹ Housing (Scotland) Act 2006 s. 22(5) and sch. 2 para. 8; Private Rented Housing Panel (Applications and Determinations) (Scotland) Regulations 2007. There is a proposal to allow third party applications: Housing (Scotland) Bill 2013 cls 23-25.

²²⁰ Right of application is not available to a Scottish secure tenancy etc.

²²¹ Private Rented Housing Panel (Applications and Determination) (Scotland) Regulations 2007.

²²² Housing (Scotland) Act 2006 s 24(2).

²²³ Housing (Scotland) Act 2001 s. 27(1).

²²⁴ Housing (Scotland) Act 2001 s. 27(2).

entitled to carry out the repairs and charge them to the landlord.²²⁵ Where the landlord fails to carry out repairs within a reasonable time the tenant may lodge a complaint with the Scottish Public Services Ombudsman. A higher standard must be met before housing meets the Scottish Housing Quality Standard²²⁶ which was introduced in February 2004 as the Scottish Government's principal measure of housing quality in Scotland. It applies in the social sector as an aspiration (though a highly influential one) for the improvement of the stock of local authority and Registered Social Landlords. In order to meet the Scottish Housing Quality Standard, a dwelling should meet five housing criteria, though we can perhaps spare the reader the fifty five separate elements into which these criteria are broken down, some of them further subdivided. The Scottish Housing Regulator is responsible for ensuring that local authorities and registered social landlords adhere to the Scottish Government's Social Housing Charter.

In Ireland while the basic repairing standard applies to all dwellings there are disparities in enforcement options between private and social rented tenants. In the private rented sector a tenant may apply to local authority but may also apply to the Private Residential Tenancies board for dispute resolution by reason of the landlord's failure to meet the standard of repair.²²⁷ A landlord may be liable to reimburse a tenant for expense they incur while carrying out repairs. The tenant is under no statutory obligation to carry out repairs and indeed the landlord is not allowed to impose any repairing obligations on the tenant,²²⁸ but if the landlord has failed to carry out pressing repairs in a reasonable time after notice to do so the tenant may carry out the repairs at their own expense and then seek payment from the landlord to reimburse them for their outlay.²²⁹ These protections are not available to a local authority tenant. Where a local authority tenant is having difficulty having repairs carried out in a reasonable time then he may lodge a complaint with the Government Ombudsman.

Across Britain and Ireland a landlord must provide the services which are reasonably required the tenant, including, as appropriate, the supply of gas, electricity, sewerage and water. Other utilities would include telephone. In most cases the supply contract would be concluded between the utility provider and the tenant directly.²³⁰

Where registration fees fall due across Britain and Ireland they are the responsibility of the landlord. In Ireland private landlords are obliged to register any tenancy of a dwelling rented by them with the Private Residential Tenancies Board, who have the power to actively pursue landlords who fail to register tenancies.²³¹ The landlord must register the tenancy within one month of commencement. In order to register the landlord must submit an application along with €90 fee.²³² Although a significant number of tenancies have not been registered, the system is a vast improvement on the previous one. In

²²⁵ Scottish Secure Tenants (Right to Repair) Regulations 2002 setting out the max amount for any single qualifying repair as well as the period in which it is to be completed.

²²⁶ 'Scottish Housing Quality Standard' (Edinburgh: Scottish Government, 2004).

²²⁷ RTA 2004 s. 78(1)(e).

²²⁸ *Norris v. Rice* TR23/DR347/2006, 25 July 2006.

²²⁹ RTA 2004 s. 12(1)(g).

²³⁰ This is discussed in section 3.2.1 below.

²³¹ RTA 2004 Part 7.

²³² *Ibid.*, s. 137(1)(b).

Scotland each landlord or agent applying for registration should pay a principal fee of £55 to each local authority in which they apply and, in the case of landlords, a property fee of £11 for each property registered.²³³ The register records the landlord and the dwelling, but not the tenant or other occupier; there is no scheme for registering individual tenancy contracts. The obligation to register is triggered where a person unconnected to the landlord can occupy a house as a dwelling – this may be under a tenancy or any other occupation agreement, and includes arrangements covering parts of a building.²³⁴ In order to secure registration the landlord has to pass the test of being a fit and proper person,²³⁵ taking into account: convictions involving fraud, dishonesty, violence or drugs, and also firearms and sexual offences;²³⁶ any record of unlawful discrimination; contraventions of housing or tenant law;²³⁷ failure to observe a Letting Code;²³⁸ and other relevant circumstances. It is important to emphasise that this test is not onerous on the landlord and should not be treated as a complete check on the landlord's previous dealings etc. It is an offence to let out a dwelling without lodging an application for registration which may incur a fine, and it is also possible for the authority to serve a notice which will mean that the tenant or occupier does not have to pay rent while the notice remains in effect.²³⁹ Advertisements of property to let must include the landlord's registration number.²⁴⁰ Registrations are renewable every three years. With regard to registration fees in England social landlords are regulated by the Homes and Communities Agency but that there is no comparable oversight regulation of the commercial/professional or private landlord sector and there is no requirement to register. This is also true in Wales but new proposals have been brought forward for national mandatory registration and licensing scheme for private sector landlords, anybody wanting to let homes privately will have to sign a register before being allowed to take on tenants.²⁴¹ One of the key features of the Housing (Wales) Act 2014 is to introduction of a compulsory registration of private rented sector landlords and letting agents.²⁴² Across Britain a licence is required for a house in multiple occupation (commonly abbreviated to HMO) that is a property shared by three or more occupiers who are not members of the same family.²⁴³ This applies to a "house" and also any premises where basic amenities are shared. So it would include a flat shared by a group of students or young professionals, or a house subdivided into bed sitting rooms

²³³ Antisocial Behaviour etc. (Scotland) Act 2004, as amended by Housing (Scotland) Act 2006 s 175 and Private Rented Housing (Scotland) Act 2011; McAllister, *Scottish Law of Leases*, para. 218, makes the point in the following para. that the register can be criticised as an example of ineffective bureaucracy.

²³⁴ It would include lodging arrangements where the occupier does not have exclusive use of a separate dwelling.

²³⁵ Antisocial Behaviour etc. (Scotland) Act 2004 s. 84.

²³⁶ The last two were added in 2011. The local authority will rely on a criminal record certificate.

²³⁷ Matters to be considered including records of antisocial behaviour orders and notices and housing related complaints were clarified in 2011.

²³⁸ Antisocial Behaviour etc. (Scotland) Act 2004 s. 92A inserted in 2006, though no such code has yet been issued. Scottish Ministers may issue guidance to local authorities under powers given in 2011.

²³⁹ Antisocial Behaviour etc. (Scotland) Act 2004 s. 94.

²⁴⁰ Antisocial Behaviour etc. (Scotland) Act 2004 s. 92B, added by Private Rented Housing (Scotland) Act 2011 s. 6.

²⁴¹ Announced by Housing Minister Huw Lewis. Wales Online www.walesonline.co.uk/business-in-wales/business-news/2012/08/22/building-societies-warning-over-landlord-regulation-scheme-91466-31668821/#ixzz2lhUFbflc, 22 January 2013.

²⁴² Cls 1-35.

²⁴³ Housing Act 1985 ss 345-394 as amended..

with shared kitchen, toilet or bathroom.²⁴⁴ This licence must be obtained before the property is rented out,²⁴⁵ and renewed every three years and can range into several hundred pounds. The cost of a licence depends on the type of House in Multiple Occupation (HMO) being licensed, and the number of persons, or units, in the property. The council must check that the owner and anyone who manages the property (for example, a letting agent) doesn't have any criminal convictions, for example, for fraud or theft. The council will inspect the property to check on safety and that it is suitable for the proposed number of tenants, and they will also ensure that proper management practice is followed.

3.1.2. *Property rights respected de iure and de facto*

There are inherent risks in letting property which may reduce the potential profitability. There is the risk of default with rent payment, of abuse or deterioration of the house by the tenant and the risk of being unable to evict a tenant, even in cases of protracted violations of the contract or default in rent payment. The risk to the landlord may be reduced through requiring a security deposit or by taking out insurances however in cases of default with rent payment or where the tenant damages the property the main remedy sought for the landlord will be to seek termination of the tenancy. Across Britain and Ireland the effect of a notice of termination depends very much on the sectoral allocation of the tenancy, in Britain the key division being between assured shorthold tenancies and tenancies with full security - fully assured tenancies in the social sector and secure tenancies in the public sector or Scottish secure tenancies as the case is in Scotland, while in Ireland the division is between tenancies governed by the Residential Tenancies Act 2004 and local authority tenancies. Across both islands there is also a residual category of tenancies falling outside all security regimes so that contractual principles apply.

Termination of a short assured tenancy

An assured shorthold tenancy will often include a fixed contractual grant for a term of six months or more. The landlord will be able to terminate the tenancy at the end of the fixed term and any contractual regrant. It is necessary to end any periodic continuation by notice to quit or other contractual rights.²⁴⁶ It is common to give a notice with a saving clause to ensure that a valid date is stated; this device has been accepted by the courts.²⁴⁷ The landlord must give a statutory notice, which must be of two months duration and expire on or after the term date.²⁴⁸ At the expiration of the notice the landlord may issue a possession action in the county court and the court must make an

²⁴⁴ There are a number of exemptions e.g. for care homes, property occupied by members of the armed forces, prisons, religious communities and co-operative housing associations; other exempted groups may be designated. The rules cannot be avoided by treating a group of six students as an independent religious order: *Thomson v. Aberdeen City Council* 2011 SLT (Sh. Ct) 218.

²⁴⁵ It is a criminal offence for a landlord to operate an HMO without a licence, and they could face a fine of up to £20,000.

²⁴⁶ It was previously necessary to specify a date at the end of a period of a tenancy while it was periodic, but this was overruled in *Spencer v. Taylor* [2013] EWCA Civ 1600.

²⁴⁷ *Hussain v. Bradford Community Housing* [2009] EWCA Civ 763.

²⁴⁸ The tenancy agreement may require longer than two months. A single document can be used to end a tenancy and to give notice of proceedings: *Aylward v. Fawaz* (1997) 29 HLR 408, CA.

order for possession which ends the tenancy when executed.²⁴⁹ Because possession is mandatory tenants tend to move once notice has been given.

Termination of an assured tenancy

Termination of a (fully) assured tenancy is quite different because security of tenure accrues when contractual protection ends: a tenant who remains in possession of the house after the lease has been terminated will have a statutory tenancy of the house²⁵⁰ and he can only be removed if the landlord obtains a county court order based on the statutory grounds. The tenant must be given notice of the proceedings for possession and this notice must state the relevant ground as well as giving any relevant information.²⁵¹ The period of notice is either two weeks or two months.²⁵² Therefore when a landlord is seeking to terminate a contractual tenancy he must serve two notices, a notice to quit which will bring the term of the lease to an end and will prevent a periodic tenancy arising; a second notice will inform the tenant of the landlord's intention to raise proceedings for recovery of possession. Where a sub-tenancy is in operation then termination by the head landlord of the tenancy will cause the sub-tenant to take the place of the head tenant. Where there are substantial (two to three months) rent arrears this can be a mandatory ground for possession meaning the court will grant possession to the landlord upon establishing the ground. Where the condition of the dwelling or common parts of the building has deteriorated because of acts of waste, or any neglect or default of the tenant this is a discretionary ground for possession meaning the court can use its discretion in making an order for possession. All of these misconduct grounds are available once the contractual term has ended and the tenancy is subject to statutory continuation.²⁵³ Some of the grounds may also be used during the contractual period of the lease where the lease provides for this, performing the function of a forfeiture clause.

Termination of an assured tenancy for management reasons

There are a number of grounds for possession where the tenant has not conducted himself improperly, and the ground is available either because the security regime is inherently limited or to facilitate proper management of the property. In many ways the situation is the same as just described. When the (fully) assured tenancy ends a statutory tenancy arises which can only be ended if the landlord obtains a county court order based on the statutory grounds.²⁵⁴ The tenant must be given notice of the proceedings for possession and this notice must state the relevant ground as well as giving any relevant information.²⁵⁵ The exact period of notice depends upon the ground being used but ranges from two weeks to two months but the court may dispense with notice in some situations.²⁵⁶ As set out above some grounds are mandatory and some are discretionary. Where the landlord can establish that any of the grounds for

²⁴⁹ Housing Act 1988 s. 5(1).

²⁵⁰ Housing Act 1988 s. 5.

²⁵¹ Housing Act 1988 s. 2; Assured Tenancies and Agricultural Occupancies (Forms) (England) Regulations 1988, as amended by SI 2003/260.

²⁵² Housing Act 1988 s. 8(4a).

²⁵³ Housing Act 1988 sch. 2 as amended eg by Housing Act 1996 ss 144-152.

²⁵⁴ Housing Act 1988 s. 5(1).

²⁵⁵ Housing Act 1988 s. 8; Assured Tenancies and Agricultural Occupancies (Forms) (England) Regulations 1988 as amended by SI 2003/260.

²⁵⁶ Housing Act 1988 s. 8(4A).

possession from 1 to 8 exists then the court must give back possession to the landlord. These mandatory grounds include the situation where occupancy is required by the landlord or where the landlord wishes to substantially redevelop the dwelling. In the event that the landlord requires the dwelling for the principal residence of the landlord or a 'spouse' etc. The landlord should have been occupying the dwelling in question prior to the beginning of the tenancy as his principal home and have given a notice to the tenant that possession might be required on this ground (though there is a discretion to dispense with notice).

Termination of tenancies governed by the Residential Tenancies Act 2004

An RTA tenancy can only be terminated by one party serving a valid notice of termination upon the other in accordance with Part 5 of the Act.²⁵⁷ The landlord seeking a termination must give a certain period of notice to the other party. The notice period will depend on the duration of the tenancy; the longer the duration of the tenancy, the longer the notice period required. However, in the case where the landlord wishes to terminate the tenancy as a result of anti-social behaviour or behaviour which threatens to damage or does actually damage the fabric of the dwelling then only a seven day notice period is required.²⁵⁸ Unlike assured shorthold tenancies where a fixed period for notice of termination applies, the notice requirements for termination of a RTA tenancy vary according to the duration of the tenancy and range from a minimum of 28 days to 112 days where the tenancy has been operating for 4 or more years.

Failure to provide the correct notice period will result in an invalid notice of termination and this will cause the tenancy to continue to operate, potentially resulting in the attraction of Part 4 tenancy status. Parties are allowed to deviate from the general notice periods where there has been a breach of obligation on the part of the other party. Where the tenant is in breach due to anti-social behaviour on their part the landlord may only give notice of 7 days. However the landlord must produce sufficient evidence. Anti-social behaviour is defined by statute and it is important to set out that a single incident may constitute ASB. Where the breach relates to rent arrears then special rules regarding rent arrears apply. The landlord has a duty to mitigate the loss from unlawful termination of the tenancy and should make efforts to fill a vacant tenancy.²⁵⁹

Where a tenancy which is governed by the RTA 2004 has been in operation for six months and a valid notice of termination has not been served then a Part 4 tenancy will come into operation with an array of legal consequences for both parties. This affects the termination procedure. In particular, a landlord can only bring about a termination of a Part 4 tenancy on one of six grounds and in doing so he must adhere to the particular requirements of any one of those six grounds²⁶⁰ in addition to complying with the normal procedural requirements set out above.²⁶¹

Breach of the tenancy: In the first instance a landlord may terminate a Part 4 tenancy where a tenant has failed to comply with his obligations. The landlord must first afford the tenant the opportunity to right the wrong complained of by notifying the tenant of the

²⁵⁷ RTA 2004 ss 57 and 58.

²⁵⁸ *Ibid.*, s. 67(2).

²⁵⁹ *Kinney and Anor v O'Doherty* TR 26/DR1039/2008.

²⁶⁰ RTA 2004 s. 34.

²⁶¹ RTA 2004 Part 5.

breach and allowing the tenant reasonable time²⁶² to correct the failure.²⁶³ Where the breach relied upon relates to rent arrears a more complex termination applies. The landlord must notify the tenant of his breach and afford him a reasonable time to remedy the breach. In addition the landlord must serve the tenant with a 14 day warning letter in relation to their rent arrears.²⁶⁴ This notice must detail the arrears and give the tenant a reasonable period of time to remedy the breach. If the tenant fails to remedy the breach then the landlord must serve a second notice informing the tenant that the rent is due and giving the tenant a further 14 days to pay. Should the tenant fail again then the landlord may terminate the tenancy by serving a notice of termination with 28 days notice.²⁶⁵

Where the dwelling is required in contemplation of sale the landlord may also bring a Part 4 tenancy to an end where he intends to sell the property within three months. When terminating a part 4 tenancy on this ground the landlord must intend to enter an enforceable agreement to transfer the whole of his interest in the dwelling for full consideration within three months.²⁶⁶ Where the dwelling required for landlords own use the landlord may also bring a part 4 tenancy to an end. However he must provide an additional statement to the tenant stating the identity of the new occupants and where the landlord is not one for the occupants the statement must set out the relationship between the new occupants and the landlord, as well as setting out the expected duration of occupation. In addition, where the dwelling becomes available for letting within 6 months then the landlord is obliged to offer the dwelling to the previous tenants.²⁶⁷ Where the landlord wishes to terminate a Part 4 tenancy but is unable to rely on one of the 6 permitted grounds he must either serve notice on or after the end of the fourth year or serve notice during the first six months of the tenancy.

Across Britain and Ireland deposits are not usual in the social sector, but they would be general in the private rented sector. A security deposit is usually charged as security against damage to the property or getting into rent arrears. Across Britain government deposit protection schemes have been introduced however such a scheme has not been introduced in Ireland although it has been proposed.²⁶⁸ Since 2007 in England

²⁶² In *Canty v. Private Residential Tenancies Board* [2007] IEHC 243 there was a failure to pay rent, and the landlord gave the errant tenant three days to remedy the issue. The court found that this period was not reasonable and instead substituted a 14 days period. As such the period of time given will depend on the nature of the breach complained of and is by nature a relative condition.

²⁶³ *Barrington-Martin and O'Neill and Anor* TR66/DR695/2007, July 9, 2007.

²⁶⁴ RTA 2004 s. 67(3).

²⁶⁵ RTA 2004 s. 67(2).

²⁶⁶ *O'Gorman v. Slattery* TR36/DR236/2007, 28 March 2007 where a landlord served a notice of termination on the basis of sale however the tenant failed vacate and arrears. In response the landlord changed locks prevent tenant from gaining access. The tenancy tribunal found that changing the locks constituted an unlawful termination of the tenancy and awarded €9,000 compensation for inconvenience. Also see *Boyne v. Hanaway* TR49/DR1262/2008.

²⁶⁷ *Barrett v. Ward* TR135/DR963/2007, 31 March 2008, landlord failed to offer the dwelling to the previous tenants and was imposed with paying compensation of €3,300 to the tenants.

²⁶⁸ See Indecon International Economic Consultants, 'Indecon's Assessment of the Feasibility of a Tenancy Deposit Protection Scheme in Ireland' (Dublin: Indecon, 2012). An independent tenant deposit scheme has been proposed in the Residential Tenancies (Amendment)(No. 2) Bill 2012. However, as of March 2014 the scheme has not been introduced.

and 2012 in Scotland²⁶⁹ an agent who charges a security deposit for an assured shorthold tenancy or short assured tenancy in Scotland must protect it in government-approved schemes²⁷⁰ and provide the tenant with details of the scheme. Landlord and tenant should agree with the agent the condition of the property and an inventory of furniture and fittings, in order to reduce disagreements at the end of the tenancy. There are two types of scheme, custodial schemes and insurance schemes, and the choice of which scheme to adopt is the landlord's. In each case the landlord must comply with the initial requirements of the scheme within thirty days of receiving the deposit, providing information²⁷¹ and handing over the deposit. Failure gives rise in each case to a claim that the tenant receive three times the deposit.²⁷² In Ireland the landlord or letting agent hold the deposit of the duration of the tenancy and at the end of a tenancy the landlord, or their agent, is under a duty to return the deposit within a reasonable timeframe. The majority of disputes before the Private Residential Tenancies Board concern allegations of illegal retention of the deposit. The extent of the number of claims has led the Government to consider introducing a deposit protection scheme.²⁷³ There are no rights of lien or pledge operating in residential lettings across Britain and Ireland.

No insurance is obligatory across Great Britain. Many households are uninsured, either because they cannot afford the premiums or because insurance is unobtainable because of flooding or other risks. Mortgage lenders invariably require borrowers to insure the building standing as security, and this includes properties bought on a Buy to Let basis. The lender will dictate the risks to be covered, the amount and the identity or character of the insurer. All major structural work falls to a residential landlord so it would be normal for a private sector landlord to repair against the normal risks such as public liability and subsidence. In Ireland a private landlord must take out and maintain a policy of insurance for the structure of the building under the RTA 2004.²⁷⁴

Across the private rented sectors of Britain and Ireland it is possible to terminate the tenancy if the house is need for the landlords own use/family use or for another economic purpose such as redevelopment or sale.²⁷⁵

In England, Wales, Scotland and Ireland some possession orders will be made outright, the most common example being orders terminating an assured shorthold tenancy/short assured tenancy once the initial contractual period and initial six month shorthold are over. Possession orders made after breaches of tenancies are often, perhaps usually,

²⁶⁹ Tenancy Deposit Schemes (Scotland) Regulations 2011, reg. 3. Information about this must be included in the Tenant's Information Pack, cl. 4.5.

²⁷⁰ Housing Act 2004 ss 213-215, sch. 10, as amended by Localism Act 2011 s. 184. Schemes in operation are the Deposit Protection Service, the Tenancy Deposit Scheme and 'mydeposits'.

²⁷¹ Housing (Tenancy Deposits) (Prescribed Information) Order 2007. Tenancy Deposit Schemes (Scotland) Regulations 2011, reg. 3. Information about this must be included in the Tenant's Information Pack, cl. 4.5.

²⁷² *Ayannuga v. Swindells* [2012] EWCA Civ 1789; *Johnson v. Old* [2013] EWCA Civ 415. See *Superstrike v. Rodrigues* [2013] EWCA Civ 669; K Lees, 'More Questions Than Answers', *Conveyancer* 2013: 60.

²⁷³ See Indecon International Economic Consultants, 'Indecon's Assessment of the Feasibility of a Tenancy Deposit Protection Scheme in Ireland' (Dublin: Indecon, 2012). An independent tenant deposit scheme has been proposed in the Residential Tenancies (Amendment)(No. 2) Bill 2012. However, as of March 2014 the scheme has not been introduced.

²⁷⁴ RTA 2004 s. 12(1)(c).

²⁷⁵ See section 3.1.2 above.

suspended. It is only in Ireland that alternative dispute resolution has been incorporated into the framework of tenancy law, at least in the private sector, in a meaningful way. The Private Residential Tenancies Board is now the appropriate forum for dealing with disputes in the private rented sector. As well as providing a range of alternative dispute resolution services to parties, there are also conventional dispute resolution services available with parties at liberty to appeal to a tenancy tribunal.²⁷⁶

3.2. Important evaluative criteria for the tenant

3.2.1. Affordability

In the private rented sector across Britain and Ireland the rent is a matter for free market negotiation, but if a welfare support such as housing benefit or rent supplement is relied on by the tenant then housing benefit is used to cover any of the rent payment, there will be limits on the rent level accepted for benefit claims. Thus the initial rent is freely negotiable between landlord and tenant and will generally correspond to prevailing market forces. Across Britain all new private lettings have been either assured or assured shorthold tenancies (short assured tenancies in Scotland).²⁷⁷ Both operate under a market rent regime, but the effect is rather different in practice. Assured shortholds give limited security of tenure, so in practice if the landlord wishes to increase the rent it is difficult for the tenant to object; eventually he will have to move out if he is not prepared to agree to an increase. Fully assured tenancies are rarely granted by private sector landlords, but if they are open market negotiation of rents applies to the initial rent. During any fixed contractual period, the landlord can put the rent up if the tenant agrees, but otherwise the landlord will have to wait until the fixed term ends before he or she can raise the rent. Where a fixed term assured tenancy is agreed it will be essential for the landlord to address the question of rent review during that fixed term because the statutory method of increase in section 13 only applies to assured periodic tenancies, though this will include the statutory periodic tenancy which arises when the fixed term assured tenancy expires.²⁷⁸ The landlord must give at least a month's notice of the proposed increase if the rent is paid on a weekly or monthly basis (more if the rent period is longer). In Britain the landlord can increase the rent payable under a shorthold most easily by granting a series of short contractual terms, thus reserving the possibility of increasing the rent at each contractual renewal. In Ireland the maximum a landlord can charge is the market rate. This essentially means the rent which a willing tenant not already in occupation would be willing to pay and a willing landlord would accept in respect of the dwelling.²⁷⁹ In practice a landlord is prohibited from setting the rent higher than an open market level and can only raise the rent rate once a year.

²⁷⁶ RTA 2004 part 6.

²⁷⁷ *Secretarial and Nominee Co Ltd v. Thomas* [2005] EWCA Civ 1008.

²⁷⁸ Housing Act 1988 s. 13; Regulatory Reform (Assured Periodic Tenancy) (Rent Increases) Order 2003. The form that can be used either for an assured or an assured shorthold tenancy is a *Landlord's notice proposing a new rent under an Assured Periodic Tenancy of premises situated in England: Assured Tenancies & Agricultural Occupancies (Forms) (Amendment) (England) Regulations 2002*; in Wales SI 2003/307.

²⁷⁹ Market rent is defined in s. 24 of the RTA 2004.

In Ireland the Residential Tenancies Act 2004 provided that Irish rents in tenancies governed within the Act must not be above a market rate²⁸⁰ and once the rate was agreed upon, it was open to annual review.²⁸¹ Rent review is broadly defined, so the method of reviewing the rent rate is left open to the parties who could decide their own rent review formula so long as the method chosen did not result in a rent which deviated from the market rate. Market rent is defined as the rent which a willing tenant not already in occupation would give and a willing landlord would take for the dwelling having regard to the other terms of the tenancy as well as the letting values of a similarly placed tenancies.²⁸² The Private Residential Tenancies Board collect rent rate data from all RTA tenancies and this data assists where a dispute arises in the determination of the market rate.²⁸³ A landlord must give 28 days' notice prior to the change in rent taking place.²⁸⁴ In the event of a dispute concerning a rent review the Board will examine whether a valid notice of a review has been served. When reviewing whether the rent rate confirms to the market rate the Board are disbarred from considering the financial circumstances of either party.²⁸⁵ In addition to consulting with local values or letting agents, parties may also be required to support such representations with direct oral evidence.²⁸⁶ Where the landlord fails to follow the correct procedures as set out in Part 3 of the RTA 2004, the rent review will have no effect and the old rent will continue.²⁸⁷

Across Britain and Ireland a landlord must provide the services which are reasonably required by the tenant, including, as appropriate, the supply of gas, electricity, sewerage and water. Other utilities would include telephone. In most cases the supply contract would be concluded between the utility provider and the tenant directly. In some cases the landlord might, for example, supply a pre-payment meter for electricity. Waste disposal is provided by the local authority and is paid for through the council tax. Contracts will generally be concluded by the tenant. If, exceptionally, a landlord concludes a contract for a utility the cost may be recovered from the tenant, usually along with the rent. In England notice would be needed to include utilities payments in rent if this had not previously been the case.²⁸⁸ The tenant must pay for the fuel and water used, usually paying the bill himself. If the landlord pays the fuel or water company's bills, the cost can be included in the rent. Where a tenant does not pay rent the usual course of action for the landlord is to terminate the tenancy and seek possession of the premises. Cutting off the supply of utilities in response to rent arrears may lead to a claim of illegal eviction by the tenant and the landlord may be liable in

²⁸⁰ RTA 2004 s. 19(1) "Market rent" is defined by the RTA 2004 s.24.

²⁸¹ RTA 2004 s. 20(1), the rent rate is open to review once a year. However a further review may be allowed where there is a substantial change in the nature of the accommodation.

²⁸² RTA 2004 s. 24 similarly placed refers to the letting values of dwellings of a similar size, type and character to the dwelling and situated in a comparable area to that in which the tenancy in question is situated.

²⁸³ RTA 2004 pt 9.

²⁸⁴ RTA 2004 s. 22(2).

²⁸⁵ RTA 2004 s. 120.

²⁸⁶ *Devlin v. MacDermot-Roe* TR30/DR511/2007, 26 April 2007.

²⁸⁷ *Canty v Connelly* TR22/DR259/2006, 11 July 2006.

²⁸⁸ Housing Act 1985 s. 103; *Rochdale Borough Council v. Dixon* [2011] EWCA Civ 1173.

damages to the tenant. In Ireland under the RTA 2004 such action would amount to constructive termination.²⁸⁹

As set out above across Britain and Ireland the primary duty to repair the dwelling will generally lie with the landlord however the tenant must be alert to the fact that he must also undertake certain obligations with regard to maintenance of the property. For instance the tenant will be liable for any damage caused to the property which is beyond normal wear and tear.²⁹⁰

Across Britain and Ireland where registration fees fall due these are the responsibility of the landlord. This is also the case with respect to taxation in Britain with respect to council tax which the occupier is liable to pay, however the equivalent tax in Ireland, the local property tax, is payable by the owner of the dwelling. These matters have been discussed above.²⁹¹ There are rent subsidies available to tenants struggling to pay their rent across Britain and Ireland.²⁹²

3.2.2. Stability

Across Britain and Ireland security in both the private and the social rented sectors attaches only to a tenancy and only where a house is let. Thus a licence will not confer security.²⁹³ This seems to open the possibility that a landlord could evade the security regimes by artificially altering a lease into a licence. This has attracted much more litigation in England than in Scotland or Ireland. In Scotland this could be because the definition of a lease is wider in Scotland²⁹⁴ while in Ireland differences in the system of rent regulation removed the possibility of such action.²⁹⁵ The English test is that a tenant must be given exclusive possession of property, and this requires that the tenant is able to exclude the landlord and all others from the property for the duration of the lease.²⁹⁶ A guest in a hotel lacks exclusive possession because the hotel management has access to the room to service it. A tenant must have exclusive control. In England many unscrupulous landlords sought to exploit this distinction in order to avoid conferring full security on people who were in substance tenants; devices included the provision of minimal breakfasts, reciting the absence of exclusive possession,²⁹⁷ or

²⁸⁹ *Wall v. Cullen* TR17/DR487/DR655/2008, 29 October 2008. Here a landlord caused the electricity supply to be cut off in order to force the tenants to leave, the Private Residential Tenancies Board held this amounted to constructive termination and awarded the tenants €3,000 compensation.

²⁹⁰ See section 3.1.1 above.

²⁹¹ See registration at section 3.1.1 and taxation at section 2.6.

²⁹² This has already been discussed in section 2.5.

²⁹³ *Street v. Mountford* [1985] AC 809, HL. See McAllister, *Scottish Law of Leases*, para. 2.50 ff. Wylie, *Irish Landlord and Tenant Law*, p. 59.

²⁹⁴ McAllister notes that Rankine's definition of a lease included 'certain uses' as well as 'the entire control' of lands.

²⁹⁵ The system of rent regulation in Ireland required the house or part of a house subject to a letting to be let as a separate dwelling. Thus, unlike in England and Wales, exclusive possession was a statutory requirement in Ireland thereby greatly reducing the uncertainty over the nature of various occupancy agreements. See Wylie, *Irish Landlord and Tenant Law*, p. 546-547.

²⁹⁶ It is perfectly permissible for the landlord to have limited rights of access e.g. to inspect the state of repair.

²⁹⁷ *Street v. Mountford* [1985] AC 809, HL.

requiring a couple to sign two separate licence agreements.²⁹⁸ These avoidance devices were invalidated by the rule that the test of exclusive possession was substantive and by allowing the courts to ignore any document that could be labelled as a 'pretence'.²⁹⁹ It appears that this was always less of an issue in Scotland³⁰⁰ and Ireland. In Ireland all private tenancies are governed by the RTA 2004 unless excluded. Among the main occupancy arrangement excluded are holiday lets; resident landlord tenancies i.e. where the landlord shares occupation employment tenancies, business tenancies, leases of more than 35 years, shared ownership leases etc.³⁰¹

Across Britain there are a wide range of tenancies that are not assured as well as many licences.³⁰² These include tenancies in other sectors such as business tenancies, agricultural leases, residential tenancies granted by social landlords and also sharing arrangements/licences (i.e. Premises are not let; where accommodation is not a self-contained dwelling;³⁰³ where the landlord is resident; serviced accommodation; tied accommodation of employees).³⁰⁴ Occupancy agreements which relate to a dwelling which is not the principle home of the occupant are excluded (i.e. Company lets;³⁰⁵ second homes; holiday lets and out of season holiday lets; student lets and out of term lets). Many of these will operate as contractual arrangements, either contractual tenancies or licence agreements. If the arrangement does create a tenancy there will be minimum periods for notices to quit but little other regulation. In some but not all cases there is protection against eviction, i.e. the requirement to obtain a court order before evicting the occupier.³⁰⁶

Licence agreements remain common in the social housing sector across Britain and Ireland. Often such arrangements are used to house homeless persons in hostels and emergency-short stay accommodation.³⁰⁷ In such situations the length of stay varies significantly and in some cases may be for as short as a single night. The licensee is not granted exclusive possession of the dwelling and therefore no tenancy arises.

²⁹⁸ *Antoniades v. Villers* [1990] 1 AC 417, HL.

²⁹⁹ *Street v. Mountford* and *Antoniades v. Villers* as above.

³⁰⁰ In theory it should have been possible for protection to be evaded in Scotland by the use of licences, though the complete lack of case law on this suggests that it was not common, perhaps because of the less developed concept of a licence in Scotland. However, there is anecdotal evidence that attempts to evade protection by means of the notorious "bed and breakfast" lets were widespread north of the border, for which there is also some case evidence – see *Holiday Flat Co v Kuczera* 1978 SLT (Sh Ct) 47 (a successful attempt at evasion) and *Gavin v Lindsay* 1987 SLT (Sh Ct) 12 (an unsuccessful attempt).

³⁰¹ RTA 2004 s. 3(2).

³⁰² There were corresponding exceptions before 1989 from the Rent Act 1977.

³⁰³ Though some accommodation may be shared, see below 6.3, pp 135-138.

³⁰⁴ This is where accommodation is provided by an employer and it is essential for the employee to live in the property to do his job.

³⁰⁵ *Eaton Square Properties v. O'Higgins* (2001) 33 HLR 68 CA.

³⁰⁶ Protection from Eviction Act 1977.

³⁰⁷ Approximately 2,000 voluntary units are provided within the sector on the basis of license arrangements. See D. Silke & C. Farrell, 'Study to examine the implications of including the voluntary and co-operative sector under the PRTB registration and dispute resolution services' (Housing and sustainable communities agency: Stationery Office, 2011), p. 14.

Across Britain and Ireland it is possible to create a lease orally however where the term of the lease is greater than one year in Scotland³⁰⁸ and Ireland³⁰⁹ or greater than three years in England and Wales³¹⁰ then it must be in writing. Despite this, all tenancies are in practice granted in writing, not least to ensure that the landlord is able to enforce terms that are clear. In addition across both Islands a tenant must be provided with a rent book which will contain key details concerning the tenancy including rent, etc.³¹¹

As detailed above in Scotland, Wales and Ireland all private landlords must register every tenancy, though there is no registration scheme in England, while in England and Wales and Scotland landlords letting houses in multiple occupation must have a licence. Where a landlord fails to register a tenancy or get a licence he will face sanctions including fines and rent penalties. In Ireland where a landlord fails to register the tenancy then he will be unable to avail of the dispute resolution services of the Board however his failure to register will in no way inhibit the rights of the tenants under the RTA 2004.³¹² In addition, the errant landlord may face prosecution by the Board for failing to register after having been notified and not taking appropriate steps to register the tenancy.³¹³ An errant landlord may face fines etc.³¹⁴

As set out earlier, deregulation of the private rented sector across Britain and Ireland during the 1980s and the return of market rents and limited security have reduced the extent to which landlords seek to avoid landlord and tenant law by using insecure instruments such as licences. In addition failure to register will lead to robust sanction, particularly in Ireland under the RTA 2004 and in the case of a failure to get a house in multiple occupation licence.

The security of tenants across Britain and Ireland has already been considered already³¹⁵ however it is worth reiterating that in general tenants in the private rented sector across Britain and Ireland have limited security and do not have a guarantee to

³⁰⁸ Requirements of Writing (Scotland) Act 1995, s. 1(7) (as amended by the Abolition of Feudal Tenure etc (Scotland) Act 2000, s 76(1) and sch 12, para 58). Also under Part 10 of the Land Registration etc (Scotland) Act 2012 (which is not yet in force) documents requiring writing under the 1995 Act can be in electronic form.

³⁰⁹ Landlord and Tenant Law Amendment (Ireland) Act 1860, s 4.

³¹⁰ Law of Property Act 1925, s. 54(2).

³¹¹ Landlord and Tenant Act 1985 s. 4. Failure gives rise to an offence under s. 7; Housing (Scotland) Act 1988 s. 30(4); Assured Tenancies (Rent Book) (Scotland) Regulations 1988 (notices etc. to be included); Housing (Rent Book) Regulations 1993 (SI No. 146/1993) as amended by Housing (Rent Books) Regulations 1993 (Amendment) Regulations 2004 (SI No. 751/2004) and by Housing (Rent Books) Amendment) Regulations 2010 (SI No. 357/2010).

³¹² *Ibid.*, s. 83(2).

³¹³ Where a landlord fails to register then he will not have recourse to the dispute resolution services of the Private Residential Tenancies Board, however his inability to register will not restrict the tenant's rights under the RTA 2004. Where the Board is of opinion that a tenancy has not been registered it shall serve a notice under s. 144(1) allowing a landlord a period of time to explain their failure. Failure to register without good reason may lead to prosecution by the Board. It is also in the landlords economic interests to register as under the RTA 2004 s.145(5) registration is necessary for tax deductions under s. 97(2)(e) of the Taxes Consolidation Act 1997.

³¹⁴ Housing Act 2004, s. 72. Letting a licensable HMO without a licence is an offence and can result in a fine of up to £20,000

³¹⁵ See section 3.1.2.

stay in their dwelling as long as they respect the contract however the extent of their security varies. Tenants in the social rented sector, particularly in Britain, generally enjoy greater security than private tenants however they do not have absolute security of tenure.

Regulation of rent increases has been covered already³¹⁶ however it is worth reiterating that market rents apply across the private rented sector in both Britain and Ireland and therefore there is nothing to prevent an increase in rent provided it is in accordance with market forces and abides by the regulatory regime governing the tenancy in question.

Across Britain and Ireland in order to evict a tenant it is necessary first to end any contractual rights and give the necessary notices of intention to recover possession discussed in the preceding section. It is then necessary to secure a court order to evict a residential tenant.³¹⁷ Defences should be run when a possession order is sought though the British jurisdiction (England, Wales and Scotland) recognise mandatory grounds. The Human Rights implications of eviction were recently the focus of much attention in Ireland. Originally, section 62 of the Housing Act 1966³¹⁸ provided a local authority with an accelerated method of recovering possession of a dwelling. While the provision has been relied on by local authorities for over forty years, its continued use³¹⁹ has been called in to question by a recent Supreme Court judgment.³²⁰ Section 62 provided a summary eviction procedure against a tenant overholding despite the service of a notice of termination. The authority could apply to the District Court for the issue of a warrant, and the court was required to issue this if satisfied that a proper demand had been made. In *Donegan and Gallagher* the Supreme Court held that this was incompatible with the tenant's trial rights under the European Convention on Human Rights.³²¹ However the eviction procedure set out in section 62 is still used by local authorities in cases where the facts are undisputed, unlike the *Donegan* case.

3.2.3. Flexibility

In general in Britain residential tenancies usually consist of a fixed term grant followed by a periodic continuation. Termination during the fixed term is considered below, so the topic here is the giving of a notice to quit a tenancy while it is periodic, either originally or by implied continuation. The continuation of assured tenancies³²² and secure

³¹⁶ See section 3.2.1.

³¹⁷ The following legislation makes it necessary to seek a court order for possession where the tenant fails to vacate. Rent Act 1984 (Scotland), Protection from Eviction Act 1977 (England and Wales), Prohibition of Forcible Entry and Occupation Act 1971 (Ireland).

³¹⁸ Ejectment proceedings were originally developed under the Landlord and Tenant Law Amendment Act Ireland 1860 (Deasy's Act), s. 86.

³¹⁹ This provision has provoked much litigation see: *Dublin City Council v. Fennell* [2005] 1 I.R. 604, *Leonard v. Dublin City Council* [2008] IEHC 79; *Donegan v. Dublin City Council* [2008] IEHC 288; *Dublin City Council v. Gallagher* [2008] IEHC 354, O'Neill J.; *Pullen v. Dublin City Council* [2008] IEHC 379, Irvine J.; and *Pullen v. Dublin City Council* (No. 2) [2009] 2 ILRM 484.

³²⁰ *Donegan v. Dublin City Council, Ireland and the Attorney General and Dublin City Council v. Gallagher* [2012] IESC 18

³²¹ *Ibid.*

³²² Housing Act 1988 s. 5(2); this is subject to any contractual regrant: s. 5(4).

tenancies³²³ is rather similar. The periodic tenancy continues between the same parties and on the same terms (ignoring express terms about termination), with the period of the tenancy being determined from how rent was last payable under the tenancy.³²⁴ At this stage it is necessary for the tenant who wishes to leave to terminate the tenancy by giving the landlord a valid notice to quit.³²⁵ The law here is a curious mixture of the old view requiring strict technical accuracy in notices and a more relaxed view allowing effect to a notice which is comprehensible to the other party.³²⁶ Many notices given by tenants are ineffective. The rules are as follows. A notice to quit residential property must be in writing, and of a minimum length of four weeks.³²⁷ A full period of the tenancy is required, so, for example, if the tenancy is quarterly a quarter's notice is required.³²⁸ The latter rule at least requires the notice to expire on either the last day of a period or the next day, the first day of the succeeding period.³²⁹ Service by post is usual. It must be remembered that one joint tenant can serve notice which ends the tenancy for all other joint tenants.³³⁰ However, in Ireland this is not the case with a tenancy governed by the RTA 2004. Rather where there are multiple tenants all tenants must agree to a termination in order for it to be valid.³³¹

Across Britain most residential tenancies are initially granted for a fixed term. If so, the tenant cannot terminate the tenancy without the landlord's concurrence during the continuance of the fixed term. This also applies to any contractual regrant. It is possible for a lease to include a break clause enabling a tenant to break a fixed term, but this is unusual unless the term is long; the terms of a break clause often require the tenant to be up to date with rent etc before being entitled to exercise the break.

In Ireland where the tenant wishes to terminate the tenancy they must give the landlord valid notice. Any notice of termination for tenancies of houses let for rent or other valuable consideration, whether by landlord or tenant, must be in writing and must be served not less than 4 weeks before the date on which it is to take effect.³³² Where a tenancy is regulated by the RTA 2004 then the period of required notice will vary according to the duration of the tenancy in the manner set out below. Alternatively where the tenant fails to provide a valid notice of termination then he runs the risk of forfeiting some or all of his deposit. For tenancies which are not regulated by the RTA 2004, the notice period is determined by the nature of the agreement, subject to the statutory minimum of twenty eight days set out above, except in the case of anti-social behaviour

³²³ Housing Act 1985 s. 86.

³²⁴ Rent paid quarterly under an annual tenancy requires a quarterly notice: *Church Commissioners for England v. Meya* [2006] EWCA Civ 821. An express tenancy agreement should state the period, the rent days and the period of notice to quit required.

³²⁵ On rehousing see *Watford Borough Council v. Simpson* (2000) 32 HLR 901, CA.

³²⁶ *Mannai Investments Co. v. Eagle Star Life Assurance Co* [1997] AC 749, HL.

³²⁷ Protection from Eviction Act 1977 s. 5; *Hounslow London Borough Council v. Pilling* [1993] 1 WLR 1242, CA; *Laine v. Cadwallader* (2001) 33 HLR 36, CA.

³²⁸ It is half a year for a yearly tenancy.

³²⁹ Notice last date period only: *McDonald v. Fernandez* [2003] EWCA Civ 1219. See also *Lower Street Properties v. Jones* (1996) 28 HLR 877; *Notting Hill Housing Trust v. Roomus* [2006] EWCA Civ 407.

³³⁰ See above, 6.4, pp. 154-155.

³³¹ RTA 2004 s. 73.

³³² Housing (Miscellaneous Provisions) Act 1992, s.16.

or where there is a damage or threat of damage to the dwelling.³³³ The parties are at liberty to include early termination terms in the tenancy agreement. Where the tenancy agreement contains such a break clause, this may allow termination to occur prior to expiry of the term and depending on the nature of the term this power may be extended to either landlord or tenant or indeed both. In a periodic tenancy the general rule is that the notice period required varies according to the duration of the tenancy and will operate to prevent renewal of the tenancy. Where there is a yearly tenancy then notice of 183 days (one half year) will be required to terminate the tenancy.³³⁴ Where there is a monthly tenancy then one month's notice is required to determine the tenancy.³³⁵ Although many local authority tenancies are weekly tenancies a minimum notice period of twenty eight days applies.

Where the tenant wishes to leave the tenancy upon expiry of the term, he must give notice to the landlord of at least 28 days. In the event that the tenant is seeking to bring about a termination due a landlord breach of obligation, the tenant must first notify the landlord of the failure in writing and give the landlord the opportunity to remedy the failure in a reasonable time. The landlord does not have a right to compensation where an early termination has been brought about in a manner which complies with the notice requirements of the RTA 2004. It is only when the tenant deviates from the required procedure that a landlord may claim compensation. Where the landlord is in breach of tenancy obligations the tenant may give a shorter notice period. As set out above the tenant must afford the landlord the opportunity to remedy a breach however where a landlord fails to remedy the breach then the tenant may give 28 days' notice. The main exception to this general rule is where the landlord's breach causes an imminent danger to the tenant due to the landlord's breach; in this situation the tenant may give 7 days' notice.

Across Britain and Ireland in order for the creation of a sub tenancy in the private rented or social rented sectors consent from the landlord is an essential requirement. In England and Wales a term against alienation is implied by statute in a secure tenancy, and applies to any assignment, sub-letting or parting with possession without consent;³³⁶ the three exceptions where dealings are permitted are: an exchange to which the landlord consents;³³⁷ an assignment ordered in matrimonial proceedings; and an assignment to a person qualified to succeed on the tenant's death. On the other hand the tenant may take in a lodger in the dwelling-house; this encourages full occupancy of social housing.³³⁸ Consent to subletting should not be withheld unreasonably.³³⁹ A secure tenant will commit an offence if he sublets the property such that the property (or any part) is no longer their only or principal home when he knows that this is contrary to

³³³ RTA 2004 ss. 67, 68.

³³⁴ *Wright v. Tracey* (1874) IR 8 CL 478 at 494.

³³⁵ *Kane v. McCabe* [1952] IR Jur. Rep. 41

³³⁶ Housing Act 1985 s 91. This applies to any periodic tenancy and to a term certain granted since 5 November 1982. The controls continue to apply while the tenancy is not secure because the tenant is not occupying as his principal home: s. 95.

³³⁷ Housing Act 1985 s. 92; consent is not to be withheld unreasonably; permitted grounds are set out in detail in sch. 3.

³³⁸ Housing Act 1985 s. 93.

³³⁹ Housing Act 1985 s. 94.

the express or implied terms of their tenancy. An offence will also be committed if the tenant dishonestly and in breach of an express or implied term of the tenancy sublets or parts with possession of the whole or part of the property and ceases to occupy it as their only or principal home. In the case of the first offence, it will be a defence for the tenant to show that they acted as they did owing to violence or threats of violence towards themselves, or towards a member of their family who was residing with them immediately before he ceased to occupy the property, from a person residing in, or in the locality of, the property.³⁴⁰ It is also a defence to the first offence to show that the person in occupation is someone who is entitled to apply to the court for an order giving him a right to occupy the dwelling-house, e.g. under an occupation order or a matrimonial order transferring the tenancy,³⁴¹ or a transfer for the benefit of a child.³⁴²

In Scotland if a social tenancy is sublet, then the subtenancy cannot be a Scottish secure tenancy, since the head tenant is not a local authority or registered social landlord, and will be prevented from being a regulated or assured tenancy by virtue of section 32(7) of the Housing (Scotland) Act 2001. If a private sector tenancy is sublet with the landlord's consent, then the sublet will normally qualify as an assured tenancy

So far as a private sector assured tenancy is concerned, a tenant is not permitted to assign the tenancy or sublet or part with possession of the whole or any part of the house without the consent of the landlord.³⁴³

In the social sector, a tenant holding under a Scottish Secure tenancy is not permitted to assign the tenancy or sublet or part with possession of the whole or any part of the house without the written consent of the landlord.³⁴⁴ In the case of assignation, the dwelling must have been the purported assignee's principal home in the six months prior to the application for landlord consent to the assignation.³⁴⁵ Where the landlord is a registered social landlord then the assignee or subtenant must be a member of the association at the time of the transfer. An authorised sub-tenant is a qualifying occupier who is entitled to receive notice of, and defend, an action raised for possession. A Scottish secure tenant is entitled to exchange his home for another property also held subject to a Scottish secure tenancy if he is able to find a suitable match and obtain the consent of both landlords.³⁴⁶

In Ireland under the RTA 2004 a tenant may not sublet without the written consent of the landlord.³⁴⁷ In the event that the landlord consents to the sub-letting then the tenant will become a landlord upon letting a sub-tenancy. As such they will be regulated with all of the obligations set out above which relate to the landlord under the RTA 2004. Subletting of social housing will usually be forbidden.

³⁴⁰ Prevention of Social Housing Fraud Act 2013 s.1(3).

³⁴¹ Family Law Act 1996 s.53 and sch. 7.

³⁴² Children Act 1989 sch.1, para.1.

³⁴³ Housing (Scotland) Act 1988 s. 23; this is an implied term of every assured tenancy; McAllister, *Scottish Law of Leases*, para. 17.59.

³⁴⁴ Housing (Scotland) Act 2001 s. 32 and sch 5, pt 2; Model Scottish Secure Tenancy (2002) cl. 4; McAllister, *Scottish Law of Leases*, para. 18.94 ff.

³⁴⁵ It is proposed to extend this to twelve months by Housing (Scotland) bill 2013 cl. 13; and allow the landlord to refuse consent where the assignee would not have a reasonable preference in housing allocation. On the current law see *East Lothian Council v. Duffy* 2012 SLT (Sh. Ct) 113.

³⁴⁶ Housing (Scotland) Act 2001 s.33; McAllister, *Scottish Law of Leases*, para. 18.99ff.

³⁴⁷ RTA 2004 s 16(k).

4. Comparison of tenures with a public task

4.1. Generalities

Secure Tenancies in England and Wales

A tenant holding under a secure tenancy has a statutory right to stay in the dwelling in excess of the contractual term stated in the lease agreement.³⁴⁸ When seeking to terminate the tenancy the landlord must give the tenant written notice³⁴⁹ setting out the ground of termination as well as the date from which the landlord may bring proceedings for recovery of possession. A minimum notice period of four weeks is required and the date set in the notice cannot be earlier than the date on which the tenancy would have been brought to an end by a notice to quit had it not been a secure tenancy.³⁵⁰ A notice to quit cannot be revoked.³⁵¹ The number of notices seeking possession has risen sharply, with 100,000 issued between April and November 2013, the period when restrictions on housing benefit began to bite.³⁵² Rent arrears and deterioration of the dwelling are both discretionary grounds for recovery of possession so the court must be satisfied that it is reasonable to make the possession Order. Where the landlord requires the dwelling for redevelopment this is a ground for recovery of possession however before making the order the Court must be satisfied that suitable alternative accommodation available.³⁵³

Assured Tenancies in England and Wales

Assured tenancies are common in the social rented sector across England and Wales.³⁵⁴

Local authority tenancies in Ireland

Termination of tenancies which fall outside of the RTA 2004 is governed by a range of statutes and various principles developed through the common law. In general there were two primary methods for bringing a tenancy to an end; serving a notice to quit or a forfeiture notice or, if it is a fixed term, expiry. In all cases where the tenancy is a residential tenancy then termination is governed by the Housing (Miscellaneous Provision) Act 1992. Prior to the 1992 Act, termination of periodic tenancies was quite straight forward; where the tenancy was weekly/monthly then all that was required was to give one week/month notice to quit in writing.³⁵⁵ The form of the notice was not strictly proscribed, and so long as it was clear from the notice that the landlord or tenant wishes to terminate the tenancy then that would suffice. The notice should give details of the tenancy, including the term, the identity of the parties, the amount of rent payable and a description of the dwelling.³⁵⁶ A periodic tenancy may be terminated without giving a

³⁴⁸ Garner and Frith, *Practical Approach* (7th edn), ch. 18.

³⁴⁹ Housing Act 1985 s. 83; Secure Tenancies (Notices) Regulations 1987 as amended for England by SI 2004/1627.

³⁵⁰ Housing Act 1985 s. 83.

³⁵¹ *Fareham Borough Council v. Miller* [2013] EWCA Civ 159.

³⁵² *Independent on Sunday* 15 December 2013 citing *Inside Housing* magazine.

³⁵³ Housing Act 1985 sch. 2, as amended eg by Housing Act 1996 ss 144-152.

³⁵⁴ This has been discussed in section 3.1.2 above.

³⁵⁵ *Ibid.*, s.16(1).

³⁵⁶ *Glory Estates Ltd v. Mooney*, unreported, HC, 13 May 1971, at pp 5-6.

reason. The Housing (Miscellaneous Provision) Act 1992 introduced a minimum notice period of twenty eight days for periodic tenancies.³⁵⁷ However, this period acts as a basic notice period with parties free to agree to longer notice periods.³⁵⁸ Where there is a yearly tenancy then notice of 183 days (a half year) is required.³⁵⁹ Under the 1992 Act notice must be served pre commencement. The Act 1992 has no application to fixed term tenancies of which the term either expires or where it is terminated early then forfeiture is the appropriate procedure.

Local authority tenancies are subject to various specialist statutes as well as the general principles of pre-2004 tenancy law which govern the termination of tenancies. Many local authority tenancies are weekly tenancies. This means that security of tenure for local authority tenants holding under a periodic tenancy is decidedly limited.³⁶⁰ However in practice local authorities are reluctant to terminate a tenancy and in many cases it is only as a last resort in response to a serious breach, e.g. anti-social behaviour, of the tenancy obligations. Therefore local authority tenants often enjoy practical security for as long as their need is present rather than in accordance with the technical security attaching to their tenancy. As such termination procedures are rarely invoked however when they do arise it is usually at the end of a lengthy dispute concerning a serious breach of the tenancy. However, the local authority³⁶¹ is an organ of state and as such is affected by various public law duties and in particular the provisions of the European Convention on Human Rights.³⁶² This has significant consequences for the parties to the tenancy as evidenced in a range of cases which concerned issues arising after termination of the tenancy.³⁶³

Short secure tenancies

There are a number of variants of the secure tenancy which lack long term security beyond a short fixed term and where possession is mandatory. In each of these cases there is a review procedure to consider the decision to limit security, and to meet the argument that proportionality must be considered. Examples are Introductory tenancies, Demoted tenancies, Family Intervention tenancies and the new Flexible tenancies. Even here the making of a possession order is not absolutely automatic because it is necessary to make available to the court the opportunity to assess the proportionality of ordering possession, or more accurately, possession should not be ordered if no reasonable person would consider it justified.³⁶⁴ In *Pinnock* a secure tenant for 30 years was demoted after antisocial behaviour by a family member and it was held that the making of a possession order was proportionate on the facts.

The Short Scottish Secure tenancy was introduced alongside the Scottish Secure Tenancy in order to provide a short term tenancy option to local authorities and Registered Social Landlords. In this sense the Short Scottish secure tenancy shares key

³⁵⁷ Housing (Miscellaneous Provisions) Act 1992, s.16(1).

³⁵⁸ *Ibid.*, s.16(3).

³⁵⁹ *Wright v. Tracey* (1874) IR 8 CL 478, *Kane v. McCabe* [1952] Ir. Jur. Rep. 41.

³⁶⁰ Housing (Miscellaneous Provisions) Act 1992, s. 16(1).

³⁶¹ Operating a section of the housing system which is meant to be guided more by a social than by commercial criteria.

³⁶² As implemented by the European Convention on Human Rights Act 2003.

³⁶³ *Donegan v. Dublin City Council and Dublin City Council v. Gallagher* [2012] IESC 18.

³⁶⁴ *Manchester City Council v. Pinnock* [2010] UKSC 45.

features with the short assured tenancy, in particular the Short Scottish secure tenancy is for a fixed term, at the end of which the landlord has an absolute right to terminate the tenancy without the tenant having the right to extended security of tenure, the right to buy or the succession rights which are available with an ordinary Scottish secure tenancy

4.2. Evaluative criteria for public/social/private subsidized landlords

- Funding by state or other bodies

Subsidisation of public/social/private landlords already been discussed.³⁶⁵

Statute has overlaid the common law of leases so completely in the field of residential tenancies that it is necessary to differentiate the key types of tenancy across Britain and Ireland.³⁶⁶ In Britain private rentals are either fully assured tenancies or assured shorthold tenancies (short assured tenancies in Scotland) while in Ireland all tenancies are governed by the Residential Tenancies Act 2004 unless excluded. With regard to social renting, in England and Wales local authority tenants will have secure tenancies while social tenants holding from non-public landlords, referred to in Wales as registered social landlords and referred to in England as registered providers of social housing, will generally have assured tenancies. In Ireland local authority tenants will have local authority tenancies while other social tenants will have a contractual tenancy or a tenancy governed by the Residential Tenancies Act 2004. The distinction is incredibly important as each tenancy will attract different rights and duties which will govern material matters of the occupancy arrangement such as rent, security etc.

4.3. Evaluative criteria for the tenant

4.3.1. Access

There is a gross undersupply of various forms of dwellings with a public task across Britain and Ireland. Across Britain in 2011 there were 1.84 million households on local authority waiting lists..³⁶⁷ In Ireland the National Assessment 2011 revealed almost 100,000 households waiting for social housing support. Of this figure, two thirds were not able to meet the cost of their existing accommodation. Demand for social housing cannot be met by existing social housing stock and the result is that housing waiting lists have grown rapidly. In 2011 almost a quarter of all those assessed as being in need of housing were on housing waiting lists for more than four years while almost sixty per cent of all those assessed as being in housing need had been on waiting lists for over two years.³⁶⁸

³⁶⁵ See section 2.5.

³⁶⁶ 'Lease' and 'tenancy' are interchangeable, but 'tenancy' is used for shorter arrangements.

³⁶⁷ 'Local Authority Housing Statistics 2010-11' (London: Department for Communities and Local Government, 2013).

³⁶⁸ Department of the Environment, *Housing Needs Assessment 2011* (Dublin: Stationery Office, 2011), p. 1.

Across Britain and Ireland public/social housing must be allocated in accordance with an allocation policy. Local authorities and registered providers of social housing are the main providers of housing with a public task in England and Wales, Scotland and Ireland. Rents in accommodation provided by these landlords should be affordable.³⁶⁹ Social housing is allocated in accordance with an allocation scheme determined by each provider.³⁷⁰ It must take into account its homelessness strategy, its tenancy strategy and, where appropriate, the London housing strategy.³⁷¹ Every social provider must have rules covering transfers and exchanges (which are not allocations³⁷²) as well as initial allocations, and the whole scheme must be published.³⁷³ The legislation covering England has been changed by the Localism Act 2011³⁷⁴ and that covering Wales is contained in the original Housing Act 1996;³⁷⁵ however the two regimes are currently the same. No such change has been introduced in Ireland or Scotland. Providers are required to allocate in accordance with their allocation scheme,³⁷⁶ but if a housing officer grants tenancies to people who are not at the top of the list the tenancies remain valid.³⁷⁷

Most applications are now made to a common register which includes the property of the local authority and registered providers operating in the locality.³⁷⁸ In England and Wales and Scotland because housing allocations can affect voting patterns and to avoid any possibility of Gerrymandering, councillors are required to recuse themselves from participation in allocation decisions affecting accommodation situated within their electoral area.³⁷⁹ However there is no such provision in Ireland.³⁸⁰

Across both Islands the prospective tenant must take the initiative by making a formal application for accommodation to a social landlord. However, the next step in the process differs greatly across all jurisdictions. In Scotland provided the applicant must be over the age of 16, but provided that is so anyone can apply for social housing and will be added to the housing waiting list. This is in contrast to England and Wales, where

³⁶⁹ The tenant will pay a lower rent and is not required to pay a deposit.

³⁷⁰ In Ireland section 60 of the Housing Act 1966, codified the allocation procedure for State housing. See Housing (Miscellaneous Provisions) Act 2009, s. 22. The Social Housing Assessment Regulations 2011 (S.I. No. 84 of 2011). For Scotland see Housing (Scotland) Act 1987 s. 21. Public consultation would be required before rules were adopted under the Housing (Scotland) Bill 2013 cl. 4.

³⁷¹ Housing Act 1996 s. 166A inserted by Localism Act 2011 s. 147.

³⁷² *R. v. Lambeth London Borough Council ex parte Pattinson* (1996) 28 HLR 214; *R v. Islington London Borough Council ex parte B* (1998) 30 HLR 706. In Ireland this is required by the Housing (Miscellaneous Provisions) Act 2009, s. 22.

³⁷³ Housing Act 1996 ss 167-168. In Ireland the scheme must be available to the public see Housing (Miscellaneous Provisions) Act 2009, s. 22.

³⁷⁴ Housing Act 1996 s. 166A, inserted by Localism Act 2011 s. 147. The tenancy strategy states the kinds of tenancies granted and the circumstances in which each kind will be granted, as well as the lengths of any term certain.

³⁷⁵ Housing Act 1996 s. 167, as amended textually by the Localism Act 2011. The duplication will enable the Welsh legislation to be changed in future, though there are no proposals to do so in the Housing (Wales) Bill 2013.

³⁷⁶ *Sahardid v. Camden London Borough Council* [2004] EWCA Civ 1485.

³⁷⁷ *Birmingham City Council v. Qasim* [2009] EWCA Civ 1080. In Ireland this is enshrined in statute by Housing (Miscellaneous Provisions) Act 2009, s. 22(7).

³⁷⁸ Housing Act 1996 s. 170. For Scotland see Housing (Scotland) Act 2001 s. 9.

³⁷⁹ Allocation of Housing (Procedure) Regulations 1997, reg. 3. For Scotland see Housing (Scotland) Act 1987 s. 20(3), (4).

³⁸⁰ Kenna, *Housing Law Rights and Policy*, pp744-745.

the applicant must be over the age of 16 and eligible to apply for an allocation of social housing, and Ireland where the applicant must be over the age of 18, eligible to apply for social housing supports and must be in need of social housing support. As one would expect the added requirements lead to closer examination of the claim in question.

In England upon submitting an application for housing from a registered provider, the applicant will be added to a housing waiting list.³⁸¹ In Ireland different requirements apply. Upon receipt of the application the housing authority will assess whether the applicant is eligible for social housing and in need of social housing. This means that the applicant will have to satisfy an income test³⁸² and will have to show that they do not have suitable alternative accommodation. A household will be regarded as having suitable alternative accommodation where a member of the household has property that the household could reasonably be expected to live in. Once both criteria have been satisfied the applicant will be added to the housing waiting list.³⁸³

Across Britain and Ireland these lists vary in length greatly from area to area however they generally include people who are homeless, people with special housing needs as well as people seeking a transfer to another social sector property.³⁸⁴ Where the applicant has special needs the council may be able to match that person with suitable accommodation in supported or sheltered accommodation.³⁸⁵ An applicant must be qualified and may either be in a priority group or without special priority or disqualified.

Across Britain and Ireland preference is given to certain priority groups in allocation.³⁸⁶ These include homeless persons;³⁸⁷ persons occupying overcrowded or insanitary houses; people needing to move on medical or welfare grounds; or people who will suffer hardship if they are unable to move.³⁸⁸ Consideration can be given to: financial resources available to meet housing costs; behaviour of the applicant and household affecting his suitability as a tenant;³⁸⁹ and, in England and Wales but not in Ireland, any local connection.

³⁸¹ Allocation of Housing (Procedure) Regulations 1997, reg. 7 requires the following; the applicant's name, the number of people in his household; the no who are under 10, expecting or aged 60+, the address and the date of entry on the register.

³⁸² There are three maximum income thresholds that apply in different areas.

³⁸³ The allocation of local authority housing is subject to equality legislation prohibiting discrimination on 9 grounds see Equal Status Act 2000 s. 6, Equality Act 2004 s. 49, these grounds are nationality, gender, family size, family status, marital status, disability, age or membership of the Traveller community.

³⁸⁴ Allocation controls do not apply to tenants transferring nor to the upgrading of flexible tenancies: Housing Act 1996 s. 159(4A) ff, inserted by Localism Act 2011 s. 145. In Ireland, households seeking a transfer are free to come to a private arrangement with another household willing to transfer.

³⁸⁵ For instance where the applicant is elderly or infirm, has mental health issues, has a disability, has learning difficulties, is a young person who needs support living independently, is a refugee or asylum seeker, is an ex-offender, or has an alcohol or drug related problem.

³⁸⁶ Housing Act 1996 s. 159. Housing (Miscellaneous Provisions) Act 2009, s. 22 (Ireland).

³⁸⁷ *R v. Westminster City Council ex parte Ali* (1997) 29 HLR 580; *R(Mei Ling Lin) v. Barnet London Borough Council* [2007] EWCA Civ 132.

³⁸⁸ Extra preference should be given to those with life-threatening illnesses; those in accommodation so overcrowded as to be a risk to health, and to those escaping domestic violence. On the last see Allocation of Housing (England) (Amendment) (Family Intervention Tenancies) Regulations 2008.

³⁸⁹ Housing Act 1996 s. 167 (allocation in Wales) allows for the removal of preference for serious unacceptable behaviour; this is not in s. 166 (allocation in England) but English authorities can take behaviour, good or poor, into account in taking allocation decisions.

Across Britain and Ireland applicants outside priority groups may well have to wait a long time to be housed. If an applicant does not a priority need for housing allocation, the above provisions indicate the wide range of factors that might be considered relevant, including period of residence in the locality, age, income, ownership or property, any record of defaults, and so on. A majority of waiting lists are processed on a points system which is geared towards prioritising certain groups over others according to housing need, however in some regions housing is allocated by a choice based system.³⁹⁰ With regard to the former, when awarding points during the allocation process, providers will generally have regard to the amount of time spent on the waiting list, whether the applicant has been in tied accommodation i.e. in military service etc. In addition the process will have regard to any medical needs,³⁹¹ social needs,³⁹² social work,³⁹³ harassment,³⁹⁴ under occupation of present accommodation, shared living space, mobile homes, when allocating points.³⁹⁵

Eligibility for public/social housing

In order to qualify for public/social housing the applicant must have a legal right to remain in the State on a long term basis. The key concept across Britain and Ireland is a 'person from abroad', that is person who is not a British or Irish citizen and who will normally be subject to immigration control. Categories of people from abroad eligible to apply for social housing include:

- (1) Foreign nationals with a right of abode in the UK persons;
- (2) Nationals of EEA member states with a right to reside in the UK under EC rules based on their economic status; this includes:
 - a. nationals of 'old' EU states who have a right to reside if they are workers, job seekers, the self-employed or students, as well as family members³⁹⁶ and carers;³⁹⁷ the right to seek housing can be terminated if the right to reside ends (because the EEA national ceases permanently³⁹⁸ to be a worker etc.);
 - b. nationals of EEA states with a right to reside in the UK under EC rules based on their economic status; this includes the three EEA states of Iceland, Liechtenstein and Norway and in practice also (under mutual treaty arrangements) Switzerland;

³⁹⁰ See the Scottish Report for a detailed discussion of choice based letting.

³⁹¹ Such as a disability.

³⁹² For instance looking after an elderly relative.

³⁹³ Where the applicant has care needs.

³⁹⁴ This would include domestic violence.

³⁹⁵ Conversely an applicant guilty of antisocial behaviour etc should be required to wait for a qualifying period before becoming entitled to housing.

³⁹⁶ EC Directive 2004/38/EC implemented by Immigration (European Economic Area) Regulations 2006, SI 2006/1003; *Harrow London Borough Council v. Ibrahim* [2008] EWCA Civ 386 (Somali married to Dane who died).

³⁹⁷ Allocation of Housing and Homelessness (England) (Amendment) Regulations 2012; this meets the decision in C-34/09 *Gerardo Ruiz Zambrano v. Office National de l'Emploi* [2011] ECR I-1177, ECJ; an example of a *Zambrano* carer is *Pryce v. Southwark London Borough Council* [2012] EWCA Civ 1572.

³⁹⁸ *R v. Westminster City Council ex parte Castelli* (1996) 28 HLR 616, CA; *Barnet London Borough Council v Ismail* [2006] EWCA Civ 383; *R (Mohamed) v. Harrow London Borough Council* [2005] EWHC 3194. Contrast a temporary cessation: *Samin v. Westminster City Council* [2012] EWCA Civ 1468 (a surprising result on the facts?).

- c. EEA nationals from states which acceded to the EU in 2004 now equated to 'old EU states';³⁹⁹
 - d. EEA nationals from Bulgaria, Romania and Croatia who are workers registered under the Worker Registration scheme;⁴⁰⁰
- (3) People subject to immigration control but in a class allowed assistance with housing:
- a. A person granted refugee status;
 - b. A person granted exceptional and unconditional leave to remain (usually on humanitarian grounds or by way of discretionary leave);⁴⁰¹
 - c. A person with current unconditional leave to remain with habitual residence in the Common Travel Area (of the United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland);⁴⁰²
 - d. A person deported by law to the UK or Ireland.

People from abroad who are not eligible for housing are those subject to immigration control and not in any exceptional group: (a) Asylum seekers; (b) EEA nationals who do not have an economic right of residence;⁴⁰³ (c) EEA jobseekers if not habitually resident in the Common Travel Area;⁴⁰⁴ (d) EEA nationals for the first three months if not habitually resident in the Common Travel Area; (e) Those admitted on the condition that they will be self-funding.

Eligibility for public/social housing – Wales

Currently the rules are enshrined in legislation⁴⁰⁵ as amplified in regulations made separately for Wales in 2006.⁴⁰⁶ These rules are the same as for eligibility for homelessness assistance in England except that Wales allows help to any person lawfully resident in the UK who is a national of a state which has ratified the European Convention on Social or Medical Assistance or the European Social Charter; this includes all EEA nationals.

³⁹⁹ Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2013. Except that ex workers only have the right to remain if they have worked for 12 months in the UK: *Putans v. Tower Hamlets London Borough Council* [2006] EWHC 1634 (Ch).

⁴⁰⁰ Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2013. The rules in Scotland here differ from those in England. There are moves to tighten controls further, though to date the threatened influx of Bulgarians has not appeared.

⁴⁰¹ Normally a condition will be imposed that no recourse will be had to public funds.

⁴⁰² Again leave would generally be conditional on being self-funding.

⁴⁰³ *Lekpo-Bozua v. Hackney London Borough Council* [2010] EWCA Civ 909 (French girl living with her aunt for 9 years; her presence was tolerated but she was not lawfully resident).

⁴⁰⁴ *R(Conde) v. Lambeth London Borough Council* [2005] EWHC 62.

⁴⁰⁵ Housing Act 1996 s. 160A.

⁴⁰⁶ Homelessness (Wales) Regulations 2006; Allocation of Housing and Homelessness (Eligibility) (Wales) Regulations 2006; in future see Housing (Wales) Bill 2013 cl. 47, sch. 2.

4.3.2. Affordability

In England tenants of private registered providers of social housing are generally⁴⁰⁷ assured tenants who can, in theory, be charged a market rent. Such landlords are, however, subject to the Home and Communities Agency 'rent influencing regime' set out in the Rents Standards Guidance. The rent regime is governed by 'target rents' which are below market rent whilst allowing the provider to meet their obligations to their tenants, maintain their stock and continue to function as financially viable organisations. Differences are recognised for certain kinds of social housing, such as supported housing and affordable rent. Affordable rents were introduced as a part of the Affordable Homes Programme 2011-15 and enables providers to charge higher rents, at levels up to 80% of the market rent, but only for new properties delivered by arrangement with the Agency.⁴⁰⁸

With regard to local authority tenancies, the terms of a secure tenancy may be varied by notice. A preliminary notice must be served by the landlord on the tenant specifying the proposed variation and its effect. If the authority decides to continue with the proposal after considering any comments from tenants, they do so by serving a notice of variation.⁴⁰⁹

In Scotland as in England, Wales and Ireland, local authority rents and Registered Social Landlords rents are lower than the market rate however unlike those jurisdictions where there are different tenancies operating in the social sector, in Scotland there is one main tenancy for all social rentals – the Scottish Secure tenancy. With regard to rent increases, local authorities have discretion over the amount of rent to charge to their tenants and there are no external limitations on what landlords can charge tenants. Under a Scottish secure tenancy⁴¹⁰ the local authority or RSL has the right to increase the rent, but that body must give the tenant at least four weeks' notice before doing so.⁴¹¹ In addition, they must consult with the tenant in a meaningful way, which takes into account the views of the tenant, before increasing the rent.⁴¹²

Local authorities provide the majority of housing with a public task in Ireland. Local authority housing is excluded from the operation of the RTA 2004 and as such the legal framework governing rent rates in the private rented sector do not apply. Rather rent levels in local authority housing are set according to a statutory framework comprising a range of primary, secondary pieces of legislation as well as various administrative guidelines, decisions and directions. Under the Housing Act 1966⁴¹³ each housing authority is empowered to set and charge rents for dwellings which it lets as part of its social housing function and there is no nationally uniform authority housing rent scheme.⁴¹⁴ Each housing authority is required to make a rent scheme which sets out

⁴⁰⁷ Rent Act fair rents apply to (secure) tenancies first granted by housing associations before 15 January 1989: Rent Act 1977 Pt 6.

⁴⁰⁸ See above 4.3, pp 97-99.

⁴⁰⁹ Housing Act 1985 s. 103; *Kilby v. Basildon District Council* [2007] EWCA Civ 479; *Peabody Trust Governors v. Reeve* [2008] EWHC 1432 (Ch).

⁴¹⁰ Some older housing association tenancies still have the right to have a fair rent registered.

⁴¹¹ Housing (Scotland) Act 2001 s. 25.

⁴¹² Housing (Scotland) Act 2001 s. 25(4).

⁴¹³ As amended.

⁴¹⁴ Housing Act 1966 s. 58 subss (3A) and (3B) were inserted by Housing (Miscellaneous Provisions) Act 2002 s 14; this will be replaced by the Housing (Miscellaneous Provisions) Act 2009 s 31.

how it will set rents.⁴¹⁵ This design of this rent scheme may be influenced by Ministerial Regulations and review and once completed the scheme must be made available for public inspection.⁴¹⁶ Local authority rents are set on a differential basis and are related to the household's ability to pay, so where the household's income is low then the rent will be low and should the household's income increase then the rent will increase proportionally. Where a household falls into arrears on their rent in local authority housing the authority has the power charge interest on overdue payments.⁴¹⁷ As such the tenant is legally obliged to inform the authority where their income changes. The authority is also empowered to offset any monies it owes to a household against interest due from that household.⁴¹⁸ The local authority may also have a minimum and/or maximum rent, which may depend on the size of the dwelling in question. Additionally, there is usually a hardship clause which gives local authorities discretion to reduce the rent if there are particular reasons to do so. Deposits are not usual in the social rented sectors across Britain and Ireland. Regulation of expenses,⁴¹⁹ repairs,⁴²⁰ and the availability of rent subsidies⁴²¹ have been discussed already.

4.3.3. Stability

The position of the tenant under the tenancy has been discussed above.⁴²²

In the social sector rights of pre-emption vary from jurisdiction to jurisdiction. In England and Wales secure tenants have a generous Right to Buy and housing association tenants have a less generous Right to Acquire their home. In Scotland this is also the case however the right to buy for all social tenants will be abolished in 2016.⁴²³ In Ireland local authority tenants have a generous right to purchase their home. The basic problem with the right to buy is that it sold off precious social housing asset without adequate provision for building more housing stock. This problem is now, at least in England according, to be solved by allowing landlords to retain the receipts from sales of social housing and to devote them to providing 30% of the cost of replacements.⁴²⁴

Right to Buy

Tenants in the social rented sector across Britain may have the right to purchase their dwelling at a discounted price, under a scheme dating from the Thatcher Government of the 1980s,⁴²⁵ and, at present, being revived in England.⁴²⁶ The Right to Buy applies in

⁴¹⁵ Housing Act 2009 s. 31(5).

⁴¹⁶ Housing Act 2009 s. 31(9).

⁴¹⁷ Housing Act 2009 s. 33; Housing (Miscellaneous Provisions) Act 2009 (Commencement Order) 2010 (SI No. 253/2010) set the rate at 6%.

⁴¹⁸ Housing Act 2009 s. 33(4).

⁴¹⁹ See section 3.2.1.

⁴²⁰ See section 3.2.1.

⁴²¹ See section 2.5.

⁴²² See section 4.1.

⁴²³ Housing (Scotland) Act 2014, s.1.

⁴²⁴ 'Reinvigorating Right to Buy and One for One Replacement' (London: Communities and Local Government, March 2012).

⁴²⁵ Housing Act 1980 Part IV, re-enacted as Housing Act 1985 Part V. Ironically it had been proposed in the Labour manifesto for the 1959 General Election, which they lost. Mrs Thatcher was much influenced by Horace Cutler, chair of Housing at the Greater London Council.

⁴²⁶ 'Reinvigorating Right to Buy and One for One Replacement' (London: Communities and Local Government, March 2012).

the public sector and there is an equivalent but more restrictive Right to Acquire in the social sector.⁴²⁷

(1) Tenants qualified to buy

In principle the Right to Buy attaches to any secure tenant (that is a tenant of a public landowner),⁴²⁸ and this includes flexible tenancies; the detail of the right depends upon when the tenancy was first granted, with longer standing local authority tenants being treated most favourably. Joint tenants must agree between themselves. The Right to Buy is subject to a residential qualification period of and throughout this continuous period the house should have been their primary dwelling; it will not be available to Lottery winners who move out to live elsewhere.⁴²⁹ The period depends upon when the applicant first became a public sector tenant: Before 18 January 2005 – two years;⁴³⁰ and on or after 18 January 2005 – five years.⁴³¹ A tenant may lose his Right to Buy by ceasing to occupy the dwelling as his principal residence, by becoming bankrupt, by committing breaches of the tenancy agreement resulting in the making of a possession order,⁴³² or as a result of antisocial behaviour.⁴³³ These cases require a proper balancing of the competing claims.⁴³⁴

(2) Restrictions and exclusions

There are a number of exclusions from the Right to Buy of which only a sketch can be attempted:⁴³⁵ accommodation specially adapted eg for the elderly;⁴³⁶ property occupied under a contract of employment,⁴³⁷ a home in the curtilage of a non-residential building;⁴³⁸ and property due for demolition.⁴³⁹

(3) Price and discount

The price paid for exercising the Right to Buy is the market value less the discount.⁴⁴⁰ The prices can be determined by the District Valuer⁴⁴¹ as at the date that the Right to

⁴²⁷ There are detailed provisions delineating the borderline Housing Act 1985 sch. 5 paras 1-3.

⁴²⁸ Housing Act 1985 s. 80.

⁴²⁹ *Islington London Borough Council v. Demetriou* [2001] 2 CLYB [4216].

⁴³⁰ Housing Act 1985 s. 119.

⁴³¹ Housing Act 1985 s. 119 as amended by Housing Act 2004 s. 180.

⁴³² Housing Act 1984 ss 121, 121A, 121B., as amended; *Islington London Borough Council v. Honeygan-Green* [2007] EWCA Civ 363 (discharge of the possession order revives the right to buy); *Knowsley Housing Trust v. White* [2007] EWCA Civ 404.

⁴³³ Housing Act 1985 s.121A inserted by Housing Act 2004 ss 191-194.

⁴³⁴ *Basildon District Council v. Wahlen* [2006] EWCA Civ 326.

⁴³⁵ Housing Act 1985 s. 120, sch. 5.

⁴³⁶ Housing Act 1985 sch. 5 paras 7, 9, 10, 11, as amended by Housing Act 2004 s. 181.

⁴³⁷ Housing Act 1985 sch. 5 para. 5; *Godsmark v. Greenwich London Borough Council* [2004] EWHC 1286 (Ch); *Copping v. Surrey County Council* [2005] EWCA Civ 1604; *Wragg v. Surrey County Council* [2008] EWCA Civ 19.

⁴³⁸ Housing Act 1985 sch. 5 para. 5.

⁴³⁹ Housing Act 1985 sch. 5 paras. 12A, 13, 14; Housing and Regeneration Act 2008 s. 305.

⁴⁴⁰ Housing Act 1985 s. 126.

⁴⁴¹ Housing Act 1985 ss 127-128B; Residential Property Tribunal (Right to Buy Determinations) (Procedure) (England) Regulations 2005; Housing and Regeneration Act 2008 s. 306.

Buy is established.⁴⁴² Levels of discount depend upon the date of the initial grant, and whether the home is a house or a flat. The discount cannot take the sale price below the floor cost, ie below the historic debt outstanding on the property.⁴⁴³ There is also an absolute cash limit, set low by the Labour administration in 1998 (especially in London) and varying regionally,⁴⁴⁴ but now set much higher by the Coalition at £75,000 (or £100,000 in London) in an attempt to 'reinvigorate' the Right to Buy.⁴⁴⁵

(4) Procedure

The Housing Act 1985 has a mandatory procedure with powers for ministers to override recalcitrant local authorities.⁴⁴⁶ Public landlords must provide information to their tenants about the Right to Buy.⁴⁴⁷ The tenant must take the initiative by putting in an application to buy.⁴⁴⁸ He may choose to do so jointly with up to three family members occupying with him; such an arrangement can be beneficial if the tenant does not meet lending criteria, but a child of the tenant living in the home has a good income.⁴⁴⁹ A sale may be voidable if the application contains fraudulent misrepresentations.⁴⁵⁰ Within four weeks of the tenant's application the landlord must either accept or refuse the application; if it accepts an offer to sell must be issued within a further two months stating the market value, the discount and the price.⁴⁵¹ If the landlord delays the remedy is a declaration of rights rather than damages.⁴⁵² The tenant has twelve weeks to accept the terms proposed.⁴⁵³ The landlord can serve a notice requiring the tenant to complete.⁴⁵⁴ A house will be sold freehold or a flat leasehold,⁴⁵⁵ in the latter case subject to a service charge.⁴⁵⁶ Until the contract is concluded the tenant may lose his Right to Buy by dying or receiving a notice to quit for misconduct. There are detailed provisions about the effect of a demolition notice.⁴⁵⁷ Disputes can be resolved by a county court.⁴⁵⁸

⁴⁴² *Copping v. Surrey County Council* [2005] EWCA Civ 1604.

⁴⁴³ Housing Act 1985 s. 131; Housing (Right to Buy) Limit on Discount) (England) Order 2013.

⁴⁴⁴ SI 1998/2997, re-enacted as Housing (Right to Acquire) (Discount) Order 2002. .

⁴⁴⁵ Housing (Right to Buy) Limit on Discount) (England) Order 2012 art. 3 (England) and 2013 Order (London); 'Reinvigorating the Right to Buy'. Previously the cap was £16,000 in London and varied between £22,000 and £38,000 in the English regions.

⁴⁴⁶ Housing Act 1985 ss 122E-125E, 132-142A, 164-170.

⁴⁴⁷ Housing Act 1985 ss 121A, 121B; Housing (Right to Buy) (Information to Secure Tenants) (England) Order 2005; in Wales SI. 2005/2681.

⁴⁴⁸ Housing Act 1985 s. 122; Housing (Right to Buy) (Prescribed Forms) (Amendment) (England) Regulations 2007.

⁴⁴⁹ The added purchasers must have a 12 month residential qualification.

⁴⁵⁰ *Haringey London Borough Council v. Hines* [2010] EWCA Civ 1111.

⁴⁵¹ Housing Act 1985 s. 124-125; these time limits are extended where the landlord changed during the five year qualification period and/or where the property is leasehold. In the latter case the landlord must also estimate the service charge that will be payable.

⁴⁵² However, rent payments can be credited against the premium: *Hanoman v. Southwark London Borough Council* [2009] UKHL 29.

⁴⁵³ Housing Act 1985 s. 125D.

⁴⁵⁴ Housing Act 1985 s. 125E; *R (Burrell) v. Lambeth London Borough Council* [2006] EWHC 394. It is also possible to find that an application has been abandoned through inactivity: *Martin v. Medina Housing Association* [2006] EWCA Civ 367.

⁴⁵⁵ Housing Act 1985 s. 138, sch. 6.

⁴⁵⁶ Indexation follows the Housing (Right to Buy) (Service Charges) (England) Order 1986 as frequently amended.

⁴⁵⁷ Housing Act 1985 ss 138A-138C.

(5) Repayment of discount

Discount has to be repaid⁴⁵⁹ if the property is resold⁴⁶⁰ within five years, on a sliding scale decreasing the amount repayable by one fifth each year.⁴⁶¹ In many cases the sale includes a right of first refusal for the landlord if the property is sold onwards within ten years;⁴⁶² this applied in national parks etc.,⁴⁶³ and in designated rural areas, of which there are many, where demand for social housing exceeds supply.

(6) Purchase by housing association tenants - the Right to Acquire

Some housing association tenants have the Right to Acquire their home⁴⁶⁴ under a modified version of Part V of the Housing Act 1985.⁴⁶⁵ There are some significant changes, notably that the landlord can choose an alternative dwelling to sell.⁴⁶⁶ The scheme is limited to property built with public subsidy or bought by housing associations since 1 April 1997. The discount is less generous⁴⁶⁷ When housing stock is transferred from the public sector to a housing association (formerly a Registered Social Landlord, now a private registered provider), the tenant enjoys a Preserved Right to Buy.⁴⁶⁸

(7) Wales

The maximum discount in Wales remains at £16,000 (as against £75,000 in English regions). There is a power for a local authority to apply to the Welsh Minister for a suspension of the Right to Buy and the Right to Acquire in pressured areas, where demand for social housing substantially exceeds supply and exercise of the rights is likely to increase the imbalance.⁴⁶⁹

(8) Scotland

In Scotland the right to buy operated as above but will be abolished in 2016⁴⁷⁰ and this has created a spike in tenants exercising their right to buy.

(9) Ireland

There are two schemes whereby tenants in social rented sector have statutory pre-emption rights. Firstly, the Incremental Purchase Scheme, which is the successor to the

⁴⁵⁸ Housing Act 1985 s. 181.

⁴⁵⁹ Technically the authority has a discretion: Housing Act 1985 s. 155A.

⁴⁶⁰ This does not include a transfer on death or to family members, nor to a compulsory purchase.

⁴⁶¹ Housing Act 1985 s. 155 as amended by Housing Act 2004 s. 195. By s. 155C the value of home improvements is ignored.

⁴⁶² Housing Act 1985 ss 156, 156A; at a price determined by ss 158-163; these are amendments by Housing Act 2004 s. 197 ff.

⁴⁶³ Housing Act 1985 s. 157.

⁴⁶⁴ Housing Act 1996 ss. 16-17.

⁴⁶⁵ Housing (Right to Acquire) Regulations 1997 sch. 2.

⁴⁶⁶ Housing Act 1996 s 124A, inserted by Housing (Right to Acquire) Regulations 1997.

⁴⁶⁷ Housing (Right to Acquire) (Discount) Order 2001.

⁴⁶⁸ Housing Act 1985 ss. 171A-171D; Housing (Preservation of the Right to Buy) Regulations 1993, amended by SI 1999/1213.

⁴⁶⁹ Housing (Wales) Measure 2011.

⁴⁷⁰ Housing (Scotland) Act 2014, s.1.

1995 Tenant Purchase Scheme, allows for a discount scheme based on household income that enables the State to share in the profits from resale during the twenty to thirty year period for which the house is subject to an incremental purchase charge. The scheme will make it possible for households in receipt of or eligible for social housing support to purchase designated new local authority and approved housing body houses.⁴⁷¹ Secondly, in 2012 the Tenant Purchase of Apartments Scheme came into effect in Ireland. This scheme allows for an apartment complex to be eligible for designation for tenant purchase under section 51 of the Housing (Miscellaneous Provisions) Act 2009. At least 65% of tenants must support designation of the complex. Where that quota is reached then apartments can be sold. Once sales begin, the housing authority will transfer ownership of the entire complex to an apartment owners' management company which will immediately lease all the apartments back to the authority for continued letting to tenants, who will then have the option of buying them from the authority at discounted rates depending upon the applicants income.

4.3.4. Flexibility

The possibility of unilateral termination by the tenant⁴⁷² and the possibility of non-abusive subletting⁴⁷³ have already been discussed.

⁴⁷¹Department of the Environment, Incremental Purchase Scheme.

⁴⁷² See section 3.2.3.

⁴⁷³ See section 3.2.3.

5. Conclusion

The comparative nature of this research effort has allowed for the selection of a number of elements which stand out in the midst of the various housing systems across Britain and Ireland. These elements touch upon a wide range of topics, from fundamental matters of tenurial definition through to reforms of tenancy law. In the first place, the 2008 reclassification of tenure in England is at odds with the tenurial structure which is more or less common to Wales, Scotland and Ireland. There are considerable difficulties with the new classification. If a homeless person is offered temporary accommodation by a private landlord acting at the request of the local authority, it is a private rental, but it might switch categories if the rent was reduced significantly. Housing provision relies on a complex connection between the role of the state and the private sector in various areas such as joint partnerships, land ownership and control, subsidies for developers, among others. The relationship between public housing backed by the state, and private housing tends to be one of mutual dependence, not least because private tenants may receive housing benefit which pays a part of the rent of a tenant in the private sector with a low income. It remains to be seen how this reclassification develops in practice.

As the private rented sector continues to grow across Great Britain and Ireland, the method of regulating that sector will be subject to new and greater pressures. In this environment the early identification of best practice is imperative. In the last decade the variety in approach to regulation of the private rented sector across these Islands has grown rapidly. Since 2004 Irish private tenancy law has forged a radically different path to English and Scottish tenancy law. By instituting a system of regulation based on implied rights and duties, the Irish system, while adhering to market rents, stands in stark contrast to the British model which remains underpinned by the notion of freedom of contract. The change may not have produced fundamentally different results in practice were it not for the introduction of the Private Residential Tenancies Board, which effectively regulates the private rented sector. When set against traditional court based dispute resolution process the alternative dispute resolution functions of the Board appear highly effective in terms of speed and cost efficiency and across both Islands this function could be identified as best practice. It is hardly surprising that the Scottish and Welsh Governments have moved towards a more specialist regulatory approach to the private rented sector akin to the Private Residential Tenancies Board. One drawback of the 2004 reforms in Ireland was the failure to provide for regulating deposits. Indeed, for many years disputes concerning deposits took up the majority of the Boards time. In contrast highly effective deposit schemes have been operating in the private rented sector of England and Scotland since 2007 and 2012 respectively. These schemes, which involve an independent body holding the deposit for the duration of the tenancy and requiring that landlord and tenant agree to the quality of the dwelling and furnishings prior to transferring the deposit, greatly reduce the potential for disputes. This scheme forms the basis for the current Irish Government proposal to reform deposit protection.

The advances made in regulation of the private rented sector stand in contrast to regulation of local authority tenancies in Ireland. For instance although terminations are rare, the effective security of the tenants in legal terms is illusory as the security of many tenants is limited to just 28 days. Across these Islands the security of Irish local authority

tenants stands in stark contrast to the extensive security enjoyed by public and social tenants in England, Wales and Scotland under secure tenancies. These countries are also leading the charge to improve the condition of rented housing. In recent years there have been extensive efforts to improve the quality of rented accommodation across Britain and Ireland. However, reforms in England and, in particular, Scotland could be considered as representing best practice in a number of respects. In Scotland the introduction of the Scottish Housing Quality Charter alongside a purposely focused regulatory body, the Scottish Housing Regulator, represents a major advance in terms of improving the quality of social rented housing. Results from the Scottish House Condition Survey indicate that this twofold approach centred on aspirational but detailed standards with dedicated regulatory oversight has dramatically improved the quality of housing in the social rented sector. While the increase in housing quality is to be welcomed it must be reiterated that across Britain and Ireland the sustained neglect of the public rented sector and failure to reinvest proceeds raised from the sale of public housing in new stock has resulted in an inadequate supply of housing across Britain and Ireland. Measure aimed at addressing this matter, such the introduction of hybrid public private leasing arrangements in Ireland, while highly novel have so far failed to make significant inroads and demand for affordable housing far exceeds supply.

With regard to provision of housing with a public task the British approach, which created a justiciable right to housing, stands out in a European context.⁴⁷⁴In the UK review procedures are laid down,⁴⁷⁵ but the ultimate decisions remain susceptible to judicial review and to human rights arguments. This legislation engenders innumerable reported cases each month about issues such as the suitability of the accommodation offered. This has proved highly controversial in the UK and the right to housing, which is far stronger than comparable provisions in European countries such as France or Germany, has been characterised as being comparatively overly generous and therefore there have been calls to curtail the right to housing in order to bring it in line with other European countries.

One final element which is common across England, Wales, Scotland and Ireland but which marks these Islands out as particularly unusual in a European context is the general absence of national tenant associations. This is in stark contrast to strong representation available to providers of private rented accommodation. The lack of representation is a major blight on the ability of tenants to have their needs represented in the development of housing law and policy concerning the rented sector.

⁴⁷⁴ Housing Act 1985 s. 64.

⁴⁷⁵ Housing Act 1985 s. 64.