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

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### National Report for **ENGLAND and WALES**

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# **1. Housing situation**

## **1.1 General features**

### **England and Wales**

Housing is central to the lives of the citizens of any nation. Everyone needs somewhere to live whether the accommodation is owner occupied or rented. This study concentrates on residential accommodation that is rented in England and Wales. As elsewhere across Europe housing is characterised by scarcity and lack of affordability, and a safety net is needed for those unable to pay rent and to help those who are left homeless. The analysis of housing law and policies in England and Wales is set within the context of its place in Europe, both as a constituent part (with Scotland and Northern Ireland) of the European Union and the fundamental rights promulgated in the European convention on Human Rights. Early parts (sections 1 to 3) examine the current housing situation and policies, this being a precursor to a detailed examination of the law governing the relationship between landlord and tenant in the residential sector (sections 4 to 7). There follow (section 8) twelve typical national cases written from the perspective of a tenant arriving from abroad who is likely to be renting in the private sector and primarily concerned with finding and contracting for rented accommodation.

### **England**

This report examines the housing situation in England and Wales, but since neither is an EU Member State, the position of these countries within the United Kingdom and within Europe requires some preliminary explanation.

England and Wales have long been a single legal jurisdiction centred on London and applying the traditional common law mix of case law and uncodified legislation. English law is quite distinct from Scottish law which is a mixed (partly civilian) system, which retained its distinctive character and very idiosyncratic terminology at the time of the Union with England.<sup>1</sup> Essentially England and Wales were a single jurisdiction, commonly described as 'English law'. Primary legislation very rarely differentiated between England and Wales, so there was a single housing law. As it happened this was also similar to Scotland because although separate Acts were passed covering Scottish housing they tended to follow the English model and the broad structure of Irish housing law is also similar in its sectoral divisions.<sup>2</sup> So English housing law provides a broad structure that is common across the islands of Great Britain and Ireland. So far as England is concerned it continues to be the case that housing legislation is passed by the Westminster Parliament and housing policy is formed in Whitehall, without significant regional devolution.

However, an English housing law is emerging for the singular reason that legislation proposed by the UK Government is now confined in its scope to England because housing powers in Wales and Scotland are devolved. This has had far more radical

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<sup>1</sup> See the Country Report on Scotland.

<sup>2</sup> The very basic principles were settled by the first security of tenure legislation passed at Westminster in 1915, whereas Ireland became a separate state in 1922; see the Country Report on the Republic of Ireland.

effects than could have been imagined because the basic sectoral arrangement of rental housing has been restructured over the period 2008-2011, causing English housing law to separate rapidly from Welsh in terms of its arrangement and terminology,<sup>3</sup> though not so far in substantive results.

## **Wales**

Wales shared the legal and administrative history of England for many centuries, but in 1951 a Minister of State with responsibility for Welsh Affairs was included as a junior minister in the UK government. This post was shared after 1957 between the Home Office and the Ministry of Housing and Local Government. Appointment of a Secretary of State for Wales to the cabinet, presiding over the Welsh Office, followed the Labour victory in the UK general election of 1964. Again the importance of housing is shown by the fact that this was one of three portfolios held by the Secretary of State, along with local government and roads, to which other areas were added gradually over the years. Until the events described in the next paragraph, this administrative split between Whitehall and Cardiff continued with legislative authority over Wales exercised at Westminster.<sup>4</sup>

More recently government powers have been devolved to Wales. The vote of the people of Wales for limited devolution in 1997, led to the creation of a National Assembly for Wales, physically located on the waterfront at Cardiff, in 1998.<sup>5</sup> A second phase of devolution in 2006 separated the executive functions of the Welsh Government more clearly from the legislative powers of the Assembly, which acquired power to pass assembly measures in devolved areas. In the context of the current investigation, the vital point is that housing is one of the devolved areas in which the Welsh Assembly has legislative competence, but finance is not devolved.<sup>6</sup>

The sectoral rearrangement of the rental sector in England in 2008 has not been followed in Wales. Tenancies are classified in Welsh law as they were in England before 2008. That is a relatively negative point, but there is much more that is positive to report from Wales. Devolution, as in Scotland, has led the devolved government to be highly active in the field of housing so that in a few years' time Welsh housing law will soon have a flavour quite distinct from English housing law and, as in Scotland, more socially orientated.<sup>7</sup> So far the activity has been focused on policy formation and consultation, a process taking place around the White Paper on 'Homes for Wales'.<sup>8</sup> There has also been a commitment to implement the Law Commission's Renting Homes project which has been rejected in England.<sup>9</sup> Attention has now shifted to the legislative phase with the Welsh Minister for Housing and

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<sup>3</sup> See below 1.4, pp 17-18.

<sup>4</sup> 'History of Welsh Devolution', on the Welsh Assembly website [www.assemblywales.org](http://www.assemblywales.org), 23 January 2013.

<sup>5</sup> Government of Wales Act 1998.

<sup>6</sup> Government of Wales Act 2006; sch. 7; R. Deacon, *Devolution in Britain Today* (Manchester University Press, 2006).

<sup>7</sup> T. Smith & R. Smith, "A Matter of Choice? Policy Divergence in Access to Social Housing Post-devolution." *Housing Studies* 18.2 (2003): 145-158.

<sup>8</sup> 'Homes for Wales: A White Paper for Better Lives and Communities' (Cardiff: Welsh Government, 2012).

<sup>9</sup> 'Renting Homes: The Final Report' (London: Law Com 297, 2006); 'Renting Homes in Wales' (London: Law Com. 337, 2013).

Regeneration introducing Wales' first Housing (Wales) Bill to the Assembly on 18 November 2013; key aims of the Bill are:

compulsory registration of private rented sector landlords and letting agents; reform of homelessness law, placing a stronger duty on local authorities to prevent homelessness and allowing the use of private sector accommodation; better provision of sites for Gypsies and Travellers; standards for local authority rents, service charges and quality of accommodation; increasing council tax on empty homes; and assisting housing provision through Co-operative Housing Associations.

Taxation powers remain non-devolved, and this creates inevitable tensions, as shown in this official statement on the Housing Bill 2013:

The Bill will enable us to improve housing standards, increase affordability, enhance our communities and help prevent the difficulties and lack of opportunities often encountered by vulnerable people. We have taken action to reduce the impact of austerity measures in Wales, but the future remains challenging in light of budget decisions taken by the UK Government. We will work in partnership to develop innovative solutions and get the best value for public money.<sup>10</sup>

Tensions may ease under the recommendations of the Silk Commission<sup>11</sup> that a package of tax and borrowing powers should be passed to the Welsh Government. Implementation of this proposal will leave the Welsh Government with more autonomy and more opportunity to take control of Welsh housing.

## **Residential sectors**

England and Wales are unusual in having three sectors which it may be helpful to introduce at this stage whilst leaving detailed description to a later point:

Private (housing without a public task) – market rents with very limited security; private sector landlords grant assured shorthold tenancies.

Public/social (housing with a public task, often contracted to 'social housing') – affordable rents with full residential security; this is subdivided into:

Public (local authorities) – secure tenancies; and

Social (housing associations) – (fully) assured tenancies.<sup>12</sup>

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<sup>10</sup> 'Statement on the Introduction of the Housing (Wales) Bill', (Cardiff: <[www.wales.gov.uk](http://www.wales.gov.uk)>, January 2014).

<sup>11</sup> 'Empowerment and Responsibility: Financial Powers to Strengthen Wales' (Cardiff, Commission on Devolution in Wales, November 2012).

<sup>12</sup> It is explained below that these are called 'private registered providers of social housing in England and 'Registered Social Landlords' in Wales; on this and the general sectoral classification see below 1.4, pp 25-27.

## **1.2 Historical evolution of the national housing situation and housing policy**

- Please describe the historic evolution of the national housing situation and housing policies briefly.**

Housing law in England and Wales is primarily legislative and based on Acts passed since the middle of the nineteenth century, but the basis of modern housing law is the homelessness legislation dating from 1977 and the tenurial reforms of the Thatcher government made in the 1980s and subsequent reactions to them.

### **(1) Public housing powers**

Building controls in towns can be traced back to the need to rebuild London in stone after the Great Fire of 1666, but modern public powers over housing conditions really derive from the response to the mass industrialisation which occurred in England at an early date, from about 1760 to about 1840, when the population began to exhibit unprecedented sustained growth.<sup>13</sup> This left England the most urbanised country in the world at the end of the nineteenth century. 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.<sup>14</sup> These evolved 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.<sup>15</sup>

### **(2) Private sector security of tenure - Rent Acts (1915-1989)**

The First World War which began one hundred years ago represents in many ways the beginning of modern society, and it can certainly be seen as the origin of modern housing law throughout Britain and Ireland. The war effort led to further industrialisation which resulted in severe housing shortages in parts of the United Kingdom. Scarcity of accommodation enabled landlords to profiteer at a time when this seemed out of keeping with the sacrifices being made by the troops and their families. Tenants' protests about escalation of rents led the Westminster Parliament to introduce the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 which provided tenants with guaranteed security of tenure and control of the rent.<sup>16</sup> At the end of the War 77% of households were renting.<sup>17</sup> War time restrictions were re-enacted in peacetime in 1919 and this led to a whole series of Rent Acts which dominated the private residential sector throughout most of the twentieth century.

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

<sup>14</sup> J.F. Kitto, 'One-roomed Homes', a paper given at a meeting of the Church of England Sanitary Association, (Manchester, 1893).

<sup>15</sup> Housing Act 1985, a consolidation of earlier powers, widely amended since.

<sup>16</sup> It is worth stating again that the date of this Act ensured that it applied throughout the two islands of Great Britain and Ireland (the south of Ireland securing independence in 1922) and hence ensured a close family resemblance in housing law across the two islands.

<sup>17</sup> 'A Century of Home Ownership and Renting in England and Wales' (London: Office for National Statistics, 2013), 1.

Details fluctuated over the years as political control changed hands at Westminster, but it found its final form in the Rent Act 1977.<sup>18</sup> By this time more people owned than rented.<sup>19</sup> This provided for fair rents, which were intermediate in level between controlled rents and market rents, but in the areas of greatest market scarcity fair rents were well below market values – even half - 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 complexities of this legislation and attempts to avoid it dominated private sector renting between 1919 and 1989.<sup>20</sup> Many of the key concepts of housing law were formulated in litigation about the meaning of the sections of these statutes.

### **(3) Mass public sector provision (1919-1980s)**

Although there were some nineteenth century Acts, mass public sector of housing really dates from the end of the First World War. In response to the poor housing conditions the local authorities, during the interwar period, built 71% of dwellings. During this period local authorities took over from the private rented sector as the largest provider of rented housing and in the post-war period substantial urban development projects were carried out and households were increasingly relocated from inner city tenements to council operated terraced housing estates. In 1980 the public/social sector consisted of 5 million homes, one third of the total, and 90% council provided.

The dominance of the public rented sector began to give way. Construction declined after the mid 1970s to be followed by sweeping demolitions. This was compounded by the large take up of the Right to Buy scheme in the late 1980s. This gave tenants of local authorities the opportunity to purchase their home at a discounted rate, an opportunity widely taken up and leading to a reduction in the number of local authority rented households and a corresponding increase in the number of owner occupied households. A similar but less generous scheme was later extended to some housing association tenants.

### **(4) Market rent reform of the private rented sector**

Modern tenancy law in England and Wales 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.<sup>21</sup> 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.<sup>22</sup> This radical reshaping of the private rented sector appears to achieved a political consensus. Certainly the greater

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<sup>18</sup> See below 4.2, p. 94.

<sup>19</sup> ‘A Century of Home Ownership and Renting in England and Wales’ (London: Office for National Statistics, 2013), p.1.

<sup>20</sup> Tenancies granted before 15 January 1989 continue to enjoy Rent Act security, but few survive today.

<sup>21</sup> Housing Act 1988; see below 4.2, p. 94.

<sup>22</sup> See below 4.2, pp 92-93.

returns for landlords have drawn new investment into the private rental market and this has led to a significant improvement in the quality of accommodation on offer.<sup>23</sup>

## (5) Social provision of affordable housing

The Thatcher Government decided to allow public sector tenants the Right to Buy their homes, in an attempt to enable those forced to rent to join the property owning democracy. In order to achieve this it was necessary to define the rights of public sector tenants, and a new form of tenancy, the secure tenancy, was crafted for this purpose; this carried full residential security of tenure, succession rights as well as the Right to Buy.<sup>24</sup> Allocation arrangements have been formalised and a right to housing has been conferred on those who were homeless, this last innovation dating back to the Labour administration of 1977.<sup>25</sup> The key defect of the policy of the time was under investment in the public sector which has continued ever since and which has been combined with demolitions and sales to sitting tenants has resulted in a depletion of the stock of accommodation available to rent.

Government policy has shifted since that time to the provision of affordable housing through the social sector. Housing associations grant assured tenancies with full residential security.<sup>26</sup> Funding for new housing was focussed on housing associations and encouragement was given to mass transfers of public sector stock to housing associations.

The sector has been affected very substantially by the incorporation of the European Convention on Human Rights directly into European law with effect from 2 October 2000.<sup>27</sup> This affects public landlords directly and social landlords more peripherally, and also affects the courts whenever they are dealing with any repossession case. Incorporation has provoked a tidal wave of litigation disproportionate to the actual changes to the law brought about by human rights arguments. Recent years have been marked by a crusade against antisocial behaviour throughout society in general and in social housing in particular,<sup>28</sup> legislation directed to this aim sometimes coming into conflict with human rights principles.

Most recently the whole terminology of the social sector has been upset in England, though not in Wales. The recent reforms are most appropriately treated in the context of the affordable housing market where public landlords and social providers of housing are considered.<sup>29</sup> Briefly:

**England:** the main sectoral division is according to the purpose of the letting which is divided into:

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<sup>23</sup> See below 1.4, pp 17-18.

<sup>24</sup> See below 4.3, pp 98-99.

<sup>25</sup> Housing (Homeless Persons) Act 1977; now Housing Act 1996 as amended e.g. by Homelessness Act 2002.

<sup>26</sup> Contrast Scotland where there is a single social sector and all social landlords grant Scottish secure tenancies.

<sup>27</sup> Human Rights Act 1998, see below 3.1, p. 60-61.

<sup>28</sup> See below 3.1, p. 57.

<sup>29</sup> See below 1.4, pp 17-18.

Public/social sector ('social' rental housing) / 'housing with a public task'): low cost/affordable housing provided at up to 80% of open market rents; landlords are:

Public = local authorities – they grant secure tenancies

Social = private registered providers of housing (the new name for housing associations) – they grant (fully) assured tenancies.

Private rental housing: provided at market rents by private landlords and much less commonly by housing associations (acting non-socially<sup>30</sup>) using (mainly) assured shorthold tenancies.

There are as yet relatively few academic books that use this new terminology.<sup>31</sup> The objective of this sectoral realignment is to try to ensure that housing associations are seen for budgetary purposes as private organisations and hence to make it unnecessary to record the debts of housing associations as public sector debt on the UK balance sheet.

**Wales:** retains for the time being the old terminology and hence the primary sectoral division is by type of landlord, into:

Social sector landlords: public authorities and Registered Social Landlords – primarily housing associations; they provide affordable housing at below market rental levels, public landlords granting secure tenancies and housing associations assured tenancies with full security; and

Private landlords: individuals and companies letting at market rents using (mainly) assured shorthold tenancies.

Older books will be good for understanding Welsh law.<sup>32</sup> There is not as yet a volume devoted to the housing law of the Principality exclusively. Both systems can be followed in the practitioners texts;<sup>33</sup> legislation if freely available.<sup>34</sup> The whole issue is revisited below as aspects of 'Types of Housing Tenures' and 'Regulatory Types of Rental Tenures'.<sup>35</sup> Whatever else can be said, it is certainly true that the massive over-complexity of the law has recently been much compounded.

- Please describe briefly the evolution of the principal types of housing tenures from the 1990s on. Explain the growth and decline of the different tenures and the reasons why that happened (e.g. privatisation or other policies).

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<sup>30</sup> A small percentage of housing association stock can be rented out at market rents, the money raised being used to fund their core social housing activities.

<sup>31</sup> D. Cowan *Housing Law and Housing Policy* (London: Macmillan, 2007); S. Garner and A. Firth, *A Practical Approach to Landlord and Tenant* (Oxford: University Press, 7th edn, 2013); A. Arden and A. Dymond, *Manual of Housing Law* (London: Sweet & Maxwell, 9<sup>th</sup> edn, 2012).

<sup>32</sup> S. Bright *Landlord and Tenant Law in Context* (Oxford: University Press, 2007); D. Hughes et al., *Housing Law and Policy*, (Oxford: University Press, 2005); P. Sparkes *A New Landlord and Tenant* (Oxford: Hart, 2001).

<sup>33</sup> E.g. Woodfall and Hill and Redman now mainly used on-line.

<sup>34</sup> J. Driscoll *Butterworths' Residential Landlord and Tenant Handbook* (London, LexisNexis, 5<sup>th</sup> edn, 2011) or from [www.legislation.gov.uk](http://www.legislation.gov.uk).

<sup>35</sup> See below 1.4, pp 17-30 and 4.1-4.3, pp 90-104.

It is best to analyse England and Wales separately. So far as **England** is concerned the following table shows the total for dwellings over the past thirty years:<sup>36</sup>

**Table 1: Dwellings (millions): England 1981-2011**

	Owner Occupiers	Private Rentals	Housing Association Rentals	Public rentals	Total
1981	10.7	2.1	0.4	4.8	17.9
1986	11.5	2.0	0.6	4.2	18.6
1991	13.3	1.8	0.6	3.9	19.7
1996	14.0	2.1	0.9	3.5	20.5
2001	14.8	2.1	1.4	2.8	21.2
2006	15.0	3.0	1.9	2.1	22.0
2011	14.7	4.1	2.3	1.7	22.8

What we can see is that the overall number of dwellings has increased by a quarter over the past thirty years. All sectors show outright growth – owner occupation, private rental property and housing association owned stock – with the sole exception of the public sectors; stock held by local authorities showed a sharp decline. Tenure shifts are best followed in terms of percentage tenures:<sup>37</sup>

**Table 2: Tenancy trends (%): England 1981-2011**

%	Owner Occupiers	Private Rentals	Housing Association Rentals	Public rentals
1981	69	12	2	26
1986	68	11	3	23
1991	68	10	3	19
1996	68	10	4	18
2001	69	11	7	13
2006	68	14	8	10
2011	64	18	11	7

More recently the trend to the private sector has accelerated so that the figures for *households* in 2012-13 show 4 million households renting privately (18%) as against 3.7 million renting in the public/social sector (17%).<sup>38</sup>

These figures show surprisingly rapid shifts in the tenurial pattern over the same thirty year period since the early days of the Thatcher government. This and the graphical representation over shows three striking trends:

<sup>36</sup> 'Dwelling Stock by Tenure: England (Historical Series)' in 'Housing Statistics', (Department for Communities and Local Government , <[www.communities.gov.uk](http://www.communities.gov.uk)>, 2012) Table 104; figures rounded and in millions with figures for 1986 extrapolated; sectors as defined by the Department.

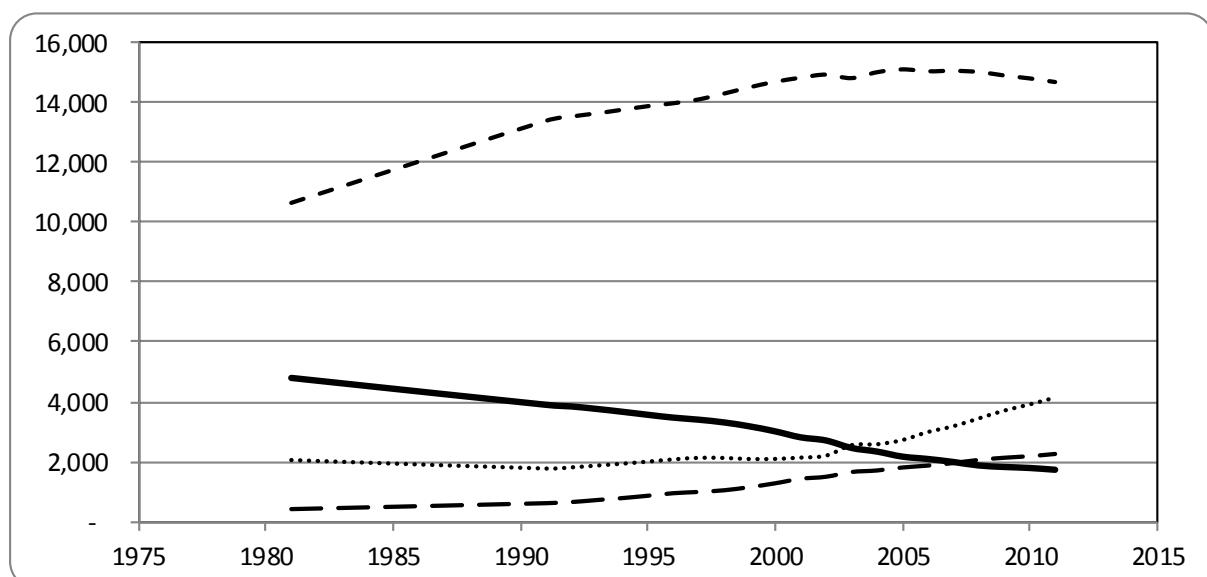
<sup>37</sup> *Ibid.*

<sup>38</sup> 'English Housing Survey Headline Report 2012-13' (London, Department for Communities and Local Government, 2014), paras 1.7-1.8.

- (1) The private owner occupier sector has remained largely static in size, but there has been an historic reverse in what was an apparently inexorable increase in its sectoral share, the decline dating from the onset of the financial problems in 2006.
- (2) A sharp rise has occurred in the percentage of the housing market held by the private rental sector since the switch from fair rents to market rents in 1989. The increase is particularly noticeable in London.<sup>39</sup> Private renting now equates in size as a sector to all social renting, that is local authority and housing association stock combined.
- (3) The public/social sector declined very sharply in the 1980s as a result of the Right to Buy, but has remained largely stable since then; however, the predominance of the public sector in the 1980s has given way to accommodation provided by housing associations (social sector) and these now predominate in the public/social sector.

These points are demonstrated graphically here:

**Figure 1: Tenures Trends in England (dwellings in thousands)<sup>40</sup>**



Key: ---: Owner occupiers; —: Rented from Local Authorities; ...: Private Rental  
- - -: Rented from Housing Associations

Wales has much smaller numbers of dwellings, but the increase in percentage terms has been similar over the same thirty year period.<sup>41</sup>

<sup>39</sup> 'A Century of Home Ownership and Renting in England and Wales' (London: Office for National Statistics, 2013), p.6.

<sup>40</sup> 'A Century of Home Ownership and Renting in England and Wales' (London: Office for National Statistics, 2013), p.6.

<sup>41</sup> 'Dwelling Stock by Tenure: Wales (Historical Series)' in 'Housing Statistics', (Department for Communities and Local Government , <[www.communities.gov.uk](http://www.communities.gov.uk)>, 2012) Table 106; figures rounded and in millions with figures for 1986 extrapolated.

**Table 3: Dwellings: Wales 1981-2011**

	Owner Occupiers	Private Rentals	Housing Association Rentals	Public Rentals	Total
	100,000	100,000	100,000	100,000	M
1981	6.7	1.1	0.1	3.0	1.1
1986	7.4	1.1	0.2		
1991	8.4	1.1	0.2	2.2	1.2
1996	8.8	1.1	0.5	2.1	1.2
2001	9.4	0.9	0.5	1.9	1.3
2006	10.0	1.2	0.7	1.6	1.3
2011	9.8	1.8	1.4	0.9	1.4

In Wales about 70% of dwellings are owner occupied; both registered social landlord and local authorities hold about 16% while the rentals from private landlord and others make up the remaining 14%.<sup>42</sup> The private rental sector dwellings in Wales have doubled over the last ten years, whereas the public/social sector has witnessed some decrease in its stock of dwelling; although there has been increase in the registered social landlords' stock within the social sector that is lost to a disproportionate decrease in the rentals from local authorities. More significant are the percentage trends:<sup>43</sup>

**Table 4: Tenancy trends (%): Wales 1981-2011<sup>44</sup>**

	Owner Occupiers	Private Rentals	Housing Association Rentals	Public rentals
	%	%	%	%
1981	61	11	1	27
1986	67	11	2	20
1991	70	10	2	18
1996	72	8	4	16
2001	74	7	4	15
2006	76	8	5	11
2011	70	13	10	7

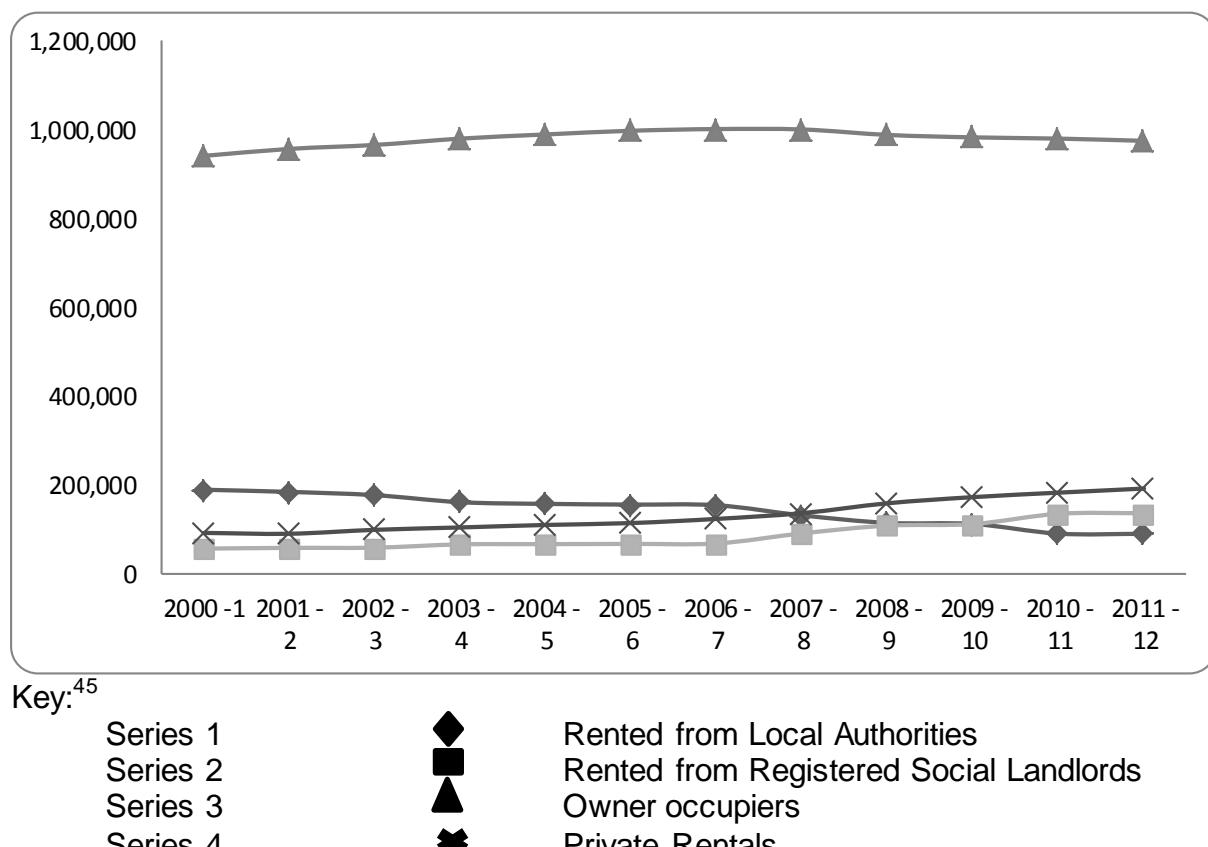
As compared to England this shows a much more marked rise in private ownership as a result of the introduction of the Right to Buy in the 1980s, and a sharper fall off in the percentage of owner occupiers as a result of the recession starting in 2006. It also shows much less impact of the introduction of assured tenancies on private rental rates, and a lower sectoral share as compared to social renting. Public housing stock has declined much more, with an overall decline in social housing and a very marked shift from public providers to Registered Social Landlords.

<sup>42</sup> R. Caunt, *Dwelling Stock Estimates for Wales, 2010-11, SDR 25/2012*, (Cardiff: Welsh Government, 2012), 2.

<sup>43</sup> 'Dwelling Stock by Tenure: Wales (Historical Series)' in 'Housing Statistics', (Department for Communities and Local Government , <[www.communities.gov.uk](http://www.communities.gov.uk)>, 2012) Table 106; figures rounded and in millions with figures for 1986 extrapolated.

<sup>44</sup> *Ibid.*

**Figure 2: Tenure Trends in Wales 2000-2012**



The balance within the public/social sector has shifted so that, by 2011/12, 72% of social sector lettings were provided by housing associations and 28% by local authorities.

In Wales, by 31 March 2010, the private sector accounted for 84% of all dwellings, whilst the public/social rented sector had declined to just 16%, from 21% of total stock in 1991-92. Registered Social Landlords have made the largest impact, delivering 83% of all the additional affordable housing<sup>46</sup> over the three years from 2007 to 2010. This represented more than half of all additional affordable housing in 21 out of the 22 local authorities;<sup>47</sup> and in three local authority areas the local authority had no stock at all.<sup>48</sup>

<sup>45</sup>'Dwelling Stock Estimates for Wales, 2011-12', 25 April, 2013 [wales.gov.uk/docs/statistics/](http://wales.gov.uk/docs/statistics/), 9 May, 2013.

<sup>46</sup> Affordable homes are additional housing units provided to specified eligible households whose needs are not met by the market. The sum of social rent, affordable rent, intermediate rent and low cost home ownership outside the conventional market dictates the makeup of affordable homes.

<sup>47</sup> A total of 4,037 additional affordable housing units were delivered by Registered Social Landlords via capital grant funding between 1 April 2007 and 31 March 2010 which is 72 per cent of all social provision over the period. See, 'Affordable Housing Provision in Wales - Analysis for 2007-08 to 2009-10' *Statistical Bulletin*, SB 26/2008 30 March, 2011,

<sup>48</sup> Pembrokeshire, the Vale of Glamorgan and Bridgend.

- In particular: What is the role of migration within the country, immigration or emigration from/towards other countries inside and outside the EU

Immigration from the EEA is a major issue. About four million migrants arrived in Britain between 2001 and 2011.<sup>49</sup> The government aimed to limit net migration to 100,000 annually, but the actual outcome in 2012 was double this. It is of course very difficult to control migration from other EEA states. About 9% of new social lettings go to foreign nationals, a rise from 6.5% in 2007/08. Foreign nationals (many EEA nationals) now make up 12% of the population.<sup>50</sup> Around 1.2 million of these immigrants now live in social housing, accounting for one in eight of the total in the sector, a proportion that may be as high as one in four in London.<sup>51</sup>

Access to housing varies according to the immigration status of the particular individual, though it should be open to EEA nationals.<sup>52</sup> This is a matter of major political controversy at present; there is a widespread perception, whatever the truth, that immigration from the EEA and outside it too rapid, and the public mood on this issue is a major driver of political debate.

By 2026, the number of households is projected to be increasing by an average annual rate of 223,000 in England, and one-third of this growth is predicted to arise from inward migration.<sup>53</sup> Increased immigration has had the greatest impact on the private rental sector. Migrants are heavily concentrated in the private rental sector during their first few years in the UK until becoming eligible for social housing or acquiring sufficient financial security to become owner occupiers.<sup>54</sup> Around 60% of migrants who arrived in the UK over the last five years currently live in private rented housing.<sup>55</sup>

The impact of immigration on the local housing market varies from place to place. In some areas, new migrants have filled vacancies in the local market, often created by other residents moving to more desirable areas.<sup>56</sup> In areas of high housing demand, some migrant workers have to compete with other low-waged workers for properties at the bottom end of the private rental sector. But the biggest policy response flows from the potential effect of migration on housing when the immigrants become eligible for social housing. This is what is responsible for the proposal to raise the eligibility criteria for social housing.<sup>57</sup>

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<sup>49</sup> 'Migration', [www.statistics.gov.uk](http://www.statistics.gov.uk), 8 August 2013.

<sup>50</sup> 'Social Housing Residency Test introduced by David Cameron', <[www.bbc.co.uk/news](http://www.bbc.co.uk/news)>, 8 August, 2013.

<sup>51</sup> 'Half a Million Immigrants given Social Housing in the Last Decade', <http://www.telegraph.co.uk/> , 8 August, 2013.

<sup>52</sup> See below 6.2, pp 129-131.

<sup>53</sup> 'New Projections of Households, for England and the Regions to 2029' (London: Communities and Local Government, 16 March, 2007).

<sup>54</sup> C. Whitehead, I. Gordon, and T. Travers, 'The Impact of Recent Migration on the London Economy', (London: London School of Economics, 2007).

<sup>55</sup> 'Social Housing and Migrants: Interim Findings' (London: Equality and Institute for Public Policy Research for the Human Rights Commission, 2008).

<sup>56</sup> For example, in Sheffield, Polish workers tend to move to areas that once accommodated students, often living in houses in multiple occupation due to the increase of purpose-built student accommodation developments: D. Robinson, K. Reeve, and K. Casey, 'The Housing Pathways of New Migrants', (York: Joseph Rowntree Foundation, 2007).

<sup>57</sup> 'Social Housing Residency Test Introduced by David Cameron', [www.bbc.co.uk](http://www.bbc.co.uk), 8 August, 2013; see below, 6.2, p. 127`.

## 1.3 Current situation

- Overview of the current situation
  - What is the number of dwellings?<sup>58</sup> How many of them are rented vs. owner-occupied? What would be the normal tenure structure? What is the most recent year of information on this?

The housing stock of Great Britain has more than tripled over the last century, increasing from about 7 million in 1900 to 22.8 million dwellings in England alone, and 1.35 million in Wales in 2011.<sup>59</sup> In England as of March 2011 there were 18.8 million private dwellings comprising owner occupied and private rented tenures, and 4.0 million rentals – 2.3 million were rented from Private Registered Providers and 1.7 million were rented from local authorities and housing associations. The private dwelling comprised over 83% of the housing stock with only 3.9 million dwellings in private rental, and of the 18.8 million private dwellings over 14.7 million were owner occupied.<sup>60</sup>

Naturally there are slightly fewer households; The headline results of the English Housing Survey 2012-13, the most recent figures available for England (alone), show that there are 22 million households, comprising:

owner occupiers	14.3 million	65%;
private renters	4.0 million	18%;
public/social renters	3.7 million	17%.

In Wales the most recent statistics from 2010 reveal a further 1.3 million households.<sup>61</sup> Figures for households are increasing as more people live alone.

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<sup>58</sup> See also above, 1.2, pp 10-13.

<sup>59</sup> S. Wilcox, *Housing Finance Review*, 1999/2000, (York: Joseph Rowntree Foundation, 1999); C. Randall, *Housing*, (Office of National Statistics, 2011). The total dwelling stock in the whole of the United Kingdom (including Northern Ireland and Scotland) now stands at over 27 million.

<sup>60</sup> R. Field, *Dwelling Stock Estimate 2011: England*, (Department for Communities and Local Government, 2011) 2, <[www.gov.uk/](http://www.gov.uk/)>, 20 December 2012.

<sup>61</sup> ‘Household Estimates’ (Cardiff, Welsh Government, 2010).

## 1.4 Types of housing tenures

### ○ Principles of classification

At this most basic point of housing law there is no longer a commonality across England and Wales, and Scotland differs sharply again.

#### **England**

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.<sup>62</sup> 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.

This is the basis on which the Homes and Communities Agency works.

There are considerable difficulties with this 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.

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: 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.

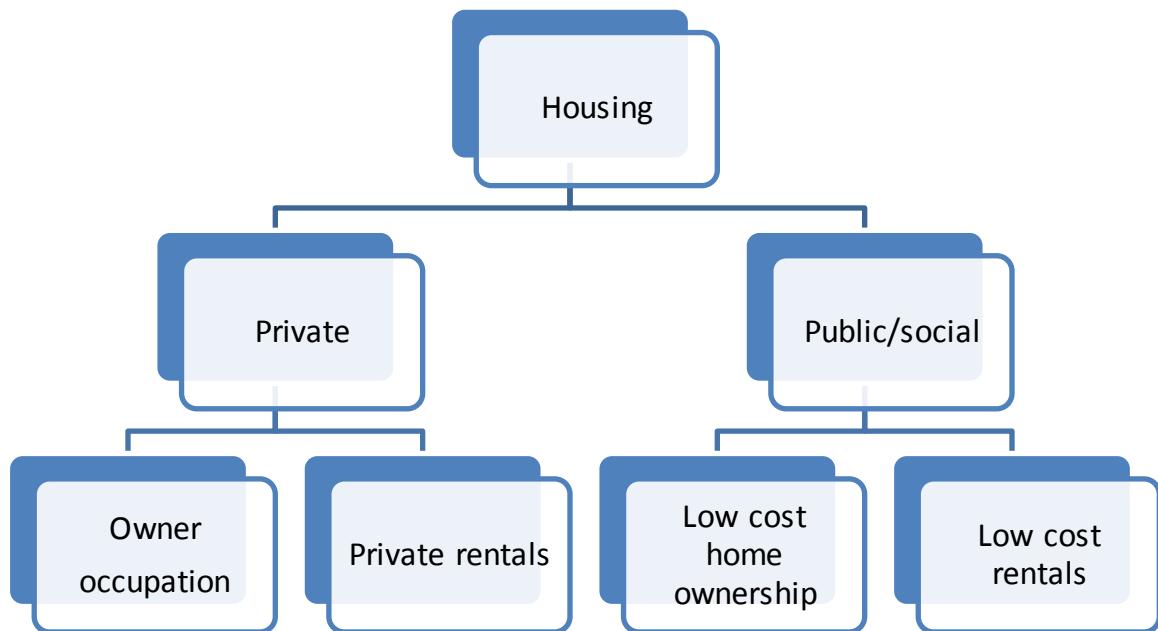
Public landlords – local housing authorities letting publicly owned housing stock; they grant secure tenancies with long term residential security at affordable rents.

Social landlords – these were formerly known as Registered Social Landlords and now as Private Registered Providers of Social Housing; they grant assured tenancies with full residential security but at affordable rents.

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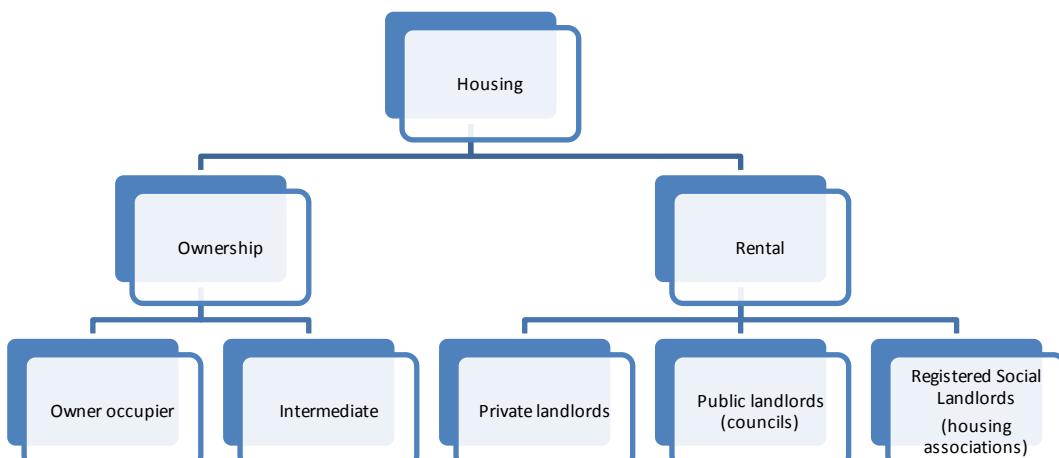
<sup>62</sup> Respectively *Cave Review of Social Housing Regulation* (London: Department for Communities and Local Government, 2007); Housing and Regeneration Act 2008 Part 2; Localism Act 2011 ss 178-179.

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 basic layout is set out below, and the layout of rental tenures below.<sup>63</sup>



## Wales

The restructuring of the public/social housing market that took place in 2008 does not apply to Wales,<sup>64</sup> 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.



There follows a description of the various housing tenures in England and Wales.

<sup>63</sup> See below 1.4, pp 25-26.

<sup>64</sup> Housing and Regeneration Act 2008 ss 59-60.

- **Home ownership**
  - **How is the financing for the building of homes typically arranged (e.g. own equity, mortgage based loan, personal loan, mix, other)**

### **Ownership tenures**

This section considers private home ownership based on market principles, leaving for the time being consideration of intermediate tenures and in particular social sector ownership or 'low cost home ownership'. The first point to make is that private ownership consists of a variety of tenures, since homes may be freehold or leasehold:

Freehold houses: a freehold is an estate, that is an ownership interest, which is unlimited in time. Technically it is not ownership at all, but a tenure by which land is held from the Crown by a feudal vassal, but in practice the feudal system makes no difference at all in everyday situations. The only real effect is the use of the word 'tenant' and therefore 'tenure' is used for property that is owned. A freehold is therefore effectively an ownership interest, called an 'estate' and now perpetual in character. The vast majority of titles are registered. Most houses are freehold.

Freehold houses subject to rentcharges: a few houses are owned freehold but subject to a rentcharge, a rent charged on freehold land. This was common in some parts of the country, including Manchester and south Wales. The existence of the rent is nothing more than a minor irritant: most rentcharges are for very small sums (e.g. £10 a year) new rentcharges cannot in general be created since 1977, the homeowner can redeem the rent, and rentcharges will be extinguished in 2037.<sup>65</sup>

Leasehold houses: there are a substantial minority of houses held on long leases, where there is a small annual rent payment called a ground rent. These are treated in the market in exactly the same way as freehold house, perhaps with a small discount on the price, provided that the remaining term of the lease is long (over about a hundred years, and ideally the traditional 999 years). It is possible to enfranchise the house – that is buy the freehold and many leaseholds are enfranchised by agreement.

Leasehold flats: English law does not allow for the enforcement of positive covenants between successive freehold owners and so it is difficult to set up satisfactory flat schemes that are freehold; anyone wishing to buy a freehold flat may find that mortgage lenders are resistant to lending on the security of a freehold flat. As a result the invariable practice is to use a leasehold flat scheme. The flat is sold on a long lease (999 years in the provinces, but shorter terms are common in London) subject to a ground rent and a service charge. The freehold and common parts are vested in a management company consisting (in the best schemes) of the residents themselves. These flats can be sold and mortgaged in much the same way as a freehold house, and the leasehold titles are registered.

Commonhold: this is a scheme for freehold flats with communal management via a commonhold association, that is it is a condominium as recognised in

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<sup>65</sup> Rentcharges Act 1977; estate rentcharges are still permitted e.g. to cover the cost of repairing a shared access road..

America and the continent of Europe. The term ‘commonhold’ ... seems to convey both the notion of land ownership and of the element of community of interests and co-operation in management which is intrinsic in the scheme.<sup>66</sup> Legislation was enacted in 2002,<sup>67</sup> but very few schemes have been built because of opposition from the mortgage lenders lobby.

### **The property owning democracy**

At the beginning of the twentieth century most households lived in accommodation that was rented privately. Ever since, official policy has been to promote home ownership. Since then there has been an almost continuous rise in the number of owner occupiers, so that in 2011 64% of English households and 70% of those in Wales owned the accommodation in which they lived. There has been a steady increase in the outright number of homes that are owned and usually also a steady increase in percentage terms of the owner occupier sector. Rising prices are predominant feature of the housing market in England, and, to a lesser extent, Wales.<sup>68</sup> This undoubtedly created an urgency for people to buy when they are able to do so. There was, however, always a recognition that there was an optimum number of owners, and that significant segments of the population would never wish to rent. It may be that this optimal level had been reached in the early 2000s. Around 2006, the raw numbers and percentage turned into decline for the first time ever, partly caused by affordability problems after the housing market reached an historic high but more as a result of the impact of the financial crisis, to be considered below.<sup>69</sup>

### **Mortgages**

The United Kingdom has a highly sophisticated mortgage market with a large number of mortgage lenders competing among themselves for market share. This has generally ensured (the last few years apart) that there is a ready supply of mortgage finance available for those wishing to buy. A couple who have found a house to buy will apply for mortgage finance to fund the purchase since very few people can afford to buy outright. The couple’s income will be checked in order to ensure that they have the ability to repay what they have borrowed. Historically loan limits were 2.5 times the principal annual salary, but many people need to borrow more than this to afford even a cheap house. Repayments were traditionally calculated so as to pay off the loan after 25 years, but longer periods may now be arranged. The property that is being offered as security will be valued by a professional valuer. A mortgage offer will be made taking into account the loan to value ratio. Historically loans were made up to 90% of the value of the house but as a result of the banking crisis lending criteria were tightened considerably with the result that many potential buyers could not obtain a mortgage, usually because they could not raise the larger deposit now required.

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<sup>66</sup> N. Roberts, ‘Commonhold: a New Property Term - But No Property in a Term!’, *Conveyancer* 2002, Jul/Aug: 341-348.

<sup>67</sup> Commonhold and Leasehold Reform Act 2002.

<sup>68</sup> See below 2.1, pp 33-35.

<sup>69</sup> See below 2.1, pp 37-38, and 2.5, pp 42-43.

### **Property owned outright or subject to a mortgage**

The economic value of owner occupation varies enormously depending upon whether a home is owned outright or is subject to an existing mortgage and, in the latter case, what percentage of the value of the home is owed to the lender. England has suffered periodic bouts of negative equity where house price falls have caused significant number of borrowers to owe more than their home is worth.

The number of owner occupiers was relatively static between 2001 and 2011, at around 15 million, but outright ownership increased sharply so that the balance is now 7.2 million owning outright and 7.6 million holding a mortgage.<sup>70</sup> People have paid off debt as a result of the economic troubles since 2006.

### **Deposit**

During the financial crisis, lenders set a cap on a lower loan to value ration than had previously been the case, the practical effect of which was to require buyers to raise a larger deposit. Although all buyer have had to find larger deposits, this particularly affected potential first time buyers as the following table shows:

Table 5: Average deposit as a % of price 1990-2010<sup>71</sup>

	<b>First Time Buyer</b>	<b>Mover</b>	<b>All buyers</b>
	%	%	%
<b>1990</b>	14	33	25
<b>1995</b>	10	32	21
<b>2000</b>	16	32	25
<b>2005</b>	19	35	30
<b>2010</b>	28	39	35

The Help to Buy scheme announced in the 2013 Budget and since extended to run until the end of 2020, is an attempt to revive the housing market and to help people to buy when they do not have a large enough deposit to meet lenders' requirements. The main scheme is a mortgage guarantee where a buyer has a minimum 5% deposit; the government guarantees to the lender a top slice of the mortgage so lenders will lend where otherwise responsible lending criteria might not be met. This apart, normal lending criteria apply. Requirements to qualify for help are:

- a residential mortgage for owner occupation;
- a repayment mortgage;
- purchase of the borrower's only property; and
- a maximum purchase price of £600,000.

There is another scheme (Help to Buy equity loans) whereby the government loans up to 20% of the cost of a new build home, enabling the buyer to fund the purchase with a 5% deposit and 75% commercial mortgage. This too is open to first time buyers and movers paying up to £600,000. Repayments will begin after five years.

<sup>70</sup> 'A Century of Home Ownership and Renting in England and Wales' (London: Office for National Statistics, 2013), 7.

<sup>71</sup> 'Repayments as a Per Cent of Income and Deposit as a Per Cent of Purchase Price – UK, 1988-2012' (London: Department of Communities and Local Government, 2011).

## **Restituted and privatized ownership in Eastern Europe**

This is not relevant in the United Kingdom. The word ‘privatization’ is sometimes used to describe transfers of local authority stock to housing associations (now private registered providers of social housing) but the process is scarcely comparable to the eastern European schemes of the early 1990s.

- **Intermediate tenures: do you classify intermediate forms of tenures between ownership and renting**

Between the two extremes of owner-occupation and renting there are intermediate home owners who share ownership rights and responsibilities with others, those on the ‘staircase’,<sup>72</sup> to full ownership; the pace of movement on the staircase can vary and reflect individual economic circumstances. This discussion which follows takes account only of mixed ownership/rental arrangements, and not leasehold ownership and flat schemes which are viewed as forms of ownership.<sup>73</sup> The category of intermediate tenures encompasses a broad range of schemes, many of them partly publicly funded. In terms of categorisation the starting point (for England) is the definition in section 70 of the Housing and Regeneration Act 2008 of low cost home ownership to include:

- (a) shared ownership arrangements;
- (b) equity percentage arrangements; or
- (c) shared ownership trusts.

The arrangement is categorised as an ownership arrangement rather than a rental whenever any proportion of ownership (however small) is involved, so a rental must be a pure rental. The same schemes apply, though categorised in different language, in Wales. They represent a tiny proportion of the overall housing stock.

They are the primary vehicle for low-cost home ownership schemes whether with or without a mortgage and apply equally to freehold as well as flats and or leasehold. Schemes work in broadly one of two ways. Either the purchaser acquires the ownership of the property, usually the freehold, but the equity is shared; or the ownership is wholly retained by the seller who grants the purchaser a long lease containing an obligation to transfer the seller's interest in the future. The majority of shared ownership schemes are provided through housing associations with public subsidy channelled through the Homes and Communities Agency.

A shared ownership arrangement involves a long repairing lease (where the tenant/owner is responsible for repairs) granted on payment of a premium calculated by reference to a percentage of the value of the dwelling house. This is the ownership stake.<sup>74</sup> In addition a rent is paid sufficient to service the residual cost. The terms of the lease include an option to purchase further shares of equity in stages, the process of ‘stair-casing’, followed by an option ultimately to acquire the landlords' interest completely. So in simple terms the buyer is granted a long lease and enabled to buy out their landlords' interests in manageable stages. All of these schemes are notorious for high level of defaults. The risk associated with shared

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<sup>72</sup> A term that refers to progression to or regression from sole ownership by buying up or selling off interest owned in a property.

<sup>73</sup> See above, 1.4, p. 17.

<sup>74</sup> J. Luba, ‘The Shared Ownership Lease - A Misleading Misnomer?’, *Landlord and Tenant Review* 2010, 14(3): 88-91.

ownership is that the lease with it the value represented by the premium may be lost before the top of the staircase is reached on significant breach of its covenants, such as rent arrears, failure to pay service charges, etc. The initial investment may be protected by using a trust which guards against total loss.<sup>75</sup>

An equity percentage scheme is structured differently, with property in the home transferred to the buyer at the beginning on terms that the buyer pays:

an initial payment; and

other sums representing a percentage of the value of the interest;

These sums are secured by a mortgage. A variant is a shared owner trust.

There are a number of other ad hoc schemes which are very difficult to classify, for example Flexi-buy; here the occupier is initially a tenant, paying only rent, but the rent can be used to build up a deposit to facilitate a future purchase, at which time the agreement would become a shared ownership arrangement.

## Housing co-operatives

Housing cooperatives offer an alternative tenure<sup>76</sup> based on a fully mutual housing association<sup>77</sup> utilising a particular corporate form. They are formed by groups of people who live in and manage collectively their accommodation, taking collective and democratic responsibility for arranging repairs, making decisions about rent and who joins or leaves the co-operative. Since fully mutual housing associations only exist for the benefit of their members it is doubtful that they would be subject to public law or the human rights legislation.<sup>78</sup> Some housing co-operatives have arisen from an attempt to extend the economic advantages of ownership to people who cannot afford to service an ordinary mortgage, and in a bid to transfer control of local authority tenancies to private bodies under the stock transfer schemes. Tenants have two legal capacities, as tenants and as members of the co-operative.<sup>79</sup> Members have a capital stake and a communal interest in the development. They have no statutory security of tenure,<sup>80</sup> no possibility of enfranchisement and no Right to Buy.<sup>81</sup>

Another form of housing co-operative is a Tenant Management Organisation, formed by tenants to manage local authority stock. Any tenant must be able to join and they have a 'co-operative flavour' but are not fully mutual.<sup>82</sup> Housing co-operatives may also be set up as a Community Land Trust, an organisation controlled by a local community to manage affordable housing or land or commercial facilities in

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<sup>75</sup> *Richardson v. Midland Heart* [2008] LTR 31 Ch. D.; S. Bright & N. Hopkins, 'Richardson v Midland Heart: Low Cost Home Ownership - Legal Issues of the Shared Ownership Lease' *Conveyancer*. 2009(4): 337-349.

<sup>76</sup> J. Alder, 'Co-operative Housing Associations - An Alternative Tenure: Part 1', *Conveyancer* 1988, May-Jun: 187-196.

<sup>77</sup> Membership is coextensive with the tenants of the association: Housing Act 1996 s. 63.

<sup>78</sup> See the discussion on the regulation of social landlords, under.

<sup>79</sup> David Rodgers has called for a new relationship under English law pulling together these two capacities to create a "New Mutualism". He does not elaborate on what this new relationship should look like. D. Rodgers, *New Mutualism: The Third Estate* (Co-operative Press Ltd., 1999), 36.

<sup>80</sup> S. 35(2)(4), sch.1, para.12h.

<sup>81</sup> *Bhai v. Black Roof Community Housing Association Ltd* [2001] 2 All ER 865, CA.

<sup>82</sup> One example, the Walsall Alliance of Tenant Management Organisations.

perpetuity.<sup>83</sup> It allows democratic control and has the potential to allow for reinvestment of profits back into community interest. This may be a way of creating community focused housing which remains affordable in the longer term.<sup>84</sup> It can also be seen as a model which creates social capital, thus providing homes but also community cohesion. On membership this is very similar to the definition of a fully mutual housing co-operative, which includes both people who are tenants or prospective tenants of the co-operative.

The security of tenure granted by housing co-operatives and associations has been resolved by the Supreme Court when it ruled that as a matter of contractual interpretation, an occupancy agreement between a mutual housing association and one of its members, which was expressed to be "from month to month until determined" could not be determined simply by a month's notice to quit. The agreement, although incapable of being a tenancy by virtue of its uncertain duration, was treated as a tenancy for life at common law and therefore took effect as a 90-year lease determinable either on the tenant's death or in accordance with its express termination provisions.<sup>85</sup>

The Commission on Cooperative and Mutual Housing examined why the housing co-operative sector was so much smaller in Britain compared to other parts of Europe. The conclusion reached in 2009 was that housing co-operatives outperformed their social landlord counterparts on many counts, and yet the co-operative sector accounts for only 0.6 per cent of the nation's total housing stock.<sup>86</sup>

Co-ownership schemes were a Scandinavian import designed to cater for people who could afford to pay a cost rent but who were unable or unwilling to become sole owner occupiers. It is one of many variations of co-operative housing tenure available under British law where the residents of a small housing development have a common interest in the management and, sometimes, the ownership of the dwellings.<sup>87</sup> Residents, through a co-ownership society, are enabled communally to own and control the management of the dwellings.<sup>88</sup> For a co-owner, his interest is in his membership of the association and the value of the property he owns, coupled with the democratic structure that emerges from his membership.<sup>89</sup>

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<sup>83</sup> C. Handy, 'Community Land Trust', *Journal of Housing Law* 2010, 13(5): 83.

<sup>84</sup> An increasing number of projects are at the development stage.

<sup>85</sup> *Mexfield Housing Co-operative Ltd v. Berrisford* [2011] UKSC 52. Mexfield was a co-operative housing association which entered into an agreement with Berrisford as a mortgage rescue. Berrisford's right of occupation was evidently not intended to be precarious and the agreement could only be determinable by the association by mutual agreement. The Supreme Court distinguished earlier cases in which it was held that an agreement for an uncertain term could not be a tenancy, *Lace v Chandler* [1944] KB 368, CA, and *Prudential Assurance Co. v. London Residuary Body* [1992] 2 AC 386, HL.

<sup>86</sup> 'Housing Associations', [www.EnglandShelter.org.uk/](http://www.EnglandShelter.org.uk/), 11 January 2013.

<sup>87</sup> Funding was provided through the former housing corporations.

<sup>88</sup> D. Clapham & K. Kintrea, 'Importing Housing Policy: Housing Co-operatives in Britain and Scandinavia', *Housing Studies*, 2(3) (1987): 157-169.

<sup>89</sup> M. Tracht 'Co-ownership and Condominium', *Encyclopedia of Law and Economics* 2 (2000): 62-89.

- **Rental tenures**
  - Are rental tenures with and without a public task distinguished? If so, how are they called and what is their share in the housing stock?
  - **Principles of classification**

As already indicated<sup>90</sup> there is no commonality across England and Wales in terms of the taxonomy of rental tenures, and Scotland differs sharply again.

## **England**

In England the primary point of classification is based on the purpose for which housing is provided, so private housing is differentiated from public/social housing, which is low cost accommodation.<sup>91</sup> In this section we concentrate on 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. The classification of housing imposed in 2008 needs to be superimposed onto the traditional classification by which tenures were classified solely by the character of the landlord, that is the following four categories:

Private landlords: 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 acting as private landlords; a small percentage of housing association stock is let at market rents using assured shortholds.

Public landlords – local housing authorities letting publicly owned housing stock; they grant secure tenancies with long term residential security at affordable rents.

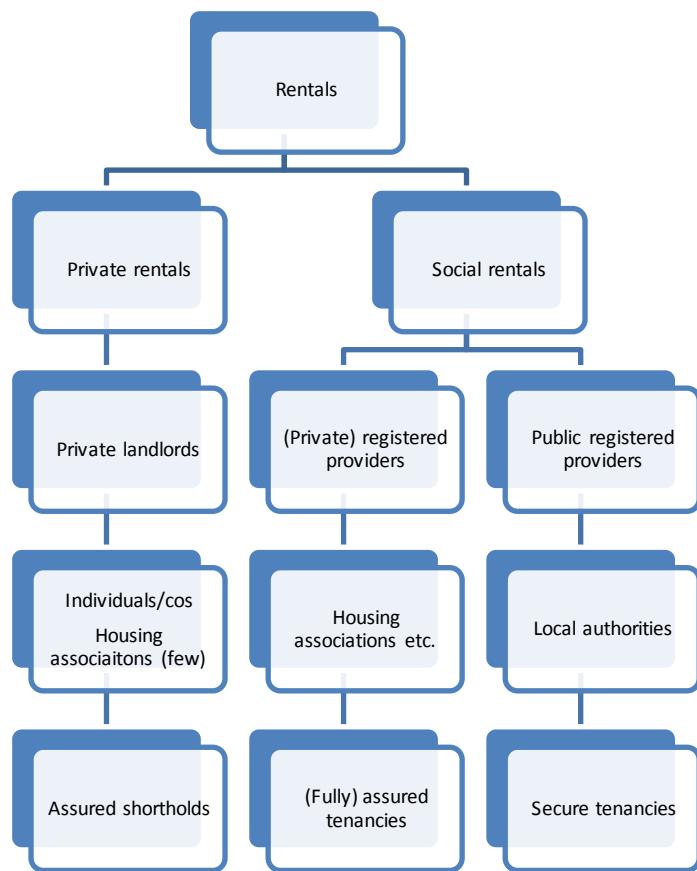
Social landlords – these were formerly known as Registered Social Landlords and now as Private Registered Providers of Social Housing; they grant assured tenancies with full residential security but at affordable rents.

So in essence the two sectors are characterised by market rents (the private sector) and low cost rents (meaning for future new build property affordable rents with a maximum of 80% of the open market rent) (public/social housing).

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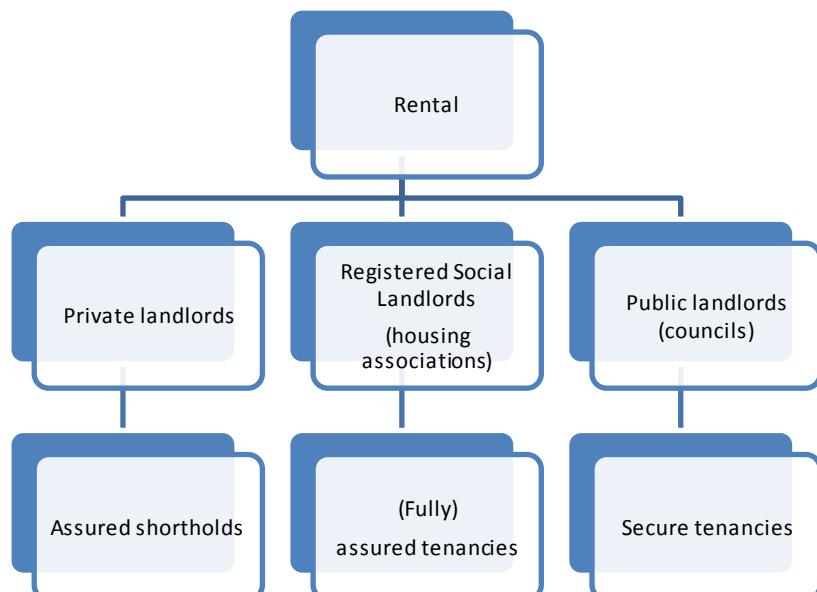
<sup>90</sup> See above 1.4, pp 17-18.

<sup>91</sup> Housing and Regeneration Act 2008 ss. 68-69.



## Wales

The restructuring of the public/social housing market that took place in 2008 does not apply to Wales,<sup>92</sup> so the framework established in the Housing Act 1996 continues to apply. Sectoral divisions are based on the character of the landlord.

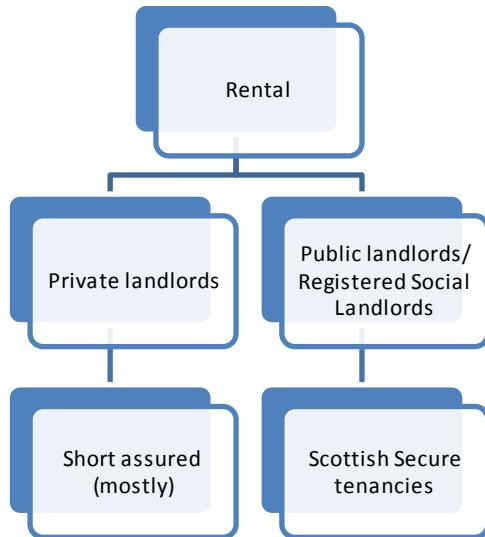



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<sup>92</sup> Housing and Regeneration Act 2008 ss 59-60.

## Scotland (for comparison)

Scotland took the former English model and the current Welsh law to its logical conclusion by creating a single social sector consisting of local authorities and Registered Social Landlords all of which grant Scottish secure tenancies.<sup>93</sup> So the Scottish rental sectors are:



- **What is the market share (% of stock) of each type of tenure?**

The housing stock of Great Britain includes 22.8 million dwellings in England alone, and 1.35 million in Wales in 2011.<sup>94</sup> In England as of March 2011 there were 18.8 million private dwellings comprising owner occupied and private rented tenures, and 4.1 million rentals – 2.3 million were rented from private registered providers (housing associations) and 1.7 million were rented from local authorities and housing associations. Private dwellings comprised over 83% of the housing stock and of these 65% of the total were owner occupied.<sup>95</sup>

**Table 6: Dwellings in millions in England and Wales: 2011<sup>96</sup>**

	Owner Occupiers	Private Rentals	Housing Association Rentals	Public rentals	Total
England	14.7M	4.1M	2.3M	1.8M	22.8M
Wales	1.0M	0.2M	0.1M	0.1M	1.4M
England and Wales	15.8M	4.3M	2.4M	1.9M	23.4M

<sup>93</sup> See Country Report on Scotland.

<sup>94</sup> S. Wilcox, *Housing Finance Review*, 1999/2000, (York: Joseph Rowntree Foundation, 1999); C. Randall, *Housing*, (Office of National Statistics, 2011). The total dwelling stock in the whole of the United Kingdom (including Northern Ireland and Scotland) now stands at over 27 million.

<sup>95</sup> R. Field, *Dwelling Stock Estimate 2011: England*, (Department for Communities and Local Government, 2011) 2, <[www.gov.uk/](http://www.gov.uk/)>, 20 December 2012.

<sup>96</sup> 'Housing Statistics 2013' (London: Department for Communities and Local Government, 2011) Table 104 Dwelling Stock by Tenure (Historical Series), England and Table 106; ditto Wales.

**Table 7: Housing sectors by % England and Wales: 2011<sup>97</sup>**

	Owner Occupiers	Private Rentals	Housing Association Rentals	Public rentals	Total
England	64%	18%	11%	7%	
Wales	70%	13%	10%	7%	
England and Wales	65%	18%	10%	7%	

**Summary Table 1 Tenure structure in England and Wales, 2011<sup>98</sup>**

Home ownership	Renting		Total
	with a public task	without a public task	
	4.3 M	4.3 M	
	18%	18%	
<b>Renting (combined)</b>			
15 M	8.3 M		23.4 M
64%	36%		100%

**How is the financing for the building of rental housing typically arranged?****Private sector**

The availability of Buy to Let mortgages during the latter part of the 1990s and first half of the 2000s was a major factor in Private Rental Sector expansion because many potential landlords invested in property to be let out, gambling on future capital appreciation. The level of Buy to Let lending fell as a result of the banking crisis of 2007.<sup>99</sup> In May 2009 the Private Rented Sector Initiative was launched by the Homes and Communities Agency in a bid to establish a viable, robust and attractive financial opportunity for investors and attracting new sources of private sector funding to the housing development sector thus helping simultaneously to stimulate housing supply and to meet demand. The Homes and Communities Agency intends to offer support to potential investors in the Private Rented Sector.<sup>100</sup>

<sup>97</sup> *Ibid.* See fn 38 above for the most recent figures.

<sup>98</sup> 'A Century of Home Ownership and Renting Infographic' [www.ons.gov.uk/ons/infographics/a-century-of-home-ownership-and-renting/index.html](http://www.ons.gov.uk/ons/infographics/a-century-of-home-ownership-and-renting/index.html), 29 July, 2013.

<sup>99</sup> There were 40,000 in 2001, 180,000 in 2006, but only a quarter of that number in 2011: Council of Mortgage Lenders (London, 2014) Table MM17.

<sup>100</sup> "Kickstart"; Access to Homes and Communities Agency Land and Rental Support' (London, Department of Communities and Local Government, 2009). The Consultation Paper identified a number of issues that it is reasonable to assume that the Government will wish to take forward: the establishment of a National Register of Private Landlords, the requirements on landlords to provide a tenancy agreement, the proposals for the compulsory licensing of letting agents, and raising the Assured Shorthold Tenancy threshold rent level to £100,000.

## **Public/social sector**

Construction has been subsidised by government grant, though the Coalition announced a regime in 2011 intended to create a self-sustaining sector by 2016, as considered in the section on subsidization.<sup>101</sup>

### **What can be said in general on the quality of housing provided?**

**Please consider the following criteria: type of building (single family versus multifamily versus high-rise; plus definition); construction period; number of rooms, number of square meters or average number of rooms or average useful floor area per dwelling and per person; availability of bath/shower, hot running water and/or central heating, etc.)**

This information can all be gleaned from the English Housing Survey: Homes 2011 which contains a welter of statistics.<sup>102</sup> Over half of all homes in England were terraced or semi-detached houses,<sup>103</sup> 17% were detached houses and 9% were bungalows. The remaining 20% were flats, mainly purpose built low rise flats. The profile across the tenures varied considerably: some 24% of owner occupied homes were detached houses, while the private rented sector contained by far the highest proportion of converted flats - 13% compared with 4% for all homes. In the local authority sector, the highest proportion (46%) were purpose built flats.

The age profile varies by tenure type with private rented accommodation having the largest proportion of pre-First World War stock and local authority stock falling into the post-Second War period up to 1980,<sup>104</sup> and housing associations having by far the greatest proportion of post-1990 stock.

The average dwelling had a total usable floor area of 91m<sup>2</sup>. However, this varied by tenure, from an average of 103m<sup>2</sup> in the owner occupied sector to 74m<sup>2</sup> for private rented dwellings and 63m<sup>2</sup> across the social rental sector. On average, those built before 1919 were the largest dwellings, with a mean useable floor area of 102m<sup>2</sup>.<sup>105</sup>

Central heating is installed in 90% of homes and in almost all cases supplies hot water; the remaining 10% of homes have immersion heaters.<sup>106</sup> The quality of accommodation has improved markedly in the last ten years, especially in the public/social sectors.

- **Which actors own these dwellings (private persons, profit or non-profit organisations, etc.)?**
- 

### **Private Rental Housing**

Private landlords are predominantly individuals: these make up 89% of landlords and are responsible for 71% of all private lettings. A further 5% of landlords are companies responsible for 15% of dwellings, including rentals linked to employment.

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<sup>101</sup> See below 3.6, pp 78-83.

<sup>102</sup> London: Department for Communities and Local Government, 2013.

<sup>103</sup> About 54%.

<sup>104</sup> 'English Housing Survey: Homes 2011' (London: Department for Communities and Local Government, 2013) para. 1.2 and fig. 1.1.

<sup>105</sup> *Ibid.*, para. 1.20.

<sup>106</sup> *Ibid.*, para. 4.6.

More than three quarters (78%) of all landlords only own a single dwelling for rent, and only one in twelve landlords say that they are full time.<sup>107</sup>

### **Public/social rented housing**

The period since 1980 has seen a huge shift from public sector accommodation provided by councils to towards the social sector and housing association provision. In England, around 3.5 million people now live in housing association accommodation. They hold 2.4 million homes as opposed to 1.9 million held by public landlords in 2011.<sup>108</sup>

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<sup>107</sup> 'Private Landlord Survey 2010', (London: Department for Communities and Local Government, 2011); C. Whitehead, *Private Rented Sector in the New Century: A Comparative Approach* (Cambridge: University of Cambridge, 2012), 117-119; see above ,1.2, pp 10-14.

<sup>108</sup> See above, 1.2, p. 11.

## **1.5 Other general aspects of the current national housing situation**

- **Are there lobby groups or umbrella groups active in any of the tenure types? If so, what are they called, how many members, etc.?**

The National Landlords Association sets out to represent four million landlords, but it is unclear how large their membership is. They strive to secure a private rented sector that is a safe, secure and viable investment, working in cooperation with national and local government. They have been involved in the discussion of tenancy deposits, Houses in Multiple Occupation licensing, grounds for repossession and energy efficiency, for example. It represents the interests of landlords in the private rental market at local, national and European level, providing information, assistance and support to landlords on all landlord related matters. The Association of Residential Lettings Agents was formed in 1981 as the professional and regulatory body for letting agents and has approximately 6,000 individual members, with 3,500 member offices across the UK. The Association promotes standards in the residential letting sector of the property market.

So far as tenants are concerned, there is no large membership organisation. There are plenty of campaigning organisations, of which Shelter is best known; it is a housing and homelessness charity which provides information, advice and support services to households experiencing housing difficulties ranging from poor quality housing to homelessness, which also carries out lobbying and campaigning on behalf of such households.

- **What is the number (and percentage) of vacant dwellings?**

About 710,000 homes are currently empty in England, according to the 2012 Empty Homes Statistics, that is 3.1% of stock. If flats above shops, uninhabitable properties, and those due for demolition were included the total might be much higher. Of the vacant homes, 259,000 are empty on a long-term basis (ie for more than six months). On the other hand the English Homes Survey gives a higher figure of 967,000; it states that the vast majority were in the private rental sector.<sup>109</sup> It appears that empty properties are proportionately much fewer in Wales; Welsh Government data suggests that there were 23,287 empty in 2011/12, representing 1.6% of stock.

An area of marked divergence in the regions of England and Wales is in empty homes. Council Tax Data published on 20 November 2012 put the number of empty homes in England at 710,000 of which 259,000 were defined as long-term empty properties.<sup>110</sup> *Homes from Empty Homes*, an independent charity in England estimates that there are 920,000 empty homes across the UK, 330,000 of which are long term empty, that is, have been empty for over six months.<sup>111</sup> The northwest region has the highest level of empty homes with over 4% of homes listed as empty. London and the Southeast have the lowest rate, just about 2%. Other areas with relatively high empty home rates are Yorkshire and Humber, and the Northeast with

<sup>109</sup> 'English Homes Survey 2013' (London: Department of Communities and Local Government, 2013), para. 1.12.

<sup>110</sup> 'Empty Homes – Commons Library Standard Note' [www.parliament.uk/briefing-papers/SN03012](http://www.parliament.uk/briefing-papers/SN03012), 13 May, 2013.

<sup>111</sup> 'Empty Homes Research' [www.emptyhomes.com/what-we-do-2/](http://www.emptyhomes.com/what-we-do-2/), 14 May, 2013. Empty homes statistics are not available for Wales.

3.8% and 3.7% respectively. It is perhaps expected that these areas are also the parts of the country with low demand for labour and relatively low population density.<sup>112</sup>

Much recent attention has focused on under-occupation in the social rented sector. In England some 400,000 social houses are under occupied by two or more bedrooms, while 250,000 are overcrowded.<sup>113</sup> The rate of under-occupation in social rented housing is around 12% and in every region other than in London, it exceeds the rate of overcrowding. 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.<sup>114</sup> In a recent consultation paper, the government advocated exempting tenants who want to move property within the social rented sector from the general rules that apply for allocating social housing. This, it is argued, would help to establish 'chain lettings', in which under-occupying tenants would find it easier to move, so freeing up their property for an overcrowded tenant. Under this proposal, new entrants would find themselves at the end of the chain. That will discourage tenants from participating in the process. It is therefore proposed that mutual exchange would be a better option than chain letting.

- **Are there important black market or otherwise irregular phenomena and practices on the housing market (especially the rental market)?**

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 and 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.<sup>115</sup> 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. The Prevention of Social Housing Fraud Act 2013 creates new offences, as of October 2013, in respect of subletting without consent. These practices are often associated with illegal immigration.

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<sup>112</sup> R. Williams, "The demand for labour in the UK." *Labour Market Trends* 112, no. 8 (2004).

<sup>113</sup> A. Clark & P. Williams, *Under Occupation and the New Policy Framework - A Report to the Housing Futures Network as Part of Facing the Future* (Cambridge Centre for Housing and Planning Research, 2011).

<sup>114</sup> See below 3.6, pp 80-82.

<sup>115</sup> [www.gov.uk/government/news/major-clampdown-launched-on-beds-in-sheds](http://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.

## 2. Economic, Urban and Social Factors

### 2.1 Current situation of the housing market

- What is the current situation of the housing market?

#### Prices

The housing market in England is characterised by steadily rising prices, and this is true to a lesser extent of Wales. Data on this phenomenon is so excessive that it is scarcely necessary to repeat it here, beyond this snapshot of the average prices near (as it happens) the accession of three Labour Prime Ministers:<sup>116</sup>

**Table 8: A snapshot of rising prices**

		Average price
Attlee	1947	£1,824
Blair	1997	£76,103
Brown	2007	£223,405

One can see the very rapid acceleration during the New Labour period, though it was not a function of political policies but was driven primarily by scarcity and secondarily by the availability of mortgage funds. The market turned in 2007 so these figures artificially choose the top of the market, though this too has turned since spring 2013 and prices are returning to the 2007 peak. A lesser phenomenon is the 'boom and bust' cycles: prices have not risen steadily but there have been periods when a housing bubble has formed only to be followed by a vigorous market correction.

In the mid-2000's, prices were still rising throughout the country. Houses bought around the period before the down slide in prices lost significant value after the period.<sup>117</sup> The banking crisis of 2006 and 2007 produced a sharp correction after which prices continued to fall, but in 2013 growth resumed, stimulated in part by the Help to Buy scheme.<sup>118</sup> In the late 1990's and early 2000's there was significant economic growth in the UK. 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 UK housing market, prior to the economic crunch that followed from 2007.<sup>119</sup> The boom did not show any marked differences across the regions and counties of England and Wales. However, the boom was led by the South of England, and by the time that it was coming to an end, it was in the North of England, Wales and Scotland that

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<sup>116</sup> 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.

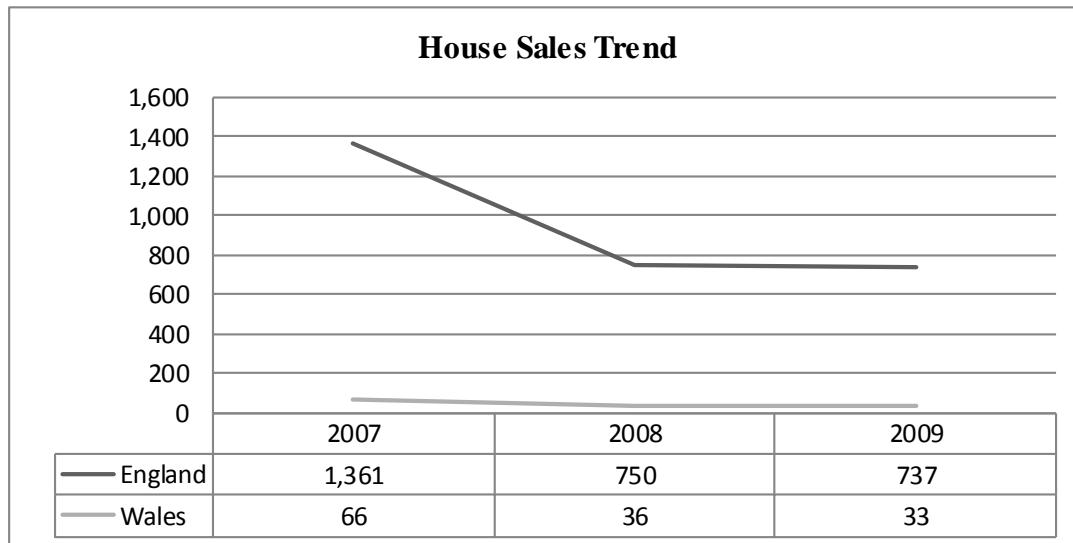
<sup>117</sup> J. Calverley, *When Bubbles Burst: Surviving the Financial Fallout* (Nicholas Brealey Publishing: 2009), 91 - 2.

<sup>118</sup> See above 1.4, p. 21.

<sup>119</sup> 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).

prices were appreciating most rapidly.<sup>120</sup> 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 average value of a loan for house purchase peaked in June 2007 at about £159,600 before decreasing to a low of £116,100 in December 2008. This was partly due to house prices falling and to the higher deposits required before a loan could be approved. The sharp drop in house prices at the onset of the housing crisis in 2007 was accompanied by a sharp drop in market activity.

**Figure 3: Houses Sales 2007-2009<sup>121</sup>**



The economic crunch resulted in a sharp drop in value of houses and negative equities. Repossessions increased in proportion to the economic downturn reaching its peak in 2009,<sup>122</sup> and many homeowners lost their homes. This merely increased the problem of homelessness. This 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 lenders<sup>123</sup> 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. The market began rising sharply at Easter 2013 and a year later continues to do so.

It is inevitable that certain types of home are more valuable than others. As at January 2014, the breakdown of average house prices was:<sup>124</sup>

**Table 9 Average prices by dwelling type**

Type of Dwelling	Average (£000)
Detached	£268
Semi-detached	£160
Terrace	£126
Flat	£160

<sup>120</sup> E. Ferrari & A. Rae, 'Local Housing Market Volatility' (York: Joseph Rowntree Foundation, 2011).

<sup>121</sup> 'UK Property Transactions Statistics' (London: HM Revenue and Customs, 2010).

<sup>122</sup> 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.

<sup>123</sup> Bank of England 'Special Liquidity Scheme: Information',

<http://www.bankofengland.co.uk/publications/Pages/news/2008/029.aspx>, 22 January 2013.

<sup>124</sup> 'House Price Index January 2014' (London: Land Registry, 2014), 4.

Average prices of homes vary widely from region to region. It also reflects urban and rural divide, and a significant north south divide in England. In Wales, the urban centres and proximity to urban areas reflect prices in houses. Urban centres and surroundings tend to be more expensive than more rural areas. The disparity in regional averages can be seen in the table below:<sup>125</sup>

**Table 10 Price variations by English region (January 2014)**

Region	Average (£000)
London	£410
South East	£223
East	£182
South West	£176
<b>England &amp; Wales</b>	<b>£168</b>
West Midlands	£132
East Midlands	£127
<b>Wales</b>	<b>£117</b>
Yorkshire & The Humber	£115
North West	£109
North East	£ 98

Price movements can vary widely by region. Mortgage debt in south west London, to take one example, exceeds that for the whole of Wales.<sup>126</sup> Average earnings are lowest for Welsh workers but average house prices are lower in the North East and North West regions of England. Incomes are an important determinant of the cost of homes, but this is not the sole factor and location is also of vital importance.

- **Is the market supply of rental housing sufficient? What is the number/percentage of families/households in need?**

There is a gross under supply of housing in all sectors.

As at 2011, the level of owner occupiers from the previous year remained unchanged at 65%, and of the dwelling stock 36% was for rental purposes,<sup>127</sup> comprising private rental, rented from local authorities and renting from other private registered providers of housing. The supply of rental housing has however not been sufficient to cope with the growing rate of homelessness. In 2009/10, more than 62,000 households were found to be homeless by local authorities in England alone.<sup>128</sup> In Wales, since 2009-10 the number of households accepted as homeless has been increasing; however during 2012-13 homeless acceptances fell by 11% with 5,795 households accepted as homeless across Wales.<sup>129</sup> There were 1.85 million households on local authority waiting lists on 1st April 2012 across the UK.<sup>130</sup>

<sup>125</sup> *Ibid.*, 5. There are also more detailed figures by council district.

<sup>126</sup> *Guardian* 18 December 2013 citing Council of Mortgage Lenders figures.

<sup>127</sup> *Dwelling Stock Estimates: 2012, England*, (Department for Local Government and Communities, 2013).

<sup>128</sup> Statutory Homelessness Statistics, Communities and Local Government 2009.

<sup>129</sup> *Ibid.*

<sup>130</sup> “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.

In 2011 there were 1.84 million households on local authority waiting lists, a figure which has risen consistently every year since at least 2001.<sup>131</sup>

- **What is the definition of 'need' as used here (possibly in terms of areas of scarcity of dwellings versus shrinkage areas)?**

This is based on homelessness applications accepted and council waiting lists.

- **Among those in need, what is the number/percentage of immigrants?**

There do not appear to be reliable statistics on this issue.

- **How is need expected to develop? What is the expectation about the growth and decline in number of households in the future in a scenario of average economic development? Is there a year forecasted where growth in number of households will stabilize or will start declining?**

Previously, the number of households has been growing much more quickly than the number of people, up by 35% since 1971, compared with a population rise of just 8%. Overall, the total number of homes has been keeping up with this household growth. However, the rate of household growth in England is projected to increase from 150,000 per year from 1991-2006 to 220,000 per year from 2006-2021 and this will require a substantial increase in the rate of house-building.<sup>132</sup>

- **To what extent do local market divergences play a role? Are there areas of growth and decline?**

Regional and local divergences are very marked, as is obvious from the fact that average house prices in London are three times those in the north. Areas of growth and decline tend to shift rapidly, but on average distance from London is a major determinant of the local market.

- **What have been the effects of the current crisis since 2007?**

The massive shortfall on accommodation (at least where it is needed) has been exacerbated by economic circumstances which are not favourable to the new provision of housing. Curbs on lending have made it very difficult for people to buy homes, and prices have fallen. This has created enormous pressure on the rented sector. Rents have been driven up by market scarcity. This has created a huge demand for social housing which cannot be met from existing stock. The resumption of house price growth in 2013-14 is exacerbating the problems and no end to the crisis can be foreseen. Public opinion is turning against the EU freedom of movement as one of the major causes of the problem.

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<sup>131</sup> 'Local Authority Housing Statistics 2010-11' (London: Department for Communities and Local Government, 2013).

<sup>132</sup> G. Palmer, P. Kenway and S. Wilcox, *Monitoring housing and neighbourhoods trends 2006*, (Joseph Rowntree Foundation, 2006).

## 2.2 Issues of price and affordability

- **What is the typical cost of rents and its relation to average disposable income? (Explanation: If rent is 300€ per month and disposable household income 1000€ per month, the rent-to-income ratio is 30%).**

Outlay on housing was highest in the private rental market, followed by owner occupiers and then social renters.<sup>133</sup> In 2013 the *median* monthly rents were:

Private	£556;
Housing association	£356;
Local authority	£316. <sup>134</sup>

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 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.<sup>135</sup>

Private renters typically spent 41% of gross income on rent. Owner occupiers spend £560 a month on mortgage repayments, 19% of gross income. Social tenants pay less, the average net rent in this sector being £330 a month in March 2012, around 30% of gross income. Averages are very misleading because of the regional disparity between London and the South east of England as compared with the remainder of England and with Wales.<sup>136</sup>

- **To what extent is home ownership attractive as an alternative to rental housing**

The figures above show the advantage of buying if it is possible to do so. Most renters wish to purchase.<sup>137</sup> Since house prices have risen inexorably 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.

- **What were the effects of the crisis since 2007?**

The financial crisis was triggered in the first quarter of 2006 when the housing market began to fall. A number of the mortgages designed for the market, like subprime mortgages, to people who may have difficulty maintaining the repayment schedule, characterized by higher interest rates and less favourable terms in order to compensate for higher credit risks were designed with an unusually large payment due at the end of the mortgage, implying that the mortgage would be refinanced within a short period to avoid the jump in the mortgage rate. Refinancing presupposed that home prices would continue to appreciate. Thus, the collapse in

<sup>133</sup> '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.

<sup>134</sup> 'English Housing Survey headline Report 2012-13' (London: Department for Communities and Local Government, 2014) paras 1.29-134, Annex Tables 3-5.

<sup>135</sup> See below, 2.3, p. 39.

<sup>136</sup> C. Whitehead, *Private Rented Sector in the New Century: A Comparative Approach* (Cambridge: University of Cambridge, 2012), 116-119 gives regionalized figures for 2011.

<sup>137</sup> See below 2.7, pp 48-50.

the housing market necessarily meant a wave of future defaults in the subprime areas. Eventually, when large price shocks lead to a bursting of the asset bubble, the fall in house prices triggered a reduction in the percentage of debt in the balance sheet of household, these unsustainable asset bubbles and credit booms go bust with the following consequences: the fall in the value of the asset backed by high leverage leading to margin calls that force borrowers to sell the asset, which in turn starts to deflate the value of the assets. This fall in the value reduces the value of the collateral backing the initial leveraged credit boom. Then, margin calls and the forced fire sale of the asset can drive down its price even below its lower essential value, creating a flowing vicious circle of falling asset prices, margin calls, and further asset price deflation.<sup>138</sup>

Economic events in the UK since 2007 created a crisis in the housing sector. The Europe-wide crisis set off in February 2008 when the UK Government announced the temporary nationalization of Northern Rock and the subsequent launch by the bank of England in April 2008 of its Special Liquidity Scheme to allow banks to swap temporarily their high-quality mortgage-backed and other securities for UK Treasury bills. By September 2008, another bank, Bradford & Bingley, was nationalized by the UK Government.

Reduced demand during the recession has been reflected in falling house prices particularly outside London and the South East, and a slump in construction across England and Wales. Data from the Department for Communities and Local Government show that between the peak in 2007 and 2011, house prices fell by 12% in the North East and by 10% in the North West. The number of property sales decreased rapidly during late 2007. Between 2008 and 2009 the East and South East of England saw the largest decrease and London saw the smallest decrease.

The number of possession orders fell dramatically during the recession in all regions by consistent levels. Between 2008 and 2009 the number of mortgage possession claims dropped by around 30 - 40% in each of the English regions and Wales. Between 2009 and 2010 the number of possession claims reduced by a further 10 to 20%.<sup>139</sup> These were obvious signs of some recovery in housing from the economic crisis shock. This reflects the success of various government initiatives aimed at preventing mortgage repossession in the context of the falling repossession rate. It would also be salient to say that the level of owner-occupation has fallen from its height of 71% in 2005 to below 65% in 2013 as a result of the economic crisis.

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<sup>138</sup> H. Overman, 'The UK Housing Crises' *CentrePiece*, (Winter 2012).

<sup>139</sup> C. Campos, et al., 'Impact of the Recession' *Regional Trends* 43 (2011): 2010-11.

## 2.3 Tenancy contracts and investment

- **Investment: Is the return (or Return on Investment) for rental dwellings attractive for landlords-investors?**

According to one commercial 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.<sup>140</sup> Potential yields vary regionally. They fluctuate wildly over time especially when capital appreciation or depreciation is taken into account.

- **To what extent are tenancy contracts relevant to professional and institutional investors?**

The vast majority of investors are individuals with a small number of rental properties.<sup>141</sup> This is because the running yield is low and does not attract institutional investors.

- **In particular: may a bundle of tenancy contracts be included in Real Estate Investment Trusts (REITS) or similar instruments?**

A real estate investment trust is a company that owns and manages income-producing property assets, allowing individual investors to earn a share of the income produced through commercial real estate ownership without the problems of holding a portfolio of land directly. It is perfectly feasible to include the rental output of a bundle of tenancy contracts as an asset within a real estate investment trust. There is a complex UK tax regime giving tax advantages.<sup>142</sup> A property rental business must contain at least three single rental properties with no one property representing more than 40% of the total value of the property rental business. At least 90 per cent of its rental profits must be distributed by way of dividend. That said, it appears that Real Estate Investment Trusts would have a very small hold on the Scottish rental market since institutional investment in residential property in general is very low.

- **Is the securitization system related to tenancies in your country? Are commercial (or other) landlords allowed to securitize their rental incomes? If yes: Is this usual and frequent?**

This is theoretically possible, but is thought to be extremely rare because there are few institutional landlords.

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<sup>140</sup> 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).

<sup>141</sup> 'Private Landlord Survey 2010' (London: Department for Communities and Local Government, 2011).

<sup>142</sup> Finance Act 2006 Part 4 as amended by the Finance Act 2007 and supplemented by numerous regulations.

## 2.4 Other economic factors

- **What kind of insurances play a role in respect to the dwelling (e.g. insurance of the building, the furniture by the landlord; third party liability insurance of the tenant?)?**

No insurance is obligatory and indeed 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. A major problem at present is to secure insurance cover against flooding: over 5 million homes in England and Wales, one in every six, are reckoned to be at risk of flooding, and the frequency and severity of flood events is on the rise.<sup>143</sup>

Renewal of an agreement between the government and insurers is under discussion to secure that insurers will continue to offer cover to existing customers living in areas at high risk of flooding providing the government commits sufficient money towards maintaining and improving flood defences.

All major structural work falls to a residential landlord<sup>144</sup> so it would be normal for a private sector landlord to repair against the normal risks such as public liability and subsidence. Insurance against public liability may be mandatory in large blocks if they count as workplaces.<sup>145</sup>

A tenant is responsible for the contents of homes and should secure contents insurance, but it is thought that many do not do so. In private rental, the landlord is responsible for insuring the building itself but the tenant will have to insure the contents that belong to him. The policy should cover a tenant's liabilities as a tenant, for example, under his tenancy agreement he may be responsible for paying for any damage done to the property such as a broken window. Some policies will include cover for accidental damage which will cover for things like a spill that ruins a carpet but will not cover for wear and tear such as carpet that is worn out or faded over the years. Half of all renters do not have home contents insurance, whereas very few owner occupiers are uninsured.<sup>146</sup> People on lower incomes are obviously less able to afford cover.<sup>147</sup>

- **What is the role of estate agents? Are their performance and fees regarded as fair and efficient?**

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 and inventory for the parties, collecting references from a tenant's

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<sup>143</sup> UK Insurance Fact, Association of British Insurers, 2012.

<sup>144</sup> See below 6.4, pp 169-170.

<sup>145</sup> Employers' Liability (Compulsory Insurance) Act 1969 s. 5.

<sup>146</sup> Living Costs and Food Survey, ONS; the data is the average for the three years to 2009; UK; updated April 2011.

<sup>147</sup> N. Danziger, *Danziger's Britain: A Journey to the Edge* (London: Flamingo, 1996), 15.

employer, bank and or previous landlord, renewing the tenancy agreement when the fixed term ends, among others.<sup>148</sup> Most now operate at least partly online.

It appears that anyone can set up as an estate agent, even if they have no previous experience in the field. It has been suggested that this increases the risks for both landlords and tenants, while making life more difficult for reputable agents. While the Estate Agents Act 1979<sup>149</sup> controls the activities of those in sales of properties, it does not control rentals. The only regulations for rental agents maybe 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. An entitlement to commission arises from successfully arranging a complete transaction for sale or rental of property.<sup>150</sup> But in certain circumstances merely contributing to the process of sale or rental, such as by effecting an initial introduction, may create entitlement to some commission.<sup>151</sup> Lack of regulation of lettings agents is a significant problem, particularly in respect of the excessive charges for basic administration. The previous Labour government signalled its intention to regulate this area but the Coalition government regards this as 'too much additional red tape'.<sup>152</sup>

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<sup>148</sup> Tenants may not be charged for finding accommodation; see below, 6.2, p. 131.

<sup>149</sup> Also the Consumers, Estate Agents and Redress Act 2007.

<sup>150</sup> *Foxtons Ltd v. Bicknell* [2008] EWCA Civ 419, [2008] 2 EGLR 23.

<sup>151</sup> *Dashwood (formerly Kaye) v Fleurets Ltd* [2007] EWHC 1610 (QB); [2007] 2 EGLR 7.

<sup>152</sup> W. Wilson & C. Fairbairn, 'Regulation of Private Sector Letting and Managing Agents' (House of Commons, Library Standard Note SN 060000).

## 2.5 Effects of the current crisis

- Has mortgage credit been restricted? What are the effects for renting?  
**Mortgage credit and renting**

The recent census figures show that 7,647,000 of properties in England and Wales are owned with a mortgage or loan of some kind, a third of all homes.<sup>153</sup> However, there are more households in Wales and the South West of England owned outright than with a mortgage or loan, a reflection of the older populations of these areas.<sup>154</sup>

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. A few landlords are professional landlords owning multiple investment properties. Tenants face difficulties if the landlord defaults on the payment of the loan.<sup>155</sup> 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. The Buy to Let market currently provides accommodation for about 2.5 million households, about 12 per cent of the UK total.<sup>156</sup> Buy to let lending continues to increase year-on-year, accounting for 11.4% of gross lending in the second quarter of 2012.<sup>157</sup>

Some limited protection is provided by the Mortgage Repossessions (Protection of Tenants etc.) Act 2010.<sup>158</sup>

- Indicate the current figures on repossession (seizures of houses in case of mortgage credit default of the buyer)? Have repossession affected the rental market?

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 quarter of 2013.<sup>159</sup> Around 1,200 homes a month are subject to forced sales at the end of 2013.<sup>160</sup> 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. Nevertheless, 2 per cent of all households include someone who has had to leave a previous property as a consequence of difficulty in paying a mortgage.<sup>161</sup>

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<sup>153</sup> '2011 Census: Key Statistics for England and Wales, March 2011', (London: Office for National Statistics, 2013).

<sup>154</sup> 27%, 886,000 dwellings. In London properties owned with a mortgage or loan form the largest category, contrasting the distribution between those owned outright and those on mortgage in the South West and Wales.

<sup>155</sup> M. Ball, 'Buy to Let: The Revolution 10 Years On' (London: Association of Residential Letting Agents, 2006) p. 1.

<sup>156</sup> 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.

<sup>157</sup> Council of Mortgage Lenders, *Housing Finance at a Glance*, September 2012, 1.

<sup>158</sup> See below 6.6, p. 193.

<sup>159</sup> 'Mortgage and Landlord Possession Statistics' (London: Office of National Statistics, 2013).

<sup>160</sup> 'Land Registry House Price Index, January 2014' (London: Land Registry, 2014), 4.

<sup>161</sup> 'English Housing Survey Headline Report 2012-13' (London: Department for Communities and Local Government, 2014), para. 1.54.

- **Has new housing or housing-related legislation been introduced in response to the crisis?**

One major response has been the introduction of the Help to Buy scheme.<sup>162</sup>

The other main legislative effort in the housing field is the attempt to cut the cost of welfare schemes. 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.<sup>163</sup> As well as supplementing the wages of working claimants, it provides assistance with housing, childcare and other costs. The existing restriction within housing benefit in the form of the local housing allowance is already worrying some authorities faced with rising rents in the private sector.<sup>164</sup> Within a reformed system of housing costs, the Universal Credit housing costs taper will be the same as for other income sources, and is expected to be set at a uniform 65% withdrawal rate, that is the rate at which universal credit will be reduced in respect of a claimant's earned income. Claimants may be allowed to receive a certain amount of earned income before their universal credit award begins to reduce. The amount of income to be disregarded may differ depending on a household's circumstances. The government's approach has been to target greater resources on those with less dependency on State support for their rent or mortgage costs. This marks a further step in the reduction of state support for housing costs, a process that began in 2011 with caps on the value of Housing Benefit for some households. Broadly, if a Universal Credit claimant receives assistance for housing costs, the value of that support will reduce the maximum level of his or her disregards<sup>165</sup> by one and a half times the amount of the housing element.<sup>166</sup>

**Summary Table 2: Effects of the Financial Crisis 2007-2013**

	Private rental		Social rental	
	Landlord	Tenant	Landlord	Tenant
<b>Crisis effects:</b>				
<b>Return on investment</b>	+			
<b>Local differences (in RoI)</b>	+		+	
<b>Affordability</b>		+		+
<b>Local differences (in need/ affordability)</b>		+		+
<b>Insurance</b>				

<sup>162</sup> See above 1.4, p. 21.

<sup>163</sup> Welfare Reform Act 2012 s. 11; see below, 3.6, pp 80-82.

<sup>164</sup> This prompted Newham Council in London to ask a housing association in Stoke if it could rehouse 500 of its families. See <[www.bbc.co.uk/news/uk-politics-17821018](http://www.bbc.co.uk/news/uk-politics-17821018)>, 14 May, 2013.

<sup>165</sup> M. Brewer, J. Browne & W. Jin, 'Universal Credit: A Preliminary Analysis of Its Impact on Incomes and Work Incentives' *Fiscal Studies* 33, no. 1 (2012): 39-71, 41.

<sup>166</sup> K. Puttick, '21st Century Welfare and Universal Credit: Reconstructing The Wage-Work-Welfare Bargain: Part 2' *Industrial Law Journal*, 2012, 41(2), 236-249.

## 2.6 Urban aspects

- What is the distribution of housing types in the city scale (e.g.: are rented houses mainly in the city centres and owner occupied in the suburbs?) vs. the region scale (e.g.: more rented houses in the big cities, less in the villages?)

This is much as one would expect, detached houses in the suburbs and flats and high rise in inner city areas.<sup>167</sup>

- Are the different types of housing regarded as contributing to specific “socio-urban” phenomena, e.g. ghettoization and gentrification

**Gentrification** is an inevitable consequence of ever increasing house prices. It 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, particularly London, Liverpool, Newcastle, Manchester, are undergoing gentrification of some sort.<sup>168</sup> The restoration and upgrading of a deteriorating or ageing neighbourhood by middle-class or affluent persons, results in increased property values and the displacement of lower-income residents. As wealthy professionals, working in the city, move in, their demand can cause a significant rise in prices of houses. 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. In *Porter v. Magill*<sup>169</sup> the promotion and implementation by councillors of a policy involving the sale of council houses in order to achieve a political advantage, preventing the local authority from meeting its statutory housing obligations amounted to wilful misconduct for which the councillors were liable in damages. Porter and Weeks, the former leader and deputy leader respectively of Westminster City Council, had formulated and implemented a policy whereby council homes would be sold in marginal wards for the purpose of selecting purchasers with pre-determined life style and tastes. The court ordered that the council be compensated if it was found to be unlawful, and that the policy had caused financial loss to the council.

**Ghettoization** is associated with high density council housing, particularly in cities such as London 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.

In 2005 the head of the Commission for Racial Equality's suggested that residential isolation was increasing for many minority groups where more than two-thirds of the residents belong to a single ethnic group.<sup>170</sup> Migrants generally gravitate towards

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<sup>167</sup> English Housing Survey: Homes 2011 (London: Department of Communities and Local Government, 2013) ch. 2.

<sup>168</sup> 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](http://www.kcl.ac.uk/sspp/departments/geography/people/academic/butler/SupergentrificationinBarnsbury.pdf)>, 2 January 2013.

<sup>169</sup> [2001] UKHL 67.

<sup>170</sup> Trevor Phillips (Commissioner for Racial Equality), September 2005, on ‘UK ghettos claim shocks ministers’ <[www.news.bbc.co.uk/1/hi/uk/4257992.stm](http://www.news.bbc.co.uk/1/hi/uk/4257992.stm)>, 2 January 2013.

ethnically segregated areas because they offer the only available affordable housing for individuals and households with a poor or inadequate knowledge of the host society's language, lacking in educational qualifications and with few skills to trade in the labour market.<sup>171</sup> Further London local council policies are moving some tenants to lower-cost areas out of the capital which could well result in ghettos of social housing. The recent cap on housing benefit may cause a flood of incomers to less expensive areas having a flood of people moving in because of the lower costs. This could well lead to a ghettoization associated with welfare benefits.

Ethnic minorities are represented disproportionately in all rental sectors since 16 per cent of tenants are from minorities, as against 10% of the general population and 8 per cent of owner occupiers.<sup>172</sup>

### Rural affordability and isolation

In 1991, it was estimated that 40% of people living in rural communities could not afford to buy their own homes, not least because the previous Government's planning and housing policies accelerated a process of gentrification and geriatrification<sup>173</sup> of rural communities that priced the next generation of rural dwellers out of the market and out of their communities. National Strategy for Neighbourhood Renewal<sup>174</sup> is a policy approach that starts quite properly with emphasis on the needs of the community; it is the government's thought on how to attract new residents into certain areas. It reflects the positive side of gentrification. The Strategy marked a shift from previous regeneration programmes<sup>175</sup> to a comprehensive strategy to tackle deprivation at neighbourhood level. It was distinguished in particular by an emphasis on locally-determined measures. Another strategy approach to tackle gentrification is the New Deal for Communities,<sup>176</sup> to increase the level of owner occupation in an area, and tackle multiple deprivations in some of the most deprived neighbourhoods in the country.

- **Do phenomena of squatting exist? What are their – legal and real world – consequences?**

When de-mobilised soldiers returned to London following the Second World War to find their homes destroyed by the bombings, up to 40,000 took up occupation with their families in empty homes, hospitals and military camps, creating the first organised post-war urban squatting movement. Although it entailed systematic trespass it was lauded as "the robust common sense of ordinary men and

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<sup>171</sup> J. Forrest & M. Poulsen, 'Are There Ethnic Enclaves/Ghettos in English Cities?' *Urban Studies* 39.4 (2002): 591-618.

<sup>172</sup> 'English Housing Survey Headline Report 2012-13' (London: Department for Communities and Local Government, 2014) paras 1.17-1.19.

<sup>173</sup> Gentrification of an area by much older people.

<sup>174</sup> 'Evaluation of the National Strategy for Neighbourhood Renewal Final Report', (London: Department for Communities and Local Government, 2010).

<sup>175</sup> Such as City Challenge and the Single Regeneration Budget.

<sup>176</sup> Thirty nine NDC Partnerships have been allocated a total of approximately £2bn with which to achieve transformational change over a ten year period, from 2002: 'New Deal for Communities – National Evaluation' <[http://extra.shu.ac.uk/ndc/ndc\\_evaluation.html](http://extra.shu.ac.uk/ndc/ndc_evaluation.html)>, 22 January 2013.

women".<sup>177</sup> Things had changed by the late 1960s, when another housing crisis was attracting another generation of urban squatters. An editorial in *The Daily Telegraph* (a right wing daily newspaper) in 1975 put it this way:

Of the many strange and frightening features of contemporary British life, none carries a more obvious and direct threat to society's survival than the growing phenomenon of squatting. Innumerable houses up and down the country are now in illegal occupation by organized gangs of thugs, layabouts and revolutionary fanatics. Costly and irrecoverable damage is continually being done to private property from sheer malice ... the motive for most of this squatting is either political - a settled purpose of subverting public order - or simple greed and aggression.<sup>178</sup>

Squatting remained lawful provided that force was not used to secure entry to a property. Section 6 of the Criminal Law Act 1977 (replacing earlier forcible entry legislation) makes it a criminal offence for a person, without lawful authority, to use or threaten violence for the purposes of securing entry into any premises if there is someone on the premises who is opposed to the entry and the person trying to secure entry knows of the other person's presence. The owner may commit this offence, so squatters also had some protection in law, though this was limited by Lord Denning M.R.'s decision in *McPhail v. Persons Unknown*.<sup>179</sup>

A squatter could previously acquire title by adverse possession.<sup>180</sup> It was sufficient to occupy for the time being, in the hope that the true owner would not assert his rights to possession.<sup>181</sup> Spurred by the need to provide housing in a time when many buildings stood empty, with a long history of dispossessed building their own housing and infrastructure through the emergence of self-managed squatter settlements, the practice gained significant recognition and protection by the law.<sup>182</sup> In modern law the limitation period for unregistered land is twelve years from when the squatting began.

The Land Registration Act 2002 has effectively curtailed the acquisition of title through adverse possession when, as is usual, title is registered.<sup>183</sup>

The long standing basis of English law that squatting was only a civil trespass has recently been reversed. Squatting affects both home-owners and landlords with unoccupied properties. The landlords' lobby suggested that squatting was commonly associated with the cultivation of cannabis and structural damage.<sup>184</sup> Squatting in

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<sup>177</sup> M. Whitaker, 'People power', *Roof Magazine*, January 2, 2007.

<sup>178</sup> Cited by M. Brake & C. Hale, *Public Order and Private Lives: the Politics of Law and Order: A Critique of Conservative Criminology* (London: Routledge, 1993), 43.

<sup>179</sup> [1973] Ch. 447 CA.

<sup>180</sup> N. Cobb & L. Fox, 'Living outside the system: the (im)morality of urban squatting after the Land Registration Act 2002' in *Legal Studies* 27 (2) (2007) pp 236-260; see also Dadusc, Deanna, and E. T.C. Dee, 'Criminalisation of Squatting: Discourses, Moral Panics and Resistances in the Netherlands, England and Wales'.

<sup>181</sup> *Ofulue v. Bossert* [2009] UKHL 16; [2009] 1 AC 990; *Lambeth London Borough Council v. Blackburn* (2001) 33 HLR 74, CA.

<sup>182</sup> E.T.C. Dee, 'Moving Towards Criminalisation and Then What?' in *Squatting in Europe: Radical Spaces, Urban Struggles*: 247, 250.

<sup>183</sup> 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.

<sup>184</sup> 'National Landlords Association Consultation response: Options for Dealing with Squatting' <[www.landlords.org.uk/news-campaigns/campaigns/squatting](http://www.landlords.org.uk/news-campaigns/campaigns/squatting)>, 6 December 2012.

residential buildings was criminalized by the (inelegantly titled) Legal Aid, Sentencing and Punishment of Offenders Act 2012. It is an offence if 'a person':<sup>185</sup>

- (a) is in a residential building as a trespasser having entered as such; and
- (b) the person knows or ought to know that he or she is a trespasser; and
- (c) the person is living in the building or intends to live there for any period.'

There have been several prosecutions resulting in custodial sentences.

There is a difference of opinion whether squatting that is criminalised by this legislation can be treated as adverse possession for the purpose of acquisition of title though, as already stated, this is largely irrelevant if title is registered.

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<sup>185</sup> 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'.

## 2.7 Social aspects

- What is (are) the dominant public opinion(s) towards certain forms of rental types or tenure forms? (e.g. is renting considered as socially inferior?) In particular: Is only home ownership regarded as a safe protection after retirement?
- What is the typical attitude of tenants towards different forms of tenure (e.g. owners of privatised apartments in former Eastern Europe not feeling and behaving as full owners)

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 economic class or social status, as perceived from the great majority of tenure occupiers. These opinions are not empirical, flowing from stereotypes informed by political campaigns, the media or trends that have become apparently associated with any tenure. 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.<sup>186</sup>

It is generally supposed that those who are homeowners are of relatively stable economic circumstances. This is regardless of the categories of homeowners – with or without mortgage, or the extent of equity on the property. And a further disregarded variable is that among home owners on mortgage there are various home-to-value loans extending from a small fraction of the value of the house up to negative equity. Such homeowners are, in comparison to those renting who are up to date on payment of rents, less well off. The common requirements for obtaining a mortgage give credit to the view that owner occupiers are relatively financially secure when compared to people of other tenures. There are checks that may not be required in obtaining housing in any other tenure, like credit checks, requirement to provide three months' pay slips or other evidence of income, proof of the previous twelve months mortgage payments and or tenancy references. If a potential mortgagor is self-employed, has insufficient account records and cannot easily prove that he has got a regular income, he would be able to get a self-certification mortgage. For this he needs a large deposit as the loan-to-value ratios are usually lower than other types of mortgage.<sup>187</sup> The lender may still want some evidence of financial standing like a certificate from an accountant, credit records, bank statements, or and previous loan records. On the other hand for renting from private landlords the general requirements are relaxed, depending on the landlord in question. More structured rental organizations or landlords using estate agents may require an application fee, holding deposit, references to check applicants' credit history, sometimes references from current and or previous employers. But most private landlords who manage their own properties will deal with the tenants on the bases of the information they require at every point in time, and in a less formal manner. Such private landlords may not require a formal application form and fee, and credit history checks.<sup>188</sup> But the landlords will need to be satisfied that the tenant

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<sup>186</sup> A. Self, J. Thomas & C. Randall, 'Measuring National Well-being: Life in the UK, 2012', (London, Office for National Statistics 2012), 50.

<sup>187</sup> Self-certified mortgages have now been phased out following the credit crunch.

<sup>188</sup> In terms of formal letting and management practices, nearly all landlords and agents (97%) made use of a written tenancy agreement, with 91% requiring a deposit, and 84% requiring tenants to

is gainfully employed so he can pay his rent as at when due. Social tenants of local authorities will be taken on whether or not they can evidence any financial circumstances. Once they meet the point threshold and are generally eligible, they will be able to get housing as at when one becomes available. These points of entry requirements generally set the tone for the view that the financial status of owner occupiers is relatively more secure.

A survey of English housing revealed that 60% of social housing tenants are economically inactive - 31% are retired and 29% are otherwise economically inactive.<sup>189</sup> And the criteria for allocation of social housing tend to provide for large numbers of disabled and other vulnerable people resulting in a concentration of low rates of employment and low income levels.<sup>190</sup> The median gross income for households in social housing in 2007/08 was £10,900, compared with £23,320 for households across all tenures. 44% of households in social housing have an annual income of less than £10,000.<sup>191</sup> Only 7% of all households in social housing have a gross annual income of £30,000 or above.

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. It must be mentioned however that this representation does no compare within rentals to show how social rentals compare with renting from private landlords.

**Table 11**  
**Life satisfaction: by selected housing tenure, 2011/12**  
**United Kingdom** Percentages

	Satisfaction with life <sup>192</sup>	
	Low (0–6)	Medium/High (7–10)
Owned outright	19.0	81.0
Bought with mortgage or loan	20.1	79.9
Rented	32.2	67.8

Source: Subjective Well-being Annual Population Survey dataset, Office for National Statistics.

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;<sup>193</sup> 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

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provide a reference: 'Private Landlords Survey 2010', (London: Department for Communities and Local Government, 2011).

<sup>189</sup> 'Survey of English Housing, Preliminary Report: 2007/08', (London: Department of Communities and Local Government, 2009).

<sup>190</sup> See below, 6.2, 125-128.

<sup>191</sup> 'Family Resources Survey' (London: Department of Work and Pensions, 2013).

<sup>192</sup> As a measure of well-being.

<sup>193</sup> Like Manchester, Birmingham and Liverpool.

properties in the areas.<sup>194</sup> A direct fallout from the riots was the threat of eviction after a member of a tenant's family is involved in anti-social behaviour or criminal activity in their local neighbourhood. This was an outcome which private tenants and owner occupiers were unlikely to face. While the disorders were largely confined to inner urban areas with a significant degree of tenure mix, social housing estates and their populations were frequently highlighted and represented as being not only the source of much of the evils, but as areas where social problems flourished.<sup>195</sup> And social housing tenants are often central to narratives of crime, disorder and anti-social behaviour; the assumption is that social housing is strongly implicated in the production of numerous social and anti-social problems.

Continuity in social housing also tends to generate its own conclusions regarding the residents. Hutton has described council housing as a living tomb, "You dare not give up the house because you might never get another, but staying is to be trapped in a ghetto of both place and mind."<sup>196</sup> This widely shared impression distorts the relationship between poverty and social detriments which are factors leading many to public housing. Since the late 1980s/early 1990s, the privately rented sector is viewed principally as being the appropriate tenure for those who are young and mobile (usually for employment reasons) but who will eventually become owner-occupiers; ie, those on an upward trajectory towards home-ownership.

Private tenants stand midway between affluent that owner occupiers may represent, and the lack in social housing. Private tenants are often those who cannot assess 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.<sup>197</sup>

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.<sup>198</sup>

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<sup>194</sup> 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.

<sup>195</sup> L. Hancock & G. Mooney, "Welfare Ghettos" and the "Broken Society": Territorial Stigmatization in the Contemporary UK' *Housing, Theory and Society*, 30(1) 2012: 46-64.

<sup>196</sup> W. Hutton, 'Open the gates and free people from Britain's ghettos,' *Observer*, 18 February 2007.

<sup>197</sup> 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](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6739/2173283.pdf).

<sup>198</sup> English Housing Survey Headline Report 2012-13' (London: Department for Communities and Local Government, 2014) paras 1.67-1.69.

### **3. Housing Policy**

#### **3.1 Introduction**

Housing policy really originated as a response to the rapid industrialization of the country in the early part of the nineteenth century. It was based on concerns for public health and sanitation and the principles laid down in the latter part of the nineteenth century have merely been refined for the twentieth and twenty first centuries. Another key period is the First World War which saw the introduction of rent controls and security of tenure in the private rented sector which continued in various stronger or weaker incarnations until the very end of the Thatcher government in 1988/1989. Public provision of housing also dates from the end of the First World War but public construction is particularly associated with the period from the end of the Second World War to the start of the Thatcher Government. The Thatcher government can be seen, again in retrospect, to have laid the foundation for a changed consensus about housing policy. On the one hand this consisted of a market led reform of the private rented sector, which has led to a revival of private renting. On the other hand the public sector was characterised by tenurial reform of the mass sales of council housing under the Right to Buy, and the end of wide scale public sector construction. Housing associations had appeared on the scene in the 1960s, but the Thatcher era began a shift from public sector to social sector provision. New Labour (1997-2010) largely continued the policies it had inherited, whilst taking an increasingly tough line on antisocial behaviour and eligibility for housing. The financial crisis intruded from 2006 onwards. Election of the Coalition government in 2010 has led to a complete reorganisation of the financing of the public/social sector and a further weakening of public/social sector security; this needs to be considered in the light of the constraints on welfare benefits paid in relation to housing.<sup>199</sup>

#### **Public controls from 1850 onwards**

Housing policies emerged out of the sanitation programmes of the nineteenth century, based on the necessity for averting the risk of widespread diseases and social degeneration. Migration from agricultural land to the cities accompanied the industrial revolution, which led to urban population growth well beyond the capacity of the existing housing provision as well as the capacities for other infrastructures like roads, sewage systems and services.<sup>200</sup> The various Acts passed during this period were concerned mainly with dealing with the congestion and insanitary conditions in the slums.<sup>201</sup> The Common Lodging Houses Act and the Labouring Classes Lodging Houses Act, both of 1851, concerned with inspection of lodging houses, were the first pieces of legislation directed specifically at changing the

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<sup>199</sup> See below, 3.6, pp 78-83.

<sup>200</sup> F. Engels & F. Wischnewetzky, *The Condition of the Working Class in England*, (Fairfield, Gloucestershire: Echo Library, 2009), p. 57.

<sup>201</sup> These Acts included: the Public Health Act of 1848, the Common Lodging Houses Act and Labouring Classes Lodging Houses Act of 1851 introduced by Lord Shaftesbury, the Torrens' Act of 1868 and 1879 dealing with individual insanitary houses, Cross's Acts of 1875 and 1879 giving powers to clear and reconstruct unhealthy areas; Housing of the Working Classes Act of 1890 giving powers to carry out improvement schemes, clear unhealthy areas and to build new houses for the working classes; the Housing Acts of 1894, 1900 and 1903; and the Housing, Town Planning etc. Act 1909, which introduced the first powers relating to the town planning of development land.

housing landscape. These Acts were directed at improving the welfare of the working class who served the new industrial society.

The state of housing and living conditions became a universal concern in the nineteenth century. Poor neighbourhoods with one-roomed homes were common. These were characterised by inadequate provisions for cooking and laundry, and small families squeezed into the size of accommodation that matched the families' affordability. Landlords would not let their single rooms to large families because of the fear of overcrowding and consequently breaking the law. Families compelled to live near the cities to work could not afford the high cost of renting which was between one fifth and one third of income. The Reverend Kitto proposed purchasing land to be handed to public bodies; then the rent paid by the labouring class would go round to the poor. Generally they saw it as the duty of the community to put people in adequate living accommodation.<sup>202</sup>

Twentieth century legislation, whilst becoming more sweeping, has followed the consensus that emerged in the second half of the nineteenth century, that housing conditions were a legitimate area of public concern.

### **Private sector security and rent regulation 1915-1989**

At the outbreak of the First World War, 77% of households lived in privately rented accommodation.<sup>203</sup> Rent controls were introduced in 1915 to prevent profiteering by landlords and re-enacted in 1919 in an attempt to ensure that the country provided 'Homes Fit for Heroes'. Security of tenure was a part of the package, along with schemes for rent control or rent regulation which fluctuated over the years as successive political masters favoured greater or lesser protection. The legislation is collectively called the Rent Acts<sup>204</sup> and ceased to apply to new lettings in January 1989. At that stage the private rental market had declined to 9.2%, primarily as a result of encouragement for private home ownership and increased wealth, but partly as a result of the poor condition of much rental accommodation.

### **Public sector construction 1918-1980**

Seeds for public sector construction were sown in the nineteenth century legislation providing for the construction of accommodation for the working classes<sup>205</sup> but by 1914 only 1% of households lived in public accommodation.<sup>206</sup> Public sector house construction took off after First World war as a response to issues of housing affordability and inadequate standards. In 1919, Parliament passed the Housing and

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<sup>202</sup> J.F. Kitto, 'One-roomed Homes', paper given at the Church of England Sanitary Association meeting, (Manchester, 1893).

<sup>203</sup> 'A Century of Home Ownership and Renting in England and Wales' (London: Office for National Statistics, 2013), 1.

<sup>204</sup> See below 4.1, pp 90-91.

<sup>205</sup> Labouring Classes Dwelling Houses Act 1866; Labouring Classes Dwellings Act 1867; For studies of social housing itself, see also J. Burnett, *A Social History of Housing 1815 - 1970*, (Devon: David & Charles, 1978); E. Gauldie, *Cruel Habitations, History of Working-Class Housing 1780-1918* (Australia: Allen & Unwin, 1974).

<sup>206</sup> 'A Century of Home Ownership and Renting in England and Wales' (London: Office for National Statistics, 2013), 1.

Town Planning Act 1919<sup>207</sup> which promised government subsidies to help finance the construction of 500,000 houses within three years, though in fact only about 213,000 homes were completed. Nevertheless housing had become a national responsibility, albeit one delegated to local authorities, and a key component of the welfare state. Other legislation during the 1920s extended the duty of local councils to make housing available as a social responsibility. An Act in 1924<sup>208</sup> gave substantial grants to local authorities in response to the acute housing shortages of that period. John Wheatley saw council housing as a universal tenure.<sup>209</sup> The following year further legislation promoted a partnership between political parties, local authorities and specially appointed committees of building employees and employers to build 190,000 new council houses at modest rents by 1925. This promoted a revolution in the provision of public housing.<sup>210</sup> A fresh Housing Act of 1930 obliged local councils to clear all remaining slum housing, and provided further subsidies to re-house inhabitants, resulting in increased slum clearance and the building of 700,000 new homes.<sup>211</sup> New council homes reached 450,000 in 1934.<sup>212</sup> Slum clearance brought a wider class of occupier to housing.<sup>213</sup>

There was a hiatus during the Second World War which was followed by the election of a Labour Government, under which the focus was again on 'housing need', as the key route into social housing, a universal tenure for all.<sup>214</sup> The decision to locate the main role in meeting housing need within the public sector under the control of local government has had the effect of trapping the social rented sector within public sector financial regimes. In 1946, the post-war government tried to meet housing inadequacy through the construction of prefabs and repairs to existing structures. But longer-term measures depended on the development of housing by local authorities. The 1946 Housing Act increased the subsidy available to local authorities, and they were allowed to borrow from the Public Works Loan Board.<sup>215</sup> A further Housing Act in 1949 enabled local authorities to build houses for the population generally, rather than only for the needy and by 1951 some 1.5 million public homes had already been constructed as a result. Public housing accounted then for 17% of the stock.<sup>216</sup>

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<sup>207</sup> The approximate number and the nature of the houses to be provided by the local authority were laid down as were estimates of the quantity of land to be acquired, the localities to be redeveloped and building density.

<sup>208</sup> Housing (Financial Provisions) Act 1924.

<sup>209</sup> A social reformer deeply committed to socialism and the presiding spirit behind the founding of the National Health Service (NHS). See 'Aneurin Bevan – Founder of the National Health Service' <[www.nyebevan.org.uk/biography/](http://www.nyebevan.org.uk/biography/)>, 22 January 2013.

<sup>210</sup> On which see R. Lyman, *The First Labour Government, 1924* (Chapman & Hall, 1957), ch 8.

<sup>211</sup> 'Improving Towns – Council Housing' <[www.parliament.uk/about/living-heritage/transformingsociety/towncountry/towns/overview/councilhousing](http://www.parliament.uk/about/living-heritage/transformingsociety/towncountry/towns/overview/councilhousing)> 20 January 2013.

<sup>212</sup> S. Lowe, *The Housing Debate*, (Bristol: Policy Press, 2011); I. Cole & R. Furby, *The Eclipse of Council Housing* (London: Routledge, 1994).

<sup>213</sup> A. Arden & C. Hunter, 'For Whom is Social Housing?' *Journal of Housing Law*, 2011, 14(5): 95.

<sup>214</sup> A social reformer deeply committed to socialism and the presiding spirit behind the founding of the National Health Service (NHS). See 'Aneurin Bevan – Founder of the National Health Service' <[www.nyebevan.org.uk/biography/](http://www.nyebevan.org.uk/biography/)>, 22 January 2013.

<sup>215</sup> A statutory body operating within the United Kingdom Debt Management Office, an Executive Agency of HM Treasury. Its function is to lend money from the National Loans Fund to local authorities and other prescribed bodies, and to collect the repayments.

<sup>216</sup> *Survey of English Housing*, (Communities and Local Government, 2011) <[www.ons.gov.uk/ons/rel/social-trends.../social.../social.../chapter-10](http://www.ons.gov.uk/ons/rel/social-trends.../social.../social.../chapter-10)>, 23 January 2013.

Thereafter there followed a period of large scale demolition and reconstruction, much of it of high rise blocks of poor quality. High rise construction ended in the 1970s and the middle of the decade marked the beginning of a decline in construction. By 1980 there were 5 million public/social sector homes, one third of the total, 90% under the control of local authorities. Stock declined as demolitions exceeded new build completions.<sup>217</sup>

This marked an increase in the provision of social housing and a new dawn in the involvement of local authorities in housing which continued for most of the next two decades by government of both political persuasions so that by the 1970s there was a mixed economy of housing policy in Britain with about one in three dwellings owned by the state.<sup>218</sup> This was a period when slum clearance was often followed by high rise development of poor quality. These do not reflect a consensus about the organisation of housing since disagreements over the respective roles of public and private sectors were apparent throughout the post-war years. By the mid-1970s, the sector was just slightly bigger (19%), as a proportion of the housing stock, than it was in 1951 (17%).<sup>219</sup>

## Home ownership 1918-2006

Government policy has long been to favour owner occupation. For most working people prior to 1914, the high level of house prices relative to wages made home ownership an impossible dream. The average price of a new dwelling, excluding land, was £250 in 1907. This compared with average weekly earnings of men in full-time manual work in various trades of about £3.60 a week.<sup>220</sup> Hence for the mass of the working population it was impossible to purchase a house outright from income.<sup>221</sup> Throughout the twentieth and twenty first centuries the growth of private home ownership has been encouraged. Undoubtedly the main reason has been that the population in general has become better off and able to realise the general aspiration of home ownership. A subsidiary reason is the growth of building societies to enable saving towards house purchase and to provide mortgage funds to facilitate house purchase. Successive Governments have sought to stimulate home ownership. To a limited extent during the 1930s this was achieved by direct subsidies<sup>222</sup> but in the post-War period it has been through tax breaks – in the past income tax relief on mortgage interest and throughout by the exemption of gains

<sup>217</sup> H. Pawson, 'Restructuring the English Social Housing Sector Since 1989 – Undermining or Underpinning the Fundamentals of Public Housing?', *Housing Studies* 21(5) 2011: 767-783.

<sup>218</sup> Alan Murie, *The Sale of Council Houses* (CURS, University of Birmingham, 1976).

<sup>219</sup> Survey of English Housing, (Communities and Local Government, 2011) <[www.ons.gov.uk/ons/rel/social-trends.../social.../social.../chapter-10](http://www.ons.gov.uk/ons/rel/social-trends.../social.../social.../chapter-10)>, 23 January 2013.

<sup>220</sup> DOE, *Housing Policy Review: Technical Volume, Part III* (London: HMSO, 1977). This compares to average weekly earnings of £440 and house price of £161, 458 as at March, 2013: see "House Price Index", [www.landregistry.gov.uk/public/house-prices-and-sales](http://www.landregistry.gov.uk/public/house-prices-and-sales), 5 March, 2013; and "Average Weekly Earnings Dataset", [www.ons.gov.uk/ons/rel/lms/labour-market-statistics/may-2013/dataset-earnings.html](http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/may-2013/dataset-earnings.html), 5 March, 2013.

<sup>221</sup> Peter Kemp (1987): Some aspects of housing consumption in late nineteenth century England and Wales, *Housing Studies*, 2:1, 3-16

<sup>222</sup> The 1923 Housing Act had given private builders subsidies to build houses, injecting 438,000 houses into the stock by 1929: H. Hobhouse, 'Public Housing in Poplar: The Inter-war Years', *Survey of London: volumes 43 and 44: Poplar, Blackwall and Isle of Dogs* (1994), pp 23-37. <[www.british-history.ac.uk/report.aspx?compid=46467](http://www.british-history.ac.uk/report.aspx?compid=46467)> 15 October 2012.

from the sale of a private residence. Strong demand has been coupled with weak supply, a problem exacerbated by the general scheme for town and country planning introduced in 1947, and as a result there has been an inexorable increase in house prices.<sup>223</sup> However, there has also been a growth in real incomes which has stimulated effective demand for private ownership from 1945 to date.<sup>224</sup>

### **Private sector 1988 to 2010**

The Thatcher government introduced the assured tenancy regime in 1988 (operating for new grants as from January 1989). The aim was to reverse the inexorable decline in the private renting sector in which Rent Act regulation of rents had reduced returns to the point that many properties were declining in quality. Landlords have been attracted partly by the greater rental yields, but also by the limitation on security to six months, making the removal of awkward tenants much easier. This policy has revived a moribund private sector to the point that it has once more overtaken the public/social sector as the largest provider of rented housing.<sup>225</sup> A key factor has been the rapid growth from the late 1990s onwards of Buy to Let financing. It was not the intention of policy to effect such a resurgence since it was assumed that private ownership would remain the tenure of choice, but it has turned out that way because of the effects of the financial crisis since 2006 and the inexorable rise in house prices that has left home ownership unaffordable for many young people. One very undesirable effect of the policy has been a large increase in housing benefit claims.

Towards the end of this period, the Labour Government introduced a Buy to Let initiative – a direct cash subsidy - to encourage institutional investors to enter the market.

### **Public sector 1980-2010**

Following the assumption of office by the Thatcher government,<sup>226</sup> major changes were effected throughout the 1980s to both the public and private sectors, changes accepted and continued by the Labour government elected in 1997. We will focus attention on the public sector first. The core policy was the sales of council houses to sitting tenants through the recognition of a Right to Buy. The Conservative government of Margaret Thatcher's programme of council house sales significantly increased owner occupation in Britain. Almost one million council houses, amounting to more than 5% of the total housing stock were sold to their tenants from 1980 to 1987, raising the proportion of home ownership from under 60%, by the same ratio, to over 65% of the total housing stock.<sup>227</sup> This policy enlarged the class of homeowners by including many former public sector tenants.<sup>228</sup> Although it is

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<sup>223</sup> See above, 2.1, pp 33-35.

<sup>224</sup> S. Wilcox, 'Private Housing' in S. Wilcox (ed.) *Housing Finance Review 1999/2000*, (London: Joseph Rowntree Foundation, 1999); J. Hicks & G. Allen, *A Century of Change: Trends in UK Statistics since 1900* (London: Social and General Statistics Section, House of Commons Library).

<sup>225</sup> See above 1.4, p. 27.

<sup>226</sup> R. Forrest, 'Privatization and Housing under Thatcher', *Journal of Urban Affairs*, 13(2) 1991: 201-219.

<sup>227</sup> G. Garrett, "The political consequences of Thatcherism" *Political Behavior* 14(4) 1992: 361, 364.

<sup>228</sup> A. Heywood, *The End of the Affair: Implications of Declining Home Ownership*, (London: Smith Institute, 2011).

sometimes described as ‘privatization’ this cannot be compared to the privatizations seen in eastern Europe in the 1990s, since exercise of the Right to Buy required the payment of a price to acquire the freehold in the home, albeit at a generously discounted price.<sup>229</sup> The success of this measure had a radical effect on housing tenure. Since 1980 some 1.9 million homes have been transferred from local authorities to owner-occupation. From 1979 to the early years of the 2000s, owner occupation increased rapidly at the expense of social housing following the inception of the right to buy policy.<sup>230</sup> Thus in the 1980s and 1990s market forces were then largely the determinants of housing trends with the liberalisation of the market and increase in the private sector housing.<sup>231</sup>

### Switch to the social sector from 1987-2010

Housing associations had emerged in the 1960s, and already accounted for 10% of homes in 1980. It was under the Thatcher government that a policy emerged of switching public/social provision of housing from the public sector (local authorities) to the social sector (housing associations). The original motivation was probably a doctrinaire belief in the benefits of a smaller state, but it has come over time to be tied up with the issue of whether housing debt is allocated to the public sector borrowing requirement. At any rate all subsequent governments have pursued a vigorous policy of preferring the social sector.

The policy emerged after 1987 of disassembling of the council sector through Tenants Choice, and voluntary transfers of stock on the initiative of councils. Alongside the Tenants Charter, a new emphasis on individual rights, the encouragement of tenant management, the favouring of housing associations, the emphasis on an enabling role for local authorities, and requirements for compulsory competitive tendering for housing management left local authorities unable to make significant direct contributions to housing stock as they had done in the past. In the post-Thatcher era, subsidy for house building has increasingly been channelled through housing associations. This can be seen as a ‘privatization’ though it is obviously weak in comparison to the events in eastern Europe in the 1990s. There has been a tendency for housing associations to become larger, perhaps through empire building by the senior managers.<sup>232</sup>

Throughout this period the basis of policy was to provide subsidies to housing associations for the provision of new build homes and conversions. From the Thatcher period onwards insufficient homes have been built to meet demand. The Blair government attempted to promote higher outputs within a market led approach by a Best Value agenda, so that social housing associations became subject to annual inspection and performance based resource allocation. After a review in 2007 this approach was persisted with, but an attempt was made to release more under-utilised public land for the construction of affordable homes. Nevertheless for an entire generation inadequate numbers of homes were built. Throughout the early

<sup>229</sup> P. Minford et al., *The Housing Morass*, (London: Institute for Economic Affairs, 1987).

<sup>230</sup> B. Pattison, D. Diacon & J. Vine, *Tenure Trends in the UK Housing System: Will the Private Rented Sector Continue to Grow?* (London: Building and Social Housing Foundation, 2010), 4.

<sup>231</sup> S. Wilcox & H. Pawson (eds), *UK Housing Review 2010/2011* (York: Centre for Housing Policy, 2011).

<sup>232</sup> H. Pawson ‘Restructuring the English Social Housing Sector Since 1989 – Undermining or Underpinning the Fundamentals of Public Housing?’ *Housing Studies* 21(5) 2011: 767-783.

2000s around 160 to 180 thousand homes were built each year, but this fell to between 80 and 110 thousands in the post crunch era of 2008-2011. In 2012/13 there was 108, 000 new build completions, of which only 43, 000 were affordable homes.<sup>233</sup>

### **Reduction of public/social sector security 1980-2015**

The Thatcher government introduced lifelong security for public/social tenants and succession rights in these sectors. An important aspect of modern housing law was introduced almost by accident as a prop for the Right to Buy scheme, that is the definition of the secure tenancy used in the public sector which described in detail the security of tenure of the secure tenant. As tenants who could afford to do so bought their homes, the profile of remaining tenants changed. New tenants continued to be mainly young families with children but council housing was increasingly associated with elderly households and lone parents. Housing associations would almost always (and certainly when letting publicly subsidised stock) grant full security of tenure, that is they would grant fully assured tenancies.

This extensive security has disadvantages. It tends to create very immobile tenants in the public/social sector and it is difficult for landlords to adapt the accommodation offered to changing needs of tenants' families. It has gradually been watered down. The first stage of this was an attempt to deal with bad behaviour by tenants by introducing limited security for new tenants (introductory tenancies) for those committing domestic violence (family intervention tenancies) and for those behaving antisocially (demoted tenancies). There are similar provisions for the social sector. This has, however, culminated in the decision by the Coalition government to introduce flexible tenancies, which are fixed term, albeit longer than the shorthold common in the private sector. All of these innovations are converging to a point where lifelong security of tenure is under threat.

### **Coalition policy 2010-2015**

Clearly the overwhelming determinant of the policy of the Coalition formed in 2010 under the premiership of David Cameron is the commitment to tackle the structural deficit.

#### **(1) Private owners**

The main factor which has reversed the decline in the private ownership sector is the Help to Buy scheme<sup>234</sup> This is supported in the policy framework *Laying the Foundations*<sup>235</sup> by other attempts to remedy the under provision of new housing over an entire generation, which sees new build completions running at half the rate at

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<sup>233</sup> H. Pawson and S Wilcox *UK Housing Review 2012* (York; Rowntree, 2012). Independent 22 November 2013.

<sup>234</sup> See above 1.4, p. 22.

<sup>235</sup> 'Laying the Foundations: A Housing Strategy for England' (London: Department for Communities and Local Government, 2011).

which new households are formed. Proposals include a simplified planning regime, direct funding for growing Places and Get Britain Building.

## **(2) Private rented sector**

The private sector is booming, but it being supported by the Build to Let scheme which provides direct subsidy for new build property intended for market rentals.

## **(3) Public/social sector**

The initial policy of the coalition was a continuation of the New Labour agenda of marketization. This included the use of public land to boost housing supply.<sup>236</sup> Another strategy to increase supply is the new homes bonus scheme, which encouraged local authorities to grant planning permissions for the building of new houses in return for additional revenue.<sup>237</sup> Other policies mark a significant shift in emphasis, notably the ‘reinvigoration’ of the Right to Buy scheme,<sup>238</sup> and renewed support for New Towns. Other initiatives are to increase the freedom local authorities have with their stock (a part of the ‘localism’ agenda) and the reform of public/social sector security.<sup>239</sup> Fixed term tenancies have been introduced<sup>240</sup> under which tenants could be asked to move on at the end of their tenancy. This helps to tackle under-occupation of social housing and is intended to increase the mobility of public/social tenants.<sup>241</sup> The most important reform is a complete overhaul of the subsidization of public sector housing, considered below.<sup>242</sup>

## **(4) Housing benefit**

Major reforms have taken place since 2010 which are considered below as an aspect of subsidization.<sup>243</sup>

- **How is housing policy related to the structure and concept of the (national) welfare state, to other welfare policies and the tax system?**

The idea that the government should intervene in housing gained currency during the nineteenth century, despite the prevailing laissez faire. Even the great propagandist for ‘self-help’, Samuel Smiles, accepted that the State had a proper

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<sup>236</sup> ‘Unlocking Public Land for Housing Supply’, (London: Town and Country Planning Report, 2007). See also A. Holmans, & C. Whitehead, *Housing the Next Generation. A Report for the TCPA*. (London: Town and Country Planning Association, 2005). See above 1.4, p. 21.

<sup>237</sup> W. Wilson, *The New Homes Bonus Scheme*, SN/SP/5724

<[www.parliament.uk/Templates/.../Pages/BPPdfDownload.aspx?bp](http://www.parliament.uk/Templates/.../Pages/BPPdfDownload.aspx?bp)> 4 January, 2013.

<sup>238</sup> In England a discount will be offered up to 60% for a house and 70% for a flat – with a new ceiling of £75,000, ‘There is a new window of opportunities’ (Department for Communities and Local Government), [www.righttobuy.communities.gov.uk](http://www.righttobuy.communities.gov.uk) 16 January 2013.

<sup>239</sup> See above p. 57.

<sup>240</sup> This is meant to be for an initial period of 5 years, and then 2 years following a review of the needs of the tenants.

<sup>241</sup> ‘Laying the Foundations: A Housing Strategy for England’ (London: Department for Communities and Local Government, 2011).

<sup>242</sup> See below. 3.6, pp. 78-83.

<sup>243</sup> See below 3.6, pp 78-83.

role in the general life of her citizens.<sup>244</sup> Poverty was seen increasingly as a problem of industrial society rather than solely as a consequence of the inadequacies of individuals.<sup>245</sup>

The modern consensus on the benefits of a welfare state derives from the widening of the franchise in the early part of the twentieth century. Early components were the introduction of the old age pension in the Lloyd George budget of 1910 and the push for 'homes fit for heroes' after the First World War. Thus the Liberal government of the 1910s laid the foundations of the welfare state, and the idea that citizens should be supported from the cradle to the grave.<sup>246</sup> Wide ranging expansion of the conception is attributed to the Labour government led by Clement Attlee after the Second World War.<sup>247</sup> Enactments included the Education Act 1944, the Family Allowance Act of 1945, the National Insurance Act 1946, and the National Health Act 1948, enacted to specifically contend with the challenges identified by William Beveridge<sup>248</sup> and described as the five giants that plagued society – disease, want, ignorance, squalor and idleness. These statutes gave legal entitlements in the nature of rights to citizens in contending with these plagues. Key features were free medical care, education reform, a widening of welfare benefits, and housing entitlement, the latter met by a major construction programme.<sup>249</sup> There are diverse views on what policy stance informs housing policies in England and Wales today.<sup>250</sup> However, there is a broad consensus on key components, such as:

- 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 benefit should be paid to those unable to afford accommodation.

The question of the tax system is considered below.<sup>251</sup>

- **What is the role of the constitutional framework of housing?**

The United Kingdom does not have a written constitution in this sense. The devolved framework of Wales has been described above.<sup>252</sup>

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<sup>244</sup> *Self-Help*, (London, 1859).

<sup>245</sup> Booth in London and later Rowntree in York established in a measured scientific way that through its very extent and nature poverty was not solely the consequence of individual weakness. Roughly 30% of Britain's people lived in poverty, caused by low pay, old age, sickness, disability and unemployment rather than by fecklessness.

<sup>246</sup> '1940's Origins of the Welfare State', 4 January 2013, [www.nationalarchives.gov.uk/cabinetpapers/alevelstudies/1940-origins-welfare-state.html](http://www.nationalarchives.gov.uk/cabinetpapers/alevelstudies/1940-origins-welfare-state.html).

<sup>247</sup> A. Digby, *British Welfare Policy: Workhouse to Welfare*, (London: Faber & Faber, 1989).

<sup>248</sup> (1879-1963) was a British economist and social reformer whose report, the Beveridge Report of 1942, set out the basis of the Welfare State in Britain.

<sup>249</sup> P. Malpass, "The Wobbly Pillar? Housing and the British Postwar Welfare State", *Journal of Social Policy*, 32 (2003): 589 – 606, 605.

<sup>250</sup> 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).

<sup>251</sup> See below 3.7, pp 84-89.

<sup>252</sup> See above 1.1, pp 5-6.

- (In particular: does a fundamental right to housing exist?)  
**Housing and Human Rights**

More recently, housing interests have been protected in various statutory instruments like the Human Rights Act 1998 which incorporated directly into domestic law the European Convention on Human Rights. Article 1 Protocol 1 limits government intrusion upon enjoyment of the ownership of property. Article 8 requires the state to respect the private life and home of every citizen, though the right is qualified by the possibility of public justification of an intrusion. It is often argued that decent housing is a human right,<sup>253</sup> but *X v. Federal Republic of Germany*<sup>254</sup> decided in the context of a refugee from East Germany, that the right to a satisfactory standard of living and to decent housing do not figure among the rights and liberties guaranteed by the European Convention on Human Rights.<sup>255</sup> Article 8 protects an existing home rather than creating a right to have housing provided. Other international conventions which do provide for a right to housing<sup>256</sup> are not justiciable in an equivalent way.

In the local laws of England and Wales the provisions of human rights laws are applied in measuring the legality of conducts during possession proceedings. Human rights provisions giving protection to family and private life are also used as a defence in possession proceedings. In *R. (JL) v. Secretary of State for Defence*<sup>257</sup> it was held that the defence of disproportionate interference in an occupier's right to respect for private and family life under the European Convention on Human Rights 1950 Article 8 could be used, not only against a claim for possession, but also as a defence against enforcement of the order once obtained.<sup>258</sup> However, this defence is only open to tenants in social housing as the Human Rights Act is directed at public bodies and by extension, bodies performing public functions.<sup>259</sup> Thus it is unlawful for a public authority to act in a way which is incompatible with the European Convention on Human Rights unless primary legislation meant that an authority could not have acted differently, or the public authority was acting so as to give effect to or enforce such provisions. Local authorities, as public authorities therefore, must comply with the Human Rights Act 1998 in the exercise of their functions relating to allocation and general management of social housing.

Where dealing with the public is concerned housing association will also be subject to public law provisions. The public status of certain housing associations is not clear. In deciding whether a body is a public authority, the courts will assess the source of the body's powers and the nature of the functions it performs. In *R. (on the application of Weaver) v. London & Quadrant Housing Trust*,<sup>260</sup> the court considered

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<sup>253</sup> N. Madge, 'Possession Proceedings and Human Rights: Part 1' *Journal of Housing Law*, 2001, 4(1): 3-6.

<sup>254</sup> (1956) 1 Year Book of the European Convention of Human Rights. 202.

<sup>255</sup> *Velosa Barreto v. Portugal* 40/1994/487/569, ECHR.

<sup>256</sup> Universal Declaration of Human Rights Article 25 (everyone has a right to a standard of living adequate for the health and well-being of her/himself and of her/his family, including specifically housing); United Nations Convention on the Rights of the Child Article 27 (signatories shall, in case of need, provide material assistance and support programmes with regard to housing).

<sup>257</sup> [2013] EWCA Civ 449.

<sup>258</sup> *Kay v. Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465.

<sup>259</sup> Human Rights Act 1998 s.6.

<sup>260</sup> [2009] EWCA Civ 587, [2010] 1 WLR 363.

whether the decision of a Registered Social Landlord to terminate a tenancy was an act of a public nature which could render the Registered Social Landlord a public authority and, therefore, amenable to judicial review. It was conceded that certain of the landlord's functions were public functions including the act of terminating a tenancy. The Court of Appeal emphasised that whether the particular housing association was or was not bound by the Human Rights Act 1998 would depend on the particular facts, and it cannot be said that the decision automatically extends to all housing associations.

## **3.2 Government actors**

**Which levels of government is/are:**

- **involved in housing policy (national, regional, local); what are they called; how many are there of each?**
- **responsible for designing which housing policy (instruments)?**
- **responsible for which housing laws and policies?**

### **Central government**

**England:** Legislative authority in relation to housing in England resides in the Westminster Parliament. Government functions are conducted through the Department for Communities and Local Government situated in London is in the nature of policy making and monitoring - policies aimed at influencing house building, affordability and overcrowding through the regulation of stamp duty revenue, provision of housing benefits, and schemes to protect borrowers. The government develops policies that have national impact on governance across England and Wales. The central government also regulates financial services, private renting and other key areas affecting the housing market.

**Wales:** Housing is a devolved issue, though finance is not. So far as housing measures are concerned, these will in future be passed by the Welsh Assembly at Cardiff. Government decisions will be taken by the Welsh Government, acting through the Minister for Housing and Regeneration.<sup>261</sup>

### **Housing Regulator (social housing)**

**England:** Housing associations were required under earlier legislation to register as Registered Social Landlords. The Cave Review reported in 2007 that a regulator should be created for social housing, with regulation separated from policy formation and implementation.<sup>262</sup> This was set up as the Office for Tenants and Social Landlords as from April 2011,<sup>263</sup> but in April 2012 this fell victim to the attack by the Coalition Government on Quangos, and responsibility now passes to the regulation Committee of the Homes and Community Agency.<sup>264</sup> This agency now maintains a register of Private Registered Providers of Social Housing, as housing associations are now known.

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'.<sup>265</sup> Registered providers must comply with specified rules about allocating accommodation, terms of tenancies, maintenance, procedures for addressing complaints by tenants against landlords, methods for consulting and informing tenants, methods of enabling tenants to influence or control the management of their accommodation and environment, policies and procedures in

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<sup>261</sup> See above 1.1, pp 5-6.

<sup>262</sup> 'Every Tenant Matters: A Review of Social Housing Regulation' (London; Department for Communities and Local Government, 2007).

<sup>263</sup> Housing and Regeneration Act 2008 Part 2, s. 81ff.

<sup>264</sup> Localism Act 2011 ss.178-179, sch. 17.

<sup>265</sup> Housing and Regeneration Act 2008 ss 193 and 194 as amended by Localism Act 2011 s. 176.

connection with anti-social behaviour,<sup>266</sup> landlords' contribution to the environmental, social and economic well-being of the areas in which their property is situated, and estate management. Financial probity and efficiency is also required.

**Wales:** The old scheme for registration of Registered Social Landlords<sup>267</sup> continues under the control of the Welsh Ministers.<sup>268</sup>

## Local Government in housing

**England:** 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.<sup>269</sup> Under the Department for Communities and Local Government guidance on housing market assessments, local authorities in England are required to develop their approach to housing through consideration of housing need and demand. In developing and creating a balance in the local housing market local governments take measures to ensure that the local demand and supply of social housing are evened out.<sup>270</sup> 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.<sup>271</sup> These powers extend to adopting suitable management structure to get the best of housing stock as an individual would do to his stock. Local councils often use Arm's-Length Management Organisations to manage their stock.<sup>272</sup> Under an Arm's-Length Management Organisations, homes remain under council ownership but are run separately from council control, more like an individual managing his property with the services of an estate agent. This leaves the local authority free to concentrate on wider strategic housing issues.

**Wales:** Similar guidance exists in Wales.<sup>273</sup> the only investment options available to Welsh authorities are stock transfer or the management of the stock remaining with the council. Arm's-Length Management Organisations are not available in Wales.

## Local authorities as landlords

**England:** Local authorities remain significant direct providers of social housing. They often acts as partners of housing associations when providing social housing to those in need.

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<sup>266</sup> Housing Act 1996 s. 218A.

<sup>267</sup> The provisions of the 1996 Act governing regulation of registered social landlords were broadly brought into line with the powers available to the regulator of social housing in England by amendments effected by the Housing (Wales) Measure 2011.

<sup>268</sup> Housing Act 1996 Part 1 (now renamed 'The Social Sector in Wales'); Housing and Regeneration Act 2008 s. 61.

<sup>269</sup> Localism Act 2011.

<sup>270</sup> Some councils in London move housing benefit claimants outside the capital to save money. Rising numbers of people are finding that they cannot afford accommodation in central London: R. Ramesh, H. Mulholland & P. Walker, 'London Looks to Export Council Tenants', *Guardian*, 24 April, 2012.

<sup>271</sup> Localism Act 2011 s. 1.

<sup>272</sup> Housing Act 1985 s.27.

<sup>273</sup> 'Local Government in Wales' [www.wlga.gov.uk/local-government-in-wales#6](http://www.wlga.gov.uk/local-government-in-wales#6), 2 January 2013.

Until recently (financial year 2011-2012), housing revenue funds in England and Wales was pooled nationally and subsidy was then paid back by central government. According to the amount each authority needed to spend on its council housing. With effect from 1 April 2012, English authorities are now self-financing in relation to their housing stock, retaining their rents and meeting their liabilities. One-off settlement payments have been made redistributing £18 billion of housing debt held by authorities. This should leave authorities with housing debt that they can afford to service based on a 30 year business plan. Each authority's permissible housing debt is capped nationally.

**Wales:** Authorities in Wales continue to operate under an annual Housing Revenue Account subsidy determined by the National Assembly.

### Housing Associations

**England:** Housing associations take various legal forms, possibly involving a trust or a corporate structure. What they have in common is the purpose of providing (constructing, improving or managing) housing accommodation, and that they do not trade for profit or distribute capital or dividends beyond a prescribed rate.<sup>274</sup>

Regulation of housing associations in England is done by the Home and Communities Agency as already explained.<sup>275</sup> Economic regulation applies to all registered providers of social housing except for local authorities,<sup>276</sup> as well as more reactive consumer regulation which includes local authorities. The Agency will set consumer standards for tenants, but will only intervene directly in very serious cases.

**Wales:** The Welsh Ministers regulate housing associations in Wales, through a scheme that seeks to put tenants at the heart of the regulatory framework. A Housing Regulation Team has been established to undertake regulation activity on their behalf. The team is part of the Welsh Government's Housing Division. The key features of the Regulatory Framework are delivery outcomes, self-assessment, regulatory assessment, financial viability judgement, regulatory assessment report, regulatory and enforcement powers, and the publication of financial viability judgements and regulatory assessment reports.<sup>277</sup> This is against the background of the share of the dwelling stock held by housing associations in Wales. Housing associations hold some 107,000 homes or 8% of Welsh housing stock. The social rented sector as a whole in Wales comprises some 222,000 properties or 17% of the total stock.<sup>278</sup>

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<sup>274</sup> Housing Associations Act 1985 s. 1.

<sup>275</sup> The Agency has a wider role to improve the supply and quality of housing in England, to secure development land and to support sustainable development. .

<sup>276</sup> The economic regulations do not apply to local authorities as this would effectively be a duplication of existing audit and treasury arrangements that review and regulate council finances.

<sup>277</sup> 'Regulatory Framework for Housing Association Registered in Wales', (Welsh Government, 2011).

<sup>278</sup> A. Heywood, 'Investing in Social Housing' (London: Housing Finance Corporation, 2010). See also J. Jennings, 'Geographical Implications of the Municipal Housing Programme in England and Wales 1919-39' *Urban Studies* 8, no. 2 (1971): 121-138.

### **3.3 Housing policies**

- **What are the main functions and objectives of housing policies pursued at different levels of governance?**
- **In particular: Does the national policy favour certain types of tenure (e.g. rented housing or home ownership (owner-occupation)?**

#### **England and Wales<sup>279</sup>**

The greatest focus has been on extending owner-occupation through the various Low Cost Home Ownership schemes that were discussed earlier in the report. A recent example is the Help to Buy scheme.<sup>280</sup> 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, which was discussed earlier in the report. At the other end of the homeowners' spectrum, the introduction of the Mortgage Rescue Scheme<sup>281</sup> allows homeowners facing repossession to sell all or part of their property to a housing association. This means that either mortgage payments are reduced, or if the property were sold completely the owner-occupier would become a tenant of the housing association. As a result of this since 2005/06 mortgage possession claims fell between 2008 and 2010.<sup>282</sup> But again has remained relatively stable over the last two years after falling from the peak in 2008. On the other end new mortgage guarantee scheme to help people take the first step onto or to move up the property ladder will be rolled out in the spring of 2013.<sup>283</sup>

Government efforts to balance 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. The government's growth review,<sup>284</sup> published in March 2011, resulted in a much stronger commitment to reforming the planning system, recognising that the supply of affordable new homes in the right places helps to create a dynamic economy, 'house building makes a direct and immediate impact on Gross Domestic Product through job creation and an almost wholly domestic supply chain.'<sup>285</sup> 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. Within the building sector, the shortage of credit has most affected small and medium-sized builders because they are more dependent on bank loans and are less able to raise equity finance or to issue bonds. Some of the highest levels of house completions in recent decades were achieved in the period from 2005/06 to 2007/08, but

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<sup>279</sup> See above, 1.1, pp 4-6.

<sup>280</sup> See above, 1.4, p. 21.

<sup>281</sup> 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'

<http://www.wales.gov.uk/about/cabinet/cabinetstatements/2010/100610mrs/?lang=en>, 17 January 2013.

<sup>282</sup> Circular to Welsh Assembly Government – Mortgage Market Review/conditions update. (Cardiff: Council of Mortgage Lenders, Cymru, 2011).

<sup>283</sup> 'Mortgage Guarantee Boost for Potential House Buyers and Builders'

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

<sup>284</sup> 'Plan for Growth', (London: HM Treasury/Department for Business, Innovation and Skills, 2011).

<sup>285</sup> *Ibid.* para. 1.62, at 37.

completions in 2009/10 fell to historically low levels<sup>286</sup> even with some increase in social sector output across the UK as a whole. While rapid falls in construction have occurred in previous housing slumps, this is the worst decline since 1945.<sup>287</sup> 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 scheme will be financed mainly through adjustments to the Formula Grant<sup>288</sup> provided by central to local government, implying redistribution towards areas with higher building rates. Since it is cash-limited, this measure can be expected to reinforce the regionally regressive nature of the council tax.

The government's stated intention is to increase supply, but with the abolition of targets,<sup>289</sup> the risk is that the present low levels of building will be used as a wholly misleading benchmark against which to measure the success of the policy. Already there is considerable evidence that the abolition of regional targets has led to reductions in the number of homes planned by local authorities.<sup>290</sup> It is therefore crucial that the New Home Bonus is monitored carefully to establish whether it is a suitable mechanism and whether it provides sufficient incentives for development.

What has been said so far decides policy developments both England and Wales, but the two have become divided since the devolution of powers to the Welsh government in 2006.<sup>291</sup> After devolution the Welsh National Assembly legislative powers extended to housing, housing finance, encouragement of home energy efficiency and conservation, regulation of rent, homelessness, residential caravans and mobile homes. Wales began operating a housing policy distinct from that generated at Westminster, resulting in notable developments and a distinctive approach. 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.<sup>292</sup>

## **Wales**

In July 2001, prior to the devolution of powers to the Welsh Assembly in respect of housing and other related matters, the National Assembly approved the National Housing Strategy for Wales tagged 'Better Homes for People in Wales'. This set out a long-term vision for housing, including the expectation that the physical standard and condition of existing housing ought be maintained and improved to the Welsh

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<sup>286</sup> 'Live Tables on House Building – Table 209: Permanent Building Completed by Tenure and County'. (London: Department for Communities and Local Government)

<[www.gov.uk/government/statistical-data-sets/live-tables-on-house-building](http://www.gov.uk/government/statistical-data-sets/live-tables-on-house-building)> 19 January, 2013.

<sup>287</sup> M. Ball, *The Housebuilding Industry: Promoting Recovery in Housing Supply*, (London: Communities and Local Government, 2010).

<sup>288</sup> The blanket term given to the main sources of general government funding for local authorities.

<sup>289</sup> *The Coalition: our programme for Government*, (London: Cabinet Office, May 2010), p. 11.

<sup>290</sup> 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.

<sup>291</sup> Government of Wales Act 2006 sch. 7.

<sup>292</sup> *One Wales: A Progressive Agenda for the Government of Wales*, (Welsh Assembly Government (WAG), June 2007).

Housing Quality Standard, subsequently introduced in 2002.<sup>293</sup> Social housing should be in a good state of repair, safe and secure, adequately heated, fuel efficient and well insulated, contain up-to-date kitchens and bathrooms, well managed, located in attractive and safe environments, and as far as possible, suits the specific requirements of the household.<sup>294</sup> 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. Nevertheless, there continues to be some increase in the local authorities' housing stock which forms a significant part of the Welsh Housing Stock.<sup>295</sup> Achieving the Welsh Housing Quality Standard also includes significant improvements in energy efficiency. In this regard, beyond the social sector, the private sector was specifically included within the second phase of the Arbed energy efficiency programme.<sup>296</sup>

The Welsh Government has a ten-year homelessness plan which places greater focus on supporting young people to live in the private rented sector. The plan focuses on tackling the root causes of homelessness.<sup>297</sup> The government supports services to work with young people to develop shared living skills, and with landlords to broker tenancies and difficulties in landlord tenant relationships to enable the private sector become involved in the reduction of homelessness. Tackling the challenges of managing support for the vulnerable has been an area of strategic policy development in Wales. Quite recently the government has introduced the Supporting People budget for housing related support. This is ring fenced, giving support services greater protection from spending cuts than their counterparts in England or Scotland where such ring-fencing is not in place.<sup>298</sup> The programme runs on enhancing support in people's own homes or in hostels, sheltered housing, or other specialist supported housing. It provides complementary support for people who may also need personal or medical care.

The growth of the private rented sector in Wales has led to a focus on how the sector might be expanded by attracting institutional finance to build more homes for private renting.<sup>299</sup> When this finance scheme is coupled with the increased emphasis on stock transfer, private housing would increase.

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<sup>293</sup> *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).

<sup>294</sup> For example, specific disabilities.

<sup>295</sup> With 237,217 social landlord dwellings, in Wales at 31 March 2012. See *Social Housing Stock and Rents*, as at 31 March 2012 (Welsh Government, 2012)

<[wales.gov.uk/topics/statistics/headlines/housing2012/120726/?lang=en](http://wales.gov.uk/topics/statistics/headlines/housing2012/120726/?lang=en)> 15 January, 2013.

<sup>296</sup> Established in 2009 to bring environmental, social and economic benefits to Wales and coordinate investment into the energy performance of Welsh homes. The second phase of the Arbed programme started in May 2012 to improve the energy efficiency of a minimum of 4800 existing homes in Wales by the end of 2015. 'Arbed - Strategic energy performance investment programme' <[www.wales.gov.uk/topics/environmentcountryside/energy/efficiency/arbed/?lang=en](http://www.wales.gov.uk/topics/environmentcountryside/energy/efficiency/arbed/?lang=en)>, 17 January 2013.

<sup>297</sup> *Ten year homelessness plan for Wales 2009-2019*. (Cardiff: WAG, 2009).

<sup>298</sup> *Supporting People Programme Grant (SPPG) Guidance* (Welsh Government, 2012), p. 8. <[www.sirgaerfyddin.gov.uk/English/health/SupportingPeople/Documents/spguidance2012.pdf](http://www.sirgaerfyddin.gov.uk/English/health/SupportingPeople/Documents/spguidance2012.pdf)> 10 December, 2012.

<sup>299</sup> P. Williams, N Salisbury & R. Caven, *Opportunities for institutional investment in affordable housing: Report to the HCA Housing Finance Group 2001* (Cambridge: Cambridge Centre for Housing and Planning Research, 2011).

The process of turning these proposals into legislation has begun, as already described.<sup>300</sup>

- **Are there measures against vacancies (e.g. fines or forced assignments of vacant houses)?**

New powers to make Empty Dwelling Management Orders were introduced in England and Wales<sup>301</sup> from April 2006 and allow councils with housing responsibilities to take over the management of some residential properties that have been empty for more than six months. It does not have to be run down or uninhabitable. The fact that it has not been lived in for more than 6 months may be enough to allow an Empty Dwelling Management Order to be made.

- **Are there special housing policies targeted at certain groups of the population (e.g. migrants)?**

Certain housing policies are targeted at specific groups of people. One example is the HomeBuy programme to enable key workers (medical staff, police, teachers, fire fighters, and prison officers) easier access to housing. Other schemes are targeted at those on low incomes and first time buyers.<sup>302</sup>

### **Functions and objectives of housing policies**

The general targets of any housing policies are a stable, affordable and accessible housing linked to health, justice and community support services, helping people live independently and improve life opportunities related to family, work, education, recreation or other pursuits. Such policies are to promote community wellbeing through better provision of housing to meet diverse community needs. The most frequently cited objectives involve appropriateness and affordability in relation to the needs of people. Appropriate housing meets the needs of residents in terms of size, physical attributes and location. Housing should be of a sufficient standard that it is safe and does not affect the health or wellbeing of household members in a negative way. It should accommodate the daily requirements of residents, and allow sufficient space and privacy for all. If household members have special needs, their housing must also accommodate them adequately.

Policies should also promote a range of housing that is affordable to households of varying financial capacity, including an adequate supply of housing that is affordable for low and moderate or those who are most likely to be having difficulty accessing affordable housing on the private housing market. Housing affordability is commonly measured in relation to the proportion of income spent on housing costs. Housing policy also seeks to provide housing choice by encouraging housing of different types, size and tenure in suitable locations, at a range of prices within the reach of households of varying financial capacity. This requires the availability of an

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<sup>300</sup> See above, 1.1, pp 5-6.

<sup>301</sup> Housing Act 2004 ss 132-147.

<sup>302</sup> See above, 1.4, p. 21.

appropriate and diverse range of housing that is accessible to households from different socio-economic groups within the community. The goals also include providing housing in a way that contributes to the sustainability of communities and is compatible with the goal of environmental sustainability in relation to the construction of new housing and maintenance of existing stock.

### **3.4 Urban policies**

The United Kingdom has a system 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. 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.

The downturn in housing supply in recent times could be traced to the Conservative's housing policy in Thatcher's government which aimed to minimise public expenditure on housing, among other objectives. Net capital spending was cut from £6 billion in 1979/80 to only £1.2 billion in 1988/89, a decline of 80%.

Urban areas will tend to see more rise in population unless there is a policy adjustment to create more jobs and opportunities in rural areas,<sup>303</sup> and consequently more new homes will need to be built. As a result of the congestion in urban areas the options then will be to use brownfield or greenfield sites. The latter are cheaper to build on, but they involve loss of countryside and may encourage commuting and traffic congestion. One possibility is the construction of eco-towns like those announced at Whitehill, Bordon and Ebbesfleet.

- Are there any measures/ incentives to prevent ghettoisation, in particular by mixed tenure type estates<sup>304</sup>**

Planning policy across the UK has also sought to create tenure mix and at the same time boost affordable housing supply through facilitating homeownership. Mixed tenure has become a predominant development and regeneration strategy over the past 15 years. After a period of renewed expansion of owner-occupation and cutback on council housing under successive governments of the 1980s and 1990s social mix has again received policy attention.

Mixed communities provoke dissatisfaction by bringing together the affluent and the poor. However, the government of the 1990s stated a preference for mixed tenure communities for social housing estates. This is reflected, for example, in the final report of the Rogers' Urban Task Force:<sup>305</sup> 'Whether we are talking about new settlements or expanding the capacity of existing urban areas, a good mix of incomes and tenure is important...' Initiatives that extend the mix of tenures and incomes on social housing estates have consistently led to an improvement in property prices, lower turnover and increased demand for homes that are vacated. They have also led to higher levels of tenant satisfaction and a better reputation for stigmatised neighbourhoods among outsiders.

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<sup>303</sup> Planning policies protect many rural areas, and these are also affected by the phenomenon of NIMBYism (Not In My Back Yard).

<sup>304</sup> Mixed tenure means that flats of different tenure types: rented, owner-occupied, social, etc. are mixed in one estate, it is the simplest way of avoiding homogenised communities, and to strengthen diversification of housing supply.

<sup>305</sup> [www.richardrogers.co.uk](http://www.richardrogers.co.uk).

Mixed tenure is sometimes viewed as a covert way of reducing council stock as tenants whose financial circumstances change for better may wish to stay on in their current location. If that happens they may opt for the option to exercise their right to buy the property. Plausible suggestions for ideal tenure proportions are that dominance by any single tenure should not exceed 50%, which would produce an even split in many cases; or that the mix should reflect the national owned-to-rented ratio. The government requirement is 60:40 for schemes it backs under the Private Finance Initiative.

Tenure mix communities are mainly made up of properties to buy on the open market, properties to buy on an equity share basis, and properties to rent. Growing concerns about housing affordability and segregation between communities has meant that mixed tenure and mixed income housing developments may increasingly be encouraged. On new housing developments, which mix affordable housing alongside market-priced housing, the goal should be to achieve more balanced communities, income mix and social mix. This may be because of findings by researchers which put areas dominated by owner occupiers in more favourable footing than others. A study conducted by Mason and Kearns<sup>306</sup> found that higher levels of social rented housing and more even tenure mix are both associated with greater recognition of neighbourhood problems and desire for improved local facilities and services. It further found that social renters may gain from living in areas with high levels of owner occupied housing.

- **'pepper potting' and 'tenure blind'**

Pepper potting is the practice of allocating numbers of units rather than specific properties to affordable housing in development and planning agreements. It recognises and reflects the way a property could move through the tenures from tenancy, through to owner-occupation usually under right-to-buy. The aim is to replace single tenure, low income and deprived estates with a mix of income and different tenure households. It is anchored on improving homes, schools, the public realm, retail, leisure and transport around an area. These improvements will attract potential owner occupiers to live in the area and hope to retain those residents who are affluent.

The difficulties with developing a scheme in a pepper potted layout include the problems of integrating houses, which are often required by the social rented sector to accommodate families with children, and private sector flats, necessary for diverse financial reasons. The management of common areas can also provide an area of difficulty and some registered social landlords prefer clustering. Phasing development can also be difficult, with financial pressures driving either private sales in the first phases of a large development, or the private sector needing to provide leadership and boost market confidence.

The social benefits of pepper potting could be uncertain. In a survey of the range of experience of local authorities and registered social landlords, it was found that either "clumping" or "pepper potting" had an influence on the "sense of community". It was found that, while tenants and owners did not mind living near to each other,

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<sup>306</sup> A. Kearnes and P. Mason, 'Mixed Tenure Communities and Neighbourhood Quality' *Housing Studies*, 22(5): 661-691.

"more resistance was apparent as proximity between tenures increased".<sup>307</sup> Friction has also been reported on developments where social housing tenants with children are located adjacent to childless higher income owner occupiers. In Poundbury first phase, Thompson-Fawcett<sup>308</sup> found children's play became an issue for the Residents' Association. This had a tenure dimension as a higher proportion of tenants comprised families with children in comparison to the owner occupiers. Objections were raised as to children playing in the mews streets and courtyard parking areas and cycling in the lanes. A new play area on the periphery of the development was planned instead, contrary to the original design intentions of the masterplan. The evidence from these studies suggests that a prescriptive rule for good design that includes pepper potting and exact resemblance of architectural design may be difficult to achieve in practice. Moreover, it is unclear whether the benefits regarding social mixing outweigh the financial and practical difficulties that can arise. Furthermore, the degree of dispersal involved in pepper potting bears the consequence that the development of a large number of social rented or affordable units is impossible unless a very large scale of building is attempted.

Tenure blind development has two components. The first is that housing from different tenures should be indistinguishable from each other with regard to their external architectural treatment and the second is that units from different tenures should be inclusive throughout the development. Pepper potting is being adopted in practice by UK government development agencies. At Upton, one of the nine good practice case studies, a representative from a registered social landlord explained that a pepper potted layout had been imposed on them by English Partnerships, the government regeneration agency that owned the land: Pepper-potting is in the agreement: no more than three social housing houses together, no more than four social housing apartments adjacent to one another.

- **public authorities "seizing" apartments to be rented to certain social groups**

This practice is not known in England and Wales.

- **Are there policies to counteract gentrification?**

This may be an aspect of local planning policy.

- **Are there any means of control and regulation of the quality of private rented housing or is quality determined governed only by free market mechanisms? (does a flat have to fulfil any standards so that it may be rented? E.g.: minimum floor area, equipment, access to technical and/or social infrastructure and/or public transport, parameters such as energy efficiency, power/water consumption, access to communal services such as garbage collection. If so: how are these factors verified and controlled?)**

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<sup>307</sup> T. Beekman, F. Lyons and J. Scott, *Improving the Understanding of the Influence of Owner Occupiers in Mixed Tenure Neighbourhoods*, (Edinburgh: Scottish Homes, 2001); P. Rowlands, A Murie and A. Tice, 'More than Tenure Mix: Developers' and Purchasers' Attitudes to New Housing Estates (York: Joseph Rowntree, 2006).

<sup>308</sup> M. Thompson-Fawcett, 'Urbanist Lived Experience: Resident Observations on Life in Poundbury' *Urban Design International* (2003) 8, 67-84.

As the demand for rented accommodation grows, many people are priced out of decent homes and forced to accept properties in poor conditions. This has resulted in many of the dwellings managed by private landlords remaining in such poor states. But quality of housing is not entirely left to market forces.

The landlord is required to keep the property in a state that will not constitute hazard to his tenants. He is to look after the exterior of the dwelling and structural elements of the dwelling, and the inside facilities which are part of the dwelling. Water, gas and electricity must be provided and have whatever is needed for their proper use. All equipment necessary to supply these utilities must be fully, safely and correctly installed. There must also be personal hygiene installations such as proper wash hand basins, showers and/or baths. The dwelling must also have sanitation and drainage covers lavatories, WC basins, drains, waste pipes, food safety covers sinks, draining boards, work tops, cooking facilities (or cooker points and space for cooking facilities), cupboards and/or shelves for storing cooking and eating utensils and equipment. It also required that food storage facilities which are usually just electricity sockets and refrigerator space be provided. Space and water heating installations, that is, any kind of fitted space heating appliances or central heating system must also be provided. This could include any kind of fitted water system for providing the instant or stored heated water.<sup>309</sup> Under the Housing Health and Safety Rating System under Part 1 of the Housing Act 2004, inspectors look at specific health and safety areas and score each hazard they find as either category 1 or 2, according to its seriousness. Landlords must take action to fix category 1 faults which are the most serious hazards. In certain circumstances, the local council can undertake the repairs themselves and claim the costs back from landlords.

There are also specific controls on Houses in Multiple Occupation.<sup>310</sup>

- **Does a regional housing policy exist? (in particular: are there any tools to regulate housing at regional level, e.g.: in order to prevent suburbanisation and periurbanisation? Is it possible to distribute local taxes so that villages can afford the limitation of housing areas?)**

The Government Offices for the Regions were established across England in 1994, reflecting a number of government departments that aimed to work in partnership with local people and organisations in order to maximise prosperity and the quality of life within their area. The Government Offices for the Regions were built up of complete counties/unitary authorities so although they were subject to change they always reflected administrative boundaries as at the end of the previous year. Scotland, Wales and Northern Ireland were not subdivided into the regions but are listed with them as regions in UK-wide statistical comparisons. After the Comprehensive Spending Review in 2011 it was confirmed that the Offices for the Regions would close on 31 March 2011, shifting focus away from regions to local areas. Until 2011, they were the primary means by which a wide range of policies and programmes of the government of the United Kingdom were delivered in the regions of England. Consequently housing policy on regional peculiarities did not survive the closure of the Offices for the Regions. The impact of neighbourhood characteristics on demand across the different regions, as well as heterogeneity in

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<sup>309</sup> Housing Act 2004, Part 1; 'Housing Health and Safety Rating System Guidance for Landlords and Property Related Professionals', (London: Department for Communities and Local Government, 2006).

<sup>310</sup> See below, 6.4, pp 170-171.

these relationships, might have some potentially important implications for housing policy on a regional basis. Other factors like access to education and level of employment could affect housing demand differently across all the regions of England.<sup>311</sup> But any research on the basis of the regions will be academic on the ground of the closures of the Government Offices for the Regions.

The current agenda favours greater localism.<sup>312</sup>

### **Urbanisation and peri-urbanisation**

Urban areas are expanding due to a combination of population growth and outward spread of urban activities. The result is that urban and rural areas are no longer separate territories. The newly emerging areas, known as “peri-urban” areas elude categorisation as either urban or rural, and are the centres of most dynamic changes in the society. But urban areas still maintain a great deal of the activities and the reputation that made them urban.

A key indication of urban areas is the demand for labour and the attendant population flow towards such areas. Thus commuting towards the urban areas is a response to meeting the challenges of providing housing for the growing population. While commuting is the immediate response, long term reaction is the creation of outskirt residential areas and the upgrading of other towns to peri-urban status. In England commuting is stretched out along a corridor from London to Manchester. An important change between 1991 and 2001 is a widening of the corridor that can be explained as the result of the de-concentration of population and jobs in combination with increasing commute distances allowing rural areas to be connected with the jobs and services of the centres in the corridor. The corridor runs from London through Birmingham to Leeds, Manchester and Liverpool. The corridor was already established in 1991 but widened considerably between 1991 and 2001, especially around Birmingham and between Birmingham and London. Within this corridor the largest urban centres experience high levels of commuter flows and a build-up of flows towards these areas. London is at the top of the order with the highest flow of commutes at 616,000 commuters in 2011. Birmingham and Manchester follow with commuter flows around 196,000 and 229,000 commuters respectively as the highest level reached in the centre of the city in 2011.<sup>313</sup> Cardiff was the most commuted destination in Wales with about 77,000. Other urban areas in Wales like Swansea and Newport were slightly short of 30,000.

The general de-concentration tendency that seems to affect commuting in England and Wales is likely to be explained by the de-concentration of populations and jobs as well as the increase in commute distances accompanied with a preference for combining rural living with the specialised jobs and services located in urban areas. The widening of the interaction corridor therefore translates into an expanded peri-

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<sup>311</sup> G. Cameron & J. Muellbauer, ‘The Housing Market and Regional Commuting and Migration Choices,’ *Scottish Journal of Political Economy* 45, 1998: 420-446.

<sup>312</sup> Localism Act 2011.

<sup>313</sup> ‘Commuter Flow from the Annual Population Survey, 2010 – 2011’ <[www.neighbourhood.statistics.gov.uk/HTMLDocs/CommuteAPS/atlas.html](http://www.neighbourhood.statistics.gov.uk/HTMLDocs/CommuteAPS/atlas.html)>, 16 May, 2013; T. Alexander, S. Nielsen & H.H. Hovgesen, ‘Exploratory Mapping of Commuter Flows in England and Wales’, *Journal of Transport Geography* 16, no. 2 (2008): 90-99.

urban area or an extended urban field organised around the corridor much more than individual urban centres.

While residing in the City of London is very expensive and most people commute to work in the centre from non-central parts of London, the average price of housing in London is currently significantly above the average of England and Wales.<sup>314</sup> The periurbanization process has pushed prices up in South-East Anglia. Moreover, the annual increase over the last year was higher in East Anglia which is periurban ring of London than in London itself or England and Wales average.

The average household size in England has progressively declined from about 4.5 persons in 1901 to less than 2.4 persons in 2001. It is expected to decline further, in response to various social trends, from the present 2.3 to 2.1 persons by 2026.<sup>315</sup> A predictable outcome is increased demand for additional housing. A Department for Environment, Food and Rural Affairs-study, commissioned to assess the environmental impact of increases in the supply of housing in the UK estimated that a further 2.24 million dwellings will be completed just in England alone during the 15-year period 2001-2016. This figure is based on current completion rates and growth areas provision under the Communities Plan. This is equivalent to about 150,000 dwellings per annum, and the estimated land take for this residential urbanisation alone would be 785 km<sup>2</sup>, about 60% of which will be on previously undeveloped, or green field, sites.<sup>316</sup> About 60% of the projected household growth to 2026 will be in London and the East, South East, and South West Regions. Scenarios in the Department for Environment, Food and Rural Affairs report that take into account an increased supply of new housing, to meet projected shortfalls in demand, suggest that the completions and corresponding land take requirements could be up to 4.52 million dwellings and 1479 km<sup>2</sup> respectively.

Suburban land is by far the most important urban land use category, estimated to typically occupy around two-thirds of all urbanised land. An estimation of even the baseline housing completions rate of 150,000 per annum to 2051 would mean almost 7.5 million new dwellings constructed in England alone. If the governmental target of 60% new housing on pre-developed land cannot be achieved and maintained, the rate of land taken from presently rural land uses is certain to rise.<sup>317</sup>

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<sup>314</sup> In 2011 London, the South East and East of England were the only areas with Gross Domestic Household Income per head above the UK average of £16,034. Northern Ireland and Wales were the only regions where Gross Domestic Household Income per head was below the UK average. See 'Regional Gross Domestic Household Income 2011' <[www.ons.gov.uk/ons/rel/regional-accounts/regional-household-income/spring-2013/stb-regional-gdhi-2011.html](http://www.ons.gov.uk/ons/rel/regional-accounts/regional-household-income/spring-2013/stb-regional-gdhi-2011.html)>, 14 May, 2013. The data are from www.landreg.gov.uk and were represented in the article of Christoffer Adams published in the *Financial Times*, 26 February 2001. See Y. Yegorov, 'Spatial Structure of Wages and Rents' (2001) <[www.eres.sciex.net/data/works/att/eres2001\\_303.content.pdf](http://eres.sciex.net/data/works/att/eres2001_303.content.pdf)>, 15 April, 2013.

<sup>315</sup> Government Actuary 2007.

<sup>316</sup> London: Department for Environment, Food and Rural Affairs, 2004.

<sup>317</sup> B. Morris & J. Cunningham, 'Suburbanisation of Important Aquifers in England and Wales: Estimating its Current Extent' *Water and Environment Journal*, 22 (2008): 88–99.

### 3.5 Energy policies

In the UK the government has a target of reducing greenhouse gas emissions by 80% on 1990 levels by 2050. In addition there are statutory targets to ensure that no household is in fuel poverty by 2016.<sup>318</sup> Meeting the ambitions of the government will require considerable improvement in energy efficiency beyond that already installed. The government makes use of a Standard Assessment Procedure to calculate the energy performance and efficiency of a dwelling. The calculation takes into account the size, shape and physical characteristics of the house, including insulation levels, to estimate the rate of heat loss through walls, roofs, windows, doors and floors. It also uses information about a property's heating system, in particular its efficiency in converting a particular fuel into heat.

The Standard Assessment Procedure calculation makes a set of standard assumptions on the heating regime, hot water, lighting, appliances and occupancy patterns of every dwelling. A standard heating regime is assumed, whereby the living space<sup>319</sup> is heated to 21°C and the rest of the house to 18°C for nine hours during weekdays and for 16 hours at the weekend. This is defined by the government as the amount of heating needed to maintain an adequate level of warmth in a home. Combining these assumptions with the physical characteristics of a property allows for a calculation of the amount of fuel required to heat a dwelling to this standard. Fuel costs and carbon emission factors can then be applied to these estimates of energy needed in the home in order to ascertain the total cost and associated carbon emissions. Finally, a Standard Assessment Procedure rating is calculated, on a scale of one to a hundred, which provides an overall indicator of the energy performance of a dwelling.

The Supplier Obligation appears to be the most important instrument to deliver energy and carbon savings in the domestic sector.<sup>320</sup> The basic concept of the Supplier Obligation is that Government imposes a savings target on energy companies that has to be achieved at the customer end. The target may relate to energy consumption or carbon emissions. The target is set by the Department of Energy and Climate Change for a defined period of time. The energy regulator, Office of Gas and Electricity Markets, is responsible for administering the Supplier Obligation and enforcing it. It defines individual savings targets for each energy company. The energy companies then contract installers of 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.<sup>321</sup> In social housing the attention for energy efficiency among landlords has been stimulated among others

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<sup>318</sup> I. Preston, et al., 'Distribution of Carbon Emissions in the UK: Implications for Domestic Energy Policy' (Joseph Rowntree Foundation, 2013).

<sup>319</sup> Usually defined as the living room.

<sup>320</sup> 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.

<sup>321</sup> 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.

by the introduction of the Decent Homes Standard.<sup>322</sup> 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<sup>323</sup>

The Planning and Energy Act 2008 enshrines in law the policy that at least 10% of the new energy required must come from renewable or low-carbon sources on or near any development. The aim was to reduce the amount of energy that had to be brought in from miles away and to encourage microgeneration and more energy-efficient buildings, which would use less energy in the first place. A local planning authority in England and Wales may in their development plan documents or local development plan impose reasonable requirements for a proportion of energy used in development in their area to be energy from renewable sources in the locality of the development; a proportion of energy used in development in their area to be low carbon energy from sources in the locality of the development; and development in their area to comply with energy efficiency standards that exceed the energy requirements of building regulations.<sup>324</sup> This will increase use of local energy, including on-site and near-site green energy, in new developments. Although this might not be a realistic outcome, it could also protect against the possibility of there being no policy in relation to renewable energy.<sup>325</sup>

The intention is that homes newly built after 2016 should meet a zero carbon standard.

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<sup>322</sup> 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.

<sup>323</sup> 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.

<sup>324</sup> Planning and Energy Act 2008 s. 1.

<sup>325</sup> M. Grekos, "Environmental Audit Committee: the structure and operation of government and the challenge of climate change", *J.P.L.* 2007 (Oct): 1453-1454.

### **3.6 Subsidization**

- Are, and if yes, to what extent, different types of housing subsidized in general (give overview)?
- Explain the different forms of subsidies for tenants, (certain) landlords and, if relevant, housing associations or similar entities acting as intermediaries (e.g. direct, by means of investment loans, tax privileges). Which level of government is competent to assign the subsidies? Is there a right to certain subsidies or does the public administration have discretion in whom to assign the subsidy?
- Have certain subsidies been challenged on legal grounds (in particular: on the basis of competition law or budget law)?

#### **Subsidization**

British housing policy has been marked by deep supply side subsidies for public social housing accompanied by extensive housing allowances on the demand side. The UK is unusual in European terms in offering large scale demand subsidies in the subsidised rental sector.<sup>326</sup> However, the Coalition government elected in 2010 is implementing root and branch reform of subsidy in both the public and the social sector. The overall shift to the demand side can be seen as bipartisan.

Public expenditure on housing has declined sharply in real terms. Relative to overall government spending, housing expenditure fell from 5.6% in 1980/81 to 1.3% in 1999/2000 and was still only 2.7% in 2008/09.<sup>327</sup> This decline in direct housing expenditure as a proportion of government expenditure, has been accompanied by a shift from supply-side subsidy to demand-side subsidy.<sup>328</sup> The low rent approach which had characterised the previous period was replaced by a policy to raise rents in real terms and replace subsidies by means-tested housing allowances. These steps represented a significant break with the past.<sup>329</sup>

#### **Subsidy for public and social housing 1980-2010**

The system of support for local housing authorities was introduced in 1988. At present Housing Revenue Account subsidy is paid each year<sup>330</sup> at a level set by the Secretary of State<sup>331</sup> with a width of discretion judicially described as 'remarkably wide'.<sup>332</sup> 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. Those authorities who were

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<sup>326</sup> 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.

<sup>327</sup> S. Wilcox & H. Pawson, *UK Housing Review* 2010-2011 (Chartered Institute of Housing, 2011)

<sup>328</sup> In the form of housing benefit, council tax benefit and the like.

<sup>329</sup> Alan Murie, "Housing", in: M. Loughlin, D. Gelfand & K. Young (Eds) *Half a Century of Municipal Decline?* (London: Allen and Unwin, 1985), pp 187-201.

<sup>330</sup> Local Government and Housing Act 1989 s. 79.

<sup>331</sup> *Ibid.*, s. 80.

<sup>332</sup> *R. v. Secretary of State for the Environment ex p. Greenwich LBC* (1990) 22 HLR 543, 546, Farquharson L.J.

determined to operate a notional surplus were required to make a payment to central government; local authorities determined to operate a notional deficit received a subsidy. The overall purpose of this redistribution of housing revenue was to enable all authorities to deliver a similar level of service while charging a similar level of rent. Legislation provides for the abolition of Housing Revenue Account subsidy in England<sup>333</sup> and the transfer of competence for Wales to the Welsh Government and the Welsh Assembly.<sup>334</sup> 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.<sup>335</sup>

Subsidy has been concentrated on housing associations in order to provide new build social housing since its introduction in 1977. By the mid-1990s they had become the main providers of social housing. The regime was set in 1988 allowing them to borrow (collective borrowing in 2006 amounted to £30 billion, though at least this sum if outside the Public Sector Borrowing Requirement) but this supplemented by capital grants (reduced over time from 100% of cost to 50%). 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. Output under Labour was low, but an attempt was made in 2008 to boost output by providing £8.4 billion through the Homes and Communities Agency to produce 155,000 homes a year for three years.<sup>336</sup>

Social housing grant in the three years to 2011 amounted to at least £8 billion. 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. An important consequence of generous subsidies was that rents charged in the public and social sectors were well below market rates. At present there are very few areas, all in the north, where social rents are set at 80% of market rents, and these are all areas where private sector rents are low. There has been a drive to raise rents in recent years. Housing supply is assisted by the provision of subsidized 'affordable' homes for key workers, in the police, fire, and ambulance services. Vulnerable groups will always require direct provision.

Very substantial sums have been invested since 2000 in the Decent Homes programme intended to improve the quality of (especially) public and social housing.

### **Subsidy of public/social housing by the Coalition**

The primary objective of the Coalition government is to remedy the structural deficit and this has led to large reductions in public expenditure. As a result 2010 saw large reductions in capital grant. The Coalition has aimed to give greater local freedom to local housing authorities, continuing and widening the greater powers of investment

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<sup>333</sup> 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.

<sup>334</sup> Public Bill Committee, 22nd Sitting, (Hansard, House of Commons, March 8, 2011) col. 866.

<sup>335</sup> H. Pawson and S. Wilcox, *UK Housing Review 2013*, (London: Chartered Institute of Housing, 2013).

<sup>336</sup> 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).

conferred by New Labour. Each authority now has control of its own budget and must seek to break even on its housing account.

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.<sup>337</sup>

### **Subsidy of the private sector**

Traditionally home ownership was encouraged by providing income tax relief on mortgage payments, but this had been removed. This was removed in the 1980s. 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.<sup>338</sup> In theory this should not cost the government anything since it is merely a guarantee against default – if the government has the maths right on this. 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.<sup>339</sup>

### **Housing benefit**

Housing benefit is paid to tenants irrespective of the sector in which they are renting. Private sector claims have recently been subject to significant measures to curtail the cost of Housing Benefit in that sector.

Housing benefit was introduced in 1972/1973, but the current single benefit was introduced in 1988. As from October 2013 it is gradually being phased out in favour of a universal credit. The benefit is a means tested benefit provided by the state by administered by local authorities. It provides for support with housing costs across the rental sectors, including public, social and private. Currently two thirds of social renters and a quarter of private renters receive housing benefit, and claims are increasing.<sup>340</sup> In 2010 it cost £20 billion – 3% of all government spending.<sup>341</sup> 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. More households are becoming reliant on housing

<sup>337</sup> 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.

<sup>338</sup> See above 1.4, p. 21.

<sup>339</sup> 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).

<sup>340</sup> 'English Housing Survey Headline Report 2012-13' paras 1.35-144; the gross annual income of a couple claiming the benefit is £12,000.

<sup>341</sup> 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).

benefit, to the point that the overall cost is in excess of £20 billion.<sup>342</sup> A shift in subsidy in favour of investment in supply by reducing the cost of housing at source to make them more affordable for households on low incomes, for example by investing in council houses; or by increasing households' incomes such as through housing benefit to enable them to access accommodation or cope with a temporary loss of income. 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.

The Department for Work and Pensions has said the overall cost of housing must be controlled and reduced, in the light of the budget deficit,<sup>343</sup> and more incentive given to seek work. Consequently there is now a cap<sup>344</sup> on housing benefit with a maximum of £350 per week housing benefit for a single person and £500 in all other cases. The policy was driven by the need to tackle budget deficit but it also shows a more hands-on approach to dealing with housing policies and practices that are not in tune with today's realities. However, the resulting effect of this may be that housing benefit claimants may increasingly seek to have alternative means of housing than reliance on Housing Benefit regardless of the individual circumstances. Claimants may be under pressure to find work or forced into homelessness should they be unable to cope with the amount paid as housing benefit.

Much recent attention has focused on under-occupation in the social rented sector. In England some 400,000 social houses are under occupied by two or more bedrooms.<sup>345</sup> The rate of under-occupation in social rented housing is around 12% and in every region other than in London, it exceeds the rate of overcrowding. 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 be under-occupying their home. Half a million households have been subject to the charge since it was introduced, and it is said that 2/3rds of these households are now in arrears with their rent. Tenants in all sectors are affected by the 'under-occupancy charge' or 'bedroom tax' as it has been labelled by the political opposition. Families living in accommodation larger than they are deemed to need will receive less housing benefit from the beginning of April 2013. Those with one spare bedroom will lose 14% of their housing benefit, while those with two or more spare bedrooms will lose 25%. The new rules allow one bedroom for each adult or couple. Up to two children under the age of 16 are expected to share, if they are the same gender.<sup>346</sup> Those under the age of 10 are expected to share whatever their gender. It is hoped that this policy move will result in £490m savings for the taxpayer in 2013-14. The

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<sup>342</sup> Department of Work and Pensions, Benefit Expenditure Tables, Budget 2011, 2011.

<sup>343</sup> 'Impact Assessment of Housing Benefit Changes' (London: Department of Work and Pensions, 2010), 1.

<sup>344</sup> Benefit Cap (Housing Benefit) Regulations 2012.

<sup>345</sup> A. Clark & P. Williams, *Under Occupation and the New Policy Framework - A Report to the Housing Futures Network as Part of Facing the Future* (Cambridge Centre for Housing and Planning Research, 2011); 'English Housing Survey Headline Report 2012-13' paras 1.62-1.63.

<sup>346</sup> Termed the single room subsidy by ministers, or the "bedroom tax" by Labour. Families with severely disabled children, foster carers and families of armed services personnel will be exempt.

government estimates that more than 660,000 claimants will be affected, with an average loss of £14 per week.<sup>347</sup>

Further controls are proposed on EU migrants; they will have to have earned £150 a week for more than three months before they can claim housing benefit and most other benefits.<sup>348</sup>

## **Summary**

Thus the current consensus is that demand side subsidy through housing benefit is more efficient than subsidy, and the Coalition moves to remove supply side subsidy has been widely welcomed. The fact remains that housing benefit is providing a very large subsidy to private landlords, increasing market rents.

**Summary Table 5 - Subsidization of landlord**

	<b>Private Landlords</b>	<b>Private Registered Providers of Social Housing</b>	<b>Local Authority</b>
Subsidy before start of contract	Build to Rent scheme.	<ol style="list-style-type: none"> <li>1. Providing public land, free or at discounted value.</li> <li>2. Homebuy grant –equity loan for agreed % of purchase price.</li> <li>3. Housing Gap Funding – increase owner occupation stock from social/ regeneration perspective.</li> </ol>	
Subsidy at start of contract		Ditto -	
Subsidy during tenancy			Rent Rebate - subsidy on rebates on Local Authority housing.

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<sup>347</sup> 'Benefit changes: Who will be affected?' [www.bbc.co.uk/news/uk-21706978](http://www.bbc.co.uk/news/uk-21706978), 15 April, 2013.

<sup>348</sup> *Guardian* 19 February 2014.

**Summary Table 6 - Subsidization of tenants**

	Social Tenants	Private Tenants	Council Tenants
Subsidy before start of contract	-	-	-
Subsidy at start of contract (moving grant)			
Subsidy during tenancy (e.g. housing allowances, rent regulation)	Housing benefit	Housing benefit	Housing benefit
Subsidised acquisition	Right-to-Acquire and preserved right to buy (former council property)		Right-to-Buy

**Summary Table 7 - Subsidization of owner-occupier**

	Home Owners	Shared Ownership
Subsidy before start of contract	Newbuy grant - lets one buy a newly built home with a deposit of only 5% of the purchase price.	
Subsidy at start of contract (e.g. grant)	Help-to-Buy – guarantees loan up to 20% of the price.	<ol style="list-style-type: none"> <li>1. Homebuy grant – equity loan for % of purchase price.</li> <li>2. Help-to-buy – guarantees loan up to 20% of the price.</li> </ol>
Subsidy during tenancy	Capital Gains Tax Relief - allows you to make a certain amount of gains each year before you have to pay tax. <sup>349</sup>	Capital Gains Tax Relief on ownership element

<sup>349</sup> 'Tax-free Allowances for Capital Gains Tax' at <http://www.hmrc.gov.uk/rates/cgt.htm#2>, 6 August, 2013; see below 3.7, pp 85-86.

## 3.7 Taxation

- **What taxes apply to the various types of tenure (ranging from ownership to rentals)?**

There are five main taxes that are wholly or partially incident on housing or housing transactions in England and Wales – council tax, stamp duty, capital gains tax, inheritance tax and Value Added Tax on repairs. What the economy seeks to do is to develop an optimal taxation policy in relation to housing, and manage the impact on the housing market.<sup>350</sup> The way in which the various taxes impact on housing are discussed below.

- **Taxation of landlords: purchase of rental property**

Stamp Duty Land Tax (SDLT) is charged on transactions with land in the UK. The tax is paid by the purchaser at the following rates on residential property:<sup>351</sup>

Purchase price of property	Rate (% total price)
£0 - £125,000 <sup>352</sup>	0%
£125,001 - £250,000	1%
£250,001 - £500,000	3%
£500,001 - £1 million	4%
Over £1 million - £2 million	5%
Over £2 million	7% <sup>353</sup>

The banding system means buyers pay the higher rates of duty on the whole of the value of their property once any threshold is exceeded, leading to sharp jumps and price huddling just below the threshold levels. 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. This can help to inject activity into the housing market. Significant savings can be made by buying within the window provided by the tax holiday.

- **Taxation of landlords: rental income**

Rental income of individual landlords is chargeable to income tax. Income here means the net income from a property that is let so that various expenses incurred in letting the property may be deducted from the income derived from rent received.<sup>354</sup> These expense 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.<sup>355</sup> Landlords which are companies

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<sup>350</sup> Analysis of optimal taxation policies needs to differentiate the value of the house and of the land on which the house sits.

<sup>351</sup> [www.gov.uk/stamp-duty-land-tax-rates](http://www.gov.uk/stamp-duty-land-tax-rates), 25 January 2013. Different dates apply to non-residential and mixed use property.

<sup>352</sup> The limit is £150,000 for registered properties in disadvantaged areas.

<sup>353</sup> Or 15% if the purchaser is a corporate body.

<sup>354</sup> Income is taxable whether derived from a lease or a licence or any other occupation arrangement.

<sup>355</sup> Income Tax Act 2007 part 2 chap. 3; UK Tax Guide 2013-14, Part II.

are required to pay tax on profits in the form of corporation tax.<sup>356</sup> 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.

- **Taxation of landlords: repairs/construction**

Value Added Tax (VAT) rules make an important distinction between supplies of construction services relating to new buildings, and those relating to the alteration or repair of existing buildings.<sup>357</sup> Builders should zero-rate supplies of construction services relating to new domestic buildings, though the standard charge will apply to architects' fees and similar overhead costs (except for 'design and build' contracts). Thus where new houses are built the only VAT commitment will be on overhead costs. This residual tax is not recoverable where the building is for domestic letting. In the event that the brand new house is sold, the sale is zero-rated and therefore the overhead VAT will be recoverable.

Value Added Tax is charged at the standard rate - currently 20% - on all repairs, renovation and maintenance work whatever the status of the building concerned. The construction of new buildings is charged a zero rate, provided the supply in question is for a social purpose.<sup>358</sup> Where building work is concerned with conversions, alterations, enlargements or repairs, VAT will be charged by contractors and others. Usually tax is charged at 20%, but sometimes at 5%. Where, however, the housing will be used for domestic letting, the VAT will generally be irrecoverable and, therefore, part of the landlord's cost. The possibility of harmonising the rate of VAT on all types of construction work is quite often raised – generally on the grounds that this would be an effective tool to encourage urban regeneration, removing an important disincentive for developers to refurbish empty properties. VAT at 20% can represent a heavy additional cost in housing expenditure, especially when landlords see VAT as a cash flow item, not an expenditure which represents a final cost.

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.

- **Taxation of landlords: disposal**

Capital Gains Tax may be paid when a landlord sells a rental property and Inheritance Tax on his death.

Capital Gains Tax is a tax on the profit when one sells an asset that has increased in value.<sup>359</sup> For gains made on or after 23 June 2010 onwards, the rate payable by an individual is 18% and 28% for individuals depending upon the taxpayer's total taxable income.<sup>360</sup> There is also an annual tax-free allowance, currently (2012-2013)

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<sup>356</sup> Corporation Tax Act 2010; *UK Tax Guide 2013-14*, Part IV.

<sup>357</sup> The dividing line between these two categories has been the subject of numerous VAT cases over the years and in an attempt to 'clarify' matters the VAT regulations now spell out the meaning of new building in some detail.

<sup>358</sup> Value Added Tax Act 1994 sch. 8; *UK Tax Guide 2013-14*, Part V.

<sup>359</sup> Taxation of Chargeable Gains Act 1992; *UK Tax Guide 2013-14*, Part III.

<sup>360</sup> 28% for trustees or personal representatives of someone who has died; corporate landlords will pay corporation tax on chargeable gains.

£10,600 for individuals. Some gains qualify for Entrepreneurs' Relief and thus for a 10% rate of tax.<sup>361</sup> The most important relief is the Private Residence Relief which applies where someone sells their principal home, and which removes tax liability completely.<sup>362</sup> This creates a major distortion of the housing market, reinforcing the disparities in taxation between home ownership and private renting, and helping to may fuel the upward spiral of house prices during housing booms.<sup>363</sup> The relief is very popular with homeowners and is designed to bolster owner occupation.

When a landlord dies, the value of his rental properties will be included in the estate on which Inheritance Tax is levied. The estate includes all assets owned at the moment of death and a proportion of the value of any gifts made in the preceding years, but for many people the largest asset is their home or their share in the home. Rented property will be included at its market value. Inheritance Tax is levied at 40% on the part of the deceased's estate exceeding £325,000.<sup>364</sup> No tax is paid when a spouse dies and leaves their property to their spouse.<sup>365</sup> If a person's tax-free allowance is not used on their death, it can be transferred to their surviving spouse or civil partner, enabling a couple to leave double the allowance without paying tax.

A common criticism of inheritance tax is that the threshold at which tax is paid has not kept pace with the rapid rise in house prices prior to the recent downturn. The International Longevity Centre has highlighted how the huge growth in property prices has substantially increased the value of inheritance, which has doubled in the last six years. International Longevity Centre's research suggests that increased inheritance has mainly been recycled into property purchases creating a circular upward pressure on house prices.<sup>366</sup>

- **Taxation of tenants: council tax**

Council tax is the local tax which helps pay for local services. It 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. There is one bill for each home, whether it is a house, flat, bungalow, maisonette, mobile home or houseboat, and whether owned or rented. Homes were banded by value in April 1991,<sup>367</sup> band A being lowest and band G highest.<sup>368</sup> Bands will not be affected by changes in general house prices, though homes may be rebanded as a result of improvements. New homes will be banded on the basis of what they would have been worth on 1 April 1991. Each year the local council sets the level of council tax for each band.

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<sup>361</sup> This reduces tax on the disposal of: all or part of a business, the assets of a business after it has stopped trading, and shares in a company.

<sup>362</sup> Taxation of Chargeable Gains Act 1992 ss 222-226.

<sup>363</sup> T. Crawshaw, *Policy Discussion: Rethinking Housing Taxation – Options for Reform*, (Shelter, 2009), for a discussion of this proposal.

<sup>364</sup> Inheritance Tax Act 1984; *UK Tax Guide 2013-14*, Part VII.

<sup>365</sup> This includes a civil partner but not a cohabitee.

<sup>366</sup> J. Lloyd, *Navigating the Age of Inheritance Tax* (London: International Longevity Centre UK, 2008); BBC News [online], 'Property prices fuel inheritances', 8 May 2008: <http://shltr.org.uk/18>.

<sup>367</sup> Local Government Finance Act 1992 c. 14.

<sup>368</sup> There is an exemption for 'granny flats' a self-contained flat forming part of a larger dwelling, where the occupier of the flat is a dependent relative of the owner of the main property.

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.<sup>369</sup> Carers and those cared for are also ignored for six months after being required to live elsewhere.<sup>370</sup>

There are some exemptions of which the most important and controversial is for vacant dwellings. In **England**: a property<sup>371</sup> which is empty (both of occupiers and of furniture) is exempt for up to six months. Once this six-month period expires and until the property becomes occupied again local authorities have discretion as to whether to apply a discount of up to 50% or to charge full council tax on the property, provided that the property remains unoccupied and substantially unfurnished. A longer period (up to twelve months) is allowed for a property which is uninhabitable without major repairs or alterations. Property which has been condemned is exempt and so is property held by a mortgagee after legal repossession. When a property becomes empty in **Wales**, there is the same exemption for property both unoccupied and unfurnished again for up to six-month exemption period, during which time no council tax is charged against the property, with the same discretionary power to relieve against a full charge when the six month period ends. The recently published Housing White Paper<sup>372</sup> sets out the Welsh Government's proposals for tackling problems affecting housing in Wales and includes proposals to bring empty homes back into use. Council tax is proposed as a tool to achieve this by extending the discretionary powers of local authorities to levy a higher rate of council tax on long-term empty homes. This will put the onus on the owners of empty homes to get empty properties back in use as quickly as possible.

Help with council tax bills is available in the form of Council Tax Benefit. The amount of any reduction reflects individual circumstances including income, savings and number of children. Other possibilities of assistance with Council Tax are if one lives with another adult, who is not a partner - known as the Second Adult Rebate.<sup>373</sup> Council tax benefit ends in April 2013 and will be incorporated into the Universal Benefit Scheme.

- **Taxation of homeowners:**
  - **Income tax of homeowners: is the value of occupying a house considered as a taxable income?**
  - **Is the profit derived from the sale of a residential home taxed?**

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<sup>369</sup> This may be a hall of residence, or a house. If the property is occupied by both students and non-students the property is not exempt but any students in the house are disregarded. Also ignored are Foreign Language Assistants on an official British Council programme.

<sup>370</sup> No charge is made on property occupied only by people with severe mental impairment.

<sup>371</sup> No charge is made for an unoccupied residential caravan or houseboat.

<sup>372</sup> *Homes for Wales: A White Paper for Better Lives and Communities* (Cardiff: Welsh Government, 2013); Housing (Wales) Bill 2013, cl. 122.

<sup>373</sup> You may get Second Adult Rebate if the person you share your home with is: 18 or over, not your partner; on a low income; not paying you rent; not paying Council Tax themselves. The Second Adult Rebate may be available even if the person gets Council Tax Benefit.

As explained above, 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.<sup>374</sup>

- **Subsidization through taxation**

- Is there any subsidization via the tax system? If so, how is it organized? (for instance, tenants being able to deduct rent from taxable income; landlords being able to deduct special costs; homeowners being treated favourably via the tax system)
- In what way do tax subsidies influence the rental markets?

Subsidization has already been considered.<sup>375</sup> 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. Main homes are within both inheritance tax and Stamp Duty land Tax.

- **Is tax evasion a problem? If yes, does it affect the rental markets in any way?**

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. Buy-to-let landlords paid £2.02 billion income tax on their rental income in 2010-11,<sup>376</sup> but they and other private landlords are reported to be evading over half a billion pounds in tax due on their rental income. Estimates by Her Majesty's Revenue and Customs reveal that that every year landlords are evading at least £550 million in tax.<sup>377</sup>

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. 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.<sup>378</sup>

In relation to council tax, benefit fraud and manipulation of the various exemptions are means of evading taxes. The broad forms these take include failure to declare work, not declaring the full amount of income, savings or capital people who are given council tax allowance have, failing to declare ownership of another property, not declaring that partners or other people are resident in the household, failing to

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<sup>374</sup> See above, pp 85-86.

<sup>375</sup> See above, 3.6, pp 78-83.

<sup>376</sup> 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.

<sup>377</sup> 'Private landlords evading at least £550 million tax on rental incomes', *The Independent*, 14 November, 2012.

<sup>378</sup> 'Deductions: General Rules' (London: Her Majesty's Revenue and Customs, PIM2005).

declare change of address. If a property is occupied by full time students only, then the property will be exempt from council tax. There may be opportunities to evade council taxes if non-student residents are not declared. This practice is very common and very difficult to detect and check.

**Summary Table 8 - taxation<sup>379</sup>**

	Social/public housing		Owner occupiers	Private rental housing	
	Landlord	Tenant		Landlord	Tenant
<b>Taxation at point of acquisition</b>					
Stamp Duty Land Tax	380		✓	✓	
<b>Taxation during tenure</b>					
Income/corporation tax on rental income				✓	
Council tax		✓	✓		✓
<b>Taxation at the end of occupancy</b>					
Capital gains tax			✓	✓	
Inheritance tax			✓	✓	

<sup>379</sup> This table ignores the complexity of rentals by housing associations at market rent levels, i.e. acting as private landlords.

<sup>380</sup> Exempt by Finance Act 2003 s. 71.

## 4. Regulatory types of rental tenures

### 4.1 Classification of different types of regulatory tenures

- Which different regulatory types of tenure (different regulation about contracts and tenant security) do you classify within the rental sector? What are their shares in dwelling stock?

Classification of tenures is over complicated, partly because distinct conceptual bases are used in England and in Wales, as already explained<sup>381</sup>

#### England

In England the primary distinction is between private renting at open market rents and social renting at low cost rents, or in future at affordable rents at up to 80% of market levels. However, the social sector is subdivided according to the nature of the landlord between private suppliers of social housing (housing associations) and public landlords (local housing authorities). Each of these categories is slightly blurred at the edges.

#### Private renting (18% of dwellings in England):

This mainly consists of lettings by private landlords for profit; housing associations are also allowed to devote a small part of their stock to market rentals, any profit to be ploughed back into their main activity of providing affordable housing. The tenures granted are:

- assured shortholds dominate the private rental market;
- (fully) assured tenancies – a small minority of private rentals;
- Rent Act tenancies – a few pre-1898 tenancies may survive;
- occupation agreements that are not assured.

#### Private registered providers of social housing (11% of dwellings in England):

This category consists of lettings by registered providers while they are acting as providers of social housing, that is when they are granting affordable housing, at rents up to 80% of the open market rent. The tenures granted are:

- (fully) assured tenancies;
- starter tenancies, like shortholds;
- occupation agreements that are not assured.

Housing associations are hybrid public bodies which let on different tenancy types from local authorities and this has implications for the extent of their human rights obligations. The public nature of a housing association can be an uncertain point in considering the extent to which such associations may be responsive to public law control. In *R. (on the application of Weaver) v. London & Quadrant Housing Trust*<sup>382</sup> a registered social landlord was held to be a public authority<sup>383</sup> where its function in managing and allocating housing stock was a public function, and as such it was amenable to judicial review on conventional public law grounds. Therefore, the termination of a tenancy by the housing trust, a hybrid public authority that provided

<sup>381</sup> See above 1.4, pp 25-27.

<sup>382</sup> [2009] EWCA Civ 587.

<sup>383</sup> Human Rights Act 1998 s. 6(3)(b).

social housing, went beyond determination by private arrangement between the parties.

**Public landlords granting social housing** (7% of dwellings in England).

This categories consists of lettings by local housing authorities and a few other public landlords. These are public bodies for the purposes of administrative law. The tenancies granted are:

Secure tenancies;

Various short tenancies – introductory tenancies, demoted and family intervention tenancies;

Occupation agreements which are not secure.

## **Wales**

The analysis is simpler and it leads to very similar practical results. The primary classification depends upon the character of the landlord and this determines the sort of tenancies they can grant:

**Private landlords** (13% of dwellings in Wales) – usually grant assured shortholds, with rarer (fully) assured tenancies or residual Rent Act tenancies, and a residual category of occupation agreements not fulfilling the requirements for full assurance.

**Registered Social Landlords** (housing associations) (10% of dwellings in Wales) – usually grant fully assured tenancies but may grant short tenancies in certain circumstances and there is the usual residual category.

**Public landlords** (7% of dwellings in Wales) – grant secure tenancies, though with certain circumstances where they are allowed to grant short tenancies and the usual residual category.

## 4.2 Regulatory types of tenures without a public task

- Please describe the regulatory types in the rental sector in your country that do not have a public task. This category may be called private or market rental housing.<sup>384</sup> Possibly “commercial” may also be terms to describe this regulatory type.
- Different types of private rental tenures and equivalents:

### Assured Shorthold Tenancies

Assured shorthold tenancies are the most common form of private residential tenancy provided in the private rented sector.<sup>385</sup> The assured shorthold tenancy is a sub-set of the assured tenancy, so it applies where:

- a separate dwelling;<sup>386</sup>
- is let;
- as the tenant’s principal home; and
- there is no exclusion.<sup>387</sup>

The characteristic of the short assured tenancy is that the security is limited to the initial contractual grant and any implied regrant.<sup>388</sup> They are commonly granted for a fixed term of six months or a year, but it could be periodic, and there is no reason why a longer term cannot be granted. In England and Wales (unlike Scotland) the assured shorthold is the default form of tenancy granted by a private sector landlord, so no warning notice needs to be served in advance of the creation of the tenant. Statistics are hard to come by, but it appears that assured shortholds account for virtually 100% of the private rented sector.

When the contractual period ends a periodic tenancy will arise by implication when rent is paid, but this too is a shorthold. Unlike an assured tenant, however, an assured shorthold tenant has no security of tenure and, to obtain a possession order, a landlord need only serve an appropriate notice. Following that there is no security of tenure, so the landlord must merely end any contractual extension of the initial grant by notice and will then have an automatic entitlement to repossession. Short assured tenants generally leave under a notice to quit.

As a form of assured tenancy, it is subject to market negotiation of rents in the private sector. The landlord cannot legally increase the rent during the fixed-term (unless a rent review provision is included). Normally, rent increases are taken care of on renewal, when the tenancy comes to an end the landlord gives the tenant notice to renew at an increased rent if appropriate. This may depend on the prevailing market conditions and the local residential rents being charged by other landlords.

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<sup>384</sup> Market rental housing means housing for which the rent price determines the conclusion of contracts and not some social rules of allocation based on need.

<sup>385</sup> Housing associations are allowed to grant assured shortholds at market rents of a small proportion of their stock, any profit being ploughed back into their social function of providing affordable housing.

<sup>386</sup> Some accommodation must be exclusive, but there may also be some shared accommodation, see below 6.3, pp 135-138.

<sup>387</sup> Housing Act 1988 s. 1. This scheme applies to tenancies first granted on or after 15 January 1989.

<sup>388</sup> Housing Act 1988 s. 19A. This has been the position in England since the Housing Act 1996. Previously (as in Scotland today) it was necessary to grant an initial six month period.

## **Analysis**

England and Wales have low regulation of the private rented sector. This can be judged across four factors: controls of initial rents, controls of increases, the duration of security of tenure, and the eviction process. A spider diagram representing these features for England and Wales is largely empty. Whitehead's study found a strong link between decreasing regulation and an increase in the size of the sector. That there is a correlation is undoubtedly, and England and Wales are the only countries to demonstrate a really significant increase,<sup>389</sup> though doubts must persist whether there is a causal link given the enormous impact of Buy to Let lending.

## **(Fully) Assured Tenancies**

A tenancy under which a dwelling-house is let as a separate dwelling is an assured tenancy if the landlord is a private sector landlord and the tenant is an individual, and occupies the dwelling-house as his only or principal home.<sup>390</sup> In the case of a private sector landlord the tenancy will be a shorthold by default, so a notice has to be served on the tenant in advance if it is intended to confer full residential security on him. This would however be very unusual for a private sector landlord.<sup>391</sup>

The terms of the statutory periodic tenancy are the same as those under the fixed term tenancy by virtue of section 5, unless the landlord or the tenant fixes different terms in accordance with section 6. This section provides a procedure for the fixing of different terms. The landlord or the tenant may, within one year of the end of the fixed term tenancy, serve a notice on the other party in the prescribed form proposing new terms.<sup>392</sup>

A (fully) assured tenant has long term residential security. The tenancy cannot be brought to an end by the landlord except by obtaining a possession order under section 7 and executing that order<sup>393</sup> or obtaining a demotion order,<sup>394</sup> or in the case of a fixed term tenancy, by exercising a power contained in the tenancy to determine the tenancy.<sup>395</sup> The grounds on which possession can be obtained are limited, and very limited during the good behaviour of the tenant.

When used by private sector landlords, the initial rent will be negotiated in the open market. The security of tenure could be undermined by allowing unlimited rent increases. It is possible to include a rent review provision but this is unusual. Instead a formal process is triggered by service of a Rent Increase Notice in specified form, which informs the tenants of the date that the rent increase will come into force. This must be at least one month after the notice is served. This date must also be at least 12 months after the date the tenant entered the property and at least 12 months after

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<sup>389</sup> C. Whitehead, 'Private Rented Sector in the New Century' (Cambridge, University, 2012), 12, 42, 55, 60, 85; E. O'Sullivan and P. de Decker, 'Regulating the Private Rental Housing Market in Europe' *European Journal of Homelessness*, 1, 2007:95-117, 99.

<sup>390</sup> Housing Act 1988 s. 1. This scheme applies to tenancies first granted on or after 15 January 1989.

<sup>391</sup> In practice most assured tenancies are created by private registered providers of social housing (housing associations).

<sup>392</sup> Housing Act 1988 s. 6(2).

<sup>393</sup> Housing Act 1988 s. 5(1)(a); s.5(1A).

<sup>394</sup> Housing Act 1988 s.6A, s.5(1)(b).

<sup>395</sup> Housing Act 1988 s. 5(1)(c), other than a right of re-entry or forfeiture (s.45(4)).

any previous rent increase.<sup>396</sup> Tenants have the right to appeal to the rent assessment committee if they think the rent increase is in excess of market values.<sup>397</sup>

Just to reiterate, the above discussion is largely irrelevant in the private sector since private landlords invariably grant assured shortholds.

- **Are there different inter-temporal schemes of rent regulations?**

Assured tenancies have been granted by initial lettings taking place on or after 15 January 1989. A few tenants may have been granted their tenancies before that date, and any such lucky tenant is described as a Rent Act tenant. They are now so rare that what follows will be brief, as will any further references to the Rent Acts.

A whole series of Acts were enacted controlling and regulating residential tenancies between 1915 and 1989, with many variations in the schemes and subtle nuances of terminology. Earlier controls were relaxed in favour of rent regulation in the final version of the legislation, the Rent Act 1977. The main features were:

- Protected or regulated tenancies;
- Long term residential security;
- 'Fair' rents which ignored scarcity and were often well below market rents;
- Prohibition of premiums;

It is generally accepted that fair rents delivered an inadequate return to private landlords and that the condition of many rented properties declined disastrously under this scheme because landlords did not make a sufficient return to be able to invest in repairs and improvements.

- **Are there regulatory differences between professional/commercial and private landlords?**

In **England** the simple answer is that there is no difference in regulation because there is none. 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.

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.<sup>398</sup> One of the key features of the Housing (Wales) Bill 2013 is to introduce compulsory registration of private rented sector landlords and letting agents.<sup>399</sup> In addition, the Landlord Accreditation Wales Scheme, which is an initiative between the Private Sector Housing/Environmental Health Services from each of the 22 Local Authorities in Wales, and is supported by the Welsh Assembly Government,<sup>400</sup> recognises good landlords and helps them differentiate themselves from less reputable landlords who give the rental market a bad name. It also allows

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<sup>396</sup> Housing Act 1988 s. 13.

<sup>397</sup> Housing Act 1988 s. 14.

<sup>398</sup> 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/#ixzz2lhUFbfc](http://www.walesonline.co.uk/business-in-wales/business-news/2012/08/22/building-societies-warning-over-landlord-regulation-scheme-91466-31668821/#ixzz2lhUFbfc)>, 22 January 2013.

<sup>399</sup> Cls 1-35.

<sup>400</sup> <[www.welshlandlords.org.uk](http://www.welshlandlords.org.uk)> 22 January 2013.

tenants to seek out professional landlords who offer good, well managed accommodation. It works by accrediting the landlord, not the property, therefore identifying the participants as competent and professional in their dealings with their properties and tenants, and with the skills necessary to run a successful business. Similarly in England accreditation of landlords is becoming increasingly important and has been adopted by councils as a way of ensuring safety and standard within the private rented sector. Councils often base their accreditation schemes on property inspections, awarding the landlord with accredited status once a percentage of their properties have been inspected. Furthermore, there is an on-going e-petition for tougher controls over private landlords currently with the Department for Communities and Local Government.<sup>401</sup> The petition seeks that basic rights regarding the state of repair and the length of time landlords have to repair is set out plainly so there are no grey areas.

- **How is the financing of private and professional/commercial landlords typically arranged (e.g. own equity, mortgage based loan, personal loan, mix, other)?**

Most private landlords have small portfolios of rental properties, built up by investment of the landlord's own equity or by buying a property with a Buy to Let mortgage.<sup>402</sup> Various schemes are being run under the auspices of the Homes and Communities Agency to facilitate private sector provision.<sup>403</sup>

- **Exceptions to the assured tenancy regime**

There are a wide range of tenancies that are not assured as well as many licences:<sup>404</sup>

Tenancies in other sectors:

Business tenancies;

Agricultural leases;

Residential tenancies granted by social landlords.

Sharing arrangements/licences:

Premises are not let;

Accommodation is not a self-contained dwelling.<sup>405</sup>

Resident landlord;

Serviced accommodation;

Tied accommodation of employees.<sup>406</sup>

Not principal home:

Company lets;<sup>407</sup>

Second homes;

Holiday lets and out of season holiday lets;

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<sup>401</sup> <[www.epetitions.direct.gov.uk/petitions/30890](http://www.epetitions.direct.gov.uk/petitions/30890)>, 23 January 2013.

<sup>402</sup> See above, 1.4, p. 28.

<sup>403</sup> See above, 1.4, p. 28.

<sup>404</sup> There were corresponding exceptions before 1989 from the Rent Act 1977.

<sup>405</sup> Though some accommodation may be shared, see below 6.3, pp 135-138.

<sup>406</sup> 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.

<sup>407</sup> *Eaton Square Properties v. O'Higgins* (2001) 33 HLR 68 CA.

Student lets and out of term lets;  
Mandatory grounds (these are assure tenancies but lacking full residential security):

Property required for occupation by the landlord;  
Mortgage default;  
Ecclesiastical property.

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.<sup>408</sup>

- **Mix of private and commercial renting (e.g. the flat above the shop)**

A flat over a shop, as part of a business tenancy or a farm-house let with a farm may create instances of a mix of private and business tenancy. The lease will usually cover both the business and residential parts of the property. However, the statutory basis for repossession is quite different for commercial and residential premises, especially where the latter qualify as assured shorthold tenancies. The Landlord and Tenant Act 1954 will apply when the premises are occupied for business purposes, and a tenancy which is governed by the 1954 Act cannot be an assured tenancy. The question therefore was whether the occupation of any part of the premises was for the purpose of a business carried on by the tenant. If so, the use of the residential part of the premises was incidental to the lease of the business premises and the tenancy could not be an assured shorthold tenancy. The court decided in *Phaik Seang Tan v. Sitkowski*<sup>409</sup> that if a tenancy was granted for mixed business and residential use and was accordingly subject to the Landlord and Tenant Act 1954, the tenant could not, simply by unilaterally ceasing the business use, arrogate to himself protection under the Rent Act 1977. The same will be true today of the assured tenancy regime.

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<sup>408</sup> Protection from Eviction Act 1977.

<sup>409</sup> [2007] EWCA Civ 30; [2007] 1 WLR 1628.

## **4.3 Regulatory types of tenure with a public task**

- Please describe the regulatory types in the rental housing with a public task**

The equivalent in **England** of ‘housing with a public task’ is social housing consisting of low cost accommodation, and in the context of this report particularly 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.<sup>410</sup> So this sector is characterised by low cost rents, and in future affordable rents with a maximum of 80% of the open market rent (public/social housing). Providers within this market are called ‘providers of social housing’ and they break down into two categories:

Public landlords – local housing authorities letting publicly owned housing stock; they grant secure tenancies with long term residential security at affordable rents.

Social landlords – these were formerly known as Registered Social Landlords and now as Private Registered Providers of Social Housing; they grant assured tenancies with full residential security but at affordable rents.

In **Wales** the categories are public landlords and Registered Social Landlords.

### **Low cost/affordable rents**

Subsidy was until recently given on the basis that rents charged would be low cost.

An affordable rent tenancy is a tenancy of residential premises granted by a social landlord in England at a rent higher than would normally be charged for social housing and at a level of up to 80% of the local gross market rent for a property of the same size and type in the private rented sector. Where a flat is being let, the 80% upper limit will take into account any service charges. Although 80% is expressed as an upper limit, the expectation is that landlords will normally charge the full 80% for each affordable rent letting. Any contractual provisions for rent increases will not exceed Retail Price Index plus 0.5%. Affordable rent is a new social housing product governed by existing statutes, by a scheme of landlord regulation and by agreements with the national funding agency for social housing, the Homes and Communities Agency. The “caps” on affordable rents and their increases have no foundation in primary or secondary legislation. They are imposed by the landlords' statutory regulator and or the Homes and Communities Agency. Letting on affordable rent falls within the definition of ‘social housing’ activity in section 68 of the Housing and Regeneration Act 2008, and within the definition of “low cost rental accommodation” in section 69<sup>411</sup> of the same Act. The affordable rent tenancy will normally be a fixed term tenancy with a minimum term of two years. It will carry security of tenure as an assured or assured shorthold tenancy protected by the Housing Act 1988 Part 1, where the landlord is a housing association, or as a secure

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<sup>410</sup> Housing and Regeneration Act 2008 ss 68, 69. Part ownership/part rental schemes count as ownership schemes.

<sup>411</sup> Accommodation is low cost rental accommodation if– (a) it is made available for rent, (b) the rent is below the market rate, and (c) the accommodation is made available in accordance with rules designed to ensure that it is made available to people whose needs are not adequately served by the commercial housing market.

tenancy protected by the Housing Act 1985 Part 4 where the landlord is a local authority.

Not all new lettings by social landlords will be at affordable rents. Subject to the directions of the social housing regulator and to the terms under which development of new social housing has been approved, social landlords will be free to choose which of their new properties, and which of any current stock that becomes available for re-letting, should be let at higher, affordable rents.<sup>412</sup> Through Section 106 of the 1990 Town and Country Planning Act, Local Authorities have been given the power to require residential developers to ensure a proportion of their units are affordable - either in the form of social rented housing or low cost homeownership and below market rentals. These properties are then generally owned and allocated by partner Housing Associations. In most cases the affordable dwellings are provided on the site in question, though the contribution may be provided at other sites or, when acceptable to local authorities, through a financial contribution.<sup>413</sup>

- **Secure tenancies (granted by local authorities)**

Large scale public sector housing dates from the First World War, but the recognition of the tenant's tenure dates from the Thatcher government, when the rights of the tenant were articulated in order to provide a vehicle for conferring a Right to Buy on council tenants. This innovation took place in 1980 when the government adopted a general privatisation programme with the sale of public sector housing to sitting tenants as the core programme, a significant break with the past.<sup>414</sup> The Conservative government of Margaret Thatcher's programme of council house sales significantly increased owner occupation in Britain. Almost one million council houses, amounting to more than 5% of the total housing stock were sold to their tenants from 1980 to 1987, raising the proportion of home ownership from under 60%, by the same ratio, to over 65% of the total housing stock.<sup>415</sup> The terms of council house sales were highly advantageous to buyers. Tenants were granted government-sponsored mortgages, and discounts ranging from 33% to 60%.<sup>416</sup> This is the background to the recognition of the secure tenancy.

In England a secure tenancy is one granted by a local authority or other public sector landlord. The initial legislation is re-enacted as the Hosuing Act 1985. This provides that any tenancy granted by a public sector landlord (even one granted before the legislation) is a secure tenancy.<sup>417</sup> The basic requirements are similar to those in the private sector, that is

a house ( technical term also including flats);  
let;  
as a separate dwelling;<sup>418</sup>

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<sup>412</sup> J. Luba and A. Marshall-Williams, 'The New Affordable Rent Tenancies' *Landlord & Tenant Review* 15(5), 2011: 159-162.

<sup>413</sup> A.D.H. Crook et al., *Planning Gain and Affordable Housing: Making it Count*, (York: Joseph Rowntree Foundation).

<sup>414</sup> A. Murie, 'Housing', in: M. Loughlin, D. Gelfand & K. Young (eds) *Half a Century of Municipal Decline?* (London: Allen and Unwin, 1985), pp 187-201.

<sup>415</sup> G. Garrett, 'The Political Consequences of Thatcherism' *Political Behavior* 14(4) 1992: 361, 364.

<sup>416</sup> P. Minford, et al. *The Housing Morass*, (London: Institute for Economic Affairs, 1987).

<sup>417</sup> Housing Act 1985 s. 79.

<sup>418</sup> The accommodation must be self-contained and no secure tenancy arises if any important living accommodation is shared.

to an individual;  
as his principal home; and  
no exclusion applies.

The secure tenancy confers full residential security on the tenant. So long as the tenant behaves himself he should have accommodation indefinitely, and if he is asked to move (for example to enable the landlord to carry out work to the property) he should be offered suitable alternative accommodation. When the tenant dies, a secure tenancy may be inherited on two occasions. The tenancy agreement should follow a model and tenants have information rights and some rights to be consulted. Social landlords are expected to charge rents that are reasonable. Where the landlord opts to increase rent and the tenant disagrees then the tenant has the right to apply to challenge the fairness of the proposed increase.<sup>419</sup>

The status of being a secure tenant was important as the passport to having the Right to Buy.<sup>420</sup>

#### ▪ **Flexible and limited security public sector tenancies**

There are a number of circumstances where a tenant who would otherwise be a secure tenant has limited security usually a fixed term. These have recently been grouped under the term 'flexible tenancies'<sup>421</sup> examples being:

- introductory tenancies granted to those new to the social sector;
- demoted tenancies after antisocial behaviour;<sup>422</sup>
- family intervention tenancies granted after domestic violence;
- temporary accommodation to homeless people.

In such situations local authorities will be able, but not obliged, to offer a limited form of the Secure Tenancy. If they do so, there is easier recovery of possession than a secure tenancy which has full security. These can also be used in situations where temporary accommodation is appropriate, notably where temporary accommodation is provided to homeless people. The tenant is given a contractual term, but no security beyond that contractual period or any tacit relocation.<sup>423</sup> The Localism Act 2011 has further eroded the right of a social tenant to a secure tenancy by conferring on social landlords the right to award fixed-term tenancies, normally for a minimum of five years, but possibly for as little as two years in certain circumstances.<sup>424</sup> There is no right to buy, no possibility of succession and strictly limited security of tenure.

#### **Social sector tenancies which are not secure**

Certain arrangements by social sector landlords fall outside the secure tenancy regime and therefore operate contractually. These include:<sup>425</sup>

- non-residential property;
- accommodation which is not self-contained eg a bed in a hostel;
- property no longer occupied by the tenant as his principal home;
- service accommodation and that used by the police and fire service; and

<sup>419</sup> See below, 6.4, pp 162-163.

<sup>420</sup> See below, 6.3, pp 144-148.

<sup>421</sup> Housing Act 1996 Part V as amended by Localism Act 2011 s 154ff..

<sup>422</sup> Housing Act 1985 s. 82A.

<sup>423</sup> It is possible for a short tenancy to convert to a fully secure tenancy and vice versa.

<sup>424</sup> D. Robinson and A. Walshaw 'Security of Tenure in Social Housing in England', *Social Policy and Society*, 2014, 13(1): 1-12.

<sup>425</sup> Housing Act 1985 sch. 1; there were additional exceptions from the Right to Buy.

student lets.

- **Housing association tenancies – (fully) assured tenancies**

Housing associations have been favoured by successive governments since the 1980s. Subsidy for new housing is primarily directed towards housing associations and governments have encouraged large scale transfers of housing stock from public authorities to housing associations. Some 200 transfers have taken place, passing 1.3 million units to the social sector at a cost of £5000 per unit.<sup>426</sup> This has been driven by the perception that housing associations are private organisations for budgetary purpose, so that the money owed by the associations can be removed from the Public Sector Borrowing Requirement, and hence help the state to meet budgetary rules. Effectively housing associations have been aligned with local authorities in order to create a single social sector. This is recognised in that affordable rental housing can be provided by any Provider of Social Housing whether public (a local authority) or private (a housing association). However, in terms of residential security the two sub-sectors remain distinct, since housing associations grant assured tenancies, not secure tenancies. The Housing Act 1988 introduced assured tenancies for housing association and housing cooperative tenants, which grant similar rights to secure tenancies,<sup>427</sup> since 15 January 1989.<sup>428</sup> In England and Wales this pattern has not been disturbed as it has in Scotland.

There is no precise language to describe assured tenants which are not short assured tenancies, but it is convenient to talk of full assurance. Again this takes effect under the Housing Act 1988<sup>429</sup> which introduced the assured tenancy for grants on or after 2 January 1989. Again as a form of assured tenancy it applies where:

a separate dwelling;  
is let;<sup>430</sup>  
as the tenant's principal home;<sup>431</sup> and  
there is no exclusion.<sup>432</sup>

A notice has to be served on the tenant in advance if it is intended to confer full residential security on him, as will normally be the case with a social provider.<sup>433</sup>

The terms of the statutory periodic tenancy are the same as those under the fixed term tenancy by virtue of section 5, unless the landlord or the tenant fixes different terms in accordance with section 6. This section provides a procedure for the fixing of different terms. The landlord or the tenant may, within one year of the end of the

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<sup>426</sup> 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).

<sup>427</sup> Housing Act 1988, Part 1.

<sup>428</sup> Housing associations granted secure tenancies until 15 January 1989, and any tenant still holding such a secure tenancy will have the Right to Buy their home.

<sup>429</sup> Housing Act 1988 ss 19A-23, as amended especially by Housing Act 1996.

<sup>430</sup> Licences can, theoretically, be secure: Housing Act 1985 s. 79(3).

<sup>431</sup> The property must be the 'principal home' at the time of the grant and throughout, but this has created problems when a tenant needs to be absent e.g. to care for a relative; see most recently *Islington London Borough Council v. Boyle* [2011] EWCA Civ 1450.

<sup>432</sup> Housing Act 1988 s. 1, sch. 1. These conditions matter much more for fully assured tenancies; since where they are absent, the tenant will lack full residential security.

<sup>433</sup> In practice most assured tenancies are created by private registered providers of social housing (housing associations).

fixed term tenancy, serve a notice on the other party in the prescribed form proposing new terms.<sup>434</sup>

A (fully) assured tenant has long term residential security. The tenancy cannot be brought to an end by the landlord except by obtaining a possession order under section 7 and executing that order<sup>435</sup> or obtaining a demotion order,<sup>436</sup> or in the case of a fixed term tenancy, by exercising a power contained in the tenancy to determine the tenancy.<sup>437</sup> The grounds on which possession can be obtained are limited, and very limited during the good behaviour of the tenant.

When used by private sector landlords, the initial rent will be negotiated in the open market. The security of tenure could be undermined by allowing unlimited rent increases. It is possible to include a rent review provision but this is unusual. Instead a formal process is triggered by service of a Rent Increase Notice in specified form, which informs the tenants of the date that the rent increase will come into force. This must be at least one month after the notice is served. This date must also be at least 12 months after the date the tenant entered the property and at least 12 months after any previous rent increase.<sup>438</sup> Tenants have the right to appeal to the rent assessment committee if they think the rent increase is in excess of market values.<sup>439</sup>

An assured tenant of a housing association has a modified version of the Right to Buy called the Right to Acquire.<sup>440</sup> There are some differences.<sup>441</sup>

#### ▪ **Housing association tenancies with limited security**

There are similar provisions as for public sector tenants for limiting security, for example by demotion of a tenancy after antisocial behaviour by a housing association tenant.<sup>442</sup>

### **Fully mutual housing associations**

Mutual housing associations are ones where the membership of the association matches precisely those holding tenancies. These fall outside the Housing Act 1988 because a tenancy which belongs to a fully mutual housing association cannot be an assured tenancy. Their position is therefore governed by the common law as is illustrated by *Mexfield Housing Co-operative Ltd v. Berrisford*.<sup>443</sup> This case involved

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<sup>434</sup> Housing Act 1988 s.6(2).

<sup>435</sup> Housing Act 1988 s.5(1)(a); s.5(1A).

<sup>436</sup> Housing Act 1988 s.6A (s.5(1)(b)).

<sup>437</sup> Housing Act 1988 s.5(1)(c)), other than a right of re-entry or forfeiture (s.45(4)).

<sup>438</sup> Housing Act 1988 s. 13.

<sup>439</sup> Housing Act 1988 s. 14.

<sup>440</sup> Housing Act 1996; Housing (Right to Acquire) Regulations 1997. This is designed to ensure that commercial lenders who fund housing association developments will not be deterred from lending by the potential loss that arises where a tenant buys a home at a discount.

<sup>441</sup> The tenant may be sold an alternative property; the discount offered is less generous; rural properties are exempt and there are differences of detail in relation to specially adapted property. The right to Acquire should not result in a loss on the particular home. There is a Social HomeBuy scheme for tenants of social landlords who do not qualify to Buy or Acquire their home.

<sup>442</sup> Housing Act 1996 Part V.

<sup>443</sup> [2011] UKSC 52, [2012] 1 AC 955; *Richardson v. Midland Heart* [2008] Landlord and Tenant Reports 31.

a mortgage rescue in which the former owner transferred the house in negative equity to a housing association and was granted the right to remain in occupation for an indefinite period. This was not a valid lease because the term was uncertain, and so superficially became a periodic tenancy that could be ended by a short period of a notice to quit subject to the limited security provided by the Protection from Eviction Act 1977. The Supreme Court was able to find that this was a lease for life and so converted into a lease for a 90 year term, terminable on death.<sup>444</sup> Lord Hope doubted whether exclusion from statutory security of tenure was appropriate. The Law will be reversed in Wales.<sup>445</sup>

#### ▪ **Other occupation arrangements**

There are a wide range of tenancies that are not assured:

Tenancies in other sectors:

Business tenancies;

Agricultural leases;

Residential tenancies granted by social landlords.

Sharing arrangements:

Accommodation is not a self-contained dwelling;<sup>446</sup>

Resident landlord;

Serviced accommodation;

Tied accommodation of employees.<sup>447</sup>

Not principal home:

Company lets;

Second homes;

Holiday lets and out of season holiday lets;

Student lets and out of term lets;

Mandatory grounds (these are assure tenancies but lacking full residential security):

Property required for occupation by the landlord;

Mortgage default;

Ecclesiastical property.

Many of these will operate as contractual arrangements, either contractual tenancies or licence agreements. There may be protection against eviction out of court or a minimum period for notices to quit but little other regulation.

#### ▪ **Stock transfer**

Public housing stock is often transferred to an alternative landlord under a Large Scale Voluntary Transfer agreement; the effect is that local authority secure tenants will be taken over by a housing association ( a Private Registered Provider). If a tenant has a Right to Buy at the time s/he will continue to have a Preserved Right to Buy. Stock transfers have taken place on a large scale from public landlords to

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<sup>444</sup> Law of Property Act 1925 s. 149(6).

<sup>445</sup> Housing (Wales) Bill 2013 cl. 120-121.

<sup>446</sup> Though some accommodation may be shared, see below 6.3, pp 135-139.

<sup>447</sup> Housing Act 1985 sch. 1 para. 2(1) prevents a tenancy being secure if the tenant is an employee of the landlord and 'his contract of employment requires him to occupy the dwelling-house for the better performance of his duties': *Wragg v. Surrey County Council* [2008] EWCA Civ 19; [2008] HLR 30 .

housing associations and in such a case the former local authority tenant has a Preserved

- **Specify for tenures with a public task:**
  - selection procedure and criteria of eligibility for tenants
  - typical contractual arrangements, and regulatory interventions
  - How does prospective tenant proceed in order to get housing?

All these matters are fully described below.<sup>448</sup>

- **subsidization possibilities**

This has been fully described above.<sup>449</sup>

**Summary Table 9: Tenure types**

<b>Rental housing without a public task</b>	
Landlords	<ul style="list-style-type: none"> <li>• private sector</li> <li>• mainly small investors</li> </ul>
Tenants	<ul style="list-style-type: none"> <li>• highly diverse backgrounds</li> <li>• 18% of households rent privately</li> <li>• slow but consistent growth</li> </ul>
Short assured tenancies	<ul style="list-style-type: none"> <li>• almost 100% of private sector</li> <li>• minimum 6 month term</li> <li>• no long term security</li> </ul>
Fully assured tenancies	<ul style="list-style-type: none"> <li>• very small number in private sector</li> <li>• fixed term or periodic</li> <li>• long term security and succession rights</li> <li>• market rents</li> <li>• mechanism to limit rent increases</li> </ul>
Exclusions	<ul style="list-style-type: none"> <li>• contractual tenancies</li> <li>• licences</li> <li>• other specific exclusions</li> <li>• lettings before 2 January 1989 (Rent Acts)</li> </ul>
<b>Rental housing for which a public task has been defined</b>	
Landlords	<ul style="list-style-type: none"> <li>• local authorities (7% of total households)</li> <li>• Registered Social Landlords (housing associations) (11% of total households)</li> </ul>
Tenants	<ul style="list-style-type: none"> <li>• chosen by allocation procedure</li> <li>• some previously homeless</li> </ul>
secure tenancy	<ul style="list-style-type: none"> <li>• vast majority of social sector tenants</li> <li>• grants before or after September 2002</li> <li>• security and succession rights</li> <li>• reasonable rents</li> <li>• formerly a Right to Buy</li> </ul>

<sup>448</sup> See below 6.2, pp 119-131.

<sup>449</sup> See above 3.6, pp 78-83.

short tenancy	<ul style="list-style-type: none"> <li>• various short term tenancies</li> <li>• introductory or after anti-social behaviour</li> <li>• lacks security, Right to Buy etc.</li> </ul>
Exclusions	<ul style="list-style-type: none"> <li>• several esp. tied accommodation of employees</li> </ul>

## 5. Origins and development of tenancy law

- What are the origins of national tenancy law and where was and is it laid down (civil code, special statute, case law)?

English law governing the landlord and tenant relationship is based on the common law system, that is a patchwork of numerous uncodified statutes amplified by case law decisions. Leases were originally short and contractual in character, but the law was transformed by an egregious decision<sup>450</sup> in 1499 that gave them a proprietary character enforceable against purchasers.<sup>451</sup> This paved the way for the recognition of lengthy leasehold estates, and therefore for the differentiation of ownership into freehold and leasehold estates which is so characteristic of the common law and so markedly different from civilian systems.

Legislation has become increasingly dominant from the middle of the nineteenth century onwards, fuelled initially by concerns for housing conditions and public health.<sup>452</sup> Authority to legislate for England and Wales resided until very recently at Westminster, and in fact it was usual for Acts to cover both jurisdictions. Since 2006 legislative power over Wales has been devolved to the Welsh Assembly at Cardiff and so Housing Acts passed at Westminster apply to England alone.<sup>453</sup>

Security of tenure and rent controls for residential tenants, as concepts, date from the First World War, and became more permanent features of the legal landscape after the end of that War when the government sought to provide 'Homes Fit for Heroes'.<sup>454</sup> The precise details of the legislation fluctuated considerably over the years, but ended up most recently in the Rent Act 1977, although this legislation is no longer relevant for tenancies granted since early in 1989.<sup>455</sup> Protection for residential tenants evolved at a time when Westminster retained legislative competence over the whole of Great Britain and Ireland so that the basic structure and sectoral divisions was common to England, Wales, Scotland and Ireland. There are similar differences between the regimes covering public and social residential tenancies, private sector residential tenancies, business leases and agricultural tenancies. Since the legislation covering residential tenancies addresses directly such fundamental social problems, it has been heavily litigated, and a mass of case-law expounds the legislative principles with cross fertilisation between English and Scottish case law.<sup>456</sup>

Today social renting is differentiated from the private market by controls of allocation and the duties owed to those who are homeless, ideas which were undeveloped until

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<sup>450</sup> Of course case law moves forward through mistakes.

<sup>451</sup> *Gaines v. Smyth*, Fitzherbert *Natura Brevium* 220 (1499).

<sup>452</sup> See above 1.2, p. 7.

<sup>453</sup> See above 1.1, pp 4-6.

<sup>454</sup> Increase of Rent and Mortgage Interest (War Restrictions) Act 1915, as repealed and re-enacted in the Increase of Rent and Mortgage Interest (Restriction) Act 1920.

<sup>455</sup> 15 January 1989.

<sup>456</sup> The volume of English case law is prodigious. Since 2000 the allocation and homelessness regimes have attracted 100 appellate cases in the Court of Appeal and above. This report can only be selective, especially for pre-2000 cases which are covered fully in P. Sparkes, *A New Landlord and Tenant*, (Oxford: Hart, 2001) chs. 1-13, and in the other texts referred to in this report.

the Housing (Homeless Persons) Act 1977, which has subsequently been re-enacted.<sup>457</sup>

Modern tenancy law dates from legislation enacted during the Thatcher government in the middle and end of the 1980s. Rights for tenants occupying public housing accommodation (that is holding from a local authority landlord) were set out in the form of a secure tenancy taking effect under the Housing Act 1985;<sup>458</sup> the object of crystallising the rights of the public sector tenant were to identify tenants who would be entitled to the Right to Buy their home at a discounted price.<sup>459</sup>

Free market principles were allowed to operate for assured shorthold tenancies operating in the private residential sector (housing without a public task).<sup>460</sup> The assured tenancy regime also applied to housing associations who now<sup>461</sup> grant (fully) assured tenancies with lifelong residential security but at affordable rents. These associations have gone through subsequent incarnations as Registered Social Landlords and (private) registered providers of social housing.<sup>462</sup> Tenants have a Right to Acquire their home, though on terms that are less generous than the scheme operating in the public sector. So private landlords and housing associations grant tenancies under the Housing Act 1988. Subsequent years have seen a progressive shift of housing provision from public landlords to housing associations (registered social landlords) with funding skewed to housing associations and with large scale stock transfers out of the public sector into the social sector.

- **Who was the political driving force? Was it based on a particular legal philosophy (e.g. socialism)? Is there a particular philosophy behind the rules (e.g. protection of the tenant's home as in Scandinavia vs. just a place to live as in most other countries)**

Broadly speaking four periods can be identified in relation to the politics driving housing law.

(1) The common law in England derives from a liberal, free market, tradition, its essentials settled in the eighteenth and nineteenth centuries and the common law governing landlord and tenant was largely formulated within this tradition. In practice this weighted the common law in favour of landlords who could afford to litigate, and it largely ignored the market context of scarcity of accommodation and an inherently weaker bargaining position of tenants.

(2) When legislative intervention began in the middle of the nineteenth century, it was utilitarian and paternalistic, concerned with improving public health but also anxious to relieve the lot of the poorer tenant. During the twentieth century, starting during and immediately after the First World War,<sup>463</sup> there was a more overt move towards tenant protection, that is an attempt to redress the inherent imbalance in landlord and tenant relationships. This was not socialist in the sense recognised in

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<sup>457</sup> Housing Act 1996 Part VII, as amended.

<sup>458</sup> Part IV; re-enacting Housing Act 1980 Part 1 ch. 2.

<sup>459</sup> Housing Act 1985 Part V as amended. There is a corresponding though less generous Right to Acquire for tenants of housing associations.

<sup>460</sup> Housing Act 1988 Part 1, ss 1-23, schs 1-2.

<sup>461</sup> Since 15 January 1989; before that they granted secure tenancies.

<sup>462</sup> Housing and Regeneration Act 2008 Part 2.

<sup>463</sup> See above, 1.2, pp 7-8.

Russia after 1917 or in eastern Europe after 1945. Rather it was broadly coincident with the widening of the franchise to create a truly democratic basis for government for the first time. For much of the twentieth century, tenant security was politically contentious, in the sense that the schemes of tenant protection were often changed when a new government was elected, though it must be remembered that the changes of power occurred at Westminster; Concern to protect a tenant's home led to sectoral legislation in England in which the residential/commercial divide is much more marked than in many European countries. A major theme of modern British scholarship in land law is what, to cite the title of Lorna Fox-O'Mahoney's book, consists of *Conceptualising Home*,<sup>464</sup> a tendency which manifests itself in landlord and tenant law by a distinctive regime for residential tenancies.

(3) As already indicated a clean break with the past was made during the Thatcher government of the 1980s. This was marked by a move towards the open market negotiation of rents in the residential sector. Regulation of private sector rents was removed by the Thatcher government for new tenancies by the Housing Act 1988, so market negotiation determines rents. However, in practice there is considerable public control in some parts of the country<sup>465</sup> because a rent levels are set by the level accepted for the calculation of housing benefit. Abolition of rent controls in the late 1980s was driven by a political belief of the Thatcher government that market allocation of housing and prices is more efficient than is state control of rents. This was accompanied by a reduction of private sector security of tenure intended to encourage investment by private landlords. These Thatcher reforms have emphasised the sectoral division dating from the early 20<sup>th</sup> century between the private residential sector and public/social housing.

In response to the poor housing conditions, local authorities had taken over from private landlords as the dominant providers of housing and in the post-war period substantial urban development projects were carried out and households were increasingly relocated from inner city tenements to council operated terraced housing estates. This was not socialist in conception but a response to the democratic power of tenants. At this time comprehensive legislation was passed setting out the housing role of the local authority as well as the rights and duties of the parties to a public tenancy. The motivating force here was the provision of the Right to Buy by the Thatcher government initially in 1980 and afterwards by the Housing Act 1985. This was driven by the desire to roll back the state and a belief that home ownership would create a broader and more stable property owning democracy. This had a profound political influence in the short term, but left a contentious legacy for the future.

(4) What is more surprising is that a consensus arose around these radical reforms, and that no steps were taken to revert to the traditional system of rent regulation or to undo the right to buy when 'New Labour' gained power under Tony Blair in 1997. From that time forward the implications of the right to buy have been realised, with a substantial reduction in public sector stock and ghettoization of those estates remaining in public hands. During this era, attention has gradually shifted from councils as public sector landlords to the provision of social housing by housing associations, and large scale transfers of housing stock from the public to the social sector. Other recent concerns have been limiting entitlement to public sector housing

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<sup>464</sup> Oxford: Hart, 2006.

<sup>465</sup> This may not be true in university cities and other areas with high private sector demand.

to those with the right to reside in the UK, and limits to security in the interests of tackling anti-social behaviour; also the introduction for the first time of fixed term tenancies called flexible tenancies.

- **What were the principal reforms and their guiding ideas up to the present date?**

Since 1988, housing law in England has been more stable than it is in Scotland and has begun to draw apart from the law in Wales.<sup>466</sup> As already explained England and Wales have not followed Scotland in creating a single social sector. In England the sectoral division is between market rent regimes in the private sector and affordable rents (at up to 80% of market levels) in the public and social sectors. In Wales the distinction is based on the character of landlord, with private landlords on one side of the divide and local authorities and Registered Social Landlords (housing associations) on the other.

There has been very considerable activity in the years since assured tenancies came into being in 1989. In the private sector a major innovation occurred in 1996 with the default form of tenancy becoming the assured shorthold. Until then it had been necessary to allow the shorthold tenant a fixed term security of at least six months and to give the tenant a warning notice that after that his tenancy was a shorthold and thus lacked full assurance. As from 28 February 1997 a private sector rental would in future be a shorthold by default (whether for an initial fixed period or immediately periodic in character) and it was necessary to serve a notice if full assurance was to be conferred;<sup>467</sup> this is the form of tenancy usually granted by housing associations but it is very unlikely that a private landlord will do this. In 2004 a scheme was enacted for the protection of tenant's deposits.<sup>468</sup>

Probably the greatest impact must be attributed to the Human Rights Act 1998 which, as from October 2000, incorporated the European Convention on Human Rights directly into domestic law. Human rights issues are now raised in many cases, certainly those involving housing authorities directly and with a more debateable impact on housing associations; it also affects repossession and many other issues.

In the social sector the allocation and homelessness regimes were consolidated in 1996 without great change,<sup>469</sup> but in 2011 changes were introduced designed to allow local authorities to favour local applicants for social housing;<sup>470</sup> this is in pursuance of the Coalition's localism agenda. There has been a sustained onslaught on anti-social behaviour, partly through limiting security. The idea of introductory tenancies was floated in 1996,<sup>471</sup> and this has been followed by the possibility of demoting tenants so that antisocial behaviour leads to the loss of guaranteed security.<sup>472</sup> Further, there has been a shift away from life-long security in the public/social sector towards a world of fixed term security and therefore greater

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<sup>466</sup> See above 1.1, pp 5-6.

<sup>467</sup> Housing Act 1996 s. 96; more detailed changes were made by ss. 96-104.

<sup>468</sup> Housing Act 2004 ss 212-215, as amended by the Localism Act 2011 s. 184.

<sup>469</sup> Housing Act 1996 Parts VI, VII.

<sup>470</sup> Localism Act 2011 s. 146.

<sup>471</sup> Housing Act 1996 s. 124 ff.

<sup>472</sup> Housing Act 2004 ss. 180-183.

mobility of tenants in the public/social sector, ideas wrapped up in the recently introduced concept of the flexible tenancy.<sup>473</sup> There has been a lot of adjustment of the grounds for possession to try to make it easier to deal with antisocial behaviour by tenants and their families and associates. The Right to Buy public sector homes is matched by a rather more restrictive Right to Acquire in the social sector.<sup>474</sup> Most recently attention has turned to legislation designed to prevent profit from unauthorised subletting of social housing.<sup>475</sup>

- **To what extent and in which fields was tenancy law since its origins influenced by fundamental rights enshrined in**
  - **the national constitution**

The United Kingdom does not have a constitution in this sense.

- **international instruments, in particular the ECHR**

In the field of housing law the European Convention on Human Rights has a pervasive influence in England and Wales as it has throughout the United Kingdom. Its influence is probably more direct in the United Kingdom than in many other European states. The Human Rights Act 1998 incorporated the Convention directly into the national legal systems and British law does not recognise the public/private divide recognised in many continental jurisdictions, so human rights arguments are raised directly in many civil cases.<sup>476</sup> There is no separate body of administrative courts to conduct judicial reviews.

Public bodies are required not to infringe the human rights of citizens, so in many aspects of housing law, the decisions of public officials are directly open to scrutiny. This can affect, for example, the decision to take repossession proceedings against a public tenant. Social landlords are not generally public bodies when acting as landlord, but they can become subject to a direct duty to observe the human rights of their tenants when that tenant has been allocated housing under the public allocation rules.<sup>477</sup> The position appears unsustainable in that the result of a repossession case based on antisocial behaviour may vary according to whether the landlord is a local authority (with public law duties) or a publicly funded housing association (without). Even when a private landlord seeks possession from a particular tenant human rights issues come into play despite the horizontality of the action raised because the court hearing the repossession is itself defined to be a public body which is required to act in a fashion that is human rights compliant; very often this requires that the court has a discretion to consider the proportionality of ordering possession in each individual case.

Another factor in the explosion of case law on human rights as applied to housing, is the wide range of substantive rights that may come into play. Perhaps central to the current investigation is Article 8 which guarantees respect for the home, and which is

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<sup>473</sup> Localism Act 2011 s. 154.

<sup>474</sup> Housing Act 1996 ss. 16-17; see below, 6.3, pp 144-148.

<sup>475</sup> Prevention of Social Housing Fraud Act 2013.

<sup>476</sup> Arden and Dymond, *Manual of Housing Law*, 9th edn, para. 1-305 ff.

<sup>477</sup> *R (Weaver) v. London and Quadrant Housing* [2009] EWCA Civ 587; contrast *YL v. Birmingham City Council* [2007] UKHL 27 (patients in private care home where they had been placed by the local authority).

obviously brought into play whenever any public decision adversely affects a tenant's home, not least when it is sought to evict him. Any residential repossession, therefore, requires consideration of whether or not the infringement upon the home is justified in the particular circumstances. Probably next in importance is Article 6(1) which confers procedural guarantees whenever a civil right is determined. This is of central importance because English law gives rights to the allocation of housing to public sector applicants and also rights to the provision of housing those unintentionally homeless (as indicated immediately below) and the form of the two legislative codes makes these rights justiciable, at least in the sense that public law duties can be enforced in court, though not directly to confer civil rights within the procedural guarantees of Article 6.<sup>478</sup> Next, there is Article 1 of Protocol 1 guaranteeing that the enjoyment of possessions will not be subject to unjustified controls. In recognising that many controls on tenants are justified, this article is self-limiting, and is probably less significant in pure housing law than the articles previously discussed. However, it can be of great use to a landlord, since every decision in favour of a tenant is an interference by the court with the enjoyment by the landlord of his possessions. Finally, mention should be made of Article 14, the prohibition of discrimination in the exercise of Convention rights. The Convention is not in general a good way to address substantive injustices in the law of landlord and tenant, but the prohibition on discriminatory rules (in the narrow context of Article 14) does provide a vehicle to attack substantive rules, by arguing that they impact differently on differently placed tenants. In *Ghaidan v. Godin-Mendoza*<sup>479</sup> the House of Lords accorded homosexual partners in a stable relationship the same status as if they were husband and wife. The court read the words which confer the right to succeed to a Rent Act tenancy on a person who was 'living with the original tenant as his or her wife or husband',<sup>480</sup> to mean 'as if they were his or her wife or husband'. The legislation was interpreted so as to be compliant with Convention rights 'so far as it is possible to do so'.

It is scarcely possible to overstate the amplitude of the explosion in housing litigation generated by the Human Rights Act 1998.<sup>481</sup> The main areas affected are challenges to:

- administrative decisions by housing officials;
- homelessness decisions;
- allocation decisions;
- discretionary decisions about reposessions;
- mandatory repossession grounds; and
- travellers and other minority groups.

In some areas, notably the standard of judicial review, there have been a series of strikes by the Strasbourg court against the decisions of the domestic courts, but these tend to arise not because the standards that a tenant is entitled to expect have been flouted, but because of Convention law and domestic law are not compatible at a technical level. The most important decision in England is *Manchester City Council*

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<sup>478</sup> *Ali v. Birmingham City Council* [2010] UKSC 8; this reverses the previous understanding in *Begum v. Tower Hamlets London Borough Council* [2002] EWCA Civ 239 (on appeal [2003] UKHL 5). It will be interesting to see whether *Ali* sticks in the Strasbourg court.

<sup>479</sup> [2004] UKHL 30.

<sup>480</sup> Rent Act 1977 sch. 1 para. 2(2).

<sup>481</sup> This came into force on 2 October 2000.

v. *Pinnock*<sup>482</sup> in which it was held that the domestic courts must have power to assess the proportionality of ordering repossession even under the so-called 'mandatory' grounds of repossession. This is the end result of a long series of cases in which the House of Lords had appeared reluctant to accept the authority of the Strasbourg court, causing much money to be wasted in litigation costs. On balance, the human rights case law has generated a great deal of heat but has illuminated relatively few cases.<sup>483</sup>

The status of housing associations under the Human Rights Act appears uncertain.<sup>484</sup> The significance of the status is that the Human Rights Act is primarily directed at public bodies but can be invoked against a private party when primary legislation is incompatible with Convention rights while such a body is carrying out public functions. A successful Human Rights Act challenge by a tenant will often have the incidental effect of constraining the landlord's actions in terms of the management of the landlord and tenant relationship in areas spanning the allocation to the recovery of possession in properties.<sup>485</sup>

Any attempt to evict a person, whether directly or by process of law, from his or her home, would on the face of it be a derogation from the respect to which the home is entitled.<sup>486</sup> Such an action by a public authority seeking possession of residential property occupied by a tenant as his home would ordinarily engage Article 8 – which guarantees, among others, the right to respect for a person's home. The claim to the protection of the human rights provisions does not mean that contractual and proprietary rights to possession could be defeated by a defence to possession proceedings based on Article 8.<sup>487</sup> This article requires proportionality evaluation by a court or tribunal to apply in all possession cases.<sup>488</sup> A tribunal attempts to strike a balance between private and public interests, the extent to which both the parties acted in good faith, the foreseeability of the actions and the legitimacy of the individual's expectations.<sup>489</sup>

The right to respect for the home is also a consideration when the fitness of a house for habitation is considered. Section 11 of the Landlord and Tenant Act 1985 obliges a residential landlord to keep in repair the structure and exterior of the dwelling-house, including the drains, gutters and external pipes; the installations in the dwelling-house for the supply of water, gas and electricity and for sanitation; and the installations for heating. In *Ratcliffe v. Sandwell MBC*<sup>490</sup> it was held that a local authority landlord was obliged to ensure that the condition of a dwelling house was not such as to infringe the tenant's right to respect for his home and family life, but this did not extend to putting the structure of the property in good habitable repair since this would confer greater rights upon the tenant than intended by the parties.

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<sup>482</sup> [2010] UKSC 45.

<sup>483</sup> There is not as yet any case in which a mandatory ground exists and it has been thought disproportionate to order possession.

<sup>484</sup> J. Morgan, 'The Alchemists' Search for the Philosophers' Stone: The Status of Registered Social Landlords under the Human Rights Act', *Modern Law Review*, 66 2003: 700.

<sup>485</sup> *Manchester City Council v. Pinnock* [2010] UKSC 45, [52], Lord Neuberger.

<sup>486</sup> I. Loveland, 'The Impact of the Human Rights Act on Security of Tenure in Public Housing,' *Public Law* 2004(Aut): 594-611.

<sup>487</sup> *Qazi v. Harrow London Borough Council* [2003] UKHL 43.

<sup>488</sup> *Corby Borough Council v. Scott* [2012] EWCA Civ 276.

<sup>489</sup> P. Popelier and C. Van De Heyning, 'Procedural Rationality: Giving Teeth to the Proportionality Analysis,' *European Constitutional Law Review*, 9(2), 2013: 230-262.

<sup>490</sup> [2002] EWCA Civ 6.

These are just a few illustrations of ways in which human rights principles have impacted upon the position of English and Welsh tenants.

- **Is there a constitutional (or similar) right to housing (*droit au logement*)?**

The right to housing in England and Wales is statutory in character and divided between two different, though closely related, regimes.

#### (A) Homelessness

UK wide legislation dating from 1977<sup>491</sup> was re-enacted as Part 6 of the Housing Act 1996<sup>492</sup> as amended by the Homelessness Act 2002 and the Localism Act 2011. The law in Wales is beginning to diverge from that in England.<sup>493</sup> 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.<sup>494</sup> 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,<sup>495</sup> but the ultimate decisions remain susceptible to judicial review and to human rights arguments.<sup>496</sup> This legislation engenders innumerable reported cases each month about issues such as the suitability of the accommodation offered.

#### (B) Allocation of social housing (housing with a public task)

Allocation of social housing takes place within a framework first laid down in 1996.<sup>497</sup> This does not provide directly justiciable rights to housing in quite the same way, but rather requires the local authority to lay down a framework for allocation decisions and to reach decisions within that framework. It may be difficult to challenge the actual decision reached, but decisions can be attacked for procedural flaws. Litigation is lower in volume than for homelessness but nevertheless appreciable.

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<sup>491</sup> Housing (Homeless Persons) Act 1977.

<sup>492</sup> Part III, ss. 58-78; see below, 6.2., pp 119-125.

<sup>493</sup> Housing (Wales) Bill 2013 Part 2, cl 36-83.

<sup>494</sup> Housing Act 1985 s. 65.

<sup>495</sup> Housing Act 1985 s. 64.

<sup>496</sup> 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 Lords in 2009; EWCA Civ – the Civil Division of the Court of Appeal; EWHC – the High Court; EWUT – the Upper Tribunal.

<sup>497</sup> Housing Act 1996 Part VI (s. 159 ff), as amended; see below, 6.2, pp 125-131.

In summary the right to housing is provided by a duty on a local authority to rehouse those found to be unintentionally homeless and a framework for making allocation decisions, both of which are justiciable. A tenant allocated housing under these rules may continue to enjoy stronger protection in human rights jurisprudence than the generality of tenants. Patriation of the European Convention rights has increased the scope for judicial challenges and emphasises the quasi-constitutional character of these rights.

The United Kingdom has acceded to a number of international human rights instruments which contain provisions relating to housing rights, most notably Article 16 of the European Social Charter, 1961, but the utility of these is limited because the rights have not been made justiciable at any level.<sup>498</sup>

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<sup>498</sup> P. Kenna, *Housing Law, Rights and Policy*, (Dublin: Clarus Press Ltd, 2011).

## 6. Tenancy regulation and its context

### 6.1 General introduction

- Give a very short overview over central rules such as basic requirements for conclusion

Statute has overlaid the common law of leases so completely in the field of residential tenancies that it is necessary at the outset to differentiate the key types of tenancy.<sup>499</sup> The discussion which follows only considers new leases granted under current law.

#### [1] Assured shorthold – private sector

The private rented sector is dominated by the assured shorthold tenancy.<sup>500</sup> Detailed conditions will be explained later,<sup>501</sup> but in essence an assured tenancy is a lease of a separate dwelling to an individual who occupies the dwelling as his principal home.<sup>502</sup> If the landlord is a private sector landlord the tenancy will then be a shorthold. It is no longer necessary to make an initial grant of at least six months nor to serve a warning notice (as it was between 1989 and 1996<sup>503</sup> and still is in Scotland), since the shorthold is the default form of tenancy. Indeed the tenancy may be periodic, though a fixed term grant of six months or a year is more common; this is not least because even if the tenancy is periodic from the start, the court cannot award possession (in the absence of a breach) during the initial six months. This tenancy will be governed by contractual rules for its duration. At the term date, the parties may contract for a new tenancy or a new tenancy may be implied from the payment and acceptance of rent, and in either case this new tenancy will continue to be a short assured tenancy. The landlord will have an automatic right to possession of the property when the current contractual arrangement comes to an end, either at the term date of the initial grant or when any express or implied continuation is ended by notice to quit.<sup>504</sup> The rent is a matter for free market negotiation, but if housing benefit is used to cover any of the rent payment, there will be limits on the rent level accepted for benefit claims. It will be seen that 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. Residential property must be habitable and the landlord must carry out major repairs, though it may obviously be difficult for a tenant lacking long-term security to make a complaint about such matters.

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<sup>499</sup> ‘Lease’ and ‘tenancy’ are interchangeable, but ‘tenancy’ is used for shorter arrangements.

<sup>500</sup> Arden and Dymond, *Manual of Housing Law*, 9th edn, para. 1-237 ff; S. Garner & A. Frith, *A Practical Approach to Landlord and Tenant*, 7<sup>th</sup> edn, (Oxford: University Press, 2012), 250ff.

<sup>501</sup> See below, 6.3, pp 135-139.

<sup>502</sup> Housing Act 1988 s. 1; if granted to joint tenants one of them must occupy as his principal home. An occupier of shared accommodation will lack even the minimal security now described.

<sup>503</sup> Housing Act 1988 s. 20.

<sup>504</sup> Housing Act 1988 s. 13.

## [2] Secure tenancy – public landlords

Local authorities are by far the largest category of public landlords. They generally grant secure tenancies.<sup>505</sup> Access to this sector would normally be by registration on a housing waiting list, though the wait may be substantial given the under investment in social housing stock over the years; the wait may be shortened considerably by scoring highly in the points allocation process. People judged to be unintentionally homeless will have priority in seeking permanent accommodation. When a person reaches the top of the waiting list, an offer of accommodation will be made; the scope for negotiation is limited to the extent that it is permitted to reject offers and the extent to which the accommodation offered is unsuitable. Many landlords have a one offer policy.

Details of the secure tenancy will be explained later,<sup>506</sup> but it is in essence a lease granted by a public sector landlord of a separate dwelling to an individual who occupies the dwelling as his principal home.<sup>507</sup> The agreement must be signed by each party. The expectation is that a secure tenancy will be granted in normal circumstances. The basis is an initial fixed period followed by a holding over on a periodic basis, which may be weekly, fortnightly, four weekly or calendar monthly. However, the tenant has security of tenure so the landlord is prevented from simply terminating the tenancy by notice; it will be necessary for the landlord to seek a court order for repossession, and this will only be granted on proof of a ground for possession. A well behaved tenant should be able to stay indefinitely, will have the opportunity to buy his property at a discount if he acts quickly, and will be able to pass on his tenancy by way of succession to family members living with him at his death. However, most tenants will now become introductory tenants at first, and it is only once the tenant has passed a form of probation that full security will accrue; more recently still public landlords have been allowed to grant fixed term tenancies when security is dependent upon the contractual term, this being a minimum of two years, the ‘flexible’ tenancy lacking proper security introduced in 2010.<sup>508</sup> The landlord will be obliged to carry out any major structural repairs.

## [3] Assured tenancy – social sector/housing associations

Since 1989 housing associations have granted (fully) assured shortholds when offering accommodation for an affordable rental.<sup>509</sup> Housing associations were formerly the most important and most numerous type of Registered Social Landlord (and remain so in Wales) but in England they are now called (private) registered providers of social housing. The initial grant may be for a fixed term or it may immediately be periodic; probably the latter is more likely. Rents in the social sector

<sup>505</sup> Housing Act 1985 Part IV; Arden & Dymond, *Manual of Housing Law*, para. 1-156; Garner & Frith, *Practical Approach*, 7th edn, ch. 17.

<sup>506</sup> See below 6.3, pp 135-139.

<sup>507</sup> Housing Act 1985 s. 79; if granted to joint tenants one of them must occupy as his principal home. If the arrangement does not relate to a separate dwelling, the occupier will lack any security and the occupation agreement will operate as a contractual agreement.

<sup>508</sup> Localism Act 2011 s. 154; this category embraces various types of tenancies under earlier law, notably introductory and demoted tenancies.

<sup>509</sup> Housing Act 1988 Part 1 chap. 1, ss 1-19; a housing association does not meet the ‘landlord condition’ in Housing Act 1985 s 80, which describes those landlords able to grant secure tenancies. See: Arden & Dymond, *Manual of Housing Law*, 9th edn, para. 1-213ff; Garner and Frith, *Practical Approach*, 7th edn, ch. 15.

will be affordable rents (ie up to 80% of open market rents). Here a tenant will acquire full residential security so the landlord is prevented from simply terminating the tenancy by notice; it will be necessary for the landlord to seek a court order for repossession, and this will only be granted on proof of a ground for possession. A well behaved tenant should be able to stay indefinitely, will have the opportunity to buy his property at a discount if he acts quickly, and will be able to pass on his tenancy by way of succession to family members living with him at his death. There are specific circumstances where it is permitted to grant a tenancy lacking proper security.<sup>510</sup> Otherwise full security must be given. The landlord will be obliged to carry out the major structural repairs.

- **To what extent is current tenancy law state law or infra-national law (if legislative jurisdiction is divided: what is the allocation of competencies and for which subject matters)**

The member state of the EU is the United Kingdom. As already explained, housing law is now determined at the level of the constituent nations within the United Kingdom, in the context of this report England at Westminster and in Whitehall and Wales in the National Assembly and the Government at Cardiff.<sup>511</sup> There is a separate national report for Scotland and this study does not comprehend the province of Northern Ireland governed from Stormont in Belfast. There is cross-fertilisation between the jurisdictions.

- **Is the position of the tenant also considered as a real property right (and therefore also governed by property law) or (only) as a personal (obligatory) right?**

For most purposes of housing law, a tenancy can be viewed as a contractual agreement, or very often a statutory extension of a contractual arrangement. However, a tenancy is a form of lease, for which the requirements are a right to exclusive occupation of land for a fixed or renewable period or periods of time, usually in return for a rent. The meaning of the agreement as to the extent of the possession which it grants depends upon the intention of the parties, objectively ascertained by reference to the language and relevant background.<sup>512</sup> A short tenancy agreement creates a leasehold estate just as much as the traditional 999 year lease.<sup>513</sup> This will be proprietary if the landlord owns an estate in the land. Such a lease will bind a purchaser. No formality is needed in creation to create a property right if the initial term is for three years or less (any statutory extension being ignored).<sup>514</sup> A short lease will be an overriding interest which binds a purchaser of the registered freehold title without requiring any protective entry on the register.<sup>515</sup> All of this follows from the decision in 1499 to allow recovery of a term from a purchaser.<sup>516</sup>

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<sup>510</sup> Localism Act 2011 s. 154.

<sup>511</sup> See above, 1.1, pp 5-6.

<sup>512</sup> *Westminster City Council v. Clarke* [1992] 2 AC 288, HL.

<sup>513</sup> *Street v. Mountford* [1985] AC 809, HL.

<sup>514</sup> Law of Property Act 1925 s. 54(2).

<sup>515</sup> Land Registration Act 2002 sch. 3 paras 1, 2. This has now been amended to include any flexible tenancies or corresponding tenancy granted by a private registered provider, however long.

<sup>516</sup> See above, 5, p. 105, fn. 451.

One should mention that as a result of the controversial decision of the House of Lords in *Bruton v. London & Quadrant Housing Trust*<sup>517</sup> it is possible for a landlord who does not hold an estate in the land to grant an effective lease to a tenant by purporting to confer exclusive possession upon him; such a lease is binding by estoppel between the parties but is not in the full sense a lease against the land since it will not bind the ultimate owner of the land.<sup>518</sup> This situation is unusual.

- **To what extent is the legislation divided up into general private law and special statutes? To what extent are these rules mandatory and dispositive? Does the relationship between general and special rules work properly so as to create legal certainty?**

Housing law is based on specific sectoral Acts, but underpinned by the general law of landlord and tenant. The parties are generally free to modify the latter.

English law does not adopt a coherent approach to allowing or disallowing landlords from contracting out of security regimes. The leading authority is *Street v. Mountford*.<sup>519</sup> In this case a solicitor as landlord granted self-contained accommodation to Mrs Mountford on the terms that he was not conferring exclusive possession to her. She also signed a 'coda' to the tenancy agreement by which she accepted that the security regime of the time (the Rent Act 1977) would not apply to her tenancy. The House of Lords held that these attempts to exclude residential security were not effective and Mrs Mountford did, therefore, hold a Rent Act tenancy. In a subsequent case, *Antoniades v. Villiers*,<sup>520</sup> an attempt was made to preclude a grant of full residential security to a couple by granting each of them, the man and the woman separately, a licence and requiring them to share possession with each other. This attempt to avoid the security regime was ineffective since it was treated as a 'pretence'. On the other hand residential security can easily be avoided by letting to a company instead of an individual.<sup>521</sup>

- **What is the court structure in tenancy law? Is there a special jurisdiction or is the ordinary one competent? What are the possibilities of appeal?**

Landlord and tenant claims should normally be brought in the county court which is local to the land.<sup>522</sup> Cases can be appealed to the Court of Appeal as of right and to the Supreme Court with leave. Issues about the level of rent are assigned to the Property Chamber of the First-tier Tribunal, from which there is an appeal to the Upper Tribunal; the Tribunals however deal mainly with issues arising from leasehold ownership, that is with long leases rather than short term residential renting. This system of adjudication is common to England and Wales.

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<sup>517</sup> [2000] 1 AC 406, HL.

<sup>518</sup> [2000] 1 AC 406, 415, Lord Hoffmann; *Islington London Borough Council v. Green* [2005] EWCA Civ 56.

<sup>519</sup> [1985] AC 809, HL.

<sup>520</sup> [1990] 1 AC 417, HL.

<sup>521</sup> *Hilton v. Plustile* [1989] 1 WLR 149, CA; *Eaton Square Properties v. O'Higgins* (2001) 33 HLR 68 CA; Sparkes A New Landlord and Tenant, ch. 6.

<sup>522</sup> Civil Procedure Rules 1998 rule 55; J.E. Adams, 'The Woolf Reforms and Property Litigation', *Conveyancer* 1999 (Nov/Dec): 459-461.

- Are there public law duties/requirements influencing tenancy contracts.  
E.g. a duty to register contracts; personal registration of tenants

Short residential tenancies do not have to be registered. There is a proposal to introduce a scheme of registration of private landlords in Wales,<sup>523</sup> mirroring that already operating in Scotland.

- Planning/zoning law requirements on (new) habitable dwellings, e.g. on minimum size, number of bathrooms etc.

Detailed rules on new dwellings or alterations to existing buildings are contained in the Building Regulations 2000, but these are so detailed that it would not be feasible to summarise them concisely. There are fourteen technical parts each with an approved document typically running to 50 pages or more, so perhaps 700 pages in total (constantly updated). A good way into this is via the online guide on the official planning portal.<sup>524</sup> Many buildings have some technical breaches of the regulations, but enforcement action is barred after four years. There are separate rules about defects so serious that they infringe public health rules.<sup>525</sup>

- What is the role of estate agents? What are the usual services they provide in the area of rental housing?

Estate agents commonly act for private sector landlords. Some agencies, typically called letting agents, just find tenants for properties or connect tenants to landlords, and manage properties. Their tasks specifically include drawing up tenancy agreements and providing an inventory to the parties, collecting references from a potential tenant's employer, bank and/or previous landlord, renewing the tenancy agreement when the fixed term ends, among others. These services are also offered by estate agents who are also involved with buying and selling properties. Agencies of both kinds increasingly rely on an online presence as against a high street office.

It appears that anyone can set up as an estate agent, even if they have no previous experience in the field. It has been suggested that this increases the risks for both landlords and tenants, while making life more difficult for reputable agents. While Estate Agents Act 1979 controls the activities of those in sales of properties, it does not control rentals. The only regulations for rental agents maybe for those who are members of The Property Ombudsman Scheme or who have registered with the Property Ombudsman under the Estate Agents Redress Scheme approved by the Office of Fair Trading. Member firms must follow the Property Ombudsman Code of Practice for Residential Sales. The Coalition Government have indicated that further regulation of letting agents is 'unnecessary red tape'.<sup>526</sup> Private members bills in the last and the current sessions of Parliament have sought to introduce a registration scheme, but this idea stands no chance of passing into legislation without government support.

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<sup>523</sup> Housing (Wales) Bill 2013 Part 1, cl 1-35.

<sup>524</sup> [www.planningportal.gov.uk](http://www.planningportal.gov.uk)

<sup>525</sup> See below 6.4, pp 169-173.

<sup>526</sup> W. Wilson & C. Fairbairn, 'Regulation of Private Sector Letting and Managing Agents' (House of Commons, Library Standard Note SN 060000).

## 6.2 Preparation and negotiation of tenancy contracts

- **Freedom of contract**
- **Are there cases in which there is an obligation for a landlord to enter into a rental contract?**

In the private sector the answer is no. Affordable housing in the public and social sectors must be allocated according to two regimes, the duties to the homeless and allocation rules, now discussed in turn, but only to those who are eligible.

### Homelessness – England

A full homelessness duty is owed to a person who is homeless unintentionally and has a priority need for accommodation. Suitable permanent accommodation must be offered, with temporary accommodation while the permanent accommodation is secured. Lesser duties are owed in other circumstances.<sup>527</sup>

Legislation giving rights to homeless people was first enacted as the Housing (Homeless Persons) Act 1977 which extended throughout Great Britain but this was consolidated for England and Wales alone as Part 7 of the Housing Act 1996. This has subsequently amended by the Homelessness Act 2002 and the Localism Act 2011.<sup>528</sup> This is all amplified by secondary legislation<sup>529</sup> and *Homelessness Guidance* which has a focus on strategies to avoid homelessness arising.<sup>530</sup> The description below follows the legislative structure of the original legislation which set out first the key concepts before defining the duties owed to homeless people of varying descriptions and more general administrative provisions. The modern English legislation has a chronological structure following an application through from when it is made to when accommodation is offered, a structure which is much more confusing.<sup>531</sup>

There are three key concepts. A person is **homeless** if he has no accommodation either in England or the rest of the United Kingdom or anywhere else in the world.<sup>532</sup> People from overseas who are eligible for housing (for example because they are EEA nationals exercising their economic rights), will often fall outside the category of the homeless because they have accommodation which they could occupy in their home state.<sup>533</sup> People become homeless for all sorts of reasons.<sup>534</sup> The most

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<sup>527</sup> Arden and Dymond, *Manual of Housing Law*, 9th edn, ch. 9; Sparkes *New Landlord and Tenant*, ch. 4.

<sup>528</sup> S. 198; 'Supplementary Guidance on the Homeless Changes in the Localism Act 2011 and on the Homelessness (Suitability of Accommodation (England) Order 2012' (London, Department for Communities and Local Government, November 2012).

<sup>529</sup> This concerns suitability of accommodation, priority need, review procedures and the qualification of non-British applicants and is considered at the appropriate place below.

<sup>530</sup> 'Homelessness Code of Guidance for Local Authorities' (London: Department for Communities and Local Government, July 2006), chs 1-3. There is a good overview of the legislation at 7-11. However, the courts have on several occasions rejected the Ministerial view of the meaning of the legislation.

<sup>531</sup> It is interesting that the Housing (Wales) Bill 2013 reverts more or less to the original structure.

<sup>532</sup> Housing Act 1996 s. 175; 'Homelessness Guidance', ch. 8.

<sup>533</sup> If they are homeless they are likely to be homeless intentionally because they have given up accommodation it would be reasonable to continue to occupy: *Re Islam* [1983] 1 AC 688, HL; *Osei v. Southwark London Borough Council* [2007] EWCA Civ 787 (surrender of tenancy in Spain); *Waltham Forest London Borough Council v. Maloba* [2007] EWCA Civ 1281 (Uganda).

<sup>534</sup> 'Homelessness Guidance', annex 7.

common today is the ending of an assured shorthold. Sometimes parents or relative or friend are unable to continue to provide accommodation. It may follow relationship breakdown or domestic violence. Sometimes a person leaves an institutional background, such as care, prison, the armed forces or hospital. On other occasions, a tenant falls into arrears with rent payments or the person's own antisocial behaviour leads to eviction from his current housing. Members of ethnic minorities are three times more likely to find themselves homeless than the average.

Homelessness in the technical sense arises where the applicant has no accommodation, whether owned or held on a tenancy or by statutory right or licence. It must be reasonable for him to occupy the accommodation with his family unit, regard being had to prevailing housing conditions where the application is made.<sup>535</sup> It must also be reasonable for the family unit to continue in occupation without, for example, facing domestic or other violence.<sup>536</sup> The two issues are separate; so a woman in a refuge has accommodation, but it still needs to be considered whether it is reasonable for her to continue to occupy it.<sup>537</sup> Other circumstances equated to homelessness are where the applicant has accommodation but cannot secure entry to it, or where the occupier of a mobile home who lacks a pitch or of a houseboat who lacks a berth.<sup>538</sup> A person is threatened with homelessness if it is likely that he will become homeless within 28 days.<sup>539</sup>

The unit considered is the applicant, anyone who normally resides with him and anyone with whom it is reasonable for the applicant to live. This unit must have accommodation available which it must be reasonable for them to occupy, regard being had to prevailing housing conditions where the application is made.<sup>540</sup> Accommodation which is overcrowded to some degree is nevertheless accommodation, but there is a level of overcrowding where it would not be reasonable for the family to continue to face, regard being had to the future. In such a case a family may be 'homeless at home'.<sup>541</sup> Many children are now raise din families split between mother and father, but homelessness duties will very rarely arise in two homes cases,<sup>542</sup> either because the children are not homeless or because of issues of intentionality.<sup>543</sup>

The authority must examine whether the applicant had a **priority need**. This is the key to securing an offer of permanent accommodation. The test is applied to the family grouping of the applicant or a person with whom the applicants resides or with whom it is reasonable for him to reside. Priority need exists for a person who is:<sup>544</sup>

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<sup>535</sup> Housing Act 1996 ss 175(3), 176.

<sup>536</sup> Housing Act 1996 s. 177 as amended by the Homelessness Act 2002 s. 10; ,Homelessness Guidance, paras 8.18ff. This should not apply to a person protected by an occupation order: *Abdullah v. Westminster City Council* [2011] EWCA Civ 1171; nor after a separation if a wife is willing to take her husband back: *Hemans v. Windsor and Maidenhead Royal Borough Council* [2011] EWCA Civ 374.

<sup>537</sup> *Manchester City Council v. Moran* [2005] EWCA Civ 378; but see *R (Aweys) v. Birmingham City Council* [2009] UKHL 36.

<sup>538</sup> Housing Act 1996 s. 176.

<sup>539</sup> Housing Act 1996 s. 175(4).

<sup>540</sup> Housing Act 1996 ss 175(3), 176.

<sup>541</sup> *R (Aweys) v. Birmingham City Council* [2009] UKHL 36.

<sup>542</sup> *El Goure v. Kensington and Chelsea Royal London Borough Council* [2012] EWCA Civ 670.

<sup>543</sup> *Bull v. Oxford City Council* [2011] EWCA Civ 609.

<sup>544</sup> Housing Act 1996 s.189; Housing (Priority Need for Accommodation) (England) Order 2001; 'Homelessness Guidance', ch. 10.

pregnant;  
residing with<sup>545</sup> dependent children,<sup>546</sup> or  
vulnerable<sup>547</sup> as a result of old age, mental illness, handicap or physical disability;<sup>548</sup>  
children formerly in care etc who are 16-17 or up to 21 if vulnerable;  
ex-service personnel who are vulnerable;  
ex-prisoners who are vulnerable after release;  
facing violence or credible threats of violence.<sup>549</sup>

There is also priority need after an emergency, such as when a chap went out for a walk only to find on his return that his caravan had been towed away.<sup>550</sup> Should the applicant not fall into one of the categories on this list then they are at best entitled to temporary accommodation and information/advice services.

The local authority must also still examine whether the applicant is homeless **intentionally**.<sup>551</sup> This will be the case where he is responsible for finding himself homeless. The whole chain of events is considered since the applicant had settled accommodation.<sup>552</sup> Many examples of intentionality are financial:

falling into rent arrears by failing to apply his benefit to rent payments;  
not paying a mortgage;<sup>553</sup>  
taking on an unaffordable rental<sup>554</sup> or mortgage.<sup>555</sup>

Others relate to more general conduct, such as:

use of a counterfeit passport to obtain housing;<sup>556</sup>

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<sup>545</sup> This does not include two homes with both mother and father: *Holmes-Moorhouse v. Richmond-on-Thames London Borough Council* [2009] UKHL 7.

<sup>546</sup> A husband may not claim that his 17 year old wife is a dependent child: *Ekinci v. Hackney London Borough Council* [2001] EWCA Civ 776. On the other hand an applicant assessed the day before her 18th birthday has to be treated as dependent: *R (M) v. Hammersmith and Fulham London Borough Council* [2008] UKHL 14.

<sup>547</sup> A broad test is applied: *Osmani v. Camden London Borough Council* [2004] EWCA Civ 1706; and many later cases.

<sup>548</sup> Homelessness duties are displaced by other regimes where a person is so impaired as not to be able to live alone: *Ex parte B* [1993] AC 509, HL.

<sup>549</sup> Violence does not require physical contact but can include threatening or intimidating behaviour or other forms of abuse giving rise directly or indirectly to the risk of harm: *Yemshaw v. Hounslow London Borough Council* [2011] UKSC 3, reversing *Danesh v. Kensington and Chelsea Royal London Borough Council* [2006] EWCA Civ 1404. No value judgement is involved: *Bond v. Leicester City Council* [2001] EWCA Civ 1544. The victim will often be required to end up a joint tenancy in order that (usually) she can be rehoused: *R (Hammia) v. Wandsworth London Borough Council* [2005] EWHC 1127 (Admin).

<sup>550</sup> *Higgs v. Brighton and Hove City Council* [2003] EWCA Civ 895.

<sup>551</sup> Housing Act 1996 s. 191. The original legislation sticks to the correct grammatical expression, becoming 'homeless intentionally' but it is very common to speak of a person being 'intentionally homeless', a term which appears in secondary legislation.

<sup>552</sup> *Din v. Wandsworth London Borough Council* [1983] 1 AC 657, HL; *Knight v. Vale Royal Borough Council* [2003] EWCA Civ 1258; *Mohamed v. Westminster City Council* [2005] EWCA Civ 796; *Gilby v. Westminster City Council* [2007] EWCA Civ 604.

<sup>553</sup> *Williams v. Wandsworth London Borough Council* [2006] EWCA Civ 375;

<sup>554</sup> *F v. Birmingham City Council* [2006] EWCA Civ 1427.

<sup>555</sup> *Watchman v. Ipswich Borough Council* [2007] EWCA Civ 348.

conviction for drugs offences,<sup>557</sup>  
eviction after antisocial behaviour;<sup>558</sup> and  
arranging to be evicted merely in order to secure accommodation from the authority.<sup>559</sup>

Another instance would be leaving accommodation when it would be reasonable for him to stay,<sup>560</sup> for example a traveller giving up bricks and mortar accommodation,<sup>561</sup> though here account has to be taken of the suitability of the accommodation. Account is taken only of deliberate acts, so an act done in good faith in ignorance of relevant facts may not lead to a finding of intentionality.<sup>562</sup> If the finding is that the homelessness is intentional the local authority will provide temporary accommodation for a reasonable period, as well as advice and support, but will not provide settled accommodation. This even negates a duty to dependent children.<sup>563</sup>

With those key concepts in mind, attention can turn to **procedure**. Once a person makes a homelessness application, the local authority is required to carry out an assessment in order to determine whether the applicant is from the United Kingdom or from abroad and in the latter case whether he is eligible for housing assistance.<sup>564</sup> The discussion which follows assumes eligibility. The authority must then determine whether the applicant is homeless or threatened with homelessness,<sup>565</sup> and if so whether it is intentional. Finally, the authority has discretion to examine whether the applicant has a local connection to the authority area.<sup>566</sup> While awaiting assessment an applicant is entitled to temporary accommodation. There are rights to review of all decisions.

The strongest homelessness duty (the **full duty**) arises when the local authority concludes that the applicant in priority need is homeless unintentionally. The authority is required to ensure that 'accommodation becomes available' for those experiencing homelessness.<sup>567</sup> Initially this covers temporary accommodation for those in apparent priority need,<sup>568</sup> but if this is confirmed then 'permanent' accommodation must be found, giving (usually) a secure tenancy or (from a private provider) an assured tenancy, either a tenancy with full assurance or (recently) a assured shorthold for at least one year.<sup>569</sup> Often a local authority will have to offer temporary accommodation as a stop-gap (the interim duty), in which case the applicant remains technically homeless until suitable permanent accommodation is

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<sup>556</sup> *Chishimba v. Kensington and Chelsea Royal London Borough Council* [2013] EWCA Civ 786.

<sup>557</sup> *Stewart v. Lambeth London Borough Council* [2002] EWCA Civ 753,

<sup>558</sup> *Denton v. Southwark London Borough Council* [2007] EWCA Civ 623

<sup>559</sup> Housing Act 1996 s. 191(3).

<sup>560</sup> *Din v. Wandsworth London Borough Council* [1983] AC 657, HL.

<sup>561</sup> *Steward v. Kingston-on-Thames Royal London Borough Council* [2007] EWCA Civ 565.

<sup>562</sup> *O'Connor v. Kensington and Chelsea Royal London Borough Council* [2004] EWCA Civ 394; *Ugiagbe v. Southwark London Borough Council* [2009] EWCA Civ 31.

<sup>563</sup> *R v. Northavon District Council ex parte Smith* [1994] 2 AC 402, HL. Intentionally does not necessarily remove entitlement to other assistance, such as help with a private sector deposit: *R (Savage) v. Hillingdon London Borough Council* [2010] EWHC 88 (Admin).

<sup>564</sup> Housing Act 1996 s. 185; this is discussed below, 6.2., pp 126-128.

<sup>565</sup> Housing Act 1996 s. 183.

<sup>566</sup> Housing Act 1996 ss 198-201.

<sup>567</sup> Housing Act 1996 s. 193; *R v. Brent London Borough Council ex parte Awua* [1996] AC 55, HL.

<sup>568</sup> Housing Act 1996 s. 188; *R v Newham London Borough Council ex parte Begum* [2000] 2 All ER 72.

<sup>569</sup> 'Homelessness Guidance' ch. 16; Localism Act 2011 s. 148.

offered.<sup>570</sup> In the past the local authority was the primary provider of housing here, but housing associations play an increasing role since the advent of the mass stock transfers of the 1990s. This has been recognised in statute and local authorities have the power to request that a private provider of social housing active in their area provide accommodation for a homeless person.<sup>571</sup> A temporary letting to a person seeking accommodation or accommodating a homeless family is not secure and can be for any duration; the landlord has a mandatory ground for possession if it chooses to exercise it, though in order to meet human rights standards there will be procedure to review the eviction decision.

In many cases authorities adopt the policy of making a single offer of accommodation on a take it or leave it basis. This is valid provided that the offer made is of accommodation that is **suitable**, to the family of the applicant including the children and to a pregnant woman.<sup>572</sup> The duty is to supply suitable accommodation, but not necessarily any particular accommodation.<sup>573</sup> There are several aspects of this. First, the council must consider the affordability of the accommodation, taking into account the financial resources and benefits received by the applicant household as against the costs in terms of rent and other outgoings and any other commitments such as child support payments.<sup>574</sup> Second, there is an attempt to limit the use by councils of bed and breakfast accommodation, by providing that an applicant with family commitments (through caring for dependent children or through pregnancy) should not be placed in bed and breakfast accommodation, and certainly not past six weeks.<sup>575</sup> Although the family unit should be able to live 'together', it may be acceptable to offer two adjoining flats.<sup>576</sup> Bricks and mortar accommodation may or may not be suitable for travellers.<sup>577</sup> Third, the authority must take into account the location of the property offered<sup>578</sup> including:

distance outside the local authority area;<sup>579</sup>

disruption to employment;

proximity to medical facilities;<sup>580</sup> and

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<sup>570</sup> Housing Act 1996 s. 188; 'Homelessness Guidance' ch. 7. The interim duty can be met in the private sector: Housing Act 1996 s. 209. However, the authority should avoid Bed and Breakfast accommodation for those with family commitments; see immediately below.

<sup>571</sup> Housing Act 1996 ss. 213, 213A.

<sup>572</sup> Housing Act 1996 s. 199; 'Homelessness Guidance' ch. 17. Suitability is also relevant when determining whether someone was homeless in the first place: *R v. Lambeth London Borough Council ex parte Ekpo-Wedderman* (1999) 31 HLR 498.

<sup>573</sup> *Begum v. Tower Hamlets London Borough Council* [2002] EWHC 633.

<sup>574</sup> Homelessness (Suitability of Accommodation) (England) Order 1996.

<sup>575</sup> Homelessness (Suitability of Accommodation) (England) Order 2003; 'Homelessness Guidance', paras 17.24-17.38, Annex 17 (minimum standards). This limits the damage inflicted by *Puhlhofer v. Hillingdon London Borough Council* [1986] AC 484, HL, which was reversed by legislation almost immediately.

<sup>576</sup> *Sharif v. Camden London Borough Council* [2013] UKSC 10. Older children can be expected to house themselves: *R (Ariemuguvbe) v. Islington London Borough Council* [2009] EWCA Civ 1308.

<sup>577</sup> *Codona v. Mid-Bedfordshire District Council* [2004] EWCA Civ 925; *Sheridan v. Basildon Borough Council* [2012] EWCA Civ 335.

<sup>578</sup> Homelessness (Suitability of Accommodation) (England) Order 2012 art. 2; 'Homelessness Guidance', para. 16.7ff.

<sup>579</sup> *R (Sacupima) v. Newham London Borough Council* [2001] 1 WLR 563, CA; *R (Calgin ) v. Enfield LBC* [2005] EWHC 1716 (Admin).

<sup>580</sup> *Omar v. Westminster City Council* [2008] EWCA Civ 421.

proximity to local services and transport.

Consideration must be given to slum status, overcrowding and the licensing of houses in multiple occupation.<sup>581</sup> Where accommodation is provided through a private sector landlord, a large set of quality standards must be met before the property is considered suitable, including:<sup>582</sup>

- reasonable physical condition;
- electrical and gas safety, fire precautions and carbon monoxide monitoring;
- suitability of the landlord;
- House in Multiple Occupation licensing;
- energy Performance Certification; and
- adequacy of the written tenancy agreement.

Usually there is a requirement to offer full assurance, but if the tenant accepts a qualifying shorthold that too ends the authority's duty;<sup>583</sup> now, under the Localism Act 2011 the full duty can be met by an offer of an assured shorthold with a fixed term of at least 12 months.<sup>584</sup> Refusal of a satisfactory offer ends the homelessness duty.<sup>585</sup>

Where the applicant has a **local connection** to the authority to which application is made, and no local connection to another authority in Great Britain, the obligation rests with the authority of application. If, however, enquiry reveals local connection with the area of another authority, the application can be referred to that authority.<sup>586</sup>

The local connection test is a real rather than technical test<sup>587</sup> and usually involves examining the applicant's prior residence, employment history and family associations for at least five years, as well as any special circumstances such as education or health treatments. The connection must be established by choice, so a direction to an asylum seeker that he must move to a particular town does not establish a local connection there;<sup>588</sup> nor does imprisonment or service in the armed forces.<sup>589</sup> Refugees and those with leave to remain do not require a local connection. This would involve the authority examining the applicant's voluntary past residence. Under the Code of Guidance that period of residence must last for at least six

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<sup>581</sup> Housing Act 1996 s. 210.

<sup>582</sup> Homelessness (Suitability of Accommodation) (England) Order 2012 art. 3; 'Homelessness Guidance' para. 16.20 ff.

<sup>583</sup> Housing Act 1996 s 193(7B).

<sup>584</sup> Localism Act 2011 s. 148 amending Housing Act 1996 s. 193; 'Supplementary Guidance'. There is a new reapplication duty under s 195A if the assured shorthold is brought to an end within 2 years.

<sup>585</sup> Housing Act 1996 s. 193, as amended by the Homelessness Act 2002 and the Localism Act 2011 s. 148; *Ravichandran v. Lewisham London Borough Council* [2010] EWCA Civ 755; *Slater v. Lewisham London Borough Council* [2006] EWCA Civ 394. There are a lot of other cases on this issue.

<sup>586</sup> Housing Act 1996 s. 198; 'Homelessness Guidance', ch. 18.

<sup>587</sup> *Eastleigh Borough Council v. Betts* [1983] 2 AC 613, HL (woman who followed her partner's work from Leicester to Hampshire did not establish a local connection in Hampshire); there are innumerable later cases.

<sup>588</sup> However, the provision of interim accommodation may establish a local connection: *Mohamed v. Hammersmith and Fulham London Borough Council* [2001] UKHL 57.

<sup>589</sup> *Al-Ameri v. Kensington and Chelsea Royal London Borough Council* [2004] UKHL 4.

months during the past twelve months or not less than three years during the previous five years.<sup>590</sup> There is a procedure to handle disputed cases.<sup>591</sup>

The finding may also be that a person is not yet homeless, but is **threatened with homelessness**, that is where he is likely to lose his home within 28 days. In such cases the authority should take reasonable steps to ensure that the accommodation 'remains available' for those threatened with homelessness.<sup>592</sup> Threatened homelessness usually arises from eviction for rent arrears or mortgage repossession.

All homelessness decisions are subject to review and appeal to a County Court on a point of law.<sup>593</sup> A brief summary of a voluminous case law is that the County Court acts like the High Court considering a judicial review application, including the human rights issue of proportionality but not Article 6 trial rights.<sup>594</sup> The current arrangements are clearly unsatisfactory and the government is quite correctly seeking a way to limit the volume of appeals.

As well as providing housing, local authorities are required to make enquiries in their area about housing need, provide advice and assistance and generally to seek to prevent homelessness.<sup>595</sup> Many homeless applicants are from ethnic minorities and authorities should seek to ensure that they act fairly.<sup>596</sup> They may contract out some of their duties to private sector contractors.<sup>597</sup>

### **Homelessness – Wales**

At present the homelessness law in England also applies in Wales, though with a slightly different formulation of similar rules on suitability of accommodation.<sup>598</sup> However, legislation currently proposed will rewrite the homelessness regime,<sup>599</sup> in the interests of securing a better narrative flow.

### **Allocation of public/social housing – England and Wales**

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. Rents in accommodation provided

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<sup>590</sup> A period of five years is prescribed by Allocation of Housing and Homelessness (Miscellaneous Provisions (England) Regulations 2006 reg. 3.

<sup>591</sup> Homelessness (Decisions on Referrals) Order 1998; local authorities have agreed procedures: 'Homelessness Guidance', Annex 18.

<sup>592</sup> Housing Act 1996 s. 195.

<sup>593</sup> Housing Act 1996 ss 202-204, and also s 204A inserted Homelessness Act 2002 s. 11; Allocation of Housing and Homelessness (Review Procedures) Regulations 1999; 'Homelessness Guidance' ch. 19.

<sup>594</sup> *Ali v. Birmingham City Council* [2010] UKSC 8.

<sup>595</sup> Housing Act 1996 ss 179-182; Homelessness Act 2002.

<sup>596</sup> 'Homelessness Guidance' Annex 1 = 'Tackling Homelessness Amongst Ethnic Minority Households'.

<sup>597</sup> Deregulation and Contracting Out Act 1994; Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996; 'Homelessness Guidance', ch. 21.

<sup>598</sup> Homelessness (Suitability of Accommodation) (Wales) Order 2006

<sup>599</sup> Homelessness (Wales) Bill 2013 cl 37-38 (reviews and strategy), 39-75 (homelessness duties).

by these landlords should be affordable.<sup>600</sup> Social housing is allocated in accordance with an allocation scheme determined by each provider. It must take into account its homelessness strategy, its tenancy strategy and, in the capital, the London housing strategy.<sup>601</sup> Every social provider must have rules covering transfers and exchanges (which are not allocations<sup>602</sup>) as well as initial allocations, and the whole scheme must be published.<sup>603</sup> Social providers are allowed a wide discretion in determining details of the scheme applied to their homes, but within a mandatory statutory framework specifying priority cases and subject to following Ministerial Guidance.<sup>604</sup> The legislation covering England has been changed by the Localism Act 2011<sup>605</sup> and that covering Wales is contained in the original Housing Act 1996,<sup>606</sup> however the two regimes are currently the same. Providers are required to allocate in accordance with their allocation scheme,<sup>607</sup> but if a housing officer grants tenancies to people who are not at the top of the list the tenancies remain valid.<sup>608</sup>

Most applications are now made to a common register which includes the property of the local authority and registered providers operating in the locality.<sup>609</sup> 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.<sup>610</sup>

A prospective tenant must take the initiative by making a formal application for accommodation to a social landlord.<sup>611</sup> The applicant must be over the age of 16, and eligible to apply for an allocation of social housing.<sup>612</sup> Upon submitting an application for housing from a registered provider, the applicant will be added to a housing waiting list.<sup>613</sup> 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.<sup>614</sup> Where the applicant has special needs the council may be able to match that person with

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<sup>600</sup> The tenant will pay a lower rent and is not required to pay a deposit.

<sup>601</sup> Housing Act 1996 s. 166A inserted by Localism Act 2011 s. 147.

<sup>602</sup> *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.

<sup>603</sup> Housing Act 1996 ss 167-168.

<sup>604</sup> ‘Guidance on the Allocation of Housing’ (London: Department of Communities and Local Government, 2012).

<sup>605</sup> 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.

<sup>606</sup> 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.

<sup>607</sup> *Sahardid v. Camden London Borough Council* [2004] EWCA Civ 1485.

<sup>608</sup> *Birmingham City Council v. Qasim* [2009] EWCA Civ 1080.

<sup>609</sup> Housing Act 1996 s. 170.

<sup>610</sup> Allocation of Housing (Procedure) Regulations 1997, reg. 3.

<sup>611</sup> Housing Act 1996 s. 166. Help with the application must be provided free of charge.

<sup>612</sup> See below 6.2, p. 128.

<sup>613</sup> 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.

<sup>614</sup> 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.

suitable accommodation in supported or sheltered accommodation.<sup>615</sup> An applicant must be qualified and may either be in a priority group or without special priority or disqualified.

A recent change has allowed the local authority to set **qualifications**. It is anticipated that this will be used to ensure a local connection through work to the area of the local authority, though employment or family association,<sup>616</sup> though this requirement cannot be applied to members of the armed forces.<sup>617</sup> This is an aspect of the government's commitment to 'localism'. Waiting lists have been slashed as those registered from other areas have been told that they have no prospect of ever receiving an allocation.<sup>618</sup>

Preference is given to certain **priority groups** in allocation.<sup>619</sup> A social landlord is required to give priority to applicants from the following groups:<sup>620</sup>

- homeless or owned homelessness duties;<sup>621</sup>
- 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.<sup>622</sup>

Consideration can be given to:

- financial resources available to meet housing costs;
- behaviour of the applicant and household affecting his suitability as a tenant;<sup>623</sup>
- any local connection.

Preference groups must be preferred,<sup>624</sup> but they do not need to be ranked equally. Cumulative preference is not required for those falling into more than one category, and the 'reasonable preference' does not confer absolute priority over all other

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<sup>615</sup> 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.

<sup>616</sup> Housing Act 1996 s. 160ZA inserted by Localism Act 2011 s. 146; 'Allocation Guidance' para. 3.18ff, 'Providing Social Housing for Local People' (London: Department of Communities and Local Government, December 2013).

<sup>617</sup> Allocation of Housing (Qualification Criteria for Armed Forces)(England) Regulations 2012 reg. 3; Housing Act 1996 (Additional Preference for Armed Forces)(England) Regulations 2012.

<sup>618</sup> *Guardian* 1 February 2014.

<sup>619</sup> Allocation here means the selection of a tenant for a secure or introductory tenant or nominating a tenant to another social provider, but it does not cover transfers or upgrades of flexible tenancies; it also excludes succession on death and transfers ordered by a family court: Housing Act 1996 ss 159(2), 160.

<sup>620</sup> Housing Act 1996 s. 159.

<sup>621</sup> *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.

<sup>622</sup> 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.

<sup>623</sup> 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.

<sup>624</sup> *R(Lindsay) v. Lambeth London Borough Council* [2002] EWCA Civ 1084.

considerations.<sup>625</sup> There is wide discretion to choose methods of banding and points allocation.<sup>626</sup>

Priority groups can also be formed of those seeking particular types of accommodation, perhaps that adapted for the elderly or the disabled.<sup>627</sup>

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. The landlord can determine how to weight applications according to their published policy.<sup>628</sup>

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 which is considered below. 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,<sup>629</sup> social needs,<sup>630</sup> social work,<sup>631</sup> harassment,<sup>632</sup> under occupation of present accommodation, shared living space, mobile homes, when allocating points.<sup>633</sup> The local authority can decide that the conduct of the applicant or a member of his household is unacceptable and that he is not therefore qualified for an allocation of social housing.<sup>634</sup> It can also defer applicants for bad behaviour.<sup>635</sup> When an applicant comes to the top of the list, the social landlord will make an offer of accommodation which the applicant is free to accept or refuse. Allocation policies must state the policy on the consideration of applicants' choices and preferences.<sup>636</sup> However, landlords are not obliged to make more than one offer and the practice after an initial refusal varies from area to area.<sup>637</sup>

Other housing authorities administer a **choice based** housing allocation system, similar to that described for Edinburgh.<sup>638</sup> However, a challenge to one scheme succeeded because it did not adequately balance new allocations and the stock set aside for transfers.<sup>639</sup>

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<sup>625</sup> *R(Ahmad) v. Newham London Borough Council* [2009] UKHL 14.

<sup>626</sup> *R(Faarah) v. Southwark London Borough Council* [2008] EWCA Civ 807.

<sup>627</sup> *Boreh v. Ealing London Borough Council* [2008] EWCA Civ 1176; *Shala v. Birmingham City Council* [2007] EWCA Civ 624.

<sup>628</sup> Possible criteria are given in 'Allocation Guidance', Annex 1.

<sup>629</sup> Such as a disability.

<sup>630</sup> For instance looking after an elderly relative.

<sup>631</sup> Where the applicant has care needs.

<sup>632</sup> This would include domestic violence.

<sup>633</sup> Conversely an applicant guilty of antisocial behaviour etc should be required to wait for a qualifying period before becoming entitled to housing.

<sup>634</sup> Housing Act 1996 s. 160ZA, inserted by Localism Act 2011 s. 146; 'Allocation Guidance' ch. 3 and Annexes 2-4.

<sup>635</sup> *R(Giles) v. Fareham Borough Council* [2002] EWHC 2951.

<sup>636</sup> Housing Act 1996 s. 167(1A).

<sup>637</sup> Refusals could result in the applicant being designated intentionally homeless should the applicant subsequently attempt to make a homeless application.

<sup>638</sup> See National Report for Scotland, 6.2.

<sup>639</sup> *R(Ahmad) v Newham London Borough Council* [2009] UKHL 14.

## **Eligibility for public/social housing – England**

A large legislative overhead has been devoted to tightening the rules in relation to eligibility to apply for an allocation of social housing or to make a homelessness application. Currently the rules are enshrined in legislation made in 1999<sup>640</sup> as amplified in regulations made for England in 2006.<sup>641</sup> The English Regulations are most important in practice since the greatest pressure by far is in London. The government is seeking to tighten these rules further in the face of a substantial majority of public opinion that favours stronger controls on all EU migration.

British citizens are eligible to apply for social housing. The key concept is a ‘person from abroad’, that is person who is not a British 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 members<sup>642</sup> and carers;<sup>643</sup> the right to seek housing can be terminated if the right to reside ends (because the EEA national ceases permanently<sup>644</sup> 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;
  - c. EEA nationals from states which acceded to the EU in 2004 now equated to ‘old EU states’,<sup>645</sup>
  - d. EEA nationals from Bulgaria, Romania and Croatia who are workers registered under the Worker Registration scheme;<sup>646</sup>

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<sup>640</sup> Housing Act 1996 s. 160A.

<sup>641</sup> Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006, as amended. These tightened the qualification rules passed in 2000 which continue to apply in Scotland.

<sup>642</sup> 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).

<sup>643</sup> 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.

<sup>644</sup> *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?).

<sup>645</sup> 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).

(3) People subject to immigration control but in a class allowed assistance with housing:

- a. A person granted refugee status;<sup>647</sup>
- b. A person granted exceptional and unconditional leave to remain (usually on humanitarian grounds or by way of discretionary leave);<sup>648</sup>
- 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);<sup>649</sup>
- d. A person deported by law to the UK.

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;<sup>650</sup>
- c. EEA jobseekers if not habitually resident in the Common Travel Area;<sup>651</sup>
- 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.

It seems that the national mood is currently hardening against immigrants with a clear majority now wanting much tougher restrictions in place,<sup>652</sup> of the kind which are common in most other EEA countries; it appears that a consensus may be emerging between the Conservatives and Labour on this issue (though not the Liberal Democrats). However, it should be added that there is a generational divide and younger people are much more open to the benefits of EU freedom of movement.<sup>653</sup>

### **Eligibility for public/social housing – Wales**

Currently the rules are enshrined in legislation<sup>654</sup> as amplified in regulations made separately for Wales in 2006.<sup>655</sup> These rules are the same as for eligibility for

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<sup>646</sup> 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.

<sup>647</sup> An asylum seeker was entitled to homelessness assistance if he made a claim before April 2000, but not since then.

<sup>648</sup> Normally a condition will be imposed that no recourse will be had to public funds.

<sup>649</sup> Again leave would generally be conditional on being self-funding.

<sup>650</sup> *Lekpo-Bozua v. Hackney London Borough Council* [2010] E WCA Civ 909 (French girl living with her aunt for 9 years; her presence was tolerated but she was not lawfully resident).

<sup>651</sup> *R(Conde) v. Lambeth London Borough Council* [2005] EWHC 62.

<sup>652</sup> ‘British Social Attitudes’ (London: Natcen Social Research, 31<sup>st</sup> Report, 2014; *Independent* 7 January 2014).

<sup>653</sup> *Independent* 16 December 2013.

<sup>654</sup> Housing Act 1996 s. 160A.

<sup>655</sup> Homelessness (Wales) Regulations 2006; Allocation of Housing and Homelessness (Eligibility) (Wales) Regulations 2006; in future see Housing (Wales) Bill 2013 cl. 47, sch. 2.

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.

- **Choice of tenant**
  - **How does the landlord normally proceed to find a tenant?**

In the private rented sector there are a variety of ways by which parties to a tenancy may be matched. Generally, where the landlord wishes to fill a vacancy the usual practice is for the landlord to advertise the vacancy through one or more media outlets. Traditionally, local print media provided the most effective means of finding a tenant, with local papers containing sections dedicated to advertising accommodation vacancies. Another traditional means of finding a tenancy was through advertising the vacancy via a letting agent or estate agent or in the local papers classified sections. While such means of finding a tenant remain in use, the vast majority of landlords now find tenants through dedicated online tenancy advertising websites such as rightmove.co.uk, primelocation.co.uk and yourmove.co.uk (the top sites on Google<sup>0</sup> and many local agencies. Such websites allow the landlord to post a vacancy along with pictures and a short description. Prospective tenants then have the opportunity to contact the landlord and arrange a viewing. Charges may not be made for providing listings of accommodation nor for registering an applicant as seeking rental property.<sup>656</sup> Landlords must comply with equality rules.<sup>657</sup>

- **What checks on the personal and financial status are usual?**

There are a number of checks which the landlord can perform on the personal and financial status of the tenant. Prior to letting a dwelling the landlord will often be concerned as to whether or not the tenant will be able to honour the tenancy agreement. In order to reduce some of the risk arising from this interaction the landlord or letting agency will often seek to carry out a range of checks on the tenant, including credit referencing, bank referencing, employment referencing, and landlord referencing as well as personal referencing. There is nothing in law to prevent a landlord from asking for a salary statement and, although he cannot compel the prospective tenant to produce one, a refusal may adversely affect the tenant's standing. In addition to direct enquiries from the tenant, the landlord may resort (after securing the permission of the tenant) to a credit information agency, however such practice would not be usual. It is common for landlords to require a guarantee for rent payments, especially from students.

With regard to housing with a public task, a public or social landlord generally takes account of the income of an applicant in determining priority, and will, therefore carry out checks on the information provided by the applicant.

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<sup>656</sup> Accommodation Agencies Act 1953; *Saunders v. Soper* [1975] AC 239, HL.

<sup>657</sup> See below 6.3, pp 141-143.

- How can information on the potential tenant be gathered lawfully? In particular: Are there blacklists of 'bad tenants'? If yes, by whom are they compiled? Are they subject to legal limitations e.g. on data protection grounds?

The extent to which such checks are lawful depends on the manner in which they are carried out. In some cases the landlord may simply ask the tenant for certain information, for instance a letter from her employer stating her current employment status or for a certificate from a credit agency stating her credit worthiness. While the prospective tenant is at liberty to refuse the request, negative inferences would most likely be drawn from such a refusal. However, providing the landlord with such information involves time and expense burdens for the tenant and often it is the case that the landlord or estate agent will prefer to use a dedicated tenant referencing service. The private rented market across the UK has developed a sophisticated tenant referencing industry with a number of operators offering swift tenant referencing services. While the procedure for following out the checks may in the most part be lawful, after the consent of the tenant has been obtained; there have been instances in which illegal fees have been charged to the tenant in order to carry out such checks.

- What checks may and does the tenant carry out on the landlord (e.g. to avoid being trapped by a swindler landlord)

There are a limited number of checks which a tenant may carry out on the landlord in order to ensure that all aspects of their agreement are in good faith. The most likely problem is a tenant renting from a landlord whose mortgage bars letting; it would theoretically be possible to find this from the land register, but this is scarcely a check a tenant is likely to carry out. A registration scheme for private landlords is proposed in Wales and if this is implemented tenants should have some reassurance that the landlord has passed a 'fit and proper person' test.<sup>658</sup> Tenants are at least protected by the requirement that deposits have to be held within a protection scheme.<sup>659</sup> Universities often run local accreditation schemes to provide potential tenants with some peace of mind on this matter.

- Contract concluded through estate agents
  - what is the usual commission they charge to the landlord and tenant?
  - Are there legal limitations on the commission?

An accommodation agency may not charge a tenant for supplying the tenant with lists of accommodation nor for registering a person as someone seeking accommodation.<sup>660</sup>

A non-returnable 'holding deposit' is often charged when a tenant agrees to rent a property, to cover the period until he signs the tenancy agreement. This deposit is usually deducted from the security deposit when the tenant moves in. If the tenant changes his mind, his holding deposit is not be returned. There may be

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<sup>658</sup> Housing (Wales) Bill 2013 cl 1-35.

<sup>659</sup> See below, 6.4, pp 163-165.

<sup>660</sup> Accommodation Agencies Act 1953; *Saunders v. Soper* [1975] AC 239, HL.

circumstances when a tenant is not able to move into the property for reasons beyond his control, for example, his reference was not satisfactory or the agency has increased the rent. In these circumstances, it may be unfair for the agency not to return the holding deposit. If a tenant has paid an administration fee and/or a holding deposit and the landlord chooses not to go ahead with the tenancy, the Office of Fair Trading Guidance<sup>661</sup> states that the tenant should receive a refund of all pre-payments.

A letting agency can charge a fee, often called an ‘administration fee’ once a contract has been agreed to accept a tenancy, covering matters such as the cost of preparing the tenancy agreement, checking references, making up the inventory and any other costs of setting up the tenancy. Some agents appear to be exploiting the scarcity of accommodation. A landlord and tenant service provider, Rentify, has found that the administration fee in London averages £220 and is as high as £600 at some agents.<sup>662</sup>

Some agencies will charge for renewing a tenancy. The agency should provide clear information about their charges before reaching agreement on the tenancy and they should be reasonable. Unfair terms protection should apply here.<sup>663</sup>

A security deposit is usually charged as security against damage to the property or getting into rent arrears. It should be returned to the tenant at the end of the tenancy if he has not breached the tenancy agreement. An agent who charges a security deposit for an assured shorthold tenancy on or after 6 April 2007 must protect it in one of the three government-approved schemes<sup>664</sup> 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.

- **Ancillary duties of both parties in the phase of contract preparation and negotiation (*‘culpa in contrahendo’ kind of situations*)**

In contrast to the requirement in civilian countries to negotiate with care, common law systems do not recognise a duty to negotiate a contract in good faith, and the *culpa in contrahendo* principle is not a part of English law. A negotiating party may be liable for contractual promises and misrepresentations, and also be liable to make restitution of benefits received during unsuccessful negotiations, but is not liable for lack of good faith as such. The strongest protection for the tenant may be under the Unfair Trading Regulations.<sup>665</sup>

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<sup>661</sup> ‘Guidance on Unfair Terms in Tenancy Agreements’ (London: Office of Fair Trading, OFT356, 2005).

<sup>662</sup> *Independent on Sunday*, 27 October 2013; [www.rentify.com](http://www.rentify.com).

<sup>663</sup> See below 6.3, pp 140-141.

<sup>664</sup> 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’.

<sup>665</sup> See below, 6.3, pp 140-141.

**Summary table for 6.2: Preparation and negotiation of tenancy contracts**

	With a public task		Without a public task
Sector	Public	Housing association	Private
Tenancy type	Secure tenancy	(Fully) assured tenancy	Assured shorthold tenancy
Choice of tenant	(1) Homelessness duty (2) Allocation	Allocation and housing homes at request of local authority	Landlord's choice
Method	Application to local authority	Application to housing association	Advertisement/letting agent
Ancillary duties	Checks on statements in application	Checks on statements in application	Avoid misrepresentation

## 6.3 Conclusion of tenancy contracts

- **Tenancy contracts**

A person occupying self-contained residential accommodation and having exclusive possession (meaning the right to exclude the landlord and all the rest of the world), will be a tenant if he occupies for a term (fixed or periodic) at a rent.<sup>666</sup>

- **distinguished from functionally similar arrangements (e.g. licence; real right of habitation)**

The distinction between tenancy contracts conferring full security, limited security tenancies and licences is exceedingly complex because of the historical position in which very great protection was conferred on Rent Act tenants in the private sector, a position which provided great incentives for landlords to seek to evade full security. This historical reason has largely disappeared because most private sector tenants now have shortholds, protections which are scarcely worth the trouble of evading. Nevertheless the basic definition of tenancies with security dates back to Rent Act days, the structure now being far more complex than it needs to be. When protection was introduced for public sector tenancies, it too was modelled on the same basis, so there is an essential commonality of definition, not least because the fully assured tenant and the secure tenant have full security, so exceptions are needed where full security is inappropriate. There is also an important difference derived from the fact that the secure tenancy was a vehicle for conferring a right to buy, and therefore it was essential to confine the definition of the secure tenancy to property which it was appropriate to sell as a unit; this makes a big difference as will be seen where the tenant shares some accommodation.

### (1) Basic requirements for residential security

Section 1 of the Housing Act 1988 defining the assured tenancy (and thus also the assured shorthold tenancy) has many features in common with section 79 of the Housing Act 1985 defining the secure tenancy. Basic elements are as follows:

A dwelling-house – this is the basic concept of the English legislation which includes a flat, but the home must be part of a building. Residents lack full security if they occupy a mobile home,<sup>667</sup> house boat<sup>668</sup> and choose to camp out permanently.

Let as a separate dwelling - the essential concept is a separate unit of living accommodation, something on which one can close the front door, and find within self-contained residential accommodation including living room, sleeping accommodation, washing facilities and toilet. There is no requirement that cooking facilities should be provided, and so a person occupying a single room may be an assured tenant.<sup>669</sup> Self-contained accommodation is fully necessary for public sector security, but some sharing of facilities is tolerated in the private sector.<sup>670</sup>

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<sup>666</sup> *Street v. Mountford* [1989] AC 809, HL.

<sup>667</sup> There are limited protections in the Mobile Homes Act 1983; eg a right to a written statement of terms and some limits to variation and termination.

<sup>668</sup> *Tristmire v. Mew* [2011] EWCA Civ 912.

<sup>669</sup> *Uratemp Ventures v. Collins* [2001] UKHL 43.

<sup>670</sup> See sub-heading (2) below, p. 136.

A tenancy – the requirement that a house is ‘let’ to a tenant serves to exclude from security a licence arrangement. For the modern regimes this means a grant of a tenancy and not an agreement for a tenancy.<sup>671</sup> In general the test for a grant of a lease is exclusive possession, that is the right for the tenant to have exclusive control of the premises free from interference by the landlord or any other person.<sup>672</sup> The extent to which this can be avoided is considered immediately below.

An individual tenant – both private and public sector regimes limit security to situations where the tenant is an individual (though in the private sector it is sufficient to have one tenant who is an individual). It follows that company lets are outside all regimes and are treated contractually.

A tenant’s principal home – both private<sup>673</sup> and public<sup>674</sup> systems limit residential security to cases where the property is let as the tenant’s only (or at least his principal) home, since one cannot have two principal homes; thus a lease of a second home will be subject to contractual rules.

## (2) Shared accommodation

In the social sector recognition of a secure tenancy offers a gateway to the right to buy, so the property must be physically separate from other dwellings. In the private sector the concern is to ensure that tenants are protected as widely as possible. A tenant must have exclusive occupation of some (‘separate’) accommodation – usually a bedroom at least, but he may share the use of other accommodation with other tenants (but not the landlord); this ‘shared accommodation’ would commonly be a bathroom or kitchen. The whole is effectively treated as a single unit and the tenancy of the shared accommodation cannot be terminated apart from the tenancy of the separate accommodation.<sup>675</sup>

## (3) Avoidance of security by granting a licence

Security in the private sector attaches only to a tenancy and only where a house is let.<sup>676</sup> Thus a licence will not confer security.<sup>677</sup> This seems to open the possibility that a landlord could evade the security regimes by artificially altering a lease into a licence. This attracted considerable litigation in the past. 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.<sup>678</sup> A guest in a hotel lacks exclusive possession because the hotel

<sup>671</sup> Housing Act 1988 s. 34; *Truro Diocesan Board of Finance v. Foley* [2008] EWCA Civ 1162; the Rent Acts covered both.

<sup>672</sup> *Street v. Mountford* [1985] AC 809, HL.

<sup>673</sup> *Fanning v. Waltham Forest Community Based Housing Association* [2001] Landlord and Tenant Reports 41. This was also a big issue under the Rent Acts.

<sup>674</sup> *Crawley Borough Council v. Sawyer* (1988) 20 HLR 98, CA; *Hammersmith & Fulham London Borough Council v. Clarke* (2001) 33 HLR 77; *Islington London Borough Council v. Boyle* [2011] EWCA Civ 1450.

<sup>675</sup> Housing Act 1988 s. 3; similarly if the tenant sublets part of the house to a sub-tenant: s. 4. These provisions are missing from Housing Act 1985 Part IV. However a carer with exclusive use of two rooms in a larger house was held not to be a tenant in *Vesely v. Levy* [2007] EWCA Civ 367.

<sup>676</sup> In the public sector a licence can create a secure tenancy: Housing Act 1985 s. 79(3); *Mansfield District Council v. Langridge* [2008] EWCA Civ 264; exceptions are almshouses and licences granted as a temporary expedient to a former trespasser. It is a surprise to find that a tenant at will is not a secure tenant: *Banjo v. Brent London Borough Council* [2005] EWCA Civ 292.

<sup>677</sup> Garner and Frith, *Practical Approach*, 7th edn, ch. 2.

<sup>678</sup> The landlord may have limited rights of access e.g. to inspect the state of repair.

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,<sup>679</sup> or requiring a couple to sign two separate licence agreements.<sup>680</sup> 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'.<sup>681</sup> The ability to control and regulate the dwelling in question is the best indicator of factual possession and this is often enough to conclude the legal status of many occupancy agreements. For instance, where there is a bed and breakfast or hotel, although the occupant is in possession of a self-contained area for a period in return for a rent the overall owner never relinquishes ultimate control over the accommodation space, that is, the power to exclude any person from the space.<sup>682</sup> However, in an occupancy agreement where there is exclusive possession of a dwelling, the occupier could be said to be a tenant and consequently the principles of tenancy law would apply. Likewise, where the landlord has reserved the right to share the occupation, exclusive possession has not been granted and so no tenancy can exist. People living in hostels may or may not get a tenancy by this test.<sup>683</sup>

#### **(4) Exclusions from assured tenancy status**

Various exclusions exist from the concept of the assured tenancy (and these also cannot be short assured tenancies):<sup>684</sup>

- lettings to students;
- holiday lettings;
- resident landlord leases;
- temporary lettings to homeless persons or where housing support is provided;
- luxury lettings (at annual rents above £100,000);
- shared ownership leases; and
- lettings by fully mutual housing associations.<sup>685</sup>

Occupation agreements falling outside the assured tenancy scheme will usually attract protection against eviction without due process of law,<sup>686</sup> but there are excluded contracts where even this protection is missing:

- resident landlord tenancies;
- occupation agreements as a temporary expedient with a trespasser;
- holiday lets;
- gratuitous licences; and
- certain public hostels.

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<sup>679</sup> *Street v. Mountford* [1985] AC 809, HL.

<sup>680</sup> *Antoniades v. Villers* [1990] 1 AC 417, HL.

<sup>681</sup> *Antoniades v. Villers* as above.

<sup>682</sup> There is a great deal of case law on the old Rent Acts.

<sup>683</sup> *Bruton v. London & Quadrant Housing Trust* [2000] 1 AC 408, HL.

<sup>684</sup> Housing Act 1988 sch. 1.

<sup>685</sup> *Joseph v. Nettleton Road Housing Co-operative Ltd* [2101] EWCA Civ 228. It is proposed to reverse this in Wales by Housing (Wales) Bill 2013 cl 120-121.

<sup>686</sup> Protection from Eviction Act 1977; *Kalas v. Farmer* [2010] EWCA Civ 108.

## **(5) Exclusions from public sector security**

Various exclusions exist from the concept of the secure tenancy:<sup>687</sup>

- service accommodation of an employee;
- lettings to students;
- various short term arrangements;<sup>688</sup> and
- leases within non-residential sectors.<sup>689</sup>

### **Specific tenancy contracts, contracts on furnished apartments;**

No differentiation is made in modern housing law between furnished and unfurnished apartment.

### **student apartments;**

Student halls are excluded from security, as are out of term lets to non-students.<sup>690</sup>

### **contracts over room(s) only (e.g. student rooms);**

In practice a landlord will very likely grant a shorthold tenancy even if the arrangement is strictly outside the assured tenancy regime. An arrangement falls within the regime if there is a dwelling, including exclusive use of some living accommodation; this is so even if some other facilities such as kitchens or bathrooms are shared. An arrangement falls outside security regimes and so is considered contractually if all accommodation is shared.<sup>691</sup>

### **contracts over rooms or apartments located in the house in which the landlord lives himself as well.**

This is only really relevant in the private rental sector. If the self-contained dwelling is, say a house or a flat, and this is occupied by both the landlord and someone else, this will amount to a resident landlord letting and will be outside all protection.<sup>692</sup> If there is a building with two self-contained dwellings, one occupied by the landlord and the other occupied by a tenant, then this is not a resident landlord arrangement and usually an assured shorthold will arise.<sup>693</sup>

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<sup>687</sup> Housing Act 1985 sch. 1.

<sup>688</sup> Introductory tenancies, accommodation for homeless people, family intervention tenancies, arrangements for asylum seekers, displaced persons, short term accommodation, temporary accommodation for the homeless: Housing Act 1985 sch. 1 paras 1A-7, as amended.

<sup>689</sup> Housing Act 1985 sch.1 paras 8, 9, 11.

<sup>690</sup> Housing Act 1985 sch. 1 para. 10; Housing Act 1988 sch. 1 para. 8; Assured and Protected Tenancies (Lettings to Students) Regulations 1998.

<sup>691</sup> Housing Act 1988 ss 3, 4; *AG Securities v. Vaughan* (reported with *Antoniades v. Villers*) [1990] 1 AC 417, HL.

<sup>692</sup> Protection from Eviction Act 1977; *Bardrick v. Haycock* (1976) 31 P. & C.R. 420, 424, Scarman LJ.

<sup>693</sup> Housing Act 1988 sch. 1 para. 10. Tenancies where the tenant's dwelling-house is in the same building or flat as the landlord's dwelling-house are not assured tenancies. Where the landlord and the tenant's homes are separate flats within a purpose-built block of flats, the tenancy will be assured. This only applies to purpose-built blocks of flats: where the landlord and the tenant's homes are separate flats in houses or other buildings converted into flats, the tenancy will not be assured. The landlord must occupy his home as his only or principal home.

## **Summary**

Although there are many types of occupation arrangements short of tenancies, in practice the assured shorthold gives very little security to the tenant and it is scarcely worth a landlord seeking to avoid shorthold controls.

- **Requirements for a valid conclusion of the contract**
  - **formal requirements**

These can be classified into general formality requirements, requirements in particular sectors, and the problem of those aged under 18.

In order to create rights in land it is usually necessary to use a deed, a formal type of document according to section 52 of the Law of Property Act 1925, but short leases are an exception to this strict rule of formality, as set out in section 54(2):

Nothing ... shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine.

Parol here is a technical term meaning without formality. The three years must be calculated as from the date of the grant.<sup>694</sup> In practice almost all tenancies are for short terms and periodic and therefore fall within the informality provision. In order to create a legal tenancy it is necessary, as shown by *Long v. Tower Hamlets London Borough Council*,<sup>695</sup> for the agreement to take effect in possession, this needing to be immediate rather than in a few days or weeks. Where the grant takes effect in the future it will be a contract to grant a tenancy.<sup>696</sup>

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.

A tenant must be provided with a rent book if it is a weekly tenancy,<sup>697</sup> giving the name and address of the landlord of the premises and other prescribed matters.<sup>698</sup>

**Secure tenancies:** it is perfectly possible to create a secure tenancy orally, since there is no requirement of writing. However, all landlords will insist on drawing up a written tenancy agreement and that the tenant sign the agreement before taking possession. The tenancy agreement should cover:

- parties, the landlord and tenant;
- an agreement to rent the property;
- description of the property;

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<sup>694</sup> J. Brown and M. Pawlowski, 'Re-thinking Section 54(2) of the Law of Property Act 1925', *Conveyancer* 2010(2): 146-163.

<sup>695</sup> [1998] Ch. 197.

<sup>696</sup> Law of Property (Miscellaneous Provisions) Act 1989 s. 2.

<sup>697</sup> Landlord and Tenant Act 1985 s. 4. Failure gives rise to an offence under s. 7.

<sup>698</sup> Rent Book (Forms of Notice) Regulations 1982 amended by SIs 1993/656 and 1998/2198.

entry date and term - usually a fixed term followed by a periodic continuation (either weekly, fortnightly, four weekly or calendar monthly);  
rent (weekly, fortnightly or calendar monthly, in advance or arrears);  
services such as heating.

There should follow terms (to be discussed in the following pages) about:

- use of the house;
- respect for others;
- subletting, assignment and exchange;
- repairs, maintenance, improvements and alterations;
- ending the tenancy;
- succession on the tenant's death; and
- information, consultation and complaints.

Secure tenancies are recorded in the Continuous Recording of Lettings system.

**Assured tenancies:** full assurance will arise where residential property is let to a tenant in such a way as to fall within the definition of an assured tenancy in the Housing Act 1988,<sup>699</sup> and notice is given that the grant is to be with full assurance.<sup>700</sup> This will usually happen when affordable housing is provided by private provider (ie a housing association). This could occur orally if the tenancy is for a year or less and otherwise in writing. Usually the landlord will be very anxious to avoid any such informal letting and will insist on a written tenancy agreement.<sup>701</sup> A housing association will give notice that full assurance is being conferred. There is a notice procedure to secure an agreed statement of the terms once the tenancy is extended as a periodic tenancy by statute.<sup>702</sup>

**Assured shorthold tenancies:** most private sector landlords will wish to grant only short assurance to their tenants. In order to do this they simply grant a tenancy falling within the assured shorthold regime.<sup>703</sup> However, a landlord must ensure that the tenancy is granted in writing for his own protection. On request the landlord must provide a written statement of the terms of an assured shorthold tenancy, covering the commencement date, the length of any fixed term or its periodic nature, the rent and rent days and any review provision.<sup>704</sup> There were previously much more onerous requirements of serving a notice in advance of the grant of the tenancy; case law suggests that many landlords failed to achieve this satisfactorily, but it is now unnecessary to consider these cases.

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<sup>699</sup> Housing Act 1988 s. 1.

<sup>700</sup> Housing Act 1988 sch. 2A.

<sup>701</sup> The 'Draft Tenant's Charter – Guidance Notes for Discussion' (London: Department for Communities and Local Government, 2013), 5, suggests that the eventual Private Sector Charter will require landlords to provide a written tenancy agreement. The previous Housing Corporation Charter seems to have become a dead letter.

<sup>702</sup> Housing Act 1988 s. 6.

<sup>703</sup> Housing Act 1988 s. 19A.

<sup>704</sup> Housing Act 1988 s 20A, inserted by Housing Act 1996 s. 97.

## **Minors**

However short the term, a tenancy creates a legal estate in land, capacity for which a rises only at 18. If a tenant is aged 16 or 17, the attempt to create a lease acts as a declaration of trust for him. The landlord holds a dual capacity both as owner/landlord and as a trustee of the leasehold term. This is a strange situation because the fiduciary duty of the trustee (to act for the beneficiary) is in contradiction of his position as a landlord (opposed to the interest of the tenant).<sup>705</sup> This might create problems in suing for rent, but the landlord would certainly require a parental guarantee in this situation.

- **registration requirements; legal consequences in the absence of registration**

There is no scheme in England for the registration of tenancies, and the only thing a landlord needs to do is to notify the council tax authorities that the tenant has taken occupation of the property.

The government in Wales is preparing to introduce a registration scheme for private sector landlords along the lines of the model already operating in Scotland.<sup>706</sup> Landlords and agents will have to be registered with the local authority and renew their registration every five years. They will need to satisfy a fit and proper person test and a training requirement. The registration number will have to be included in all advertisements. Landlords who fail to register may face a rent stopping order. This will not be implemented in England.

- **Restrictions on choice of tenant - antidiscrimination issues**

- **EU directives and national law on antidiscrimination**

Antidiscrimination provisions apply to landlords in both the private and social rented sectors. When a landlord is letting accommodation he must ensure that no person or group of persons is treated less favourably than any other person or group of persons because of their race, colour, ethnic or national origin, sex, disability or sexual orientation.<sup>707</sup> When dealing with persons with a disability a landlord must not unreasonably withhold consent to the tenants to adapt the rented accommodation to meet the needs of the disabled occupants.<sup>708</sup> The Disability Discrimination Act 2005, which amended the early Act of 1995, introduced a set of positive general duties which require public bodies to promote equality of opportunity for disabled people. The general duty for disability states that public authorities must have due regard, when carrying out their functions, to the need to:

- a) eliminate unlawful discrimination;
- b) eliminate harassment of disabled persons that is related to their disability;
- c) promote equality of opportunity between disabled persons and others;

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<sup>705</sup> *Kingston on Thames London Borough Council v. Prince* (1999) 31 HLR 593, CA; *Alexander-David v. Hammersmith and Fulham London Borough Council* [2009] EWCA Civ 259.

<sup>706</sup> Housing (Wales) Bill 2013 Part 1, cl 1-35.

<sup>707</sup> Race Relations Act 1976; Disability Discrimination Act 1995; Sex Discrimination Act 1975.

<sup>708</sup> Equality Act 2010 s. 190.

- d) take steps to take account of disabled persons' disabilities, even where that involves treating disabled people more favourably than other persons;
- e) promote positive attitudes towards disabled persons; and
- f) encourage participation by disabled persons in public life.

Equal treatment of disabled people should be part of the culture of public authorities, and in practical and demonstrable ways going beyond simple consultation to include the promotion of positive attitudes and to ensure the involvement of disabled people. In drawing up the local housing strategy, local authorities should demonstrate that needs have been researched, supportive and meaningful involvement has occurred and actions to be taken have been identified. The strategy should be monitored and evaluated for its effectiveness .

It is illegal for a landlord, mortgage lender or other service provider to discriminate because a person is disabled.<sup>709</sup> The Equality Act 2010 defines a disability as a physical or mental condition that has a long-term, adverse effect on a person day-to-day life. Disability discrimination occurs when a disabled person is treated less favourably than a non-disabled person, and they are treated this way for a reason arising from their disability, and the treatment cannot be justified. A letting agent would be treating a disabled person less favourably if they refused to serve them when providing a service, offered a reduced service or a worse standard of service or made an offer on poorer terms. Aside from statute there is also a Code of Practice on Racial Equality in Housing 2006 which provides guidance.

The Equality Act 2006 amends the Sex Discrimination Act 1975 and introduced the Gender Equality Duty. The general duty states that public authorities must have due regard, when carrying out their functions, to the need to eliminate unlawful discrimination and harassment; and promote equality of opportunity between women and men. The duty places the legal responsibility on public authorities to positively demonstrate that they treat men and women fairly. Racial discrimination occurs when a person is treated less favourably than someone else, because of your race, colour, nationality, or national or ethnic origins. Race is one of the characteristics protected by the Equality Act 2010.<sup>710</sup>

A person who lets or manages residential premises unlawfully discriminates against a disabled person if he unreasonably refuses a request made by the tenant or someone on his behalf to provide an auxiliary aid or service which would enable the disabled person to enjoy the premises.<sup>711</sup>

There was no discrimination where a landlord had refused to install a stair-lift in a block of residential flats since none of the reasons for the landlord's refusal related to the tenant's disability.<sup>712</sup> W's treatment could not have been said to be any less favourable than the treatment that would have been accorded to any comparators, since it was clear that all tenants would have been treated in the same way

In *Preddy v. Bull*<sup>713</sup> Christian hoteliers who only let double rooms to married couples were held to have discriminated directly against two homosexual men in a civil

<sup>709</sup> Equality Act 2010; Disability Discrimination Act 2005.

<sup>710</sup> The Equality Act 2010 now covers racial discrimination replacing the Race Relations Act 1976.

<sup>711</sup> Equality Act 2010 ss 20, 21, 22, 38 and sch. 4.

<sup>712</sup> *Richmond Court (Swansea) Ltd v. Williams* [2006] EWCA Civ 1719.

<sup>713</sup> [2013] UKSC 73.

partnership<sup>714</sup> by refusing to let them a double room. The hoteliers could not use human rights arguments to justify that discrimination. In another case, the House of Lords decided in *Ghaidan v. Godin-Mendoza*<sup>715</sup> that the Rent Act 1977 succession regime<sup>716</sup> could be made human rights compliant by taking the succession rights of surviving spouses and those who 'lived together as husband and wife' and treating same-sex couples in the same way.

### **Limitations on freedom of contract through regulation**

- **mandatory provisions in rental contracts, in particular: mandatory minimum requirements of what needs to be stated in a tenancy contract**

There appears to be no statement for either England or Wales of mandatory minimum requirements. General contractual principles require as a minimum agreement on the three 'P's – property (including the term/duration), parties and price.

- **control of contractual terms (EU directive and national law); consequences of invalidity of contractual terms**

The European Communities (Unfair Terms in Consumer Contracts) Regulations 1999<sup>717</sup> can apply to land in general and to residential tenancies in particular. It covers both the private and social sectors.<sup>718</sup> One London borough attracted opprobrium for its practice of requiring homeless families to sign a tenancy agreement without seeing the property on offer, the resulting terms being unfair.<sup>719</sup> Guidance can be sought from the Office of Fair Trading operating United Kingdom wide.<sup>720</sup> The problem is particularly acute if, as usual, the landlord provides standard terms on a take it or leave it basis. Potential problems include unfair disclaimers, repairing obligations, rent retention clauses, rights of entry, financial providers, variation of tenancies, rent reviews, forfeiture clauses and restrictions on assignment and subletting.

The Regulations apply to unfair terms in contracts concluded between a consumer and a seller or supplier. Tenants in both private and public sector accommodation are generally protected by the regulations. Individuals entering into contracts after 1 July 1995 to take tenancies from landlords who are acting in the course of a business - including local authorities and registered providers of social housing - have consumer protection from unfair standard terms. An unfair term is generally defined as one that has not been individually negotiated and which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the tenant. One example is a term allowing a right of unilateral variation to a landlord.<sup>721</sup> However, core terms that

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<sup>714</sup> Equality Act (Sexual Orientation) Regulations 2007 reg.3 (1).

<sup>715</sup> [2004] UKHL 30.

<sup>716</sup> Sch.1 para. 2.

<sup>717</sup> Sparkes, *European Land Law*, para. 8.35.

<sup>718</sup> S Bright 'Unfair Contract Terms and Local Authority Tenants', *Journal of Housing Law* 2004: 2.

<sup>719</sup> *Newham London Borough Council v. Khatun* [2004] EWCA Civ 55.

<sup>720</sup> 'Guidance on Unfair Terms in Tenancy Agreements' (London: Office of Fair Trading, OFT356, 2005).

<sup>721</sup> *Peabody Trust Governors v. Reeve* [2008] EWHC 1432.

describe the property, rent or length of term are exempt, provided they are clearly written and displayed prominently. Schedule 2 of the 1999 Regulations sets out a non-exhaustive list of terms which may be regarded as unfair. The terms in the list show how unfair terms have the likelihood of altering what the position would be under the ordinary rules of tenancy if the contract were silent on the point. The effect of this is that contracts must be intelligible to ordinary consumers without legal advice. So, a drafting style that may be acceptable in a commercial contract may well be unacceptable in a standard tenancy agreement if it is inundated with legal jargon, statutory references and unduly lengthy sentences which make it difficult to understand. Even if terms are within the Regulations, they will stand if they do not cause a significant imbalance in the landlord and tenant relationship.<sup>722</sup> Unfair contract terms are not binding on the tenant, but the tenancy agreement continues to bind the parties without the unfair term.<sup>723</sup> Either party may rely upon the rest of the agreement.

#### **- statutory pre-emption rights of the tenant**

Private sector tenants have no statutory right of pre-emption, but secure tenants have a generous Right to Buy and housing association tenants have a less generous Right to Acquire their home. This is an extensive topic.

### **Right to Buy**

Tenants in the social rented sector may have the right to purchase their dwelling at a discounted price, under a scheme dating from the Thatcher Government of the 1980s,<sup>724</sup> and, at present, being revived in England.<sup>725</sup> The Right to Buy applies in the public sector and there is an equivalent but more restrictive Right to Acquire in the social sector.<sup>726</sup>

#### **(1) Tenants qualified to buy**

In principle the Right to Buy attaches to any secure tenant (that is a tenant of a public landowner),<sup>727</sup> 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

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<sup>722</sup> *UK Housing Alliance (North West) v. Francis* [2010] EWCA Civ 117.

<sup>723</sup> Regulation 8.

<sup>724</sup> 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.

<sup>725</sup> 'Reinvigorating Right to Buy and One for One Replacement' (London: Communities and Local Government, March 2012).

<sup>726</sup> There are detailed provisions delineating the borderline Housing Act 1985 sch. 5 paras 1-3.

<sup>727</sup> Housing Act 1985 s. 80.

available to Lottery winners who move out to live elsewhere.<sup>728</sup> The period depends upon when the applicant first became a public sector tenant:

Before 18 January 2005	- two years, <sup>729</sup>
On or after 18 January 2005	- five years. <sup>730</sup>

Although the qualification period is in principle continuous, there is some discretion to ignore breaks in occupation which were beyond the control of the tenant.<sup>731</sup>

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,<sup>732</sup> or as a result of antisocial behaviour.<sup>733</sup> These cases require a proper balancing of the competing claims.<sup>734</sup>

## (2) Restrictions and exclusions

There are a number of exclusions from the Right to Buy of which only a sketch can be attempted:<sup>735</sup>

accommodation specially adapted eg for the elderly,<sup>736</sup>  
property occupied under a contract of employment,<sup>737</sup>  
a home in the curtilage of a non-residential building;<sup>738</sup> and  
property due for demolition.<sup>739</sup>

## (3) Price and discount

The price paid for exercising the Right to Buy is the market value less the discount.<sup>740</sup> The prices can be determined by the District Valuer<sup>741</sup> as at the date that the Right to Buy is established.<sup>742</sup> Levels of discount depend upon the date of the initial grant, and whether the home is a house or a flat:

Initial grant before 18 January 2005 (two year residential qualification period):

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<sup>728</sup> *Islington London Borough Council v. Demetriou* [2001] 2 CLYB [4216].

<sup>729</sup> Housing Act 1985 s. 119.

<sup>730</sup> Housing Act 1985 s. 119 as amended by Housing Act 2004 s. 180.

<sup>731</sup> Housing Act 1985 sch. 4.

<sup>732</sup> 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.

<sup>733</sup> Housing Act 1985 s.121A inserted by Housing Act 2004 ss 191-194.

<sup>734</sup> *Basildon District Council v. Wahlen* [2006] EWCA Civ 326.

<sup>735</sup> Housing Act 1985 s. 120, sch. 5.

<sup>736</sup> Housing Act 1985 sch. 5 paras 7, 9, 10, 11, as amended by Housing Act 2004 s. 181.

<sup>737</sup> 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.

<sup>738</sup> Housing Act 1985 sch. 5 para. 5.

<sup>739</sup> Housing Act 1985 sch. 5 paras. 12A, 13, 14; Housing and Regeneration Act 2008 s. 305.

<sup>740</sup> Housing Act 1985 s. 126.

<sup>741</sup> Housing Act 1985 ss 127-128B; Residential Property Tribunal (Right to Buy Determinations) (Procedure) (England) Regulations 2005; Housing and Regeneration Act 2008 s. 306.

<sup>742</sup> *Copping v. Surrey County Council* [2005] EWCA Civ 1604.

House:<sup>743</sup> 30% plus 1% for each year over 2, maximum 60%;  
 Flat:<sup>744</sup> 44% plus 2% for each year over 2, maximum of 70%;  
 Initial grant on or after 18 January 2005 (five year residential qualification).<sup>745</sup>  
 House: 35% plus 1% for each year over 5, maximum of 60%;  
 Flat: 50% plus 2% for each year over 5, maximum of 60%.

The discount cannot take the sale price below the floor cost, ie below the historic debt outstanding on the property.<sup>746</sup> There is also an absolute cash limit, set low by the Labour administration in 1998 (especially in London) and varying regionally,<sup>747</sup> 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.<sup>748</sup>

Local authorities were originally obliged to provide finance to tenants wishing to purchase under the scheme but unable to arrange the finance privately, but this has been left to the private market since 1993, and there is no longer a right to acquire on rent to mortgage terms.

#### (4) Procedure

The Thatcher government expected opposition to the Right to Buy from Labour controlled councils and accordingly the Housing Act 1985 has a mandatory procedure with powers for ministers to override recalcitrant local authorities.<sup>749</sup> Public landlords must provide information to their tenants about the Right to Buy.<sup>750</sup> The tenant must take the initiative by putting in an application to buy.<sup>751</sup> 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.<sup>752</sup> A sale may be voidable if the application contains fraudulent misrepresentations.<sup>753</sup>

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.<sup>754</sup> If the landlord delays

<sup>743</sup> This is defined by Housing Act 1985 s. 183.

<sup>744</sup> This is defined by Housing Act 1985 s. 183.

<sup>745</sup> Housing Act 2004 s. 180.

<sup>746</sup> Housing Act 1985 s. 131; Housing (Right to Buy) Limit on Discount) (England) Order 2013.

<sup>747</sup> SI 1998/2997, re-enacted as Housing (Right to Acquire) (Discount) Order 2002. .

<sup>748</sup> 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.

<sup>749</sup> Housing Act 1985 ss 122E-125E, 132-142A, 164-170.

<sup>750</sup> Housing Act 1985 ss 121A, 121B; Housing (Right to Buy) (Information to Secure Tenants) (England) Order 2005; in Wales SI. 2005/2681.

<sup>751</sup> Housing Act 1985 s. 122; Housing (Right to Buy) (Prescribed Forms) (Amendment) (England) Regulations 2007.

<sup>752</sup> The added purchasers must have a 12 month residential qualification.

<sup>753</sup> *Haringey London Borough Council v. Hines* [2010] EWCA Civ 1111.

<sup>754</sup> 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.

the remedy is a declaration of rights rather than damages.<sup>755</sup> The tenant has twelve weeks to accept the terms proposed.<sup>756</sup> The landlord can serve a notice requiring the tenant to complete.<sup>757</sup> If the first process falls through and is then restarted, this negates the first offer price.<sup>758</sup> A house will be sold freehold or a flat leasehold,<sup>759</sup> in the latter case subject to a service charge.<sup>760</sup> Either way, the title must be registered.<sup>761</sup>

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.<sup>762</sup> Disputes can be resolved by a county court.<sup>763</sup>

## (5) Repayment of discount

Discount has to be repaid<sup>764</sup> if the property is resold<sup>765</sup> within five years, on a sliding scale decreasing the amount repayable by one fifth each year.<sup>766</sup>

In many cases the sale includes a right of first refusal for the landlord if the property is sold onwards within ten years;<sup>767</sup> this applied in national parks etc.,<sup>768</sup> 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 home<sup>769</sup> under a modified version of Part V of the Housing Act 1985.<sup>770</sup> There are some significant changes, notably that the landlord can choose an alternative dwelling to sell.<sup>771</sup> The scheme is limited to property built with public subsidy or bought by housing associations since 1 April 1997. The discount is less generous<sup>772</sup>

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<sup>755</sup> However, rent payments can be credited against the premium: *Hanoman v. Southwark London Borough Council* [2009] UKHL 29.

<sup>756</sup> Housing Act 1985 s. 125D.

<sup>757</sup> 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.

<sup>758</sup> *Nessa v. Tower Hamlets London Borough Council* [2010] EWCA Civ 559.

<sup>759</sup> Housing Act 1985 s. 138, sch. 6.

<sup>760</sup> Indexation follows the Housing (Right to Buy) (Service Charges) (England) Order 1986 as frequently amended.

<sup>761</sup> Housing Act 1985 s. 154.

<sup>762</sup> Housing Act 1985 ss 138A-138C.

<sup>763</sup> Housing Act 1985 s. 181.

<sup>764</sup> Technically the authority has a discretion: Housing Act 1985 s. 155A.

<sup>765</sup> This does not include a transfer on death or to family members, nor to a compulsory purchase.

<sup>766</sup> Housing Act 1985 s. 155 as amended by Housing Act 2004 s. 195. By s. 155C the value of home improvements is ignored.

<sup>767</sup> Housing Act 1985 ss 156, 156A; at a price determined by ss 158-163; these are amendments by Housing Act 2004 s. 197 ff.

<sup>768</sup> Housing Act 1985 s. 157.

<sup>769</sup> Housing Act 1996 ss. 16-17.

<sup>770</sup> Housing (Right to Acquire) Regulations 1997 sch. 2.

<sup>771</sup> Housing Act 1996 s 124A, inserted by Housing (Right to Acquire) Regulations 1997.

<sup>772</sup> Housing (Right to Acquire) (Discount) Order 2001.

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.<sup>773</sup>

### **(7) Numbers exercising right**

The right to buy scheme introduced in 1980 proved highly popular with tenants in the public rented sector. By 1987 one million former tenants across Britain had become homeowners, with one third of all tenants buying during the 1980s, and in total there have been around two million sales since 1980. Exact statistics are hard to come by. In recent years however, particularly from the mid-2000s onwards there has been a dramatic decrease in the number of sales taking place to sitting tenants. This change can in part be attributed to changes in the housing market and wider economy in addition to housing policy reform in this area which recently has increasingly been directed towards reducing the number of sales under the scheme. However, there remain a vast number of households which retain a right to buy.

The legacy of the Right to Buy is extremely controversial because prime property was sold off without adequate provision for its replacement, the tendency for unsalable property to be left creating sink estates, and the inequity of favouring some social sector tenants when there is such a shortage of accommodation. A recent report by a Labour member of the Greater London Authority suggests that 36% of homes bought in London have ended up being let out by private landlords and this rises to more than half in Tower Hamlets; it also suggests that private landlords charge up to £230 a week more than do social landlords creating a huge drain on the social security budget.<sup>774</sup> Although this is obviously partisan in character, the figures on which it is based have not as yet been challenged.

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, according to the Coalition, 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.<sup>775</sup>

### **(8) 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.<sup>776</sup>

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<sup>773</sup> Housing Act 1985 ss. 171A-171D; Housing (Preservation of the Right to Buy) Regulations 1993, amended by SI 1999/1213.

<sup>774</sup> T. Copley 'From Right to Buy to Buy to Let' (London: London Assembly Labour, January 2014).

<sup>775</sup> 'Reinvigorating Right to Buy and One for One Replacement' (London: Communities and Local Government, March 2012).

<sup>776</sup> Housing (Wales) Measure 2011.

- are there provisions to the effect that a mortgagor is not allowed to lease the dwelling (charged by the mortgage) or similar restrictions?

A mortgagor in possession of land while in possession has power to grant a lease or tenancy of the mortgaged land.<sup>777</sup> This power to lease is almost invariably excluded in residential mortgages, though not of course in Buy to Let financing.<sup>778</sup> In the normal case the tenancy will be unauthorised. If the mortgage falls into arrears, the lender will be able to obtain possession against the tenants. Some minor alleviation is provided by the Mortgage (Protection of Tenants) Act 2010 which ensures at least that the tenants receive notice when proceedings are issued, and will be entitled to apply for suspension of the repossession for two months. Execution will not be permitted until notice has been served on those in occupation giving them an opportunity to apply for a suspension.<sup>779</sup>

### **Summary table for 6.3 Conclusion of tenancy contracts**

	Public task		Without public task
	Secure tenancy	Fully assured tenancy	Assured shorthold
Requirements for valid conclusion	Eligibility Allocation Written agreement and summary	Eligibility Allocation Written agreement and summary	No formal requirements (but written agreement invariable)
Regulations limiting freedom of contract	Agreement provided by landlord  Subject to Unfair terms Regulations	Agreement provided by landlord  Subject to Unfair terms Regulations	Standard form drafted by landlord on take it or leave it basis  Subject to Unfair terms Regulations

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<sup>777</sup> Law of Property Act 1925 s. 99.

<sup>778</sup> Here a notice should be served before the letting to preserve the right to a ground for possession if the mortgage cannot be repaid: see below 6.6, p. 188.

<sup>779</sup> Arden and Dymond, *Manual of Housing Law*, 7<sup>th</sup> edn, para. 1-97 ff; Dwelling Houses (Execution of Possession Orders by Mortgagees) Regulations 2010.

## 6.4 Contents of tenancy contracts

- Description of dwelling; indication of the habitable surface (and consequences in case of the provision of wrong data)

Accurate description of the dwelling being let is desirable. Practice is rather sloppy but this may not matter overmuch because residential tenants invariably take the opportunity to view the dwelling prior to signing the lease agreement. During the viewing the prospective tenant has the opportunity to ask the landlord about the physical extent of the dwelling. The tenancy agreement may contain a description of the dwelling; outlining the number of rooms and their functions. Where the landlord has provided the tenant with inaccurate data about the dwelling there are a number of outcomes depending on the nature of the error, but the misdescription may be so serious as to amount to a material defect for which the tenant could raise an action for misrepresentation or mistake. However, it is unusual for this to arise after a visual inspection.

In the private sector the description of the tenancy must match any House in Multiple Occupation licence. The accommodation referred to must, if it is to be an assured tenancy, be a dwelling-house and let as a separate dwelling subject to the possibility that the complete dwelling may include shared accommodation;<sup>780</sup> it is therefore essential to identify the separate accommodation and any that is shared in detail.

A secure tenancy granted by a public landlord must relate to a separate dwelling, with no vital accommodation shared, and the tenancy agreement itself must identify the property. It should also delineate shared facilities such as shared access ways, lifts etc. Tenancy agreements are often lax in this regard since the property is often identified by its full postal address alone.

- Allowed uses of the rented dwelling and their limits

A use clause is crucial in order to secure the correct application of the sectoral divisions in English tenancy law. What is important is the purpose for which the property is let, not how it is used subsequently. Residential schemes require property to be let as a separate dwelling for the use of the tenant as his principal home.<sup>781</sup>

In the social sector it is more obviously necessary to control the use of property to ensure fairness to others seeking social housing. An obligation will be imposed on the tenant to enter the property and to use it as the tenant's principal home and solely for that purpose.<sup>782</sup> Failure to do so will be a ground for possession.<sup>783</sup>

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<sup>780</sup> Housing Act 1988 ss 1, 3-4.

<sup>781</sup> Housing Act 1985 s. 79; Housing Act 1988 s.1.

<sup>782</sup> There is the possibility of asking permission for ancillary business use, and it will commonly be provided that permission must not be unreasonably refused.

<sup>783</sup> Because the tenancy will not be secure.

- In particular: to what extent are mixed (residence/commercial) contracts lawful and usual (e.g. having a shop, a legal office or a doctor's studio in the dwelling)

In principle a mixed commercial letting is treated as a business tenancy<sup>784</sup> or an agricultural tenancy<sup>785</sup> as the case may be. The test is not which use is predominant as one might expect. Rather if the residential purpose is mixed with a commercial purpose this will take the whole letting into the commercial scheme.<sup>786</sup> In a recent case,<sup>787</sup> the Court of Appeal ruled that a tenancy which had started as a business use tenancy, but had over the years become a purely residential usage, remained within the Landlord and Tenant Act 1954. The same is also largely true of agricultural uses, though there is a special provision allowing the assured tenancy regime to operate when a tenancy of a house includes an area of land along with it.<sup>788</sup> The converse should also be true that the courts would be reluctant to infer a change of tenancy status if the tenancy has been originally granted as a residential tenancy. In *Brewer v. Andrews*<sup>789</sup> the tenants used their rented house where they lived as a guest house. The tenancy was originally granted as an assured shorthold, with a clause restricting its use to a single private dwelling house. The Court of Appeal held that the purpose of the tenancy agreement was clear to all parties and that the tenancy should operate under the rules for assured tenancies - despite surrounding circumstances indicating a significant proportion of business use. However, use for a commercial purpose will commonly be a ground for possession of residential property.

A tenancy of a dwelling will require residential use and also expressly prohibit business use. Excessive business use may well constitute a nuisance and hence a ground for possession.<sup>790</sup> A tenancy may well contemplate some ancillary commercial activity from the rented dwelling since one in four people now carry out some of their work from home.<sup>791</sup> It was previously held that minor commercial use is compatible with the residential character of the letting and one would expect the same to be true of the modern assured tenancy. A residential tenancy may well require the landlord's consent to an ancillary use, perhaps softened by a provision that consent is not to be unreasonably withheld.

- **Parties to a tenancy contract**

- **Landlord: who can lawfully be a landlord?**

Landlords fall into four classes.

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<sup>784</sup> Landlord and Tenant Act 1954 Part II.

<sup>785</sup> Agricultural Tenancies Act 1995.

<sup>786</sup> *Pulleng v. Curran* (1982) 44 P & CR 58; *Webb v Barnet London Borough Council* (1989) 21 HLR 228; *Wagle v. Henry Smith Trustees* [1990] 1 QB 42; there were numerous authorities on the similar principle applying to the Rent Acts.

<sup>787</sup> *Phaik Seang Tan v. Sitkowski* [2007] EWCA Civ 30.

<sup>788</sup> Housing Act 1988 s. 2.

<sup>789</sup> (1998) 30 HLR 203, CA.

<sup>790</sup> See below 6.6, p. 187.

<sup>791</sup> 'Social Tenants' Access to Home Working Opportunities', (York: Joseph Rowntree Foundation, 2002).

Private landlords: may be individuals or they may be companies. The overwhelming majority are individuals often with only one property to let. Capacity to hold land accrues at the age of 18. There are also some large corporate landlords with large rental portfolios, but these are a minority.<sup>792</sup> The landlord should own an interest in the property to be let sufficient to support the grant. If the property is mortgaged (other than a Buy to Let mortgage), it will almost invariably be necessary for the borrower to obtain the consent of the mortgagee before letting the property out, and as this is rarely obtained many tenancies are unauthorised as against lender.<sup>793</sup> Private sector landlords invariably grant assured shortholds.

Housing associations when acting as market rental providers: this usually only applies to a small percentage of their stock, but when acting in this way they can grant assured shortholds at market rents.

Public landlords: these are almost always local authorities and grant secure tenancies at affordable rents.<sup>794</sup> They usually grant secure tenancies with full security after an introductory phase of a year. There are a limited set of circumstances in which they can grant fixed term tenancies called flexible tenancies.<sup>795</sup>

Private providers of social housing: a variety of different entities fall into this category, but it is sufficient to focus on the largest group, housing associations. These have to register with the social tenancy regulator, the Homes and Community Agency. That done, they are in a position to act as social landlords letting homes at affordable rents. They generally grant full assurance, often after a 'starter' period of one year.

**- does a change of the landlord through inheritance, sale or public auction affect the position of the tenant?**

The basic answer to this is no, since a tenancy creates a leasehold estate in land which binds a purchaser. (However there is a mandatory ground for possession where a mortgagee is entitled to exercise a power of sale.<sup>796</sup>) The sale may have some marginal effects. The most common situation is a stock transfer from a local authority to a housing association which changes the sectoral allocation of the letting. Sale will not give rise to a ground for repossession, but inheritance may in certain circumstances give a ground for possession in the private sector.<sup>797</sup>

**- Tenant:**

**- Who can lawfully be a tenant?**

Essentially the tenant needs legal capacity. Legal capacity to hold a legal estate in land accrues at 18. It is possible to contract at a lower age but not in a way that will

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<sup>792</sup> See above 1.4, pp 29-30.

<sup>793</sup> See above 2.5, pp 42-43.

<sup>794</sup> This does not include lettings by the Crown (eg in army barracks) which are outside security regimes; an assured tenancy will arise when the Crown transfers the reversion to a private registered provider of social housing: *Crown Estate Commissioners v. Peabody Trust* [2011] EWHC 1467 (Ch).

<sup>795</sup> See above, 4.3, p. 99.

<sup>796</sup> Housing Act 1988 sch. 2, Ground 2.

<sup>797</sup> See below, 6.6, p. 189.

bind the contracting party when he turns 18. Where a landlord grants a tenancy to a minor aged 16 or 17, the legal estate cannot pass to the intended tenant, so the landlord becomes a trustee of the term for the beneficiary.<sup>798</sup> There are also issues of mental capacity. All the residential security regimes assume that the tenant is an individual who will use the property as his principal residence. If this is not the case, the tenancy will operate contractually without any statutory security. It is commonly the case that a home is rented by a couple and it is usually appropriate for them to rent together as joint tenants. In the social sector, landlords are obliged to follow their allocation policies and the immigration status of the applicant must be taken into account.<sup>799</sup>

- **Which persons are allowed to move in an apartment together with the tenant (spouse, children etc)?**

In the private sector, this is a matter of contractual negotiation between landlord and tenant. A spouse has a common law right to live with his or her spouse. It is usually assumed that a tenant is allowed to occupy residential property with his or her spouse or registered partner or cohabitee (of whatever gender). It is usual also for children to live with their parents and for the tenant to share with other family members, but this should be negotiated with the landlord. Family courts have powers to direct the residence of children, but only after landlords have been heard. In the social sector family members will have been identified during the allocation process. Tenants should tell their landlord who is in occupation, and landlords may require tenants to disclose this information.

Occupancy of the apartment will be limited to a certain number of people. The limit will usually be set by the overcrowding rules.<sup>800</sup> Landlords must ensure that private rented housing is not overcrowded, based on the number of people sleeping in the property. What is based on the lower of two tests. Under the room standard, two people of the opposite sex should not be required to sleep in the same room except for couples living together and children up to the age of 10. Under the space standard, the number of persons sleeping in a house has also to be tested against the number and floor area of the rooms available as sleeping accommodation according to the tables given below; here children under the age of one are disregarded and children up to the age of 10 count as a half. The limit is the lowest of these various figures.

<b>Table 1</b>		<b>Table 2</b>	
<b>No rooms</b>	<b>No persons</b>	<b>Floor area</b>	<b>No persons</b>
1	2	110 sq. ft. or more	2
2	3	90 - 110 sq. ft.	1½
3	5	70 - 90 sq. ft.	1
4	7½	50 - 70 sq. ft.	½
5 or more	2 / room	Less than 50 sq ft.	0

<sup>798</sup> See above, 6.3, p. 141.

<sup>799</sup> See above, 6.2, pp 129-131.

<sup>800</sup> Housing Act 1985 Part X, ss 324-344.

Judged by these standards around 3% of households live in overcrowded accommodation.<sup>801</sup>

An occupier of premises commits an offence by allowing overcrowding to occur. If property is overcrowded so as to affect the health or well-being of occupiers or the amenity of the house and its locality, the local authority can serve an “overcrowding statutory notice” requiring this to be rectified.

Overcrowding may infringe the terms of any House in Multiple Occupation licence. Action may be taken to deal both with over occupancy and under occupancy.<sup>802</sup>

- **Changes of parties:**
- **in case of divorce (and equivalents such as separation of non-married and same sex couples);**

This depends, first, upon whether the couple are joint tenants or not.

If they are joint tenants, a notice to quit can be served by any one of the co-tenants and it will bring the tenancy to an end.<sup>803</sup> This will occur despite the objection of the other tenant, as held in *Hammersmith London Borough Council v. Monk*.<sup>804</sup> This is often used by local authorities to end the tenancy of a violent partner and to relet the property to the victim of the abuse. Various attempts to challenge the *Monk* rule on the basis that service of a notice is a breach of trust and on human rights arguments but these have all failed.<sup>805</sup> *Monk* is controversial because it allows the local authority to sidestep the normal repossession procedures, and also the family law procedures which would enable the court to end the right of occupation of one joint tenant after, for example, violence to the other partner; the party being excluded by the court would have a right to be heard whereas a *Monk* notice ends the occupation right without due process. It is very difficult to see how the House of Lords could regard this as compliant with trial rights. The court has power to make an occupation order in all cases involving married or unmarried couples, with or without children, and this includes power to exclude one party from all rights of occupation. If this is not done results can be capricious as shown by *Walker v. Birmingham City Council*;<sup>806</sup> a council flat was let to the applicant's father and mother as joint tenants, but the father left. On the mother's death the tenancy vested in the father who was not occupying the flat and hence the tenancy had ceased to be secure.<sup>807</sup> The council obtained

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<sup>801</sup> ‘English Housing Survey Headline Report 2012-13’ para. 1.61.

<sup>802</sup> See e.g. *Reading Borough Council v. Holt* [2013] EWCA Civ 641.

<sup>803</sup> Arden and Dymond, *Manual of Housing Law*, 9th edn, para. 1-45ff.

<sup>804</sup> [1992] 1 AC 478, HL.

<sup>805</sup> *Notting Hill Housing Trust v. Brackley* [2001] EWCA Civ 601; *Qazi v. Harrow London Borough Council* [2003] UKHL 43; *Hackney London Borough Council v. Snowden* (2001) 33 HLR 49, CA; *Newham London Borough Council v. Kibata* [2003] EWCA Civ 1785. A human rights challenge to the subsequent repossession was upheld in *McCann v. United Kingdom*, Application 19009/04, (2008) 47 EHRR 40; *Wandsworth London Borough Council v. Dixon* [2009] EWHC 27 (Admin). The party excluded will be homeless, though often intentionally so: *Fletcher v. Brent London Borough Council* [2006] EWCA Civ 960.

<sup>806</sup> [2007] UKHL 22; *Solihull Metropolitan Borough Council v. Hickin* [2010] EWCA Civ 868.

<sup>807</sup> There are two issues, whether the property is a home, and whether it is a principal home: *Islington London Borough Council v. Boyle* [2011] EWCA Civ 1456.

possession against the applicant son; survivorship had bypassed any possibility of succession to the tenancy.

Family Intervention tenancies are not secure tenancies,<sup>808</sup> but the decision to intervene is subject to review.<sup>809</sup>

If a property is vested in one party, the effects of relationship breakdown can be capricious. Often informal arrangements are made where one party leaves and the other takes on the tenancy without going through matrimonial proceedings, but an informal assignment is ineffective,<sup>810</sup> and anyway would require the permission of the landlord.<sup>811</sup> In this situation the tenant has ceased to use the dwelling as his principal home and so secure status is lost,<sup>812</sup> and also the Right to Buy. The correct thing to do here is to apply to the family court which can order a transfer of the tenancy. The court has power to transfer a tenancy on divorce (and its equivalents) and also under the jurisdiction over children. There are different statutory bases for plain old boring married couples, couples who divorce overseas, registered civil partners (who must be of the same sex), and (unmarried) parents.<sup>813</sup>

- **apartments shared among students (in particular: may a student moving out be replaced by motion of the other students);**

Students sharing a house may either be a group of licensees or they may be joint tenants, depending largely on whether they approached the landlord collectively or separately.<sup>814</sup> It appears that legal tenants are limited to four.<sup>815</sup> If they are joint tenants, a notice to quit can be served by any one of the tenants and this will bring the tenancy to an end, despite the objection of the other tenants, the principle in *Hammersmith London Borough Council v. Monk*.<sup>816</sup> This is often used by local authorities to end the tenancy of a violent partner and to relet the property to the victim of the abuse, but it can also be used where there are say four students renting a flat if one of the four decides to end the tenancy against the wishes of the other three. The issue can be avoided by contractual provision, but landlords are reluctant to cede their power to control who becomes a tenant. In practice a departing tenant often finds a replacement to take over the rent obligation and landlords are often happy to accept a person nominated by the departing tenant.

- **death of tenant**

The effect of death depends upon whether a tenancy is held jointly or by a single tenant. The former is simpler to understand. Of the two forms of co-ownership in

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<sup>808</sup> Housing Act 1985 sch. 1 para 4A, inserted by Housing and Regeneration Act 2008 s. 297.

<sup>809</sup> Family Intervention Tenancies (Review)(England) Regulations 2008.

<sup>810</sup> *Crago v. Julian* [1992] 1 WLR 372, CA.

<sup>811</sup> *Croydon London Borough Council v. Buston* [1991] 24 HLR 36, CA.

<sup>812</sup> *Walker v. Birmingham City Council* [2007] UKHL 22.

<sup>813</sup> Matrimonial Causes Act 1973; Matrimonial and Family Proceedings Act 1984; Children Act 1989; Civil Partnership Act 2004 sch. 5.

<sup>814</sup> Respectively *AG Securities v. Vaughan* and *Antoniades v. Villers*, [1990] 1 AC 417, HL.

<sup>815</sup> It is not clear whether Law of Property Act 1925 s. 36 applies to an informal tenancy, but Trustee Act 1925 s. 34 seems to impose a limit of four anyway.

<sup>816</sup> [1992] 1 AC 478, HL.

English law, it appears that an informal tenancy can only be held by joint tenants. Its characteristic is survivorship, by which the estate is passed to the survivor or survivors of the couple will continue as the tenant automatically after the death. A tenancy will be secure or assured while any one of the tenants uses the property as his principal home, but the security will be lost on death unless one at least of the survivors uses the property as the principal home.<sup>817</sup>

#### (1) Assured tenancy with capital value

This is a rare situation. Most private sector assured tenancies will be shortholds, so after the death of the tenant the landlord will be able to obtain possession unless he agrees to accept a partner or family member as a shorthold tenant. Occasionally though a longer tenancy may have been granted in return for payment of a capital premium and in this case the leasehold term has some value. If this is held by a sole tenant this term will vest in the personal representatives of the tenant who will pass it on to the beneficiaries entitled under the tenant's will or on his intestacy.

#### (2) Social sector tenancies

If a single tenant dies, the effect varies. The primary rule is that the tenancy will pass to a spouse living with the deceased as the successor's principal residence. 'Spouse' here is to be understood widely. It includes a married couple, civil partners (who must be of the same sex under current English law), a heterosexual couple of opposite sex living together as husband and wife,<sup>818</sup> but also a couple of the same sex living together as husband and wife.<sup>819</sup> If there is no qualified 'spouse' there may or may not be a succession to a qualified family member; family is closely defined and excludes for example a brother in law<sup>820</sup> and a foster child.<sup>821</sup>

In all cases, there can only be one statutory succession, so these rules only apply when the deceased tenant was not himself a successor (or survivor in the case of a joint tenancy<sup>822</sup>).

##### a. Succession to secure tenancy granted before April 2012

Succession is limited to one occasion (including any survivorship of joint tenants); the statutory succession can take place either to a 'spouse' (widely defined) or a member of the tenant's family.<sup>823</sup> The latter category must have used the property as their principal home for 12 months before the death.<sup>824</sup> These rules continue to apply in Wales.

##### b. Succession to assured tenancy granted before April 2012

When a sole tenant dies the tenancy vests in the 'spouse' of the tenant (as interpreted above) if he or she was occupying the property as his principal home at

<sup>817</sup> *Walker v. Birmingham City Council* [2007] UKHL 22.

<sup>818</sup> An unmarried couple claiming benefits separately: *Amicus Horizon v. Mabbott's Estate* [2012] EWCA Civ 895.

<sup>819</sup> *Ghaidan v. Godin-Mendoza* [2004] UKHL 30; *Nutting v. Southern Housing Group* [2004] EWHC 2982.

<sup>820</sup> *Wandsworth London Borough Council v. Michalah* [2002] EWCA Civ 271.

<sup>821</sup> *Sheffield City Council v. Wall's Personal Representatives* [2010] EWCA Civ 922.

<sup>822</sup> In *Walker v. Birmingham City Council*, [2007] UKHL 22, a survivorship to a mother occurred on the father's death in 1969 - before the secure tenancy regime was created in 1980 – and this survivorship was disregarded so that on the mother's death in 2004 a succession could occur.

<sup>823</sup> Housing Act 1985 ss. 87-88.

<sup>824</sup> *Freeman v. Islington London Borough Council* [2009] EWCA Civ 536 (daughter lived with her father full time for the last year of his life but 'resided with' required more than this); a tough decision?

that time. There are no rights for family members. Again succession is limited to a single occasion. These rules continue to apply in Wales.

c. Succession to secure or assured tenancy in England granted since April 2012  
Succession to a secure tenancy<sup>825</sup> or an assured tenancy<sup>826</sup> is limited to a ‘spouse’ (widely interpreted) unless the landlord has provided expressly for wider succession rights.

(3) Non-qualified successor

In this case the landlord will be able to recover possession after the death of the tenant.<sup>827</sup>

- **Subletting: Under what conditions is subletting allowed? Is subletting being abused e.g. with the aim of circumventing the legal protection of tenants (when the tenant is offered not an ordinary lease contract but a sublease contract only)?**

As usual it is necessary to differentiate the private and the public/social sectors.<sup>828</sup>

### Private rentals

The position varies according to whether a premium has been paid and the length of the term. In a relatively long lease for which a capital premium has been paid, the tenant will need to ensure that the term is saleable.<sup>829</sup> This may be achieved by allowing assignment or by requiring the consent of the landlord to an assignment but providing that the consent of the landlord is not to be withheld unreasonably.<sup>830</sup> In all other cases a private landlord will invariably introduce an absolute bar on all dealings with the lease; this should include assignment, subletting, and parting with possession (e.g. to a mortgagee). It will usually be provided that any fixed term can be forfeited if this term is breached since without such a term, a landlord risks ending up with a assignee who cannot pay the rent. The term against assignment or subletting without consent will be implied into assured tenancies which are periodic or statutory.<sup>831</sup>

### Public rentals

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<sup>825</sup> Housing Act 1985 s. 86A s amended by Localism Act 2011 s. 160.

<sup>826</sup> Housing Act 1988 s. 17 as amended by Localism Act 2011 s. 11; the amendment is technically poor because it amends s. 17 without leaving the text that applies to pre-April 2012 tenancies.

<sup>827</sup> Housing Act 1985 sch. 2 Ground 15 (secure); Housing Act 1988 sch. 2 Ground 7 (assured); *Walker v. Birmingham City Council* [2007] UKHL 22; *Thurrock Borough Council v. West* [2012] EWCA Civ 1435..

<sup>828</sup> Arden and Dymond, *Manual of Housing Law*, 9<sup>th</sup> edn, para. 1.59ff.

<sup>829</sup> Housing Act 1988 s. 15 will not apply.

<sup>830</sup> This qualification will be implied: Landlord and Tenant Act 1927 s. 19.

<sup>831</sup> Housing Act 1988 s. 15; in the case of a non-statutory periodic tenancy this applies where there is no express provision and no premium was paid.

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;<sup>832</sup> the three exceptions where dealings are permitted are:

- an exchange to which the landlord consents;<sup>833</sup>
- 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.<sup>834</sup> Consent to subletting should not be withheld unreasonably.<sup>835</sup>

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 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.<sup>836</sup> 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,<sup>837</sup> or a transfer for the benefit of a child.<sup>838</sup> The object of the introduction of these offences is to ensure that social housing is used by those to whom it is allocated and that they are not using it as a source of profit.<sup>839</sup>

## Social rentals

Similar provisions will apply to assured tenancies granted by private registered providers of social housing and registered social landlords.<sup>840</sup> It is an implied term of every assured tenancy which is a periodic tenancy that, except with the consent of the landlord, the tenant shall not assign the tenancy (in whole or in part); or sub-let or part with possession of the whole or any part of the dwelling-house let on the tenancy.<sup>841</sup> This does not apply, however, to periodic tenancy which is not a statutory periodic tenancy if there is a provision (whether contained in the tenancy or not)

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<sup>832</sup> 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.

<sup>833</sup> Housing Act 1985 s. 92; consent is not to be withheld unreasonably; permitted grounds are set out in detail in sch. 3.

<sup>834</sup> Housing Act 1985 s. 93.

<sup>835</sup> Housing Act 1985 s. 94.

<sup>836</sup> Prevention of Social Housing Fraud Act 2013 s.1(3).

<sup>837</sup> Family Law Act 1996 s.53 and sch. 7.

<sup>838</sup> Children Act 1989 sch.1, para. 1.

<sup>839</sup> On the relevance of schizophrenia see *Malcolm v. Lewisham London Borough Council* [2008] UKHL 43 (the relevant comparator for assessing equality is a tenant who has not sublet).

<sup>840</sup> Prevention of Social Housing Fraud Act 2013 s.2.

<sup>841</sup> Housing Act 1988 s. 15.

under which the tenant is prohibited absolutely or conditionally from assigning sub-letting or parting with possession, or is permitted to do so either absolutely or conditionally.

- **Is it possible, and if yes under what conditions, to conclude a contract with a multiplicity of tenants (e.g. group of students)?**

A property may be let on multiple occupancy, if it is occupied by two or more persons, each of whom is a tenant or licensee of only part of the dwelling, or where each tenant/licensee is only liable for a proportion of the rent/license fee.<sup>842</sup> It appears that there is a limit to four legal tenants.<sup>843</sup> As co-owners, if one were to die the others become entitled at law by survivorship.

If accommodation is occupied by people not forming a single household and it is multi-storey it may attract the licensing requirements for Houses in Multiple Occupation,<sup>844</sup> though not if the accommodation is provided by an educational institution itself.<sup>845</sup>

- **Duration of contract**

- **Open-ended vs. limited in time contracts**

- **For limited in time contracts: is there a mandatory minimum or maximum duration?**

The tenancy agreement should state the date from which the term is to run, though it may be implied that this is immediate if nothing else is specified. It is unusual for a residential tenancy to be preceded by a contract, and much more common for the term to run immediately from the grant. One must distinguish here between tenancies with long term security and those with short security, and the rules for private landlords and for social sector providers.

#### (1) Assured shortholds

A shorthold granted usually by a private sector landlord does not require a fixed term in either England or Wales,<sup>846</sup> so it may be a fixed term or periodic. Either way the landlord will not be able to secure possession simply by serving notice to quit within the first six months unless there is a major breach of covenant. It is usual to grant at

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<sup>842</sup> *AG Securities v. Vaughan* [1990] 1 AC 417, HL.

<sup>843</sup> Trustee Act 1925 s. 34; it may be doubted whether this limit is observed, or even known about, in practice.

<sup>844</sup> Family members include: spouses; cohabitantes who live together as husband and wife; same-sex couples who are in an equivalent relationship; parents; grandparents; children; grandchildren; brothers; sisters; uncles; nephews; nieces; and, cousins. Half-blood relationships are treated as full-blood relationships, and step-children are treated as children: s. 258. Regulations include certain people who are not family members, including carers, foster children, au pairs and nannies.

<sup>845</sup> Housing Act 2004 sch. 14 para. 4; Houses in Multiple Occupation (Specified Educational Establishments) (England) Regulations 2013/1601.

<sup>846</sup> Contrast a short assured tenancy in Scotland which requires an initial six month fixed period.

least an initial fixed term of six months and of course the tenant may wish to negotiate a longer deal; twelve months is normal in university cities. There is a small segment of the market where longer terms are granted in return for a premium.<sup>847</sup> Any fixed term needs to be for a definite period of time and not periods such as 'furnished for duration [of the Second World War]'<sup>848</sup> or 'until required for road widening';<sup>849</sup> in such cases there will be a periodic tenancy implied from the payment and acceptance of rent. In the past it was necessary to grant a six month term but this requirement was dropped in 1996.

The period of a tenancy is all important when it comes to serving notice to quit. In general a periodic tenancy is terminated by notice to quit of one full period of the tenancy and expiring at the end of a period (usually a rent day). So a monthly tenancy granted on the 6th of a month can be terminated at the end of the 5th of any subsequent month. Two special rules apply: that notice to quit a yearly tenancy is a half year's notice expiring on an anniversary date of the tenancy and notice to quit a dwelling must be at least 28 days (on either side) this being a straight period unrelated to the period of the tenancy. The parties may contract out of the common law rule that a notice to quit must expire on a rent day, but clear words are needed in order to achieve this. These rules are modified by the statutory regimes and are considered in the context of termination.<sup>850</sup>

## (2) Affordable housing

When accommodation is publicly funded, the normal expectation is that a tenant will be granted full residential security, though as explained below not immediately. Secure and fully assured tenancies may have an initial fixed term but more generally will be periodic from the outset. The period may be weekly or monthly. An essential of a lease is a definite term, but periodic tenancies meet the requirement of certainty and in practice this rule is almost irrelevant for short residential tenancies and in any event once rent is paid and accepted a periodic tenancy will be implied to match the way in which rent is calculated.

## (3) Short tenancies of affordable housing

The usual practice when a public sector landlord allocates accommodation to a new tenant is to grant an introductory tenancy,<sup>851</sup> a grant for an initial trial period of one year.<sup>852</sup> There is no security of tenure so the landlord can institute proceedings at the end of the introductory period.<sup>853</sup> This introductory term can be extended by six months but the decision to extend it is subject to a review process,<sup>854</sup> and the

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<sup>847</sup> *Artesian Residential Developments v. Beck* [1999] 3 All ER 113 CA (10 year term).

<sup>848</sup> *Lace v. Chantler* [1944] KB 368, CA.

<sup>849</sup> *Prudential Assurance Ltd. v. London Residuary Body* [1992] 2 AC 386, HL.

<sup>850</sup> See below, 6.6, pp 184-186.

<sup>851</sup> Housing Act 1996 ss.124-137, sch. 14 as amended by Housing Act 2004 s. 179; Arden and Dymond, *Manual of Housing Law*, 9th edn, para. 2-213.

<sup>852</sup> Housing Act 1996 s. 125.

<sup>853</sup> *Cardiff City Council v. Stone* [2002] EWCA Civ 298; *Camden London Borough Council v. Stafford* [2012] EWCA Civ 839.

<sup>854</sup> Housing Act 1996 ss 125 and 125A and 125B as amended by Housing Act 2004 s. 179; Introductory Tenancies (Review of Decisions) (England) Regulations 2006, and in Wales SI 2006/2983.

decision not to upgrade to a secure tenancy will be reviewable. At first it was intended to give an automatic right to repossession, thus holding tenants to a period of probation.<sup>855</sup> In order to be human rights compliant, the review procedure has to consider proportionality in addition to traditional grounds for judicial review,<sup>856</sup> though case law suggests that it will be difficult to raise a case of disproportionality that is seriously arguable.<sup>857</sup> There is considerable legislative overhead since an introductory tenancy is not a secure tenancy<sup>858</sup> so matters such as succession, repairs and assignment have to be reproduced.<sup>859</sup>

A second way that a short public sector tenancy can arise is by demotion of a secure tenancy, under a court order after proof of antisocial behaviour by the tenant. Again this process is subject to a review procedure.<sup>860</sup> In *Manchester City Council v. Pincock*<sup>861</sup> the authority demoted a tenancy after serious allegations against the tenant's partner and children. The Supreme Court held that the review procedure had to measure the proportionality of the interference with the tenant's home, but that on the facts an order of repossession was proportionate.

More fundamental changes in the form of the flexible tenancy were introduced in 2011.<sup>862</sup> A landlord who would normally grant a secure tenancy can now grant a fixed term of at least two years, giving the tenant notice that the tenancy will be 'flexible'.<sup>863</sup> The landlord should adopt a tenancy strategy indicating the circumstances in which short tenancies will be granted and should only act in accordance with that policy. The tenant can ask for a review of the decision about the length of the term to be granted.<sup>864</sup> Possession will be automatic if the flexible tenancy has come to an end and the usual notice requiring possession has been served; however it is necessary for the landlord to serve a notice of six months duration warning that the tenancy will end and not be renewed, stating the reasons and allowing a review.<sup>865</sup> Introductory tenancies<sup>866</sup> and demoted tenancies<sup>867</sup> may become flexible via notice procedures.

There are corresponding provisions in the housing association sector. A tenant usually gets a starter tenancy for a year before being upgraded to full assurance.

Any public or social sector tenancy can be converted to a family intervention tenancy.<sup>868</sup>

- Other agreements on duration and their validity: 'chain contracts'; prolongation option; contracts for life etc.

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<sup>855</sup> *Manchester City Council v. Cochrane* (1999) 31 HLR 810, CA.

<sup>856</sup> *R(McLellan) v. Bracknell Forest Borough Council* [2001] EWCA Civ 1510.

<sup>857</sup> *Hounslow London Borough Council v. Powell* [2011] UKSC 8.

<sup>858</sup> Housing Act 1985 sch. 1 para. 4.

<sup>859</sup> Housing Act 1996 ss 131-137.

<sup>860</sup> Demoted Tenancies (Review of Decisions) (England) Regulations 2004; in Wales SI 2005/1228. [2010] UKSC 45.

<sup>862</sup> Housing Act 1985 s. 107A inserted by Localism Act 2011 s. 154.

<sup>863</sup> This is a form of secure tenancy.

<sup>864</sup> Flexible Tenancies (Review Procedures) Regulations 2012.

<sup>865</sup> Housing Act 1985 s. 107D inserted by Localism Act 2011 s. 154.

<sup>866</sup> Housing Act 1985 s. 137A inserted by Localism Act 2011 s. 154.

<sup>867</sup> Housing Act 1985 s. 143A inserted by Localism Act 2011 s. 154.

<sup>868</sup> Housing Act 1988 s. 20C inserted by Localism Act 2011.

It is possible to grant an option to renew a residential tenancy but this would be unusual. Options are very common in connection with long residential leases and commercial leases.

A lease for life is often converted to a 90 year term. This applies if the lease was granted at a rent or in consideration of a fine, and otherwise it operates under a trust. The rules cover a lease for life or lives, any term of years determinable with life (eg 'to T for 40 years if he so long lives'), and corresponding leases until marriage. The converted 90 year term is determinable by one month's notice in writing after the death (or marriage) of the original lessee.<sup>869</sup> These rules all have technical reason to do with distinguishing freehold and leasehold estates, but it goes almost without saying that landlords should avoid granting leases for lives at all costs.

- **Rent payment**

- **In general: freedom of contract vs. rent control**

The sectoral division varies here between England and Wales. In England the basic division is between market orientated rents and affordable rents, affordable rents being defined as up to 80% of the market rent. The former are granted by private landlords and exceptionally by housing associations, whereas the latter are granted by public landlords and private registered providers of social housing. In Wales the division is between grants by private sector landlords on the one hand, these being at market rents, and by public landlords and Registered Social Landlords these being at affordable rents.<sup>870</sup>

During most of the twentieth century, from 1915 until 1989, different schemes of limiting private sector rents were in force. At some stages there were rent controls so the maximum rent permitted was a multiple of the rateable value of the property, at some stages there were decontrols, and at other times there was rent regulation, whereby fair rents were set. Fair rents were set ignoring scarcity value and so in areas of high demand were set much below the open market rent. This remains the case for any residual pre-15 January 1989 private sector tenants, but these are now few in number. Landlords could now charge market rates for assured or assured shorthold tenancies. The new statutory regime considerably affected the previous fair rent regime by directing that, when fixing registered fair rents for existing Rent Act tenancies, rent officers had to take account of rents being charged for comparable assured tenancies which were significantly higher than comparable registered fair rents then current.<sup>871</sup> This unintended consequence of the Housing Act 1988 led to the introduction of a statutory capping mechanism that restricted the level of any permitted increase for registered fair rents,<sup>872</sup> but this was ruled unlawful.<sup>873</sup> It appears that the fair rent system would survive human rights scrutiny.<sup>874</sup> It is arguable that the fair rent regime caused a sector wide decline in the

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<sup>869</sup> Law of Property Act 1925 s. 149(6).

<sup>870</sup> See above 4.3, pp 97-99.

<sup>871</sup> *Spath Holme Ltd v. Greater Manchester and Lancashire Rent Assessment Committee (No. 1)* [1995] 2 EGLR 80, CA; *Curtis v London Rent Assessment Committee* [1999] QB 92, CA.

<sup>872</sup> Rent Acts (Maximum Fair Rent) Order 1999.

<sup>873</sup> *R(Spath Holme Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] 2 AC 349, HL.

<sup>874</sup> *Mellacher Case* (1989) Series A, No. 169.

quality of accommodation since landlords lacked the return required to ensure that repairs were carried out properly.

Part I of the Housing Act 1988 came into effect on 15 January 1989. All new private lettings have been either assured or assured shorthold tenancies.<sup>875</sup> 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.<sup>876</sup> 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).

There is no objection to the landlord taking a premium when granting an assured tenancy.

Social housing should be 'low cost', either 'low-cost rental accommodation' and 'low-cost home ownership'.<sup>877</sup> Accommodation is low cost rental accommodation if it is made available for rent, the rent is below the market rate, and the accommodation is made to persons whose needs are not adequately served by the commercial housing market.<sup>878</sup> The Homes and Communities Agency may set standards for private registered providers about levels of rent, whilst bearing in mind the desirability of housing associations being free to decide how to conduct their own business.<sup>879</sup> The existing social rent regime was laid down in the early 2000s for rents at no more than 80% of estimated market rent (inclusive of service charges). The precise arrangement depends upon the 'delivery agreement' by which funding was provided. Increases are capped at 0.5% above the Retail Prices Index, though rents can be reset on each new letting.<sup>880</sup> Future homes will be commissioned by the Homes and Communities Agency on the basis of affordable rents. Affordable rents will be up to 80% of gross market rents, taking account of service charge,<sup>881</sup> with complex arrangements for rent flexibility within rent caps based on indexation.

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<sup>875</sup> *Secretarial and Nominee Co Ltd v. Thomas* [2005] EWCA Civ 1008.

<sup>876</sup> 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.

<sup>877</sup> Housing and Regeneration Act 2008 ss 68-77.

<sup>878</sup> Housing and Regeneration Act 2008 s. 69.

<sup>879</sup> Housing and Regeneration Act 2008 s.194.

<sup>880</sup> 'Regulatory Framework for Social Housing in England from April 2012' (London: Homes and Communities Agency, 2012) para. 1.3.

<sup>881</sup> 'Directions on Regulatory Standards' (November 2011); 'Affordable Homes Programme 2011-15 Framework' (London: Department of Communities and Local Government, 2011) para. 3.

- **Rent control: how is it legally framed; when does it apply; who carries it out; what are the consequences when the parties agree on an excessive rent**

### **Private sector**

A tenant who disagrees with a proposed rent or rent increase<sup>882</sup> may apply to the First-tier Tribunal (Property Chamber) for a decision as to what the rent should be.<sup>883</sup> Application must be made to the Tribunal before the date on which the new rent would be due. Decisions may be reached by consideration of documents or after a personal hearing of both parties. An appeal lies to the Upper Tribunal. The Tribunal decides what rent the landlord could reasonably expect for the property if he or she was letting it on the open market under a new tenancy on the same terms, ignoring the effect of improvements made by the tenant. The Tribunal may agree the proposed rent or set a higher or lower rent, but whatever rent they fix becomes the legal maximum the landlord can charge. It will usually operate from the date specified in the landlord's notice of increase unless the committee considers the tenant would suffer undue hardship when it may delay its effect. The landlord can propose a further increase after a year.

### **Social/public**

Tenants of private registered providers are generally<sup>884</sup> 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.<sup>885</sup>

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.<sup>886</sup>

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<sup>882</sup> If you are an assured or a shorthold tenant, you can ask a committee to set a rent under a contractual periodic or statutory periodic tenancy if you have been given notice by the landlord of a rent increase. If you are a shorthold tenant, you can ask a committee to set a rent at the beginning of a shorthold tenancy if you consider the rent to be significantly higher than rents for comparable tenancies.

<sup>883</sup> Housing Act 1988 s. 14 as amended.

<sup>884</sup> Rent Act fair rents apply to (secure) tenancies first granted by housing associations before 15 January 1989: Rent Act 1977 Pt 6.

<sup>885</sup> See above 4.3, pp 97-99.

<sup>886</sup> Housing Act 1985 s. 103; *Kilby v. Basildon District Council* [2007] EWCA Civ 479; *Peabody Trust Governors v. Reeve* [2008] EWHC 1432 (Ch).

**- Maturity (fixed payment date); consequences in case of delayed payment**

Rent days will be stated in the tenancy agreement and are usually the same as the period of a periodic tenancy. A weekly tenant will have a rent book basic containing information about the tenancy,<sup>887</sup> and rent demands also require contact details of landlords.<sup>888</sup> When rent is in arrears there is a debt, and a ground for repossession.

**- May the tenant exercise set off and retention rights over the rent payment? (i.e. the tenant withholding the rent or parts of it when the landlord does not respect his contractual duties, e.g. does not repair a defect);**

Rent began as a ‘service’ which had to be performed in isolation from other obligations, but the modern tendency is to view the rent obligation as a contractual obligation like any other,<sup>889</sup> a perception which enables a set off against rent. The set off may be legal set off for a fixed monetary sum actually paid (eg for the cost of repairs undertaken)<sup>890</sup> or equitable for an unquantified claim (such as a claim for incidental damage caused by disrepair).<sup>891</sup> Set off requires mutuality.<sup>892</sup> A tenant can set off claims against a former landlord against rent due to a current landlord, provided (as is usual) arrears of rent were assigned to the current landlord.<sup>893</sup> Set off is dangerous and best avoided.<sup>894</sup> It is usual for all leases to provide for payment of rent ‘without deduction’ but this may be an unfair term in a residential tenancy.<sup>895</sup>

**- - May claims from rental agreements be assigned to third parties (i.e. may the landlord assign his rent claim to a bank?)**

Yes, but this would be very unusual; most landlords are individuals owning no more than a handful of properties.

**- May a rent payment be replaced by a performance in kind (e.g. reparation, renovation)? Does the tenant have a statutory right to this effect? Could a lien of the ‘tenant-contractor’ create problems in that case? (a lien is a statutory right of a contractor to ensure his being paid for his performances, e.g. improvements to the house, e.g. § 648 BGB)**

It is perfectly possible to let a property on the basis that the tenant will renovate the property, but this is very unlikely to occur on a short rental basis. The person renovating the property would insist on a grant of a long leasehold term so that he had something of capital value to preserve the value of the improvements. There are no liens of the kind suggested.

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<sup>887</sup> Landlord and Tenant Act 1985 s. 4; Rent Book (Forms of Notice) Regulations 1993.

<sup>888</sup> Landlord and Tenant Act 1987; *Beitov Properties v. Martin* [2012] UKUT 133 (LC).

<sup>889</sup> *United Scientific Holdings v. Burnley Borough Council* [1978] AC 904, HL.

<sup>890</sup> *Lee Parker v. Izzet* [1971] 1 WLR 1688, Ch. D.

<sup>891</sup> *Asco Developments v. Gordon* (1978) 248 EG 683; *British Anzani (Felixstowe) v. International Marine Management (UK)* [1980] QB 137; *Televantos v. McCulloch* (1991) 23 HLR 412, CA.

<sup>892</sup> *Mauder Taylor v. Blacquiere* [2002] EWCA Civ 1633.

<sup>893</sup> *Muscat v. Smith* [2003] EWCA Civ 962.

<sup>894</sup> Arden and Dymond, *Manual of Housing Law*, 9th edn, para. 5-86.

<sup>895</sup> See above 6.3, pp 143-144.

- **Clauses on rent increase; Open-ended vs. limited in time contracts; automatic increase clauses (e.g. 3% per year); index-oriented increase clauses**

There are statutory procedures for increases of rent in both the assured and secure regimes. However, this can be replaced by express terms in the case of an assured tenancy.<sup>896</sup> Rent review clauses which provide for rents to be increased to market levels are universal in the commercial sphere but relatively unusual in the residential context. Commercial rent review clauses are generally upwards only, but such a provision might be open to challenge in the residential context as with any other pretence. One rent review clause that was rejected was a provision for a rent of £4,680 paid by a claimant in receipt of housing benefit, to be increased to £25,000 if no housing benefit was received.<sup>897</sup> Indexation clauses are unusual, though lawful. Their place is in a fixed term assured tenancy, where it is usual to provide for a percentage rise rather than indexation. In this type of clause time is not of the essence, so it does not matter if the landlord serves notice late.<sup>898</sup>

- **Does the landlord have a lien on the tenant's (movable) property in the house (Vermieterpfandrecht as in § 562 BGB, which functions as a guarantee for the payment of the rent by the tenant)? If yes, what is the scope of this right? How is it enforced?**

No. A landlord formerly had a right to distrain on movable property belonging to the tenant, but it is not lawful to distrain on any tenant, and especially not a private residential tenant.<sup>899</sup>

- **Utilities**
- **Describe the usual kinds of utilities (e.g. basic utilities like the supply of water, gas and electricity vs. additional utilities, i.e. services such as waste collection) and their legal regulation**

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. 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.

- **Responsibility of and distribution among the parties:**

Contracts will generally be concluded by the tenant.

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<sup>896</sup> *Contour Homes v. Rowen* [2007] EWCA Civ 842; *London District Properties Management v. Goolamy* [2009] EWHC 1367 (Admin) (5% per annum).

<sup>897</sup> *Bankway Properties v. Penfold-Dunsford* [2001] EWCA Civ 528.

<sup>898</sup> *White v. Riverside Housing Association* [2005] EWCA Civ 1385.

<sup>899</sup> Housing Act 1988 s. 29. There is no public sector provision.

If, exceptionally, a landlord concludes a contract for a utility the cost may be recovered from the tenant, usually along with the rent. Notice would be needed to include utilities payments in rent if this had not previously been the case.<sup>900</sup>

- **How may the increase of prices for utilities be carried out lawfully?**

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.

- **Is a disruption of supply by the external provider or the landlord possible, in particular if the tenant does not pay the rent?**

Protocols are designed to prevent supplies of services being disconnected for arrears of payments, though this remains an ultimate possibility (except in the case of water supply).

- **Deposit:**

- **What is the legal concept (e.g. is the deposit an advance rent payment or a guarantee deposit to cover future claims of the landlord)?**
- **What is the usual and lawful amount of a deposit?**
- **How does the landlord have to manage the deposit (e.g. special account; interests owed to the tenant?)**

Deposits would not be usual in the social sector, but they would be general in the private rented sector. In the past it was illegal to charge a premium for the grant of a lease, so it was necessary to be very precise about distinguishing capital payments and deposits on account of rent. This is now not really an issue. The landlord under an assured shorthold tenancy will routinely require the payment of a deposit by the tenant as security for the performance of the obligations of the tenancy.

Since April 2007, the a landlord has been required to pass any deposit paid by a tenant at the commencement of an assured shorthold tenancy to an authorised tenancy deposit scheme.<sup>901</sup> Any tenancy deposit paid to a person in connection with an assured shorthold tenancy must be dealt with in accordance with an authorised scheme. The original regime gave some unsatisfactory results,<sup>902</sup> to which substantial changes were introduced with effect from 6 April 2012.<sup>903</sup> There should be clear agreement on the condition of the property through an agreed inventory. 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

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<sup>900</sup> Housing Act 1985 s. 103; *Rochdale Borough Council v. Dixon* [2011] EWCA Civ 1173.

<sup>901</sup> Housing Act 2004 ss 212-215.

<sup>902</sup> *Tiensia v. Vision Enterprises* [2010] EWCA Civ 1224; *Draycott v. Hannells Letting* [2010] EWHC 217 (QB); *Potts v. Densely* [2011] EWHC 1144 (QB); *Gladehurst Properties v. Hashemi* [2011] EWCA Civ 604.

<sup>903</sup> Localism Act 2011 s. 184.

deposit, providing information<sup>904</sup> and handing over the deposit. Failure gives rise in each case to a claim that the tenant receive three times the deposit.<sup>905</sup> A custodial scheme requires a landlord to pay any deposit received to a scheme administrator, who is required to keep it in a separate account until such time as, in accordance with the scheme, it falls to be paid to the landlord or the tenant. Interest is payable.<sup>906</sup> The tenant or the landlord may apply, at any time after the tenancy has ended, for the whole or part of the deposit to be paid to him, and, if satisfied that the parties have agreed that the payment should be made or that the court has so decided, the scheme administrator will pay out the relevant amount in accordance with the agreement or decision. Schemes offer alternative ways of settling disputes which aim to be faster and cheaper than regular court actions. A landlord is now required to protect the deposit within 30 days.<sup>907</sup> If a landlord fails to protect the deposit, the landlord cannot rely on service of a notice to obtain possession of the property until either the landlord returns the deposit to the tenant in full or with such deductions as the tenant agrees; or, if the tenant has taken proceedings against the landlord for non-protection and those proceedings have been concluded.<sup>908</sup>

A real trap has emerged in *Superstrike v. Rodrigues*.<sup>909</sup> An assured shorthold tenancy granted in 1997 (before the requirement to lodge deposits in a protected scheme) expired after a year and turned into a statutory tenancy (at a time when the tenant deposit scheme was in operation). It was held in these circumstances that the landlord was in breach of the scheme and could not now enforce the tenancy agreement by securing repossession.

#### - What are the allowed uses of the deposit by the landlord?

The tenancy deposit which is typically four to six weeks' rent and is payable upon the signing of the tenancy agreement applies to housing in the private sector, and occasionally private registered providers of social housing. The deposit should be returned to the tenant at the end of the tenancy, if he has honoured the terms of the tenancy agreement. If the tenant has broken the terms of the tenancy agreement, then at the end of the tenancy the landlord and tenant should agree on the return of the deposit and any deductions from it. If the tenant is unhappy with the amount the landlord wishes to deduct from the deposit or the landlord refuses to engage in the deposit return process, the tenant is entitled to raise their dispute with the relevant tenancy deposit protection scheme.<sup>910</sup>

The landlord is required to give the tenant details of the scheme to enable the tenant to enforce his rights. Details required<sup>911</sup> are the name, address, telephone number, e-mail address and any fax number of the scheme administrator of the authorised tenancy deposit scheme applying to the deposit, any information contained in a leaflet supplied by the scheme administrator to the landlord which explains the

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<sup>904</sup> Housing (Tenancy Deposits) (Prescribed Information) Order 2007.

<sup>905</sup> *Ayannuga v. Swindells* [2012] EWCA Civ 1789; *Johnson v. Old* [2013] EWCA Civ 415.

<sup>906</sup> Housing (Tenancy Deposits) (Specified Interest Rate) Order 2007.

<sup>907</sup> Housing Act 1996 s. 213(3) as amended by Localism Act 2011 s. 184.

<sup>908</sup> Housing Act 1996 s. 214 as amended.

<sup>909</sup> [2013] EWCA Civ 669; K Lees, 'More Questions Than Answers', *Conveyancer* 2013: 60.

<sup>910</sup> 'A Guide to Tenancy Deposits, Disputes and Damages', (London: Deposit Protection Services, March 2012).

<sup>911</sup> Housing (Tenancy Deposits) (Prescribed Information) Order 2007.

operation of the procedures that apply under the scheme by which an amount in respect of a deposit may be paid or repaid to the tenant at the end of the shorthold tenancy following information in connection with the tenancy in respect of which the deposit has been paid, the amount of the deposit paid, the address of the property to which the tenancy relates, the name, address, telephone number, and any e-mail address or fax number of the landlord in respect of the property for which the deposit is paid, and a host of other pieces of information must be supplied to the tenant. It is insufficient for a landlord merely to pay a tenant's deposit into an authorised scheme without providing the specified information. Nor is it sufficient to provide some of the information to the tenant, but omit other elements of the required information, or provide information that is inappropriate to the particular tenancy deposit scheme in which the deposit is held.<sup>912</sup>

- **Repairs**
- **Who is responsible for what kinds of maintenance works and repairs? What kind of repairs or works may lawfully be assigned to the other party (especially the tenant)?**

## Landlords

In short-term leases, the primary source of repairing obligations is the Landlord and Tenant Act 1985. Section 11 imposes on the landlord the obligation to carry out the major repairs in a term of seven years or less, and in flexible tenancies of whatever length.<sup>913</sup> The obligation attaches to the landlord under a lease but not to the licensor under a licence.<sup>914</sup> The landlord may not contract out of these obligations.<sup>915</sup> A tenant may apply to the court for an order for specific performance of the landlord's repairing obligations. In addition, he may claim damages.

The landlord is responsible for all things which relate to the structure and exterior of the building, including the roof, guttering, chimneys, plasterwork,<sup>916</sup> walls, windows and doors. The landlord is responsible for ensuring that installations within the flat<sup>917</sup> for the supply of key services utilities are kept in good condition. This includes the pipes supplying gas, electricity or water, flues for gas boilers and ventilation, and drains. The landlord is responsible for ensuring any gas appliances are safely-installed and working properly. The landlord should be able to produce a gas safety certificate upon request completed after a regular inspection by a qualified CORGI inspector.<sup>918</sup> The landlord is also responsible for the hot water supply.

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<sup>912</sup> R. Standing, 'Tenancy Deposit - Landlord's Failure to Provide Prescribed Information: *Ayannuga v. Swindells*', *Landlord and Tenant Review*, 17(4) 2013: 134-137.

<sup>913</sup> Localism Act 2011 s. 166; this also applies to longer fixed terms provided by a private registered provider of social housing.

<sup>914</sup> *Bruton v. London and Quadrant Housing Trust* [2000] AC 406, HL.

<sup>915</sup> Housing Act 1985 s. 12(2). Authorisation could be obtained from the county court, but this would be very unusual.

<sup>916</sup> *Grand v. Gill* [2011] EWCA Civ 554.

<sup>917</sup> This excludes water pipers in a roof space outside the flat: *Passley v. Wandsworth London Borough Council* (1998) 30 HLR 165, CA; *Niazi Services v. Van der Loo* [2004] EWCA Civ 53.

<sup>918</sup> Gas Safety (Installation & Use) Regulations 1998.

The obligation to repair only arises when notice has been given to the landlord.<sup>919</sup> However, there may be a claim in tort where the landlord was not informed under the Defective Premises Act 1972.

Some tenancy agreements impose more onerous obligations on the landlord than those implied by section 11 of the 1985 Act. In *Welsh v. Greenwich LBC*,<sup>920</sup> the tenancy agreement obliged the landlord to keep the premises in ‘good condition’. The Court of Appeal held that this covenant obliged the landlord to remedy condensation damp even though that did not fall within section 11 of the 1985 Act. In *Southwark LBC v. Long*<sup>921</sup> the local authority submitted in a defence to a claim for disrepair that it had complied with a contractual duty to ‘take reasonable steps to keep the estate and common parts clean and tidy’ by appointing contractors and instructing them to clean the common parts. The court held that the obligation could not be satisfied by delegation to contractors unless there is an adequate system for monitoring their performance. Inadequate supervision of the contractors was a failure to take reasonable steps for the purpose of the obligation in the tenancy.

The repairing covenant in the Landlord and Tenant Act 1985 is limited because it only relates to defects which are the consequence of disrepair. It does not apply to inherent defects arising from the method of construction of the dwelling. A requirement to secure fitness is implied in furnished lettings, which may explain why many are unfurnished. But there is no implied term as to fitness for human habitation; the term implied by section 8(1) of the Landlord and Tenant Act 1985 has become a dead letter because of the rent limits are so low that they are unlikely ever to apply.<sup>922</sup>

Common areas shared between tenants, such as hallways, lifts and stairs, are outside the statutory repairing covenant, but it will often be possible to imply a term – which in practice has to be imposed on the landlord – to carry out major works; so for example the landlord will be responsible for maintaining lifts in a block of flats.<sup>923</sup>

## Private sector housing condition

Housing conditions in the private rented sector have been adjudged to be the worst of any providers of housing.<sup>924</sup> The private rented sector has a majority of landlords engaged in the part-time letting of small portfolios with little or no relevant qualifications on house management.

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<sup>919</sup> *O'Brien v. Robinson* [1973] AC 912, HL; *Sheldon v West Bromwich Corporation* (1984) 13 HLR 23, CA; *Dinefwr Borough Council v. Jones* (1987) 19 HLR 445; *Hall v. Howard* (1988) 20 HLR 566.

<sup>920</sup> (2001) 33 HLR 40, CA.

<sup>921</sup> [2002] EWCA Civ 403.

<sup>922</sup> P.F. Smith, ‘Repairs - A New Set of Problems,’ *Conveyancer*, 1990 (Sep/Oct): 335-347.

<sup>923</sup> *Liverpool City Council v. Irwin* [1977] AC 239, HL.

<sup>924</sup> In a recent survey conducted by the housing charity Shelter, more than 90% of environmental health officers said they had encountered cases of severe damp, mould, electrical or fire safety hazards in private properties they investigated: M. Pennycook, ‘Sub-standard Rented Housing is Blighting Britain’ *Guardian*, 22 August 2011.

Part 1 of the Housing Act 2004 introduced the framework for the Housing Health and Safety Rating System.<sup>925</sup> In relation to the fitness standard, authorities could only take action in respect of a limited number of housing defects, such as structural stability or lack of sanitation. The Rating System enables authorities to address a much wider range of housing defects, in dwellings, houses in multiple occupation and common parts. The main issues are that the dwelling should:

- be free from health and safety hazards;
- in a reasonable state of repair;
- have reasonably modern kitchens, bathrooms and boilers; and
- reasonably well insulated.

It is also based on a mathematical approach, which allows authorities to compare properties which may have markedly different defects. The likelihood and class of harm is assessed and dwellings are banded into 10 bands, of which the first three bands A-C represent category 1 hazards. The authority has power to serve an improvement notice on the person having control or managing the property or the landlord.

The English House Survey<sup>926</sup> uses these standards to assess the housing stock. It found that 2/3rds of private sector rental homes had problems with the external fabric. It found that 5% of properties had damp problems (a big improvement over a decade) and 15% of homes displayed Category 1 hazards. It found that the worst conditions were in privately rented homes, small terraced houses, and those built before 1919. Some five million homes suffered from either substantial disrepair, serious damp or were non-decent.

The Housing Act 2004 provides for the licensing for houses in multiple occupation.<sup>927</sup> The Act sets out standards of management for this type of property.<sup>928</sup> There are two types of houses in multiple occupation licensing: mandatory licensing and additional licensing. Licensing is mandatory for all houses in multiple occupations which have three or more storeys and are occupied by five or more persons forming two or more households. Additional licensing is when a council can impose a licence on other categories of houses in multiple occupations in its area which are not subject to mandatory licensing. The council can do this if it considers that a significant proportion of these houses in multiple occupations are being managed sufficiently ineffectively so as to give rise to one or more particular problems, either for the occupants of the houses in multiple occupations or for members of the public. Issues are fitness for the number of occupants, overcrowding and standards of

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<sup>925</sup> A risk-based evaluation tool to help local authorities identify and protect against potential risks and hazards to health and safety from any deficiencies identified in dwellings.

<sup>926</sup> 'English Housing Survey: Homes 2011' (London: Department of Communities and Local Government, 2013) ch. 3.

<sup>927</sup> Housing Act 1985 ss 345-394 as amended. For a building or part of a building to be classified as an HMO under the Act it must meet all of the following tests: more than one household shares an amenity (or the building lacks an amenity) such as a bathroom, toilet or cooking facilities, or is a converted building that does not entirely comprise self-contained, or is comprised entirely of converted self-contained flats and where the standard of conversion does not meet the minimum that is required by the 1991 Building Regulations, and more than one third of the flats are occupied under short tenancies. For a building to be classified as an HMO it must also be occupied by more than one household as their only or main residence.

<sup>928</sup> Part 2 of the Act.

management, The local authority can issue a works notice and may suspend the receipt of rent until the work has been completed.<sup>929</sup>

Furniture and soft furnishings supplied by the landlord in let properties are required to meet the fire safety standards as set by the Furniture and Furnishings (Fire) (Safety) Regulations 1988.<sup>930</sup> These regulations require that beds, headboards of beds, mattresses (of any size); sofas, sofa-beds, futons and other convertibles; nursery furniture; garden furniture which is suitable for use in a dwelling; furniture in new caravans; and so on are of fire resistant standards as set by the Regulations. Furniture manufactured since March 1989 will comply with these regulations and most will be marked with a label showing compliance. The Regulations do not apply to sleeping bags, bed-clothes and pillowcases, loose covers for mattresses, curtains and carpets.<sup>931</sup> Properties let continuously to the same tenant since December 1996 until there is change of tenancy are exempted from this Regulation. Non-compliance with this Regulation is a criminal offence and carries penalties of a £5,000 fine, 6 month's imprisonment, or both. In the event of a death, charges could extend to manslaughter.

## Social

The Decent Homes Standard measures the quality of social homes. A social home is described as decent<sup>932</sup> when it meets the current statutory minimum standard<sup>933</sup> for housing – be in a reasonable state of repair, has reasonably modern facilities and services, and provides a reasonable degree of thermal comfort.<sup>934</sup> 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.<sup>935</sup>

The regulation of private providers of social housing in England is based on regulation requiring landlords to comply with applicable health and safety legislation, breach of which would also be a breach of a standard. There is also the consumer regulation which is a more reactive form of regulation applicable to all registered providers including local authorities. While the Home and Communities Agency will

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<sup>929</sup> Housing Act 1985 ss 375-394.

<sup>930</sup> 1324 as amended by the Regulations 1989/2358, Regulations 1993/207 and 2010/2205.

<sup>931</sup> Others are furniture and furnishings manufactured before 1 January 1950 as the inflammable materials were not in use prior to 1950 (antique furniture would be exempt unless it had been re-upholstered in the intervening period).

<sup>932</sup> 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.

<sup>933</sup> 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.

<sup>934</sup> 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.

<sup>935</sup> 'Regulatory Framework for Social Housing in England from April 2012' (London: Homes and Communities Agency, 2012).

continue to set consumer standards for tenants, it will only intervene in cases of serious detriment that have caused, or are likely to cause, harm to tenants.

A particular problem is damp, exacerbated by better thermal insulation and by tenants turning down their heating to reduce fuel bills.

## Tenants

In furnished rental apartments, the tenant is usually responsible for keeping furniture in good condition, but the landlord may be responsible for replacing furniture worn out by natural wear and tear. The tenant is usually responsible for minor repairs to internal decorations unless the disrepair is caused by dampness or wear and tear, then it becomes the landlord's responsibility.<sup>936</sup> Tenants do not have to redecorate a property unless they have damaged the decoration, or it is specified in the tenancy agreement.<sup>937</sup> In these cases, the landlord may want to keep all or part of the deposit unless the tenant repairs any damage before he leaves.

The landlord will not usually have an obligation to maintain or replace electrical appliances like fridges, freezers, washing machines and cookers unless it is stated in the tenancy agreement that he should at certain intervals. If there is no written tenancy agreement, the landlord may be responsible for any of these items.

It is often the tenant's responsibility for the upkeep of a garden, but tenants are not required to clean up or carry out improvements to a garden already in a bad state. If there is no written tenancy agreement, the landlord is usually responsible for garden repairs unless agreed otherwise during the negotiation of the agreement.

- **Habitability (i.e. the dwellings legally capable of being leased).**

There is no requirement that a property let should be fit for human habitation, unless the letting is furnished. However, the Housing Health and Safety System can be used to enforce private sector conditions. There is also a system of control of statutory nuisances.<sup>938</sup> A private landlord needs to meet the minimum safety standard, and social housing should be decent.

- **Connections of the contract to third parties**

- **Rights of tenants in relation to a mortgagee (before and after foreclosure)**

In general if a borrower grants a tenancy of the mortgaged property, the tenancy will be unauthorised, though this will not be the case if the mortgage envisages letting (as in Buy to Let financing) or if the mortgagee has given consent. In such circumstances if the mortgagee is able to obtain possession against the borrower it will be able to secure possession against the tenants. However a recent statute gives the tenant the right to two months' notice of repossession.<sup>939</sup>

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<sup>936</sup> *Warren v. Keen* [1954] 1 QB 15, CA.

<sup>937</sup> *Beedles v. Guinness North Country* [2011] EWCA Civ 442.

<sup>938</sup> Environmental Protection Act 1990.

<sup>939</sup> See below, 6.7, p. 193.

**Summary table for 6.4 Contents of tenancy contracts**

	With a public task		Without a public task
	Secure Tenancy	Fully assured tenancy	Short assured tenancy
	Public landlord	Usually private registered provider of social housing	Private landlord
Description of dwelling	Depends on nature of property	Depends on nature of property	Depends on nature of property
Parties	Landlord and tenant	Landlord and tenant	Landlord and tenant
Use	Principal residence	Principal residence	Principal residence
Duration	Often monthly	Usually periodic, possibly with initial fixed term	Minimum grant of six months
Rent	Affordable	Affordable	Market
Deposit	No	No	Usually two months; subject to tenancy deposit scheme
Repairs, etc.	Major structural repair on landlord Agreement provides for other matters	Major structural repair on landlord Agreement provides for other matters	Major structural repair on landlord Agreement will provide for other matters
Assignment	Requires consent	Requires consent	Usually absolute bar

## **6.5 Implementation of tenancy contracts**

- **Disruptions of performance (in particular “breach of contract”) prior to the handover of the dwelling**
- **In the sphere of the landlord:**

### **- Delayed completion of dwelling**

It would be very unusual to enter into a rental agreement for a property that was not in a state that was fit for habitation and ready for immediate occupation. If it were decided to make a rental arrangement in such circumstances it would be essential to enter into a contract rather than a tenancy and to include provisions dealing with delay comparable to the terms included when a flat is sold ‘off plan’. If the landlord does not protect himself in these circumstances the failure to hand over the property will be considered under the general contract law governing remedies for breach of contract. The tenant will be entitled to rescind the agreement and obtain damages.

### **- Refusal of handover by landlord (in particular: case of “double lease” in which the landlord has concluded two valid contracts with different tenants)**

It would be unusual for a landlord to conclude two valid contracts or tenancies with different tenants over the same dwelling. The move towards registration of landlords in Wales will reduce the possibility of such a practice still further.<sup>940</sup> Priority would be determined on a first in time principle. For the sitting tenants there are a number of rights flowing from their right to possession which would ground an action against the landlord. He is under a duty not to derogate from his grant, that is, the tenant, upon taking possession of the dwelling, has the right to be maintained in possession and the landlord must not do anything that would deprive or partially deprive him of this. The remedies available to the tenant include damages, abatement and rescission.

### **- Refusal of clearing and handover by previous tenant**

This will be a breach of the requirement on the landlord to deliver vacant possession on completion, but again landlords are unlikely to fall into this trap because in practice the new tenancy would not be granted until vacant possession could be delivered.

### **- Public law impediments to handover to the tenant**

It would not be usual to conclude a rental arrangement until the property was ready for occupation.

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<sup>940</sup> Housing (Wales) Bill 2013 cls 1-35.

- **In the sphere of the tenant:**
- **refusal of handover by tenant;**

Again this situation is not very realistic for short term residential letting. It is not the practice to grant contracts before a short term rental. A private sector tenant is not likely to pay over a large tenancy deposit and then refuse to take over the property. Any dispute by a tenant allocated affordable housing about the suitability of the housing will have been resolved as part of the review mechanism. The problem envisaged here would mainly arise where a new build flat was being sold on a long lease and the tenant alleged that the flat built did not meet the specification. In the case where there is a prolonged absence by the tenant the landlord may be able to escape the contract by rescission or he may elect to take action to compel the tenant to take possession by virtue of an order of specific implement. It should be remembered that residential security is dependent upon continued occupation of the property as a principal residence. That said case law has thrown up one illustration where the tenant agreed a rent that she would not be able to afford if housing benefit was refused; in fact benefit was refused because of a social security rule which the parties had not foreseen, and the court solved the problem by implying a term that the tenancy would end if the tenant did not receive benefit.<sup>941</sup>

Failure to occupy affordable housing would be a ground for repossession, but in fact it is not necessary to go through a court repossession since the tenancy will cease to be secure when unoccupied.

- **insolvency of tenant**

Insolvency may cause a lease to vest in the tenant's trustee in bankruptcy, but this will only apply if there is a capital value in it which can be realised for the benefit of creditors. Most residential lettings will be 'excluded assets' that will not vest automatically in the trustee in bankruptcy.<sup>942</sup> Insolvency will generally be a ground for possession, particularly if it causes rent not to be paid, and fixed term leases will generally provide for forfeiture on insolvency, usually widely defined to include a wide variety of related procedures.<sup>943</sup>

- **Disruptions of performance (in particular 'breach of contract') after the handover of the dwelling**

Defects in the dwelling are regulated by the common law and also by statute. The landlord is under a common law duty to provide subjects which are in a tenantable or habitable condition. They must also be maintained in this condition, but no duty arises until the tenant has brought a defect to the landlord's attention. Should the landlord fail to carry out repairs after notification then this will amount to a breach of the landlord's obligation. For a defect of the dwelling to result in a material breach of the contract, entitling the tenant to rescind, it must be one which reduces the condition of the property in such a way as to make it substantially unsuitable. A

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<sup>941</sup> *Graves v. Graves* [2007] EWCA Civ 660.

<sup>942</sup> Insolvency Act 1986 s. 308A.

<sup>943</sup> *Harlow District Council v. Hall* [2006] EWCA Civ 156.

breach which is not so serious as to amount to a material breach may result in the award of damages or will allow the tenant to retain his rent. This common law duty is closely linked to the landlord's duty to carry out repairs (dealt with in the previous section). The landlord's duty in this regard is to maintain the exterior and structure and installations in the dwelling, and also to maintain the property in a safe condition. The landlord is not required to carry out repairs arising from the actions of third parties or which arise from the tenant's negligence.

- **Defects of the dwelling**
  - **Notion of defects: is there a general definition?**

**Examples: is the exposure to noise e.g. from a building site in front of the house or are noisy neighbours a defect?**

The tenant may have an action in nuisance against the person creating the noise, but it is unlikely that a residential tenant will litigate. The question is what rights the tenant has against the landlord and here the case law is not encouraging. This may be a breach of the implied term for quiet enjoyment ('quiet' here including but by no means restricted to freedom from noise) but a landlord is not liable for inherent defects in the construction of a dwelling. A tenant must take the property as it is and not claim to have a better dwelling. *Southwark London Borough Council v. Mills* shows the unsatisfactory nature of that rule: tenants living in an adequately soundproofed block in south London had to put up with being able to hear all the day to day activities of their neighbours, including 'their televisions, their babies crying, their comings and goings, their quarrels and their lovemaking'.<sup>944</sup>

### **damages caused by a party or third persons?**

A landlord would not be liable for damage caused by a third party without the landlord's authorisation.

### **occupation by third parties?**

This concerns the covenant or implied term for quiet enjoyment which is implied in all leases and tenancies. A landlord must grant the tenant exclusive possession of the property let, free from any external interference, and any interference authorised by the landlord will be a breach of that implied obligation.

- **Discuss the possible legal consequences: rent reduction; damages;**

A breach of the above kinds would sound in damages, and since rent is contractual in character it could lead to set off against rent or complete suspension of the rent in the case of total eviction.<sup>945</sup> In an extreme case the tenant might have the right to repudiate the lease.

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<sup>944</sup> [1999] 4 All ER 449, 452d, Lord Hoffmann.

<sup>945</sup> See above 6.4, p. 165.

- **Discuss the possible legal consequences: ‘right to cure’ (to repair the defect by the landlord);**

A private tenant has the right to repair and deduct the cost incurred from the rent;<sup>946</sup> however, the landlord only becomes liable under a repairing obligation when notice has been served on the landlord,<sup>947</sup> so it is essential that notice is given and a reasonable time allowed to elapse before the tenant takes matters into his own hands. Even then it is risky.

A secure tenant in the public sector has a limited ‘right to repair’; secure tenants whose landlords are local housing authorities may employ contractors to carry out repairs of prescribed descriptions which the landlord is obliged to carry out, after notice has been given and the landlord has failed to make good the work.<sup>948</sup>

- **Discuss the possible legal consequences: possessory actions (in case of occupation by third parties) (what are the relationships between different remedies; what are the prescription periods for these remedies)**

The landlord would need to take action to remove third parties. It will usually be possible to make use of the criminal law since residential trespass is a crime<sup>949</sup> and the police can be asked to remove someone who has displaced a residential occupier.<sup>950</sup>

### **Implementation of (unilateral) rent increases**

- **Ordinary rent increases to compensate inflation/ increase gains**
- **Rent increase after renovation or similar**
- **Rent increases in “houses with public task”**
- **Procedure to be followed for rent increases**
- **Is there some orientation at the market rent; if yes, how is the market rent measured/calculated (e.g. statistical devices such as a *Mietspiegel*)?**

These matters have already been explained.<sup>951</sup>

- **Possible objections of the tenant against the rent increase**

These matters have already been explained.<sup>952</sup>

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<sup>946</sup> See above 6.4, p. 165.

<sup>947</sup> *O'Brien v. Robinson* [1973] AC 912, HL.

<sup>948</sup> Housing Act 1985 s. 96; Secure Tenants of Local Authorities (Right to Repair) Regulations 1994.

<sup>949</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO') s. 144; see above, 2.6, pp 47-48.

<sup>950</sup> Criminal Law Act 1977 s. 7.

<sup>951</sup> See above 6.4, pp 159-163.

<sup>952</sup> See above 6.4, p. 162-164.

- **Improvements/changes of the dwelling**
- **Is the tenant allowed to make (objective) improvements on the dwelling (e.g. putting in new tiles)?**

**Private tenants** are most likely to be subject to an absolute obligation not to make any structural changes to the property they are letting, though it is of course possible for the landlord to agree to a particular change. Sometimes the tenant will be restricted from carrying out improvements or alterations without the landlord's prior consent. Should the agreement remain silent in this area there will still be an implied common law condition not to commit 'waste' a concept which includes beneficial changes. Where the tenant makes an unauthorised alteration he will be liable for breach of contract and to return the dwelling to its original condition.

**Secure tenants** are not permitted to carry out work in relation to the house without the written consent of the landlord, but this must not be unreasonably withheld.<sup>953</sup> A refusal can be challenged in the county court.<sup>954</sup> Work might include an alteration, improvement or enlargement of the house or of any fittings or fixtures, the addition of new fittings or fixtures, the erection of a garage, shed or other structure. If the tenant wishes to carry out work on the dwelling there is a detailed statutory framework which the tenant must adhere. The tenant must make a written application to the landlord for the landlord's consent, giving details of the proposed work and the landlord has one month to either consent to the work, consent but impose conditions or refuse the request. Should the landlord fail to reply within the time period he will be taken to consent to the work. This reply must contain any conditions imposed or where consent is refused, it must contain reasons for the refusal. In deciding whether to impose conditions the landlord must have regard to the age and condition of the house as well as the cost of complying with the condition. A tenant may appeal a refusal or condition to the court by way of summary appeal. The court is to have regard to the safety of occupiers of the house or of any other premises, any expenditure which the landlord is likely to incur as a result of the work, whether the work is likely to reduce the value of the house or of any premises of which it forms part, or to make the house or such premises less suitable for letting or for sale, and any effect which the work is likely to have on the extent of the accommodation provided by the house.

### Tenant's fixtures and improvements

Under the common law a thing affixed to a rented property will become the property of the landlord.<sup>955</sup> The test is based partly on the degree of physical annexation and partly on the purpose of annexation. There are two exceptions to this rule, though trade fixtures are unlikely in residential lettings. The other is ornamental fixtures, that is an object attached to the property for the better enjoyment of the object itself, the leading case concerning a tapestry which was nailed to wooden battens nailed to the wall of a house simply to enable the tapestry to be seen. Such items apart, the landlord could claim things fixed to the property by the tenant, but is usually more likely to require their removal with damage being made good.

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<sup>953</sup> Housing Act 1985 ss 97-101. This applies to any work beyond internal decoration. Social tenants should generally have the same right.

<sup>954</sup> Housing Act 1985 s.110.

<sup>955</sup> *Elitestone v. Morris* [1997] 1 WLR 687, HL.

- **Must, and if yes under what conditions, improvements of the dwelling by the tenant be compensated by the landlord?**

In the private sector this is a matter of contract, but in the public sector the effect of an authorised improvement will be ignored when the rent is reviewed and when the price is set under the Right to Buy and the tenant will be entitled to be reimbursed for the cost of a qualifying improvement at the end of the tenancy.<sup>956</sup>

- **Is the tenant allowed to make other changes to the dwelling?**
- in particular changes needed to accommodate a handicap (e.g. building an elevator; ensuring access for wheelchairs etc)?
- fixing antennas, including parabolic antennas

If adaptation is needed of the demised property, this should be negotiated with the landlord before the property is let. A right to make an adaptation may be implied, or it may be possible to use the equality legislation to secure such rights.<sup>957</sup>

In the public sector the test is whether the improvement -

- (a) is of such a nature as to be calculated to add to the letting value of the holding at the termination of the tenancy; and
- (b) is reasonable and suitable to the character thereof; and
- (c) will not diminish the value of any other property belonging to the same landlord, or to any superior landlord from whom the immediate landlord of the tenant directly or indirectly holds;

- **Alterations of the dwelling by the landlord**
- **What does the tenant have to tolerate?**
- **Which procedures must be followed**

Generally speaking a tenant may be expected to tolerate minor works. If major work is required, the landlord will have to provide alternative accommodation and will then have a ground for recovery of possession from the original property, whether held on an assured tenancy and a secure tenancy.<sup>958</sup> With regard to minor works the landlord must be alert to his common law obligations. In particular, the landlord is under a duty not to derogate from his grant. As set out above, this means that the landlord must not do anything which would deprive the tenant of his right under the lease and the remedies are abatement or rescission. In addition the landlord is under a duty to provide subjects which are reasonably fit for the purpose for which they are let and this means that they are tenantable or habitable. Should the landlord's actions, in carrying out renovations, make it substantially unsuitable this will be a material breach of the obligation for quiet enjoyment.

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<sup>956</sup> Housing Act 1985 s 99A; Secure Tenancy (Compensation for Improvements) Regulations 1994.

<sup>957</sup> See above, 6.2, pp 141-143.

<sup>958</sup> Private/social sector: Housing Act 1988 sch. 2 ground 6. Social sector: Housing Act 1985 sch. 2, grounds 10, 10A.

- **Uses of the dwelling**
- **Discuss allowed vs. forbidden uses such as:**
  - **keeping animals; smells; receiving guests; prostitution and commercial uses (e.g. converting one room in a medical clinic); removing an internal wall; fixing pamphlets outside.**

## **General**

Most tenancy agreements will contain detailed rules about the use of the property. A typical secure tenancy would include a lengthy section covering the behaviour expected of the tenant, who is responsible for the activities of those living with the tenant and visitors, including:

- care of the home, decoration, furniture, fixtures;
- care of common parts;
- respect for neighbour's property;
- not to run a business from the property;
- prohibition on illegal and immoral activities, including drug taking, drug dealing, prostitution, handling stolen goods, betting and gambling;
- placing rubbish in allocated places; and
- careful use of heating appliances.

This is followed by a lengthy section on showing respect for others, an obligation which may be broken in numerous ways:

- excessive noise or allowing visitors to be noisy;
- failure to control pets;
- use for illegal or immoral purposes;
- leaving rubbish in unauthorised places;
- failure to control children;
- vandalism;
- harassment or assault of people in the neighbourhood;
- carrying offensive weapons;
- using or selling drugs;
- selling alcohol or using alcohol in an antisocial manner;
- running a business in an antisocial manner; or
- parking or carrying out work to vehicles.

In relation to the keeping of pets, most landlords will lay down rules on this topic. These will be subject to equality principles. Thus a landlord would not be allowed to refuse permission for a tenant to keep a guide dog or other assistance dog under a 'no pets' rule. In *Thomas-Ashley v. Drum Housing Association*<sup>959</sup> a dog was kept of a kind that would not be permitted by the housing association and, although the tenant had mental health issues helped by keeping a dog, it had not been made impossible or unreasonably difficult to enjoy the premises. The lease will generally contain a clause prohibiting use of the dwelling which could result in a nuisance; this could relate to keeping animals, odours, receiving guests etc. There will always be a clause prohibiting use for immoral or illegal purposes and this will be a ground for recovery of possession in assured and secure tenancies.

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<sup>959</sup> [2010] EWCA Civ 265. In a fully mutual housing association there is no protection so a notice to quit is valid: *Joseph v. Nettleton Road Housing Co-operative Ltd* [2010] EWCA Civ 228 (Staffordshire bull terrier).

## **Antisocial behaviour**

Antisocial behaviour by tenants and their families and visitors is a huge issue, and landlords have to take steps to deal with antisocial tenants and neighbours. Public landlords and social providers must have strategies for dealing with this issue.<sup>960</sup>

Courts have refused, however, to impose a duty of care on housing authorities to prevent the death of a tenant through the antisocial behaviour of other tenants.<sup>961</sup>

There are innumerable cases on repossession for antisocial behaviour, such as:

- drugs;
- drinking;
- possession of a revolver;
- late night disturbances (over a period of three years); and
- rubbish flung from windows.<sup>962</sup>

A **secure tenancy** can be demoted by notice after a court finding of antisocial behaviour.<sup>963</sup> Security is limited to a contractual term of at least six months, but no guarantee of security after the end of the fixed term.<sup>964</sup> The landlord has a mandatory ground for possession if it chooses to exercise it, though in order to meet human rights standards there will be procedure to review the eviction decision. A recovery notice must be served between two and six months before repossession is sought.<sup>965</sup>

The grounds on which this effective demotion can be made are set out in detail, including a previous antisocial behaviour order, the making of a new order, or antisocial behaviour by any other resident. There is also power to make antisocial behaviour injunctions.<sup>966</sup>

In the **private sector**, the main controls are:

- antisocial behaviour orders against tenants or family members; and
- antisocial behaviour notice to landlord to control the activities of others.

No doubt it would be possible for the tenant to take action directly in nuisance, but this would be unlikely on account of the cost.

### **• is there an obligation of the tenant to live in the dwelling?**

This may be an express term of a tenancy agreement. In all sectors, security will only apply if the tenant occupies the property as his principal home, so after a prolonged absence by the tenant, the tenancy will cease to be assured or secure. This principle is emphasised in particular in the public sector. Failure to occupy property would be a ground for repossession, but in fact it is not necessary to go through a court repossession since there are specific provisions dealing with abandonment.<sup>967</sup> A social landlord can give notice that the property appears to have been abandoned which places the onus on the tenant to challenge the notice or to give notice of their intention of occupy the property. Notices are often disputed.<sup>968</sup>

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<sup>960</sup> 'Regulatory Framework for Social Housing in England from April 2012' (London, Homes and Communities Agency, 2012).

<sup>961</sup> *Mowan v. Wandsworth London Borough Council* (2001) 33 HLR 56.

<sup>962</sup> Immediate possession will often be justified: *Manchester City Council v. Higgins* [2005] EWCA Civ 1423.

<sup>963</sup> Housing Act 1985 s. 82A.

<sup>964</sup> The tenancy will revert to full security if it is not terminated.

<sup>965</sup> Housing Act 1985 s. 36.

<sup>966</sup> Housing Act 1996 ss 152-158, sch. 15; *Manchester City Council v. Ali* [2003] HLR 11; *Swindon Borough Council v. Redpath* [2009] EWCA Civ 943.

<sup>967</sup> Housing Act 1985 s. 50.

<sup>968</sup> See above, 6.4, p. 150.

- **Are there specificities for holiday homes?**

A holiday home is not let as a principal home and so is not an assured tenancy (in the private sector) and cannot be a secure tenancy in the social sector. An out of season let of a holiday home will usually be on a short assured basis, but if full assurance is granted by mistake there will be a mandatory ground for possession. Restrictions on letting as holiday homes may exist in some areas and will be enforced through planning conditions.

- **Video surveillance of the building:**

**Is the surveillance of certain parts (e.g. corridors) of the building lawful and usual?**

Security surveillance of certain parts of the building is lawful and usual. However, any security cameras should only be installed in public places like entrances, parking lots, and laundry rooms to protect tenant privacy. Most uses of CCTV will be covered by the Data Protection Act which sets out rules which CCTV operators must follow. The tenant will have a number of rights including the right to see information held about him, including CCTV images of him, or images which give away information about him. Where a tenant is concerned that CCTV is being used for harassment, anti-social behaviour or other matters dealt with under the criminal law, then these are matters for the police. Law enforcement covert surveillance activities are covered by the Regulation of Investigatory Powers Act 2000

**Summary table for 6.5 Implementation of tenancy contracts**

	With a public task		Without a public task
	Secure tenancy	Assured tenancy	Assured shorthold tenancy.
Sector	Public	Social	Private
Breaches prior to handover	Landlord must carry out check	Landlord must carry out check	Tenancy only granted when property ready
Breaches after handover	Duty on landlord Complaints procedure	Duty on landlord Complaints procedure	Action
Rent increases	Notice Challenge procedure	Notice Challenge procedure	Statutory notice Can challenge
Changes to the dwelling	Requires written consent	Requires written consent	Outright bar
Use of the dwelling	Principal residence	Principal residence	Residence

## 6.6 Termination of tenancy contracts

- **Mutual termination agreements**

The parties to a rental agreement are free to come to a mutual agreement which allows for termination prior to expiration of the term. The tenant needs to be aware that this may lead to him becoming homeless intentionally<sup>969</sup> which would limit his possibility of applying for social housing in the future. Termination will also occur where the parties to an existing tenancy agree to a new tenancy on different terms, the effect of the regrant being an implied surrender of the existing tenancy. When the assured tenancy regime replaced the Rent Act regimes in 1989, landlords were able to move tenants from the old to the new regime by altering the property or the parties to the regrant or by allowing a short gap between the surrender and the regrant;<sup>970</sup> there were inadequate safeguards for Rent Act protected tenants, and many were moved to an assured basis without adequate warning.

- **Notice by the tenant**

- **Periods and deadlines to be respected**

In general 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 tenancies<sup>971</sup> and secure tenancies<sup>972</sup> 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.<sup>973</sup> 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.<sup>974</sup> 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.<sup>975</sup> 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.<sup>976</sup> A full period of the tenancy is required, so, for example, if the tenancy is quarterly a quarter's notice is required.<sup>977</sup> The latter rule at least requires the notice

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<sup>969</sup> If the local authority decides that it was reasonable for the tenant to continue to occupy the home he has left voluntarily.

<sup>970</sup> *Bolnore Properties v. Cobb* (1997) 29 HLR 202, CA.

<sup>971</sup> Housing Act 1988 s. 5(2); this is subject to any contractual regrant: s. 5(4).

<sup>972</sup> Housing Act 1985 s. 86.

<sup>973</sup> 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.

<sup>974</sup> On rehousing see *Watford Borough Council v. Simpson* (2000) 32 HLR 901, CA.

<sup>975</sup> *Mannai Investments Co. v. Eagle Star Life Assurance Co* [1997] AC 749, HL.

<sup>976</sup> 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.

<sup>977</sup> It is half a year for a yearly tenancy.

to expire on either the last day of a period or the next day, the first day of the succeeding period.<sup>978</sup> 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.<sup>979</sup>

- **May the tenant terminate the agreement before the agreed date of termination (especially in case of contracts limited in time); if yes: does the landlord then have a right to compensation (or be allowed to impose sanctions such as penalty payments)?**

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.

- **Are there preconditions such as proposing another tenant to the landlord?**

Tenancies in the residential sector would rarely provide for the tenant to propose a replacement tenant for one who leaves. This might be appropriate where a flat is taken by a group of students to avoid the problem that a notice by one joint tenant would end the tenancy of all the others. It is probably common in practice for a tenant who leaves to suggest a replacement to curtail rent liability, whatever the tenancy agreement says. Clauses to this effect are rare and in general the landlord will find a replacement tenant without the previous tenant's assistance.

- **Notice by the landlord**

- **Ordinary vs. extraordinary notice in open-ended or time-limited contracts; definition of ordinary vs. extraordinary (generally available in cases of massive rent arrears or strong antisocial behaviour)**

- **Notices on grounds of Public Interest -**

The effect of a notice of termination depends very much on the sectoral allocation of the tenancy, 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. There is also a residual category of tenancies falling outside all security regimes so that contractual principles apply.

#### **(A) 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

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<sup>978</sup> 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.

<sup>979</sup> See above, 6.4, pp. 154-155.

the fixed term and any contractual regrant. It is necessary to end any periodic continuation by notice to quit or other contractual rights.<sup>980</sup> 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.<sup>981</sup> The landlord must give a statutory notice, which must be of two months duration and expire on or after the term date.<sup>982</sup> At the expiration of the notice the landlord may issue a possession action in the county court and the court must make an order for possession which ends the tenancy when executed.<sup>983</sup> Because possession is mandatory tenants tend to move once notice has been given.

### **(B) Termination of an assured tenancy for tenant misconduct**

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 house<sup>984</sup> 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.<sup>985</sup> The period of notice is either two weeks or two months.<sup>986</sup> 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.

There are numerous grounds of possession. Some of which are discretionary and others mandatory. Some are based on the misconduct of the tenant. All of these misconduct grounds are available once the contractual term has ended and the tenancy is subject to statutory continuation.<sup>987</sup> 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.

### **Misconduct grounds for possession against assured tenant**

<b>Mandatory</b>	Possession must be ordered once the ground is established
Ground 8	Substantial rent arrears

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<sup>980</sup> 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.

<sup>981</sup> *Hussain v. Bradford Community Housing* [2009] EWCA Civ 763.

<sup>982</sup> 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.

<sup>983</sup> Housing Act 1988 s. 5(1).

<sup>984</sup> Housing Act 1988 s. 5.

<sup>985</sup> Housing Act 1988 s. 2; Assured Tenancies and Agricultural Occupancies (Forms) (England) Regulations 1988, as amended by SI 2003/260.

<sup>986</sup> Housing Act 1988 s. 8(4a).

<sup>987</sup> Housing Act 1988 sch. 2 as amended eg by Housing Act 1996 ss 144-152.

	Two months if rent is payable weekly or monthly; <sup>988</sup> Three months if it is quarterly or yearly.
<b>Discretionary</b>	The court may only order possession if it considers it reasonable to do so; hence the court may adjourn proceedings or make a suspended possession order.
Ground 10	Rent arrears Rent was in arrears at the date of the pre-action notice and also when proceedings for possession are begun.
Ground 11	Rent persistently late Where the tenant has persistently delayed paying rent regardless of whether or not any rent is in arrears when proceedings for possession are begun.
Ground 12	Breach of obligation Breach of any obligation of the tenancy (other than one related to the payment of rent). <sup>989</sup>
Ground 13	Deterioration of dwelling 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.
Ground 14	Nuisance etc. Where the tenant, or a person lodging with the tenant or visiting the dwelling has caused nuisance or annoyance to neighbours <sup>990</sup> or has been convicted of using or allowing the house to be used for immoral or illegal purposes; or an indictable offence committed in the locality of the house. <sup>991</sup>
Ground 14A	Domestic violence Violence by the tenant to a spouse or partner causing that person to leave. <sup>992</sup>
Ground 15	Deterioration of furniture Deterioration in the condition of any furniture provided by the landlord due to ill-treatment by the tenant or person lodging with the tenant.
Ground 17	Misrepresentation The landlord was induced to grant the tenancy by a false statement made knowingly or recklessly by the tenant or someone acting at his instigation. <sup>993</sup>

<sup>988</sup> *Coltrane v. Day* [2003] EWCA Civ 342; *North British Housing Association v. Matthews* [2004] EWCA Civ 1736; *S v. Floyd* [2008] EWCA Civ 201.

<sup>989</sup> *Leeds and Yorkshire Housing Association v. Vertigen* [2010] EWCA Civ 1583.

<sup>990</sup> Usually possession will be ordered outright: *New Charter Housing (North) v. Ashcroft* [2004] EWCA Civ 310; *London and Quadrant Housing Trust v. Root* [2005] EWCA Civ 43; *Friendship Care and Housing Association v. Begum* [2011] EWCA Civ 1807; *Byrne v. Poplar Housing and Regeneration Community Association* [2012] EWCA Civ 832. It may be appropriate to suspend a possession order if the perpetrators have moved out: *Gallagher v. Castle Vale Action Trust* [2001] EWCA Civ 944. Also if the behaviour is caused by disability: *North Devon Homes v. Brazier* [2003] EWHC 574.

<sup>991</sup> *Raglan Housing Association v. Fairclough* [2007] EWCA Civ 1087.

<sup>992</sup> *Metropolitan Housing Trust v. Hadjazi* [2010] EWCA Civ 750.

<sup>993</sup> *Windsor and District Housing Association v. Hewitt* [2011] EWCA Civ 735.

### **(C) 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.<sup>994</sup> 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.<sup>995</sup> The exact period of notice depends upon the ground being used:<sup>996</sup>

grounds 1, 2, 5, 6, 7, 9, 10                  two months;

other grounds                  two weeks.

The court may dispense with notice in some situations.

<b>Mandatory</b>	Where the landlord can establish that any of the grounds for possession from 1 to 8 exists then the court must give back possession to the landlord.
Ground 1	Occupancy required by landlord 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).
Ground 2	Mortgage default Should the landlord default on a loan which had as its security the dwelling of the tenancy and the creditor is entitled to sell the house as part of the security arrangement then ground 2 may be relied upon to recover possession. Notice should be given at the outset, but there is discretion to dispense with notice. <sup>997</sup>
Ground 3	(Out of season) holiday let Where the dwelling is let, as and out of season holiday let for a term of less than 8 months. Under this ground the landlord must give notice to the tenant prior to commencement of the tenancy that

<sup>994</sup> Housing Act 1988 s. 5(1).

<sup>995</sup> Housing Act 1988 s. 8; Assured Tenancies and Agricultural Occupancies (Forms) (England) Regulations 1988 as amended by SI 2003/260.

<sup>996</sup> Housing Act 1988 s. 8(4A).

<sup>997</sup> If the tenancy is unauthorised by the mortgagee, the mortgagee will be able to secure possession; see below p. 193.

	possession might be recovered under this ground. <sup>998</sup>
Ground 4	<b>Student accommodation</b> In the event that a landlord wants to recover possession of a dwelling which is let as student accommodation he may rely on ground 4 to do so. In order to rely on this ground, the dwelling must be let for a period not exceeding 12 months and the usual notice requirement applies.
Ground 5	<b>Ministers of religion</b> Where the dwelling is required as the home of a minister of religion from which to perform the duties of his office, subject to the usual notice requirement.
Ground 6	<b>Substantial redevelopment</b> Where the landlord requires possession of the dwelling in order to carry out substantial redevelopment works on the house then he may use ground 6 to acquire possession of the dwelling.
Ground 7	<b>Inherited tenancy</b> In the event that the tenant has inherited the tenancy from a former tenant but the landlord wishes to recover possession of the dwelling he may rely on ground 7 to secure possession in proceedings brought within 12 months of the death of the former landlord.
<b>Discretionary</b>	
Ground 9	The County Court is not to grant an order for possession unless they consider it reasonable to do so. In this manner the court has discretion to delay an order of possession or to make a suspended possession order.
Ground 16	<b>Suitable alternative accommodation</b> Where suitable alternative accommodation is available for the tenant or will be available for him when the order for possession takes effect, the landlord may rely on ground 9. <b>Former employee tenancy</b> Where the house was let to the tenant in consequence of his employment by the landlord and the tenant has ceased to be in that employment.

It must be remembered that there are a number of tenancies excluded from the assured tenancy regime and for those contractual principles apply, one example being a holiday letting.

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<sup>998</sup> The holiday lettings themselves are not assured tenancies and not even within the Protection from Eviction Act 1977.

## **(D) Termination of Rent Act tenancies**

A Rent Act tenant enjoys full security of tenure under the Rent Act 1977, which has rather similar grounds for possession, some mandatory and others discretionary; they operate in a manner which makes it more difficult for the landlord to gain an order of possession. For instance, rent arrears are always discretionary ground under the protected tenancy.<sup>999</sup>

## **(E) Termination of Secure Tenancies**

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.<sup>1000</sup> When seeking to terminate the tenancy the landlord must give the tenant written notice<sup>1001</sup> 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.<sup>1002</sup> A notice to quit cannot be revoked.<sup>1003</sup> 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.<sup>1004</sup>

### **Secure Tenancy – Grounds for recovery of possession<sup>1005</sup>**

#### **Misconduct grounds**

<b>Discretionary</b>	It must be reasonable to order possession
Ground 1	Rent arrears or other breach Where there are outstanding rent arrears or the tenant has broken any other obligation.
Ground 2	Nuisance or annoyance Where the tenant or a person living with, or visiting, the tenant has been (a) guilty of conduct causing a nuisance or annoyance to others in the locality, <sup>1006</sup> (b) convicted of using or allowing immoral or illegal purposes or (c) convicted of an indictable offence committed in the locality of the house. <sup>1007</sup>
Ground 2A	Domestic violence

<sup>999</sup> Rent 1977 sch. 15; Sparkes *A New Landlord and Tenant*, ch. 13.

<sup>1000</sup> Garner and Frith, *Practical Approach* (7th edn), ch. 18.

<sup>1001</sup> Housing Act 1985 s. 83; Secure Tenancies (Notices) Regulations 1987 as amended for England by SI 2004/1627.

<sup>1002</sup> Housing Act 1985 s. 83.

<sup>1003</sup> *Fareham Borough Council v. Miller* [2013] EWCA Civ 159.

<sup>1004</sup> *Independent on Sunday* 15 December 2013 citing *Inside Housing* magazine.

<sup>1005</sup> Housing Act 1985 sch. 2, as amended eg by Housing Act 1996 ss 144-152.

<sup>1006</sup> In general possession should be outright: *Canterbury City Council v. Lowe* (2001) 33 HLR 53, CA; *Pollards Hill Housing Association v. Marsh* [2002] EWCA Civ 199; *Sandwell Metropolitan Borough Council v. Hensley* [2007] EWCA Civ 1425; *Barking and Dagenham London Borough Council v. Bakare* [2012] EWCA Civ 750. On the effect of disability see: *Manchester City Council v. Romano* [2004] EWCA Civ 834; *Barber v. Croydon London Borough Council* [2010] EWCA Civ 51 (effect of report that tenant's life would descend into chaos if evicted). The question is the likelihood of a recurrence: *Birmingham City Council v. Ashton* [2012] EWCA Civ 1557.

<sup>1007</sup> *Knowsley Housing Trust v. Prescott* [2009] EWHC 924 (QB).

	Violence causing a spouse or partner to leave. <sup>1008</sup>
Ground 3	Deterioration of conditions Where the tenant, or a person living with the tenant, has caused deterioration in the condition of the dwelling by waste or acts or defaults..
Ground 4	Deterioration of furniture Where the tenant, or a person living with the tenant, has caused deterioration in the condition of the furniture then the landlord may seek an order for possession on ground 4.
Ground 5	False statement Where the landlord was induced to grant the tenancy by a false statement made knowingly or recklessly by the tenant. <sup>1009</sup>
Ground 6	Exchange A premium was charged on an exchange.

### **Management grounds**

#### **Discretionary**

Ground 7	It must be reasonable to order possession Dwelling in the curtilage of non-residential property required for an employee
Ground 8	Temporary home during works on the principal home

#### **Alternative accommodation**

Ground 9	Court must be satisfied suitable alternative accommodation available Overcrowding Where the house is overcrowded.
Ground 10	Redevelopment Where the landlord intends to carry out substantial construction work on the dwelling.
Ground 10A	Redevelopment scheme Dwelling is in an area to be redeveloped.
Ground 11	Charitable dwellings Where the tenant's use conflicts with the objects of the charitable landlord.

#### **Discretionary and alternative accommodation**

Ground 12	It must be reasonable to order possession and suitable alternative accommodation is available Dwelling in the curtilage of non-residential property required for an employee
Grounds 13 -15	Specially adapted accommodation
Ground 15A, 16	Successor with over ample accommodation A successor to the tenancy has accommodation more extensive than he reasonably requires in England (15A) and Wales (16). <sup>1010</sup>

<sup>1008</sup> The domestic violence has to be the sole factor: *Camden London Borough Council v. Mallett* (2001) 33 HLR 20, CA.

<sup>1009</sup> *Waltham Forest London Borough Council v. Roberts* [2004] EWCA Civ 940; *Merton London Borough Council v. Richards* [2005] EWCA Civ 639. The ground is only available against the tenant who made the false statement and not against a successor: *Islington London Borough Council v. Uckac* [2006] EWCA Civ 340.

The grounds are not relevant if the tenant has ceased to occupy the property as his principal home and so the tenancy has ceased to be secure.<sup>1011</sup>

## (F) 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.<sup>1012</sup> 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.

### i. after sale including public auction ('emptio non tollit locatum'), or inheritance of the dwelling

Sale will not make any difference to a residential tenancy, but an inheritance will in the case of an assured tenancy, give rise to a ground for possession (ground 7); the claim for possession will need to be brought within 12 months of the inheritance.

- Requirement of giving valid reasons for notice: admissible reasons
- Objections by the tenant
- Does the tenancy have 'prolongation rights', i.e. the statutory right to stay for an additional period of time (outside the execution procedure)?
- Challenging the notice before court (or similar bodies)

These vary from ground to ground and have been fully discussed above.

- in particular claims for extension of the contract or for granting of a period of grace under substantive or procedural law

The discussion of the grounds for possession above has differentiated mandatory and discretionary grounds for possession. In the latter case the court can suspend a possession order, for example on the terms that specified payments are made to reduce arrears of rent. The court can take account of a wide range of factors, not necessarily those stated in the landlord's notice seeking possession.<sup>1013</sup>

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<sup>1010</sup> *Wandsworth London Borough Council v. Randall* [2007] EWCA Civ 1126; *Bracknell Forest Borough Council v. Green* [2009] EWCA Civ 238; *Brent London Borough Council v. Tudor* [2013] EWCA Civ 157.

<sup>1011</sup> *Kensington and Chelsea Royal London Borough Council v. O'Sullivan* [2003] EWCA Civ 371.

<sup>1012</sup> *Manchester City Council v. Pinnock* [2010] UKSC 45.

<sup>1013</sup> *Sheffield City Council v. Hopkins* [2001] EWCA Civ 1023; *Bristol City Council v. Hassan* [2006] EWCA Civ 656.

- **Termination for other reasons**

- **Termination as a result of execution proceedings against the landlord (in particular: repossession for default of mortgage payment)**

Normally a mortgage will prohibit letting and so if a lease is granted it will be unauthorised as against the lender; the lender will be able to secure possession. However, a Buy to Let mortgage may anticipate that tenancies will be granted. In such a case the landlord should serve a notice under Ground 2 before granting the tenancy and this will ensure that if mortgage falls into arrears that vacant possession can be obtained against the tenant.

In general then the mortgagee will not be bound by the tenancy and the tenant will be ousted when a possession order is enforced. The tenant is out on the street and left with a claim for damages against a probably impecunious landlord. Some respite for the hapless tenant is offered by the Mortgage Repossessions (Protection of Tenants etc.) Act 2010 along with the Dwelling Houses (Execution of Possession Order by Mortgagees) Regulations 2010 and the Civil Procedure (Amendment No 2) Rules. The tenant should be aware of the possession hearing through service under existing law of a notice to occupiers. In that event, he can turn up at the hearing without being made a party to proceedings and ask for possession to be postponed for up to two months which is likely to represent a doubling of the standard time given to the mortgagor to deliver possession. If possession has already been ordered but not delivered up, the court is now empowered to stay or suspend possession in favour of the tenant for up to two months so long as the tenant has not already been granted more time and the mortgagee has failed to undertake in writing not to enforce for two months at the tenant's request. The tenant may well earn more time by saving his application until after the original hearing as the two months' grace subsequently granted can run from the date of the subsequent application and not the original hearing.

The court is to have regard to the tenant's circumstances and the nature of any tenancy breach by the tenant and whether the tenant might reasonably have been expected to avoid the breach or to have remedied it. Time granted to the tenant may be conditional on making payments to the mortgagee for future occupation. The mortgagee is prevented from enforcing in all dwelling-house cases until 14 days after he has given a prescribed notice to the property of a request for the issue of a warrant for possession. He cannot apply for the warrant before giving the notice because the Civil Procedure Rules oblige him when applying to certify that notice has been given in accordance with the regulations.<sup>1014</sup>

- **What are the rights of tenants in urban renewal? In particular: What are the rules for rehousing in case of demolition of rental dwellings? Are tenants interested parties in public decision-making on real estate in case of urban renewal?**

A public sector landlord will be able to obtain possession, provided it offers the tenant alternative accommodation. In the private sector a landlord has a redevelopment ground for possession, but comprehensive redevelopment will involve compulsory purchase of private interests, and this process would terminate the interests of tenants.

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<sup>1014</sup> S. Gold, 'Tenant Crumbs', *New Law Journal* 160 2010: 1187.

### **Summary table for 6.6 Termination of tenancy contracts**

	Secure tenancy	Fully assured tenancy	Assured shorthold
Landlord	Local authority	Housing association	Private individual
Mutual termination	May agree	May agree	May agree
Notice by tenant	Usually four weeks	Depends on tenancy agreement	Not during fixed contractual period; Must end periodic tenancy; Minimum 28 days
Notice by landlord	Tenant has security	Tenant has security	Tenant has no security, but must be at end of contractual grant or tacit relocation
Other reasons for termination	Number of grounds based either on management reasons or misconduct by the tenant	Number of grounds based either on management reasons or misconduct by the tenant	Number of grounds based either on management reasons or misconduct by the tenant

## 6.7 Enforcing tenancy contracts

- **Eviction procedure: conditions, competent courts, main procedural steps and objections**

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.<sup>1015</sup>

It is then necessary to secure a court order to evict a residential tenant. Due process is not a requirement to end excluded tenancies and licences,<sup>1016</sup> in the following categories:

resident landlord licences;  
temporary accommodation for trespassers,<sup>1017</sup>  
holiday lettings;  
gratuitous arrangements; and  
certain public hostels.<sup>1018</sup>

Apart from these cases the Protection from Eviction Act 1977 applies.<sup>1019</sup> It creates criminal offences to protect residential occupiers from unlawful eviction and harassment by their landlord or any person. The offences is committed - if a person unlawfully deprives a residential occupier<sup>1020</sup> of any premises, or any part of the premises, of his occupation or attempts to do so;<sup>1021</sup> a landlord or his agent does acts likely to interfere with the peace and comfort of a residential occupier or members of his household or persistently withdraws or withholds services reasonably required for the occupation of the premises as a residence knowing or having reasonable cause to believe either that the conduct was likely to cause the residential occupier to give up the occupation of the whole or part of the premises or to refrain from exercising any right or pursuing any remedy in respect of the whole or part of the premises;<sup>1022</sup> any person does acts likely to interfere with the peace and comfort of a residential occupier or members of his household or persistently withdraws or withholds services reasonably required for the occupation of the premises as a residence with the intention of causing the residential occupier to give up occupation of the premises or any part thereof or to refrain from exercising any right or from pursuing any remedy in respect of the premises or part thereof.<sup>1023</sup> Thus it is a breach to regain possession without a court order while the tenant is in prison.<sup>1024</sup> A tenancy is not ended if the tenant is forced out by harassment.<sup>1025</sup>

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<sup>1015</sup> See above, 6.6, pp 184-186.

<sup>1016</sup> Protection from Eviction Act 1977 s. 3.

<sup>1017</sup> *Mohamed v. Manek* (1995) 27 HLR 439; *Desnousse v. Newham London Borough Council* [2006] EWCA Civ 547.

<sup>1018</sup> *Rogerson v. Wigan Metropolitan Borough Council* [2004] EWHC 1677.

<sup>1019</sup> Garner and Frith, *Practical Approach*, (7th edn) ch 19; Sparkes, *New Landlord and Tenant*, ch 12.

<sup>1020</sup> A vital issue is whether the tenant is sleeping in the home: *Sumeghova v. McMahon* [2002] EWCA Civ 1581.

<sup>1021</sup> Protection from Eviction Act 1977 s.1(2).

<sup>1022</sup> Protection from Eviction Act 1977 s.1(3A); *R v. Allen*[2013] EWCA Crim 676.

<sup>1023</sup> Protection from Eviction Act 1977 s.1(3).

<sup>1024</sup> *Kalas v. Farmer*[2010] EWCA Civ 108.

<sup>1025</sup> *Suurpere v. Nice* [2011] EWHC 2003 (QB); *Belgravia Property Investment and Development Co Ltd v. Webb* [2001] EWCA Civ 2075.

The venue for repossession proceedings is always the county court for the locality where the land is sited.<sup>1026</sup> Legal aid has been withdrawn in many housing cases.

Court procedure is divided between accelerated repossession proceedings for shortholds and assured tenancies with mandatory grounds and normal repossession proceedings where the court has to consider all the circumstances to assess the reasonableness of granting possession.

The effect of an order for possession also varies. In the case of an assured tenancy the tenancy ends when possession is recovered under the possession order.<sup>1027</sup> However, in the case of a secure tenancy, the making of a possession order terminates the secure status of the tenant, even if the possession order is suspended on terms that payments will be made towards arrears.<sup>1028</sup> This is so even if the arrears that have to be paid off during the suspension are discharged,<sup>1029</sup> and even if the landlord wants to waive the breaches.<sup>1030</sup> Thereafter the tenant is a 'tolerated trespasser'<sup>1031</sup> liable to mesne profits rather than rent,<sup>1032</sup> and unable to enforce repairing covenants. The former tenant will have lost the Right to Buy and, if he dies, no succession can occur.<sup>1033</sup> The result appears bizarre on the facts of *Austin*: a possession order was made in February 1987 but the former tenant remained in possession until his death in 2005, throughout that time being a trespasser. This is a truly shocking example of how the doctrine of precedent tends to reinforce erroneous decisions with bizarre results.

- **Rules on protection ('social defences') from eviction**

Defences should be run when a possession order is sought (unless the Ground stated is mandatory). The issue of a warrant for possession is an administrative act and trial rights are irrelevant at that stage.<sup>1034</sup>

- **May rules on the bankruptcy of tenant-consumers influence the enforcement of contracts?**

Most residential tenancies are excluded from automatic vesting in the trustee in bankruptcy.<sup>1035</sup> A bankruptcy order or debt relief order cannot preclude the making of an order for possession of a dwelling let, on an assured tenancy, on the ground of

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<sup>1026</sup> Civil Procedure Rules 1998 rule 55; J.E. Adams, 'The Woolf Reforms and Property Litigation', *Conveyancer* 1999, Nov/Dec, 459-461.

<sup>1027</sup> *Knowsley Housing Trust v. White* [2008] UKHL 70.

<sup>1028</sup> A possession order of this kind can be varied: *Manchester City Council v. Finn* [2002] EWCA Civ 1998.

<sup>1029</sup> *London and Quadrant Housing Trust v. Ansell* [2007] EWCA Civ 326.

<sup>1030</sup> *Lambeth London borough Council v. O'Kane* [2005] EWCA Civ 1010.

<sup>1031</sup> *Thompson v. Elmbridge Borough Council* [1987] 1 WLR 1425, CA; *Greenwich London Borough Council v. Regan* (1996) 28 HLR 469, CA; *Burrows v. Brent London Borough Council* (1996) 1 WLR 1448; *Swindon Borough Council v. Aston* [2002] EWCA Civ 1850; *Richmond v. Kensington and Chelsea Royal London Borough Council* [2006] EWCA Civ 68.

<sup>1032</sup> *Jones v. Merton London Borough Council* [2008] EWCA Civ 660.

<sup>1033</sup> *Hawkins v. Newham London Borough Council* [2005] EWCA Civ 451; *Austin v. Southwark London Borough Council* [2009] EWCA Civ 66, [2010] UKSC 28. This is amended prospectively by the Housing and Regeneration Act 2008.

<sup>1034</sup> *St Brice v. Southwark London Borough Council* [2001] EWCA Civ 1138.

<sup>1035</sup> Insolvency Act 1986 s. 308A.

rent arrears; it is not possible to make an order conditional on payment of arrears during the currency of a debt relief order.<sup>1036</sup>.

### **Summary table for 6.7 Enforcing tenancy contracts**

	Housing with a public task		Without a public task
	Secure Tenancy	Fully assured tenancy	Assured shorthold
Sector	Public	Social	Private
Eviction procedure	County Court	County Court	County Court
Protection from eviction	Yes – criminal offence to evict out of court	Yes – criminal offence to evict out of court	Yes – criminal offence to evict out of court
Effects of bankruptcy	None	Terminates contractual right but bring into effect statutory protection	None

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<sup>1036</sup> *Places for People Homes v. Sharples* [2011] EWCA Civ 813.

## 6.8 Tenancy law and procedure “in action”

The practical role of private rented housing can only be realistically assessed when the practical functioning of the legal system in our field (“tenancy law in action”) is taken into account:

- **What is the legal status and what are the roles, tasks and responsibilities of associations of landlords and tenants?**

There are about 700,000 landlords in the private rented sector in England and Wales, 23 per cent of whom are represented by a letting agent. Approximately one-third of those agents are members of an affiliated body. The key body for individual landlords is the National Landlords Association. The other bodies are the United Kingdom Association of Letting Agents, the National Association of Estate Agents, and the Association of Residential Letting Agents.<sup>1037</sup>

The National Landlords Association is the leading association for private residential landlords in the UK. The association helps landlords make a success of their lettings by offering ongoing support to deal with landlord related matters. The members range from full-time landlords with large property portfolios to those with just a single letting. The Association lobbies on issues such as the shorthold scheme and grounds for possession. The Association works in co-operation with national and local government to secure a thriving private-rented sector where the legislative framework provides for a fair and equitable balance between the interests of residential landlords, letting agents and tenants. The association also manages one of the deposit insurance schemes, *My Deposits*, in a partnership with a private insurance firm, Hamilton Fraser Insurance.

Associations of council house tenants are common in Britain but are a relatively undocumented form of urban movement.<sup>1038</sup> The impetus for setting up the tenants' groups is the need to band together, both to put pressure on the council over management and environmental problems, and also to provide the support to counteract the hostility of host communities.<sup>1039</sup> Tenant organisations which include management organisations and associations across England and Wales have powers to hold their landlord to account and have a greater say in running their community. There are currently around 200 tenant management organisations with powers to manage buildings and services, and several hundred tenant panels with more informal advisory powers in England.<sup>1040</sup> A recognised tenants' association may at any time serve a notice on the landlord requesting him to consult the association in accordance with this section on matters relating to the appointment or employment by him of a managing agent for any relevant premises.<sup>1041</sup>

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<sup>1037</sup> ‘Tenancy Deposits Implementation, a Scoping Study Report’ by PKF Consultants for ODPM and the National Assembly for Wales (NAW); see also M. Biles, ‘Tenancy Deposit Schemes’ Landlord and Tenant Review 2005, 9(6), 165-171

<sup>1038</sup> S.G. Lowe, *Urban Social Movements: The City after Castells* (Basingstoke: Macmillan 1986).

<sup>1039</sup> L. Cairncross, D. Clapham, and R. Goodlad, ‘Origins and Activities of Tenants' Associations In Britain’ *Urban Studies* 29, no. 5 (1992): 709-725.

<sup>1040</sup> Department for Communities and Local Government, ‘Putting communities in control: giving social tenants more power,’ <https://www.gov.uk/government/news/putting-communities-in-control-giving-social-tenants-more-power>, accessed on 16 September, 2013.

<sup>1041</sup> Landlord and Tenant Act 1985 s. 30B.

The transient nature of shortholds means that there is no real representation for shorthold tenants, other than homelessness charities such as Shelter.

- **What is the role of standard contracts prepared by association or other actors?**

Standard form contracts are quite usual across both sectors of the rented sector in England and Wales. Public and social tenants would be unlikely to be able to negotiate variations of their landlord's standard form contract. It is feasible for a tenant to negotiate minor changes in assured shorthold documents.

- **How are tenancy law disputes carried out? Is tenancy law often enforced before courts by landlords and tenants and/or are - voluntary or compulsory - mechanisms of conciliation, mediation or alternative dispute resolution used?**

Disputes are generally resolved before the Property Chamber of the First-tier Tribunal rather than the courts. Many minor issues are also resolved by the Housing Ombudsmen; their powers now extend to local authority landlords, housing associations and any private landlords who sign up.

- **Do procedures work well and without unreasonable delays? What is the average length of procedures?**

All procedures are regulated by the Civil Procedure Rules 1998 under which the court is responsible for case management and this should ensure reasonable dispatch in the conduct of cases. This is designed to avoid delay based breaches of the trial right in Article 6 of the European Convention on Human Rights.

- **Are there peculiarities for the execution of tenancy law judgments (e.g. suspensions of, or delays for, eviction)?**

Some possession orders will be made outright, the most common example being orders terminating an assured shorthold tenancy once the initial contractual period and initial six month shorthold are over.

Possession orders made after breaches of tenancies are often, perhaps usually, suspended; so for example a tenant in arrears with his rent falling within the discretionary grounds for possession will be ordered to give up possession but execution of the order will be suspended while regular payments are made to reduce the arrears. Appellate courts should only interfere if there is a misuse of the trial court's powers.<sup>1042</sup>

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<sup>1042</sup> *Circle 33 Housing Trust v. Ellis* [2005] EWCA Civ 1233.

- **How about legal certainty in tenancy law? (e.g.: are there contradicting statutes, is there secondary literature usually accessible to lawyers etc?)**

There are problems of complexity but not of legal certainty. There is a surplus of case-law and plenty of secondary exposition.

- **Are there problems of fairness and justice? Are there problems of access to courts especially for tenants? What is the situation concerning legal fees, legal aid and insurance against legal costs?**

Restrictions on legal aid mean that many tenant's facing eviction proceedings now represent themselves.<sup>1043</sup>

- **Are there “swindler problems” on the rental market (e.g. flats fraudulently advertised on the internet as rental offers by swindlers to whom the flats do not belong)?**

There is no evidence of prosecutions for Unfair Commercial Practices in this area.

- **Are the areas of “non-enforcement” of tenancy law (such as legal provisions having become obsolete in practice)?**

Tenancy law is largely based on statutes passed since 1988 and this is an area in which the government and Parliament have been extremely active, so the law is up to date. If anything the problem is too much reform rather than too little.

- **What are the 10-20 most serious problems in tenancy law and its enforcement?**

- Complexity of rental regimes and duplication between them;
- Ignorance of the law by private sector landlords and tenants;
- Cost of litigation, and caps to legal aid;
- Illegal letting fees;
- Rent arrears;
- Invalid notices to quit;
- Standards of maintenance of dwelling;
- Letting of unfit housing;
- Illegal eviction and human rights; and
- Antisocial behaviour.

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<sup>1043</sup> *R v. Lord Chancellor ex parte Witham* [1998] QB 575.

- **What kind of tenancy-related issues are currently debated in public and/or in politics?**

Housing is a major issue. The current topics which are most debated are (1) whether the government's Help to Buy scheme will promote a housing bubble; (2) the regionalization of house price wealth; (3) curbs on access to welfare benefits of immigrants, especially those from the most recent accession countries; (4) changes on access to the allocation of public and social housing introduced in 2010; and (5) the under occupancy charge, ie the cap on housing benefit where property is under occupied, dubbed by the opposition the 'bedroom tax'.

## **7. Effects of EU law and policies on national tenancy law**

### **7.1 EU policies and legislation affecting national housing policies**

EU policies and legislation have had a significant impact on national housing policies and in many areas EU initiatives have become embedded into various national tenancy laws.<sup>1044</sup> Aside from the fundamental freedoms, EU law has had a significant impact on housing law and policy in England and Wales in a number of areas including; consumer law and policy, competition and state aid law, regulation of construction, energy saving rules, private international law including international procedural law, anti-discrimination legislation, tax law, social policy against poverty and social exclusion, constitutional law affecting the EU and the European Convention of Human Rights and the harmonisation and unification of general contract law. EU laws and policies are also contributing to the collection of statistics on housing in England and Wales.

#### **EU law and housing provision**

EU law has a significant impact on the provision of housing at a macro level, especially new build housing, simply because the provision of housing is taking place within a single market to which internal market principles apply.

Local authorities and social landlords (mainly housing associations) are mass providers of housing with a public task, and as such their activities must fall within public procurement rules. When placing construction contracts they must ensure that all contractors in Europe have an opportunity to tender for work on a fair basis. EC public procurement law coordinates procurement procedures for the award of public contracts for work, supply and service<sup>1045</sup> in line with principles of equal treatment, transparency and competition. This regime has a direct impact on housing, for instance procurement law regulates the construction of local authority housing<sup>1046</sup> but also regulates public private partnership construction arrangements.

Work takes place within an internal market regime. This ensures that construction companies and workers can move freely around the EU. It also ensures a single market in construction materials, standardising specifications and making products cheaper as a result of free competition across the single market.<sup>1047</sup> Two other major concerns are safety and energy efficiency. Here the EU has been very active. In terms of safety, specific rules relate to: air-conditioners,<sup>1048</sup> lifts,<sup>1049</sup> and boilers<sup>1050</sup>. In

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<sup>1044</sup> Footnotes here give brief details of legislation; for full details refer to the table of the transposition of European legislation affecting tenancies into English and Welsh law, below p. 208.

<sup>1045</sup> Directive 2004/18/EC; Public Contracts Regulations 2006.

<sup>1046</sup> Directive 2004/18/EC, art. 34.

<sup>1047</sup> Council Directive 89/106/EEC; implemented by Construction Products Regulations 1991 as amended by SI No. 1994/3051 but repealed by the Construction Products Regulations 2013.

<sup>1048</sup> Commission Regulation (EU) N° 626/2011; Co-Design for Energy-Related Products Regulations 2010.

<sup>1049</sup> Directive 95/16/EC; Lifts Regulations 1997.

<sup>1050</sup> Directive 92/42/EEC amended by Directive 93/68/EEC; Boilers (Efficiency) Regulations 1993, as amended.

terms of energy efficiency the regulations just referred to on air-conditioners and boilers are significant here too, as are a whole raft of measures designed to tackle the huge crisis of global warming.

A series of directives have addressed the energy performance of new and existing buildings, including of course homes designed for rental as dwellings.<sup>1051</sup> The EU has sought to promote the use of renewable energy in buildings.<sup>1052</sup> A recent directive set energy saving targets for large buildings<sup>1053</sup> and this is due for transposition now.<sup>1054</sup> On a different tack the EU has promoted a single market in gas and electricity.<sup>1055</sup> Many aspects of European regulation are reflected in the Building Regulations.

Although there had been big improvements over a decade the English Housing Survey of 2011<sup>1056</sup> suggests that there are limits to the improvements that can be made. It found that 63% of homes had wall insulation and 47% adequate loft insulation, and 38% energy efficient boilers of recent vintage; but it 8% of homes (1.8 million) were in the worst two energy bandings, and that many of these were not easy to improve. It found that 39% of homes had low energy bulbs in half the rooms and that in properties requiring an energy performance Certificate, 50% of the occupiers had seen the Certificate and in only 3% of cases had the recommendations been carried out.

### **EU social policy against poverty and exclusion**

The aim of the European Union's social policy is to promote employment, improve living and working conditions, provide an appropriate level of social protection and develop measures to combat exclusion. The EU Programme for Employment and Social Solidarity (PROGRESS) is directed toward supporting the development and coordination of EU policy in employment, social inclusion and social protection, working conditions, anti-discrimination and gender equality within EU States. PROGRESS is a key part of the Europe 2020 Strategy, which sets out a ten year growth strategy for the EU. The 2013 UK National Reform Programme sets out the policies pursued by the UK Government in working towards the Europe 2020 targets. Among the main Commission recommendations for the UK to help it improve its economic performance were reform of the housing market as well as reform of supports to low income households. England and Wales role in implementing the Europe 2020 strategy has been impacted by the economic recession and indeed the National Reform Programme goes hand in hand with the UK's 2012-13 Convergence Programme. The Welsh Government's *Programme for Government* also contains policies which are geared towards meeting the Europe 2020 strategy.<sup>1057</sup> The UK reform programme policies towards reducing poverty and social inclusion are largely centred upon expanding employment incentives through welfare reform.<sup>1058</sup>

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<sup>1051</sup> Directive 2010/31/EU; Energy Performance of Buildings (England and Wales) Amendment Regulations 2013.

<sup>1052</sup> Directive 2009/28/EC (amending and repealing Directives 2001/77/EC and 2003/30/EC).

<sup>1053</sup> Directive 2012/27/EU on energy efficiency.

<sup>1054</sup> Transposition date is June 2014.

<sup>1055</sup> Directive 2009/72/EC (repealing Directive 2003/54/EC); Electricity and Gas (Internal Markets) Regulations 2011.

<sup>1056</sup> 'English Housing Survey: Homes 2011' (London: Department of Communities and Local Government, 2013) chs 4-5.

<sup>1057</sup> 'Programme for Government' (Cardiff: Welsh Government, 2013).

<sup>1058</sup> 'National Reform Programme' (London: HM Government, 2013), p. 63.

## **7.2 EU policies and legislation affecting national tenancy laws**

EU legislation has had a significant impact on peripheral aspects of national tenancy laws, but its effect is pointillistic in character as is inevitable given the Treaty provision excluding EU direct competence over property law.<sup>1059</sup> EU activity is appropriate in order to facilitate the free operation of the single internal market, and it is in this field that EU activity has a major effect on national rental markets, often, as it were, by a glancing blow.

### **Free movement of landlords**

One important aspect of the Maastricht reforms was the freeing of capital to move across Europe, and one aspect of this would be the freedom for capital from other EEA nationals to move to England and Wales to invest in the private rental stock.<sup>1060</sup> This freedom exists, but it is not clear to what extent investors from elsewhere in the EEA have in fact bought buy to let property. As explained in part 1 of this Report, England and Wales is only just recovering from the housing bubble created in the years before 2007 and at present the general housing market, excluding London, is probably unattractive to outside investors. If there was a significant inflow of workers seeking employment, this might draw in investment capital which in turn might help the housing market to recover. There are important money laundering controls to prevent money with illicit sources flooding into the Irish housing market.

### **Free movement of tenants**

More evident are the effects of free movement of workers from other EEA countries in search of employment in England and Wales. All of these are potential entrants to the rental market, in the short term to the private rented sector and in the longer term to public and social housing. They will have freedom to move money into England and Wales in order to make initial payments of rent and deposits. Workers from eastern Europe may find jobs that are well paid by their standards, but also rents that are high as well. There is no restriction on the purchase of secondary homes for EEA citizens and there are no cases in which a licence to buy a house is needed. However, in certain areas of England and Wales, planning controls restrict new housing to those with a local connection to the area. England and Wales have no controls on renting targeted at specific nationalities, even in the most pressured areas.<sup>1061</sup>

### **Choice of tenant**

Anti-discrimination legislation predates the impact of EU law but has been greatly strengthened by European principles. In particular, the anti-discrimination principles of Directives issued by the Council in 2000<sup>1062</sup> and 2004<sup>1063</sup> have found their way on

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<sup>1059</sup> Treaty on the Functioning of the EU art. 345; formerly Treaty of Rome art. 295. The form of this article suggests that ‘property’ is defined by national rules rather than having an autonomous definition. Tenancies would be viewed as part of property law throughout Great Britain and Ireland.

<sup>1060</sup> Sparkes, *European Land Law*, ch. 1.

<sup>1061</sup> Sparkes, *European Land Law*, ch. 2.

<sup>1062</sup> Directive 2004/113/EC (equal treatment between men and women in e.g. access to services).

to the statute book in a number of acts now consolidated in the Equality Act 2010. This legislation prohibits discrimination on age, being or becoming a transsexual person, being married or in a civil partnership, being pregnant or having a child, disability, race including colour, nationality, ethnic or national origin, religion, belief or lack of religion/belief, sex and sexual orientation. A landlord should not discriminate against a tenant or potential tenant on any of these grounds.

## Marketing controls on rentals

### (1) The conceptual status of the tenant in EU law

Clearly a crucial issue in the development of EU law in its interface with tenancy agreements is the issue of EU competence, and that turns on how a tenant is perceived conceptually. A residential tenant lies somewhere between a commercial purchaser of land (largely outside the scope of EU protection) and a consumer buying goods (fully within the scope of the internal market). Just where on that scale does a residential tenant lie?

If one sees a tenant as a person acquiring a legal leasehold estate in land, a purchaser of heritable property, the tenant will look very much like a purchaser, a person subject largely to domestic law and needing a knowledge of domestic law in order to be safe. It should be emphasised that in common law systems a tenancy agreement is seen as an estate in land and so likely to fall within the scope of the exclusion from EU competence over the 'rules of property ownership'.<sup>1064</sup>

However, it is also clearly possible to see a tenant as a consumer, as a contracting party, a person consuming the service of the provision of accommodation by the landlord. A residential tenant can be seen as a consumer, taking a service – making accommodation available to the tenant - from a landlord in a superior bargaining position. There is thus competence for the EU to seek to address this imbalance. It can scarcely be said that the EU has adopted a coherent view of the position of consumers of land. In general land purchase is excluded from EU legislation, and on the principle of subsidiarity this seems a subject matter ideally suited to national regulation. The position of residential tenants lacks coherence. A person seeking to rent a home appears to be an archetypal consumer and someone in need to protection, and this is doubly so where a person is moving in pursuance of his freedom of movement to seek employment and needs to rent a home in a foreign country. This fits naturally with the conceptualisation of the tenancy in civilian systems as a hire contract, with little differentiation of the hire of a car and the rental of a flat.<sup>1065</sup> It should also be observed that the problem of competence becomes much less of a problem the less that an occupier has a tenancy agreement and the more that his agreement approximates to a licence. There appears to be nothing to preclude EU competence over rent a room types of arrangements, though of course the issue of subsidiarity remains.

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<sup>1063</sup> Directive 2000/43/EC (equal treatment irrespective of racial or ethnic origin).

<sup>1064</sup> Treaty on the Functioning of the EU art. 345; formerly Treaty of Rome art. 295.

<sup>1065</sup> This division is less clear in France: *Code Civil* Book Three (Modes of Acquiring Property), Title VIII (Contracts of Rental or Hire); and clearer in Germany: *Bürgerliches Gesetzbuch* Book Two (Obligations) Section VII (Particular Obligations) Title 3 (Lease); but it must be remembered that a lease of land is quasi-property in Germany in the sense that it binds a purchaser.

Assuming that a residential tenant can be seen as a consumer of accommodation services, consumer protection might in principle come into play, but in fact the effect is very muted and the EU position lacks coherence, but appears to have turned decisively against intervention in tenancy law.<sup>1066</sup>

## (2) Information rights and cooling off

The Consumer Rights Directive 2011<sup>1067</sup> has eschewed the opportunity to apply EU rules to rental agreements. Basic information rights are specified for consumers entering into sales and service contracts, as well as protections for those contracting at a distance (over the internet) and what is colloquially and inaccurately described as 'doorstep' selling (that is at the consumer's home or at least away from the trader's business premises). It also allows 'cooling off' periods after contracts were concluded in the latter two ways. The Directive applies to contracts of the B2C model which are either contracts for the sale of (movable) goods or contracts for the supply of services. The second limb might include the provision of residential accommodation, but, it is expressly provided that the Directive does not apply to the provision of social housing nor to the rental of accommodation for residential purposes.<sup>1068</sup> It is noteworthy that the exclusion makes no reference to the existence or non-existence of a 'tenancy' and therefore the lease/licence distinction is not in play; both tenancies and licences are excluded from the scope of the Directive. The relevant recital states that rental agreements are covered by domestic law, clearly therefore drawing on subsidiarity more than a lack of competence.<sup>1069</sup> The recital also states that the protections are not appropriate to rental agreements.<sup>1070</sup> The withdrawal right on contracting away from business premises never applied to rental agreements, and it would indeed be rather awkward to differentiate a contract made by a landlord at the accommodation being let and a contract made at the office of the landlord's letting agent after the landlord had shown the tenant the property itself.<sup>1071</sup>

Distance contracting for goods involves a withdrawal right, and this seems all important for things bought over the internet and therefore unseen. It would be perfectly possible to enter into a rental agreement over the internet, finding particulars online, taking a virtual tour of the accommodation and then signing an online form to take the accommodation. This might suit, say, a couple moving from eastern Europe to England or Wales to take up work. The case for a cooling off period where the tenant has not seen the accommodation in persons seems overwhelming. Under the previous specific rules (now repealed), distance rentals were within the ambit of EU consumer law,<sup>1072</sup> but they have now moved outside EU protection.

The Consumer Rights Directive will be applicable to any contract with a letting agent (since this is not directly a rental but for help in finding accommodation) and also to

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<sup>1066</sup> It should be mentioned that competence over the internal market and consumer affairs currently resides at Westminster, though further devolution to Edinburgh is likely.

<sup>1067</sup> Directive 2011/83/EU; this will be transposed by the (UK) Consumer Right Bills 2013.

<sup>1068</sup> Respectively art. 3(a) and 3(f).

<sup>1069</sup> Recital (26).

<sup>1070</sup> Recital (26).

<sup>1071</sup> Former Directive 85/577/EEC (contracting away from business premises); transposed by SI 2008/1816). Its genesis was the practice of locking timeshare punters into presentations away from the timeshare block: Sparkes, *European Land Law*, ch. 5.

<sup>1072</sup> Former Directive 97/7/EC (distance contracting); was transposed by SI No. 2000/2334.

any contract by a landlord (private or social) to supply gas, electricity, district heating or other utilities.<sup>1073</sup>

### **(3) Unfair marketing practice**

Given that the most recent EU legislation on Consumer Rights has drawn back from involvement in residential tenancy law, it is odd to find a much wider remit in the preceding legislation on Unfair Commercial Practices. The Directive<sup>1074</sup> has been implemented by regulations which more or less copy out the terms of the Directive.<sup>1075</sup> They cover all supplies, whether of goods or of services, in a B2C format, including leases and the concept of a purchase also extends to a lease. Various types of improper sales techniques by landlords or their agents are controlled, including:

- unfair marketing techniques;
- aggression;
- omitting necessary information contrary to the standard of professional diligence so as to have a materially distorting effect on the consumer's decision; and
- misleading advertising.

The scarcity of rental accommodation makes it unlikely that landlords will need to harass potential tenants, so in the rental market unfair practices may often be by concealment and failure of disclosure of defects.

Where EU consumer law does provide some control of bad practice by landlords, procedural laws may also help with, for example obtaining an injunction against unfair commercial practices or otherwise directed towards protecting the collective interests of consumers.<sup>1076</sup>

### **Energy saving rules**

The rental market is an important arena in the battle against carbon emissions and the global warming that results. One important weapon that is available is labelling of energy efficiency so that tenants are alerted to the likely impact of the use of a flat on their energy bills. The battle so far as it is directed at landlords has already been considered. So far as tenants are concerned, four main policy strands can be detected: conferring a choice of energy supplier, provision of information about the energy efficiency of the dwelling itself, labelling of the appliances within the dwelling and promotion of low energy light bulbs.

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<sup>1073</sup> Directive 2011/83/EU, art. 3.

<sup>1074</sup> Directive No. 2005/29/EC; Sparkes, *European Land Law*, ch. 5. .

<sup>1075</sup> Unfair Trading Regulations 2008, SI 2008/1277.

<sup>1076</sup> Directive 2009/22/EC.

## **(1) Energy supply**

Central to any market, and certainly to the European internal market, is a free market in energy. Europe has set the rules for the markets in electricity<sup>1077</sup> and gas,<sup>1078</sup> tackling also consumer choice, consideration of the position of vulnerable customers, safety issues and making the energy efficiency of buildings a high priority. By allowing tenants a choice of supplier, pressure is created for lower prices.

## **(2) Energy labelling of dwellings**

Attention has been directed towards improving the energy efficiency of new and existing buildings and these changes now inform the Building Energy Rating Certificate scheme.<sup>1079</sup> Under this scheme all buildings for lease must have a Building Energy Rating certificate and this must be provided to any prospective tenants prior to entering a tenancy.

## **(3) Labelling of appliances**

EU laws have required the labelling of white goods in the kitchen and other power-hungry electrical appliances, so that tenants, like all other citizens, can make informed decisions in order to secure lower energy costs as a result of labelling of:

dishwashers;<sup>1080</sup>  
electric ovens;<sup>1081</sup>  
refrigerators and freezers;<sup>1082</sup>  
televisions;<sup>1083</sup>  
tumble driers;<sup>1084</sup>  
washer-driers;<sup>1085</sup> and  
washing machines.<sup>1086</sup>

All of these labelling requirements are applied in England and Wales.<sup>1087</sup>

## **(4) Light bulbs**

Light bulbs consume a lot of energy collectively and it has been very important to move to low energy models; legislation to achieve this<sup>1088</sup> has been transposed into English law.<sup>1089</sup>

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<sup>1077</sup> Directive 2009/72/EC; Electricity and Gas (Internal Market) Regulations 2011, SI 2011/2704.

<sup>1078</sup> Directive 2009/73/EC (replacing Directive 2003/55/EC); transposition as immediately above.

<sup>1079</sup> Directive 2010/30/EU;). Energy Information Regulations 2011, SI 2011/1524.

<sup>1080</sup> Commission Directive 97/17/EC; Commission Regulation (EU) 1059/2010.

<sup>1081</sup> Commission Directive 2002/40/EC.

<sup>1082</sup> Commission Directive 94/2/EC; Commission Directive 2003/66/EC. On the future ban on CFC gas R22 see M Green 'Keep a Cool Head' *Property Law Journal* 2013, 312 : 18-21.

<sup>1083</sup> Commission Regulation (EU) 1062/2010.

<sup>1084</sup> Commission Regulation (EU) 392/2012.

<sup>1085</sup> Commission Directive 96/60/EC.

<sup>1086</sup> Commission Directive 95/12/EEC; Commission Regulation (EU) 1061/2010.

<sup>1087</sup> Energy Information Regulations 2011.

## **Substantive EU tenancy law**

At various times there have been proposals for the EU to adopt a common contract law, and these various proposals might have had unintended effects on contracts affecting land. The current proposal for a Common European Sales Law is confined to cross-border sales of goods and will not therefore affect tenancy law.<sup>1090</sup> There are two pieces of EU consumer law which have a peripheral impact on the substantive law of European tenancy agreements. The first is the Unfair Terms in Consumer Contracts Directive<sup>1091</sup> which is fully implemented in UK law,<sup>1092</sup> the impact of which has already been considered in the substantive report.<sup>1093</sup> The other is the Unfair Commercial Practices Directive<sup>1094</sup> implemented by regulations<sup>1095</sup> which might have a marginal impact because it talks of unfair practices in relation to after-sales services, and which might therefore have an impact on such matters as carrying out repairs.<sup>1096</sup>

Overall the tide has turned against the extension of EU legislation into aspects of land law.

## **Choice of law and forum**

Tenancy law is complex and separate for each EU state, so it seems clear that the *lex situs* rule should apply to the determination of disputes, and that a site-based forum is also essential. In terms of choice of law for an English, the Rome I Regulation,<sup>1097</sup> probably does achieve the objective of ensuring that English law applies to an English tenancy, since any mandatory rules in an tenancy agreement will be drawn from the law of the site. Since tenancy agreements are generally drawn up for landlords, it is very unlikely that a tenant would be allowed to choose a non-English law. The choice of law rules would make it theoretically possible to have a non-English contract to create an English tenancy, which seems very undesirable.

In terms of forum, it is obvious that tenancy disputes should be directed to England. The Brussels Regulation, however, determines that jurisdiction is to be exercised by the EU country in which the defendant is domiciled, regardless of his/her nationality. It is conceivable that a worker might rent in England and yet retain a domicile in their country of origin, and so this Regulation might lead to a non-site forum for an English tenancy dispute.<sup>1098</sup> The Brussels I Regulation<sup>1099</sup> has been transposed into English

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<sup>1088</sup> Directive 2010/31/EU. Delegated Regulation (EU) Nº 874/2012 of 12 July 2012 supplementing Directive 2010/30/EU;

<sup>1089</sup> Eco-design of Energy-related Products and Energy Information (Amendment) Regulations 2013, SI 2013/1232, amending SI 2010/1552.

<sup>1090</sup> A Common European Sales Law to Facilitate Cross-Border Transactions in the Single Market, COM(2011) 636 final.

<sup>1091</sup> Directive 93/13/EEC.

<sup>1092</sup> Unfair Terms in Consumer Contracts Regulations 1999, S.I. 1999/2083

<sup>1093</sup> See above, 6.4, pp 143-144.

<sup>1094</sup> Directive 2005/29/EC.

<sup>1095</sup> Unfair Trading Regulations 2008, SI 2008/1277.

<sup>1096</sup> Sparkes, *European Land Law*, para. 5.50.

<sup>1097</sup> Regulation (EC) 593/2008 on the law applicable to contractual obligations - Rome I; Law Applicable to Contractual Obligations (England and Wales) Regulations 2009, SI 2009/3064.

<sup>1098</sup> It is also possible that a family dispute might arise between a tenant from another EEA country in England and the spouse or partner in that other EEA country, possibly affecting the right to occupy the English home.

law in a messy way.<sup>1100</sup> It is submitted that all land disputes should have a site-based forum and should use site-based law.<sup>1101</sup>

## Summary

EU law has a number of indirect impacts on English tenancy law through the operation of internal market rules and consumer protection principles, though its impact is patchy.

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<sup>1099</sup> Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

<sup>1100</sup> Civil Jurisdiction and Judgments Act 1982

Civil Jurisdiction and Judgments Act 1982 amended by Civil Jurisdiction and Judgments Order, SI 2001/3929 and on numerous other occasions

<sup>1101</sup> Sparkes *European Land Law*, ch. 4: 97, 104.

## 7.3 Table of transposition of EU legislation

SUBJECT	EUROPEAN DIRECTIVES	ENGLISH/UNITED KINGDOM TRANSPOSITION
<b>PUBLIC PROCUREMENT</b>		
Public procurement	Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJEU 30.4.2004 L134/114) (Previous legislation repealed).	Public Contracts Regulations 2006, SI No. 5/2006
<b>CONSTRUCTION</b>		
Construction materials:	Regulation (EU) 305/2011 on construction materials (OJEU 4.4.2011/ L88/5) (Replaces Directive 89/106/EEC, OJEC 11.02.1989, L40/12)	Directly applicable as from 1 July 2013 (Replaces Construction Products Regulations 1992, SI 1992/1620 as amended by SI 1994/3051).
Hazardous substances	Directive 2011/65/EU of 8 June 2011 on the restriction of the use of certain hazardous substances in electrical and electronic equipment (OJEU 01.07.2011, L174/88). (Replaces Directive 2002/95/EC from 2 January 2013, OJEU 13.2.2003, L139/19).	Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2012 (SI 2012/3032) (Formerly SI 2006/2748 as amended by SIs 2006/1463, 2008/37, 2009/581).
Lifts	Directive 2006/42/EC on Machinery of 17 May 2006 (OJEC 9.6.2006 L157/24) (Replacing Directive 95/16/EC on lifts, OJEC 07.09.1995, L213/1).	Supply of Machinery (Safety) Regulations 2008 (SI 2008/1597) (Replacing Lifts Regulations 1997 SI 1997/831)
<b>ENERGY EFFICIENCY - BUILDINGS</b>		
Energy saving targets/ large buildings	Directive 2012/27/EU of 25 October 2012 on energy efficiency (OJEU 14.11.2012, L315/1). This amended Directives 2009/125/EC and 2010/30/EU and repealed Directives 2004/8/EC and 2006/32/EC.	Energy Efficiency (Eligible Buildings) Regulations 2013 SI. 2013/3220
Energy efficiency of new and existing buildings	Directive 2010/31/EU of 19 May 2010 on the energy performance of buildings (OJEU 18.06.2010, L153/13).  (The previous directive was 2002/91/EC).	Energy Performance of Buildings (England and Wales) Amendment Regulations 2013  (SI No. 2013/603)  (Amending SSI 2008/301 as amended by SI 2004/3328).
Renewable energy use in buildings.	Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources (OJEU 5.6.2009, L140/16) Replaces Directives 2001/77/EC and 2003/30/EC	Renewables Obligation Order 2009 SI 2009/785, as amended by SIs 2011/984, 2013/768.

<b>UTILITIES</b>		
Electricity	Directive 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity. (OJEU 14.8.2009, L211/55)	Electricity and Gas (Internal Market) Regulations 2011 (SI 2011/2704)
Natural gas.	Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas (OJEU 14.8.2009, L211/94).	As above
Procurement of communication services	Directive 2009/136/EC on consumer protection in the procurement of communication services (OJEU 18.12.2009, L337/11). Amending Directives 2002/22/EC and 2002/58/EC and Regulation (EC) 2006/2004	Privacy and Communication (EC Directive) Regulations 2003 (SI 2003/2426 as amended by SI 2011/1208).
<b>ENERGY EFFICIENCY – FITTINGS IN BUILDINGS</b>		
Lighting	Delegated Regulation (EU) 874/2012 of 12 July 2012 supplementing Directive 2010/30/EU with regard to energy labelling of electrical lamps and luminaires (OJEU 26.9.2012, L258/1).	Eco-design of Energy-related Products and Energy Information (Amendment) Regulations 2013 (SI 2013/1232, amending SI 2010/1552).
Heating and hot water	Directive 82/885/EEC of 10 December 1982 on the performance of heat generators for space heating and the production of hot water in new or existing non-industrial buildings and on the insulation of heat and domestic hot-water distribution in new non-industrial buildings (OJEC 31.12.1982, L378/19). Amending Directive 78/170/EEC	Energy Conservation Act 1981
Boilers	Directive 92/42/EEC of 21 May 1992 on efficiency requirements for new hot-water boilers fired with liquid or gaseous fuels (OJEC 22.06.1992, L167/1). (Amended by Directive 93/68/EEC of 22 July 1993, BOE 27.03.1995 Nº 73).	Boilers (Efficiency) Regulations 1993 (SI 1993/3083 as amended by SIs 1998/3083 and 2006/170).
<b>ENERGY EFFICIENCY – APPLIANCES</b>		
Energy labelling	Directive 2010/30/EU of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products (OJEU 18.6.2010, L153/1)	Energy Information Regulations 2011 (SI 2011/1524).
Air conditioners	Delegated Regulation (EU) Nº 626/2011 (OJEU 6.7.2011, L178/1).	As above
Dishwashers.	Commission Directive 97/17/EC (OJEC 07.05.1997, L118/1) Delegated Regulation (EU) Nº 1059/2010 (OJEU 30.11.2010, L314/1).	As above.
Electric ovens	Commission Directive 2002/40/EC (OJEC 15.05.2012, L128/45).	As above
Lamps	Commission Directive 98/11/EC (OJEC 10.3.1998, L71/1).	As above

Refrigerators and freezers	Commission Directive 94/2/EC (OJEC 17.2.1994, L45/1). Delegated Regulation (EU) N° 1060/2010 (OJEU 30.11.2010, L314).	As above
Televisions	Delegated Regulation (EU) N° 1062/2010 (OJEU 30.11.2010, L314/64).	As above
Tumble driers	Delegated Regulation (EU) N° 392/2012 (OJEU 9.5.2012, L123/1).	As above
Washing machines	Commission Directive 95/12/EEC (OJEC 21.06.1995, L136/1). Delegated Regulation (EU) N° 1061/2010 (OJEU 30.10.2010, L314/47).	As above

### CONSUMER PROTECTION

Information and consumer rights.	Directive 2011/83/EU on consumer rights (OJEU 22.11.2011, L304/64). Repeals Directives 85/577/EEC (contracting away from business premises) and 97/7/EC (distance contracting).	Consumer Rights Bill 2013 (Cm 8657) Repealed SIs covered 'doorstep' selling (SI 2008/1816); distance contracts (SI No. 2000/2334).
Unfair commercial practices	Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and (OJEU 01.6.2005, L149/22) Amending Directives 84/450/EEC, 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) N° 2006/2004.	Unfair Trading Regulations 2008 (SI 2008/1277)
Unfair terms	Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJEC 21.04.1993, L095/1). Amended by the Consumer Rights Directive 2011/83/EU (above)	Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083)

### HOUSING LAW

Choice of law	Regulation (EC) 593/2008 on the law applicable to contractual obligations - Rome I (OJEU 04.07.2008, L177/6).	The Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009 SSI 2009/3064
Jurisdiction	Regulation (EC) N° 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJEC 16.01.2001, L12/1).	Civil Jurisdiction and Judgments Act 1982, amended by Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, and on numerous other occasions

### DISCRIMINATION

Sex.	Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJEU 21.12.2004, L373/37).	Equality Act 2010
Racial or ethnic origin.	Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJEC 19.07.2000, L180/22).	Equality Act 2010

<b>EEA NATIONALS</b>		
Free movement for European citizens and their families	Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJEU 30.04.2004, L158/77) amending Regulation (EEC) 1612/68 (free movement of workers) and repealing numerous earlier Directives	Immigration (European Economic Area) Regulations 2006 (SI 2006/1003).
Equality in granting housing, aids, subsidies, premiums or tax advantages to workers moving within the EU.	Recommendation 65/379/EEC by the Commission to the Member States on the housing of workers and their families moving within the Community (OJEC 27.07.1965 N° L 137/27).	

## **8. Typical national cases**

These cases are drafted from the perspective of a tenant arriving from abroad who is likely to be renting in the private sector and primarily concerned with finding and contracting for rented accommodation.

### **8.1 Allocation of social housing**

**Mr Asif is a British citizen and lives with his wife and their four children all below the ages of 18, all girls. Two and a half years ago he applied for a council flat as a council tenant and since then has been on the ‘waiting list’. He has been informed that a three bedrooomed flat has been allocated to him. In the letter confirming the offer it is stated that the current offer is what is available in view of the fact that his children are all of the same sex and under 18. It also states that if he refuses the offer he will become subject to the council’s recently adopted housing allocation policy which requires applicants to have lived in the council area for five years, and that therefore Mr Asif will be removed from the waiting list. What options are open to him?**

Mr Asif's position will depend upon whether or not he has satisfied the requirements for the full homelessness duty to be owed to him;<sup>1102</sup> otherwise he will simply be a waiting list applicant. In order to establish a duty to provide accommodation in his favour he will need to show that he is homeless, unintentionally so, and in priority need. Clearly he has been living somewhere for the past two and a half years with his family, so he is not homeless in the literal sense, but he may be homeless in the legal sense if he is living in accommodation that is not suitable for his household, that is apart from himself his wife and children. If his existing accommodation is unsuitable he will be entitled to housing, given the priority need established by looking after his infant children, provided he has not left suitable accommodation voluntarily. In such a case he should have been given reasonable priority on the housing list.

Mr Asif was entitled to apply for housing if he was not homeless, and some preference would attach if the accommodation he was occupying was overcrowded. When a person reaches the top of the waiting list an offer of accommodation will be made. The accommodation offered should be suitable. It will be usual to adopt a one-offer policy, but this needs to be made clear when the offer is made and the consequences of refusal. The basic question here is the suitability of the accommodation which takes account of a wide variety of factors such as location and proximity of Mr Asif's employment; however, the key question we are told about here is the size of the accommodation. The accommodation offered may or may not be overcrowded; two or more girls may share a bedroom, but the facts stated may lead to overcrowding since normally a maximum of five persons can live in a three bedrooomed flat, though this does depend on the ages of the children. The floor area of the rooms would also need to be considered. If the accommodation is suitable and Mr Asif has been warned about the consequences of refusal, he may be removed from the waiting list.

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<sup>1102</sup> The issues discussed in this case are considered above under 6.2, pp 116-128.

The allocation rules have changed recently to allow authorities to impose residence requirements, a process which is drastically shortening many waiting lists. Provided that the new allocation regime has been adopted properly Mr Asif can be removed from the list for failure to meet a residence requirement.

## **8.2 Eligibility for housing**

**Citizens of Moldova, Poland and Bulgaria met on a coach headed for London and on arrival all went to the council for the area of the coach station claiming to be homeless. How will the council deal with their claims?**

Different rules will apply to each of the three claimants.<sup>1103</sup> The Moldovan citizen will probably be ineligible for public/social housing. He is likely to be subject to immigration control and as such ineligible for housing assistance.

The Polish citizen is an immigrant from an EEA country, and citizens of states which acceded to the EU in 2004 are now treated in the same way as those from longer standing Member States. The Polish citizen will be eligible for housing assistance provided he or she is exercising an economic right of free movement, for example as a worker or self-employed person. The EU Treaty rights exception has been considered in a number of cases.<sup>1104</sup> In summary, these authorities have held that the provision of social housing is not 'necessary' for jobseekers to exercise that Treaty right in the United Kingdom, though the situation is different for workers. If a worker he or she will need to demonstrate settled employment before becoming entitled to any welfare benefits. It is likely that the person moving to London will not be entitled to homelessness duties to be exercised in his or her favour, since they have presumably given up settled accommodation in Poland. So he or she may be entitled to apply to be entered on the waiting list, but the local rules may (and are likely in London) to include rules requiring settled residence in the borough for a number of years before the person can be entered on the housing register.

The migrant from Bulgaria<sup>1105</sup> has recently become subject to the same rules, except that the economic migrant status must be established before arrival by registration you will be entitled to Housing Benefit and or Council Tax Benefit if any of the following applies:

Therefore the Moldova citizen will not be eligible for housing; so will the Polish and Romanian if they have just entered the UK because even a UK citizen will not be automatically eligible unless he habitually resides in the UK. If that condition of residence is met, the Moldovan is not eligible as stated above, not being from the EEA. But the Polish is. Slightly different criteria will apply to the Romanian, subject to his exercise of EU treaty rights.

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<sup>1103</sup> The issues in this case are discussed above, 6.2, pp 126-128.

<sup>1104</sup> *R. (on the application of Conde) v Lambeth LBC [2005] EWHC 62; R. (on the application of Mohamed) v Harrow LBC[2006] H.L.R. 18 and Putans v Tower Hamlets LBC[2006] EWHC 1634.*

<sup>1105</sup> Initial restrictions expired at the end of 2013.

### **8.3 Formality**

Mr Smith arranged to rent a property from Mr Jones while the property was being renovated. Mr Jones has taken some money from Mr Smith as holding deposit and an oral agreement has been reached that the property will be ready for occupation on 15 December 2013, and that Mr Smith will sign a written tenancy agreement at that time. Readiness is delayed until 26 December, on which day the two of them agree that Mr Smith can move in next day. Mr Jones finds that his letting agent's office is closed until the New Year and so he has to allow Mr Smith to move in on 27 December; he takes a cheque for £3,000, gives a receipt for one month's rent in advance and a deposit equal to two months' rent, and gives him the keys. When the letting agent returns to work on 2 January 2014 she is horrified and calls Mr Smith saying he has to sign their standard form letting agreement and pay the letting agent's fees, but Mr Smith refuses, saying 'I am in now.' Advise Mr Jones.

This question asks the process of formation of a rental agreement.<sup>1106</sup> What has happened is by no means disastrous in modern English law. There is a distinction between an agreement for letting and a tenancy agreement, the latter being more significant. A short tenancy or lease can be created informally, even orally – the technical term is by parol. This can occur if a market rent is payable, the term is for three years or less, and the tenancy takes effect in possession. The original arrangement is not, therefore, a tenancy agreement,<sup>1107</sup> but a tenancy is formed on 27 December. The term of the tenancy will be monthly since, if no express term is agreed, the term will be implied from the payment and acceptance of rent, the precise period following the method by the rent is calculated as opposed to the method of payment. The landlord will need to lodge the deposit with a deposit holding scheme.<sup>1108</sup>

In the private residential sector, the tenancy will automatically be an assured shorthold. The landlord will not be able to terminate the tenancy during an initial period of six months, but after that will be able to terminate the tenancy by notice without assigning any reason for doing so. If it is thought important to secure a written tenancy agreement, this can be done by terminating the oral shorthold and reletting. It would be usual for private lettings to be by written agreement so that the landlord can introduce a number of terms particularly about the permitted use of the property. A written tenancy agreement would be signed by both parties but would not need to be executed as a deed.

An oral letting would be much more problematic in the social and public sectors since in each case the tenant will obtain long-term security of tenure under the oral tenancy agreement (though not under a contract for a tenancy) and the option of termination and reletting will not be available.

The letting agent may not charge a potential tenant for registering as a person seeking accommodation nor for providing particulars of properties available to rent, but may charge a legitimate administration fee, that is the cost of completing credit checks and preparing and executing the tenancy agreement.

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<sup>1106</sup> See above, 6.2, pp 139-141.

<sup>1107</sup> It may be a contract for a tenancy, and this too can be created orally.

<sup>1108</sup> See above, 6.4, pp 167-169.

## **8.4 Lease/licence**

Jill and Mary are a lesbian couple seeking to rent a flat together. They make a joint approach to Lucinda who has advertised a suitable two bedroom flat. Lucinda tells them that they will have to sign agreements prepared by her solicitor. She produced two documents in similar form each described as a 'Licence' and stating that they will have the right to share the flat with any other person or persons nominated by Lucinda. Jill queries this saying that she doesn't want to share with anyone else, to which Lucinda replies 'I understand you are an item, but these agreements are just to keep my solicitor happy.' A few weeks later Lucinda meets a couple who offer far more rent for the flat and Lucinda tells Jill and Mary that they will have to move out by the end of the week. Advise them.

An assured shorthold tenancy arises when a private landlord grants exclusive possession of self-contained accommodation to a tenant or group of tenants. At one time it was very common for landlords to seek to evade the security of tenure regime by offering multiple licences rather than a single lease. It was decided in *Street v. Mountford*<sup>1109</sup> that a landlord could not convert a lease into a licence in this way because the test for the existence of a lease – a grant of exclusive possession – was substantive.<sup>1110</sup> There is more scope for licences when there are more than one occupier because if they are genuinely required to share with each other none of them has exclusive possession. This happened in one case in which a landlord let out individual rooms in a four roomed student flat to occupiers who were unknown to each other before they moved in to the flat.<sup>1111</sup> However, the fact of this case appears closest to *Antoniades v Villiers* in which it was held that a (heterosexual) couple who made a joint approach to a landlord were joint tenants even though they had signed separate licence agreements.<sup>1112</sup>

The consequence of finding that Jill and Mary are shorthold tenants is that they have an initial period of security of six months during which the landlord cannot evict them and at the end of the period they can only be removed after the landlord serves a notice of her intention to recover possession – a notice giving two month's notice. It is likely that the tenants will move out and that court proceedings will be unnecessary. As tenants Jill and Mary will have the right to due process so they cannot be evicted without court proceedings. The right to possession at the end of a shorthold after service of a proper notice requiring possession is automatic and so tenant will generally choose to leave rather than incur court costs.

## **8.5 Discrimination in housing**

Musa who is a Muslim has asked to rent a flat in a block of flats managed by Mr Robinson. Upon completion of the form pre-tenancy agreement, Mr Robinson noticed that Musa had stated that he was a Muslim and gay. Mr Robinson did not hide his dislike for gays in general and for gay Muslims in particular and immediately told Musa that he would not be given the

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<sup>1109</sup> [1989] AC 809, HL.

<sup>1110</sup> See above 6.3, pp 135-139.

<sup>1111</sup> *AG Securities v Vaughan* [1990] 1 AC 417, HL.

<sup>1112</sup> [1990] 1 AC 417, HL.

**accommodation for these reasons. Although no agreement has been reached, Musa is aggrieved and has consulted you for advice.**

This question looks at how discrimination will be dealt with in a housing arrangement both under the equality legislation and the European Convention on Human Rights.<sup>1113</sup> Under the Equality Act 2010, a person who is letting property (Mr Robinson) is not permitted to discriminate against someone on the basis of their race, religion or belief, or their sexual orientation (Musa). Each of these characteristics is protected under the Act. Musa should be advised to contact the specialist body, the Equality Advisory and Support Service in order to make a complaint which may result in Mr Robinson being prosecuted.

Similar issues arose in the case of *Preddy v Bull*<sup>1114</sup> where a couple of Christian hoteliers had a policy of only letting double rooms to married couples; they were held to have discriminated directly against two homosexual men in a civil partnership by refusing to let them a double room.<sup>1115</sup> The court decided further that to the extent that the Regulations limited the manifestation of B's religious beliefs, such a limitation was necessary in a democratic society for the protection of the rights and freedoms of others. This follows the approach adopted by the House of Lords in *Ghaidan v Godin-Mendoza*<sup>1116</sup> to the interpretation of the provisions governing succession to Rent Act tenancies;<sup>1117</sup> survivorship rights were accorded to the survivor of a cohabiting same sex couple even though the legislation referred only to the survivor of spouses and those living together as husband and wife. It seems clear here that the spirit and letter of the equality legislation had been breached.

## **8.6 Rent increase**

**Rose rents a property from Sally, who wishes to increase the rent. Advise Sally.**

The landlord will not be able to increase the rent under an assured shorthold during any contractual period, but will be able to increase the rent at the end of any contractual period by notice. The tenant could theoretically challenge the rent increase if it takes the rent above market level, and a determination would fix the maximum rent for a time, but there would be nothing to prevent Sally evicting Rose in this situation. In practice challenges by assured shorthold tenants are extremely rare.<sup>1118</sup>

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<sup>1113</sup> See above 6.3, pp 141-143.

<sup>1114</sup> [2013] UKSC 73.

<sup>1115</sup> In *Rodriguez v Minister of Housing of Gibraltar*, [2009] UKPC 52, a policy of granting joint tenancies in government housing to couples only if they were married to each other or if they had a child in common did not comply with the Constitution Order 2006 (Gibraltar) s.14. It discriminated against same sex couples, who could neither marry nor have children together.

<sup>1116</sup> [2004] UKHL 30.

<sup>1117</sup> The court was required to depart from the interpretation of para.2 enunciated in *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, HL, and para.2 should be read, and given effect to, as though the survivor of a homosexual couple living together was the surviving spouse.

<sup>1118</sup> See above 6.4, p. 164.

## **8.7 Rent arrears**

**Mr Small has been renting a property at 14 University Close, on a five year lease from Mr Head. He has been an employee of the university and has been in relative stable financial condition. He has been made redundant lately and consequently he has not paid his rent for the last month and fears that his landlord will seek to evict him. Advise him.**

There is a significant sub-sector of the private residential market which provides for medium length fixed term tenancies. The tenancy will automatically be an assured shorthold, unless a notice was served at the outset stating that it was to be a 'fully' assured tenancy. It is highly likely that the tenancy agreement will provide for forfeiture; it should provide for forfeiture of the fixed term for non-payment of rent, probably after default for 4 or 21 days (and for other breaches corresponding to the grounds for possession). The landlord's options will depend on how much rent is due. If there are two months or more rent due, then the landlord may seek possession of the tenancy. Ground 8 provides a mandatory ground for repossession where two months' rent is in arrears, both at the date the notice of seeking possession is served and at the date of the court hearing. Being a mandatory ground, the court has no discretion and must award possession if Mr Head establishes the rent arrears. However, if Mr Small paid off some of the arrears, prior to the court hearing, Mr Head would not be able to pursue Ground 8. If less than two months' arrears are due, Mr Head could seek possession on either Ground 10 (some rent arrears due) or Ground 11. Ground 11 applies whether or not any rent is in arrears on the date on which proceedings for possession are begun, and where the tenant has persistently delayed paying rent which has become due. Both these Grounds are discretionary and so the court must consider it reasonable to award possession. It is highly likely that the court would suspend the possession order if Mr Small attends the hearing and promises to pay future rent payments and an amount from the arrears (this could be a relatively small amount each month). The fact that Mr Small's arrears have accrued as a result of his redundancy would be insufficient to affect Ground 8 but would certainly be relevant when the court exercises its discretion under Grounds 10 or 11.<sup>1119</sup>

The landlord can forfeit the lease and give notice of repossession with a single notice. In practice the landlord is unlikely to take proceedings immediately, because the right to possession will be far more clear cut once two months' arrears accrue. At that time there will be a mandatory ground for possession and the accelerated repossession procedure will become available.

Small needs to explore whether he may be able to secure welfare benefits to assist with rent payments as a result of his redundancy.

## **8.8. Property condition**

**Roger has rented a detached house from Susan for several years. A few weeks ago the boiler blew up and had to be turned off. Roger rang Susan asking her**

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<sup>1119</sup> See above 6.6, pp 186-187.

**to organise a repair. When Susan visited with a heating engineer, they found that the boiler had been malfunctioning for some time and Susan told Roger that he would be responsible for repairing the boiler as he had not told the landlord of the problem sooner. Roger replies that he will stop the rent until the boiler is repaired. Susan then observes that the wall paper and interior paintwork are grubby and tells Roger that he must redecorate. Advise Roger.**

The landlord of a dwelling held under a short lease (up to seven years) is responsible for repairing the structure and exterior of the dwelling and the installations within it, including the installations for the supply of hot water and space heating. It follows that Susan will be liable for replacement of the boiler.<sup>1120</sup> Technically it is necessary for the tenant to give written notice of the defect before a repairing obligation arises, though in this case the requirement for written notice has undoubtedly been waived.<sup>1121</sup>

Although Roger may have the right to stop rent against the unquantified damages arising from the landlord's breach of her repairing obligation, it will be most unwise to do so given the possible counterclaim. If this course is taken it will be essential first to give a written notice of the disrepair. He is better advised to sue to enforce the repairing obligation.

As an assured shorthold tenant, Roger may be in a precarious position concerning his security of tenure: much will depend on whether he has a fixed-term contract or one that is periodic. If it is fixed-term, Susan will not be able to end it (unless Roger has breached the agreement in some way). However, if it is periodic, Susan will be able to end the tenancy by giving Roger two months' notice. It is irrelevant that Susan's notice to quit is effectively retaliation for Roger's insistence on having the boiler mended. Housing charities have consistently highlighted the difficult for assured shorthold tenants to insist that the landlord carries out his/her repairing obligations because of the ability for the landlord to terminate the tenancy by notice.

Redecoration may fall to the tenant if the tenancy agreement so provides, but this will be subject to fair wear and tear. Most commonly in these types of tenancy, the tenant will be obliged to keep the house clean and to make good any damage (except for fair wear and tear) that they have caused.

## **8.9 Bad behaviour**

**Mrs Ade rents a flat from the Bon Repos Housing Association. She is horrified to discover that the Card family, who live in the flat above hers, dispose of their rubbish by throwing it out of the window onto the grass beneath Mrs Ade's window. Mrs Ade consults the standard form tenancy agreement she has signed and finds that it contains no express provisions about the conduct of tenants.**

As the Cards are housing association tenants they will probably hold a fully assured tenancy, and the housing association will not simply be able to terminate their tenancy, even if it wished to do so. Anti-social behaviour is a high priority in social

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<sup>1120</sup> See above 6.4, pp 169-170.

<sup>1121</sup> *O'Brien v Robinson* [1973] AC 912, HL.

housing<sup>1122</sup> and there are many possible courses of action which range from informal intervention by the housing association's staff (most large associations employ dedicated staff to deal with such issues) to legal action. Because of the social nature of the landlord, the association would most certainly be expected to take action against the Cards. It is highly likely that the housing association is part of the relevant local authority's anti-social behaviour strategy and would therefore be obliged to co-operate with that strategy. However, it would be expected that the association would only use legal action – and particularly repossession – as a last resort. It would be highly unusual for the tenancy agreement not to contain an express term concerning the conduct of tenants. However, the absence of an express term is not a serious obstacle, in terms of taking action against the Cards, since 'nuisance or annoyance' is a ground for repossession that is statutorily provided for and throwing rubbish out of a window would easily come within its scope.

If the Card family are new tenants, then it is likely that they have a 'starter tenancy' (equivalent to the Introductory Tenancy in the public sector). If this is the case, the Card's tenancy could be brought to an end by employing the prescribed review procedure. If the Card family have an assured tenancy, then the housing association make seek an order of demotion from the court. If successful, the assured tenancy would be converted into a demoted tenancy and could be ended relatively easily, following a prescribed procedure, if the Cards continue to commit acts of anti-social behaviour. It is highly unlikely that the housing association would seek repossession for this behaviour alone but it remains open as a possibility under Ground 14. However, this ground of repossession is discretionary and therefore the court must decide whether it is reasonable to award possession. It is unlikely that the court would consider it reasonable to award possession on the basis of this behaviour alone. Possibilities here are an anti-social behaviour orders, a demotion order converting the tenancy into a shorthold which could be terminated or a nuisance action leading to an injunction. It will almost certainly not be realistic for Mrs Ade to take action directly so she should complain to the housing association and ask them to take action.

## **8.10 Expiration of the term**

**Goodfellow has come to dislike his tenant Angus. He has written a letter to Angus requesting Angus to leave at the end of the month. Angus had lived in the property for a year and had been paying rent on a monthly basis and the tenancy renewable every year. Angus has written back that he is unable to move and is now entitled to automatic renewal since the end of the first year of the tenancy. What steps does Goodfellow need to take to take back possession from Angus?**

Angus is a shorthold tenant. Goodfellow can therefore terminate his tenancy without assigning a reason for doing so.<sup>1123</sup> In order to do so he will have to show that the contractual term has come to an end, and will have to terminate any periodic continuation of the tenancy. In addition it will be necessary to serve a statutory notice

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<sup>1122</sup> See above 6.5, p. 182.

<sup>1123</sup> See above 6.6, pp 185-186.

requiring possession, a notice entitling Angus to two months' notice of the intention to seek proceedings. There is no obligation on Goodfellow to renew the tenancy and, provided that there is no current fixed term in place, Angus will have no defence to the notice to terminate. Consequently, in practice, Angus is unlikely to contest the notice. If there is a fixed term contract (eg, 12 months) then Goodfellow must prove that a ground of repossession exists (eg, rent arrears, nuisance) and must apply to the court for repossession and the contract must provide that repossession may be sought on that ground. In practice, it will be very common to include that provision. The outcome of the court case will depend on whether the ground for repossession (if established) is mandatory or discretionary. If the ground is mandatory (eg, Ground 8 – two months' rent arrears), Angus will have no defence and the court must award possession. However, if the ground is discretionary (eg, Ground 14 – nuisance and annoyance), the court must consider whether it is reasonable to award possession.

## **8.11 Notice by joint tenant**

**Two students, John and Matthew, are renting a two bedroom flat from Mrs Singh paying a monthly rent. The tenancy is for an initial period of six months. After three months the relationship between John and Matthew has turned sour and John is looking for another property to rent. Advise Matthew.**

John and Matthew must be joint tenants. For the duration of the initial fixed term both are bound by the tenancy which means that if John wants to leave the tenancy during the fixed term he will remain liable for rent. However, John is entitled to leave at the end of the initial fixed period. If he chooses not to do so the tenancy will convert into a periodic, monthly, tenancy. At this stage John will be entitled to serve notice to terminate the tenancy. The notice will be one full month's notice expiring on a rent day.

In the absence of an express term to the contrary, one joint tenant may give notice without the concurrence of the others.<sup>1124</sup> A notice to quit signed by one of several joint tenants is sufficient to determine a periodic joint tenancy, and a notice to quit by any one effectually puts an end to that tenancy. The principle is that if one of two joint tenants who hold the whole wishes to terminate the tenancy, his notice to determine whether or not given with the authority of the other joint tenant will operate to terminate the tenancy altogether, for the tenancy is to continue only as long as he and all the other joint tenants shall please. This is unless by the express terms of the tenancy agreement a notice to quit is required to be served by all tenants.<sup>1125</sup> Challenges to this result on the basis of trust law and human right principles have failed. In practice the landlord will often accept a substitute proposed by the outgoing tenant or those who continue.

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<sup>1124</sup> *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478, HL; see above, 6.4, pp 154-155.

<sup>1125</sup> The tenancy agreement may also require a notice to be served on all the joint landlords.

## **8.12 Recovery of deposit**

**XYZ Estate Agency has received holding deposit from Mr Newman in respect of No 17 White Crescent. Mr Newman passed the various checks conducted by XYZ and, after paying over a deposit to XYZ, moved into the property where he has lived for the last four years. He has now decided to move on to another property owing to the increased size of his family and wants his deposit back, but XYZ are not forthcoming about how long he has to wait for the deposit and whether it will be returned in full. Advise Mr Newman.**

Landlords must observe carefully the rules about deposit protection. A tenant's deposit must be lodged with an administrator of an authorised tenancy deposit scheme.<sup>1126</sup>

The landlord must provide prescribed information to the tenant about the tenancy deposit scheme,<sup>1127</sup> which is information of real importance to a tenant and not a mere matter of procedure or of subsidiary importance.<sup>1128</sup> This includes contact details of the scheme's administrator, a leaflet explaining the operation of the scheme, and procedures for repaying deposits and resolving disputes, and details of the specific deposit. The landlord should certify that the information provided is accurate to the best of his knowledge and belief and ask the tenant to sign a document confirming this. In *Ayannuga v Swindells* the landlord provided some information but omitted details of the procedures for repayment, challenging deductions and dispute resolution. The tenant succeeded in a counterclaim against an action for rent arrears. The court could make an order requiring repayment of a deposit to a tenant or requiring the landlord to pay the deposit into a designated account, and requiring the landlord to pay three times the deposit amount to the tenant.<sup>1129</sup> Thus Mr Newman could get his deposit back and the order could include the order to pay back three times the deposit amount. Any dispute can be resolved using the dispute resolution process provided if both parties agree to it.

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<sup>1126</sup> See above, 6.4, pp 167-169.

<sup>1127</sup> Housing Act 2004 s. 213(5) (6); Housing (Tenancy Deposit) (Prescribed Information) Order 2007 art. 2.

<sup>1128</sup> *Ayannuga v Swindells* [2012] EWCA Civ 1789.

<sup>1129</sup> *Gladehurst Properties Ltd v Hashemi* [2011] EWCA Civ 604; [2011] 4 All E.R. 556.

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