

SOCIAL HOUSING (REGULATION) BILL: EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

Introduction

1. The Social Housing (Regulation) Bill (“the Bill”) was introduced in the House of Lords on 8th June 2022.
2. The Bill has three core objectives:
 - a. to facilitate a new, proactive consumer regulation regime;
 - b. to refine the existing economic regulatory regime; and
 - c. to strengthen the Regulator of Social Housing’s (“the Regulator”) powers to enforce the consumer and economic regimes.
3. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Bill. It has been prepared by the Department for Levelling Up, Housing and Communities.
4. The provisions of the Bill engage the following Convention rights:
 - a. *Article 6* – this right provides that in the determination of a person’s civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law;
 - b. *Article 8* - this right provides that persons have the right to respect for their home and private life;
 - c. *Article 1 Protocol 1 (“A1P1”)* – this right provides that persons (both natural and legal) have the right to the peaceful enjoyment of their possessions.
5. In all cases, we consider that our proposals are compatible with the relevant Convention rights, and that in the case of provision engaging article 8 and A1P1 that any interferences are justified and proportionate.
6. Where there is no significant Convention issue or where potential Convention issues arise in relation to policies that will be given effect by the exercise of enabling powers under the Bill, no mention is made of the provision. All enabling powers in this Bill are capable of being exercised in a way that is compatible with Convention rights and the

Secretary of State is required to act compatibly with Convention rights when making secondary legislation.

7. We also make no mention of Convention issues potentially arising from the exercise by the Regulator of powers conferred by or amended by the Bill. In doing so the Regulator will consider the circumstances of any case and is required to act compatibly with ECHR rights by section 6(1) of the Human Rights Act 1998. Furthermore, section 92K(5) of the Housing and Regeneration Act 2008 (“HRA08”) requires the Regulator to exercise its functions in a way that minimises interference, and which (so far as is possible) is proportionate, consistent, transparent and accountable. The compatibility of any proposed action will be considered by the Regulator when considering exercise of those powers.

Statement under section 19 of the Human Rights Act

8. On introduction in the House of Lords Lord Greenhalgh, the Minister of State for Building Safety and Fire, made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.

ECHR analysis by clause

Clause 9 – Appointment of health and safety lead by registered provider

9. This provision requires a registered provider of social housing (“registered provider”) to designate a health and safety lead to carry out functions relating to its health and safety duties towards tenants, notify the Regulator of the name and contact details of the health and safety lead and publish that information. It also provides for the enforcement of these and related requirements.
10. Article 8 is engaged by the requirement to publish and give to the Regulator personal data relating to the health and safety lead. To the extent there is any interference with article 8 this is proportionate to the legitimate policy objective of ensuring tenants know who within their landlord’s organisation is responsible for health and safety.
11. The provision is compatible with article 6 as the Regulator’s powers to enforce the requirement and related provision are subject to appeal to the High Court.

Clause 11 – Moratorium on the disposal of land

Clause 12 – Limited liability partnerships

12. Clause 11 amends the housing moratorium regime (sections 143A-159 HRA08).
13. Clause 12 extends the housing moratorium regime and the housing administration regime (sections 92-117 Housing and Planning Act 2016) to Limited Liability Partnerships (“LLP”).
14. A housing moratorium applies where certain types of private registered provider (“PRP”) are insolvent etc. When a moratorium is in force a PRP is not able to dispose of land without the consent of the Regulator. The purpose of a housing moratorium is to enable the Regulator to take appropriate action to protect the social housing stock and tenants of social housing. Clause 11 changes how a moratorium begins, closing a loophole in the existing regime which could allow a PRP to dispose of property between the taking of a relevant step (such as a winding up petition or an application for an administration order) and notification being given to the Regulator that that step has been taken.
15. Housing administration is a special administration regime that applies in relation to certain types of PRP as an alternative to ordinary administration. A housing administrator has two objectives, those of normal administration and that of keeping the social housing of an insolvent provider in the regulated sector. Its purpose is, if possible, secure to tenants the continued protection of a tenancy of social housing.
16. Both a housing moratorium and housing administration may interfere with the A1P1 rights of PRPs and potentially their secured creditors. This is a qualified right.
17. The modest change to the housing moratorium regime made by clause 11 is intended to make the housing moratorium regime work more effectively and is proportionate to the risk that insolvency of a registered provider and its impact on that provider’s social housing poses to the social housing stock and the security of tenants living in social housing.
18. Likewise, the extension of the housing moratorium and housing administration regimes to LLPs is justified and proportionate to the aim of protecting tenants of LLP PRPs of housing that are in financial difficulties.

Clause 22 – Surveys

19. Section 199 of the HRA08 currently gives the Regulator a power, where the Regulator suspects that a registered provider may be failing to maintain premises in accordance with standards under section 193, to arrange for an authorised person to enter the premises in order to undertake a survey. Clause 22 reduces the period of notice that must be given and enables entry without consent if a warrant is obtained. This is to ensure the Regulator is able to gain access to the property swiftly to make an assessment of any work required in circumstances where there is a health or safety risk to tenants.
20. Exercise of this power by the Regulator may interfere with a tenant's article 8 rights and a tenant's or PRP's A1P1 rights. As noted above, before exercising its powers under this clause the Regulator will consider the circumstances of any case and is required to act compatibly with ECHR rights.
21. Likewise, a justice of the peace to whom an application for a warrant is made is required to act compatibly with ECHR rights.
22. This clause also makes connected provision for enforcement engaging article 6. There is no right of appeal in respect of the exercise of this power but any decision to exercise the power may be challenged by means of judicial review. This is sufficient to ensure article 6 compliance.

Clause 23 – Performance improvement plan

23. This provision gives the Regulator new powers to require a registered provider to prepare a performance improvement plan setting out how the provider proposes to address an issue identified by the Regulator and to implement the plan if it is approved by the Regulator.
24. Exercise of this power by the Regulator may interfere with a PRP's A1P1 rights. As noted above, before exercising its powers under this clause the Regulator will consider the circumstances of any case and is required to act compatibly with ECHR rights.
25. This clause also makes connected provision for enforcement engaging article 6. A registered provider may appeal to the High Court against a decision to give the provider a performance improvement plan notice, ensuring compatibility with providers' article 6 rights.

26. We note that refusal to approve a performance improvement plan notice is not, itself, appealable. We consider this nevertheless to be compatible with providers' article 6 rights as there is no associated penalty. In these circumstances the Regulator is required to consider whether it is appropriate to exercise any of its other enforcement powers which themselves are compatible with article 6.

Clause 24 – Emergency remedial action

27. This provision gives the Regulator new powers to authorise persons to enter premises to take specified emergency remedial action and enables entry without consent if a warrant is obtained. This will enable the Regulator to make emergency repairs to a property in circumstances where there is a health or safety risk to tenants.
28. Exercise of this power by the Regulator may interfere with a tenant's article 8 rights and a tenant's or PRP's A1P1 rights. As noted above, before exercising its powers under this clause the Regulator will consider the circumstances of any case and is required to act compatibly with ECHR rights.
29. Likewise, a justice of the peace to whom an application for a warrant is made is required to act compatibly with ECHR rights.
30. This clause also makes connected provision for enforcement engaging article 6. A registered provider may appeal to the High Court against the Regulator's decisions to make arrangements to take emergency remedial action or to require the PRP to pay associated expenses, ensuring compatibility with providers' article 6 rights.

Paragraph 6 of Schedule 3 – provision removing the cap on financial penalties that the Regulator may impose

31. Section 228 of the HRA08 allows the Regulator to impose a financial penalty on registered providers on various grounds set out in section 227 which include failure to meet a regulatory standard, where the affairs of a provider are mismanaged and failure to comply with an enforcement notice. The Bill also adds various grounds for imposing a financial penalty including failure to appoint a health and safety lead and failure to comply with a performance improvement plan notice.
32. This provision removes the £5000 cap on the maximum amount of such penalty, thus enabling the Regulator to impose an unlimited fine. This is to ensure the penalties imposed by the Regulator are sufficiently robust and serve as an effective deterrent against failure by PRPs to comply with regulatory requirements. The clause is

compatible with the civil limb of article 6 as there is a right of appeal to the High Court. The provision is regulatory not criminal in nature and available in relation to a class of persons that have submitted voluntarily to regulation.

Department for Levelling Up, Housing and Communities

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