Written evidence submitted by Dr Edward Kirton-Darling and associates to The Renters' Rights Public Bill Committee (RRB01).

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Introduction

Rent Repayment Orders, introduced in the Housing Act 2004 and expanded in the Housing and Planning Act 2016 are an extraordinary legal innovation. They were created in the context of longstanding failures to improve conditions and landlord practices by conventional legal action and policy efforts. They have the capacity to transform private tenants from passive victims of poor housing into prosecutors pursuing individual gain and the wider public good by incentivising tenants to respond to breaches of housing regulation.

We are a team of legal academics with expertise in housing law, and we are currently undertaking research on RROs. The impact of the RRO on a segmented and volatile private rental market has been complex. Since 2016, when the requirement for a landlord conviction was removed, there have been more than 2000 cases at the FTT, the vast majority of which are from London. The cases indicate appetite for the remedy, as well as strategic responses, such as landlords using rent-to-rent agreements to avoid legal responsibility and tenants targeting landlords to profit from the regime. RROs have prompted the emergence of community interest, commission-funded lay representation for tenants, and social media has provided a fertile ground for the dissemination of legal strategies. However, some tenants have faced difficulties such as language barriers and meeting the evidential and legal requirements. The RRO has also met with more traditional resistance including legal challenges by landlords, and judicial scrutiny, including concerns with 'windfall' gains.

The Bill proposes an expansion of RROs. Our research indicates that the expansion should reflect the following principles:

(i) RROs must be legally and procedurally as simple as possible consistent with the criminal basis of the sanction so that they remain accessible to the broadest range of tenants. Ensuring that the most vulnerable tenants are enabled to claim the benefits of an RRO should be a priority.

(ii) RROs must be proportionate and procedurally fair so that landlords retain trust in the RRO as an appropriate remedy for poor landlord practices.

(iii) In appropriate cases, the use of RROs could be extended to circumstances where there is no existing criminal offence as a trigger.

* Contributions by Helen Carr and Richard Percival are made on the basis of their academic positions, not as judges of the First-tier Tribunal.

(iv) Unlike local authority enforcement action there is no filter or triage system for RROs and their design must reflect that. On the other hand their role when the local authority is unable or unwilling to enforce housing legislation must be preserved.

Comments on the provisions of the bill.

RROs and misuse of possession grounds

1. The offences in new section 16J of the Housing Act 2004 deploy RROs to support elements of the new assured tenancy regime. Since the abolition of section 21 in Scotland, there is evidence of significant misuse of possession grounds. We welcome the use of RROs as a key tool to ensure compliance with the new regime.

2. The offence in relation to the misuse of possession grounds appears to us to be central to doing so, and we strongly support its addition to the list of RRO-attracting offences. The offence relies on the mental element of *knowing* or being *reckless* as to whether the landlord could not obtain possession on the ground. We suggest that this mental element could prove problematic. Case law established that "knowledge", meaning "true belief", is a high threshold, as against terms like "believes" or "suspects", often used with "knowledge" in offence descriptions. Recklessness is a broadly subjective term – it requires a defendant to appreciate that a risk exists, but then (unreasonably) to take the risk. Thus a landlord could contend that he or she did not know the ground was unobtainable, and it did not occur to them that such a risk existed. In current RRO practice, the FTT will often reject a claim of "reasonable excuse" if a landlord did not have any processes in place to inform him/herself of their regulatory requirements. As drafted, this offence could not be made out where the landlord genuinely did not know what was required for the ground of possession, and so did not appreciate any risk that it would be unobtainable. We suggest that an objective reasonableness criterion be substituted, such as there being reasonable grounds to believe that possession would not be granted.

RROs and the 'restricted period'

3. The imposition of a restricted period during which a property may not be let following reliance on grounds 1 and 1A is a key anti-misuse provision; and we welcome the use of an RRO to support it. The limited defence for people other than a landlord who had taken all reasonable steps to avoid contravening the prohibitions is clearly appropriate. In the light of the regulatory nature of the offences, it is appropriate that, that defence apart, the offences should be ones of strict liability (ie with no other mental element), like the licensing offences which currently account for most RRO applications.

RROs and continuing breaches

4. We welcome the extension of RROs where there has been a continuing breach of rules designed to improve the culture of compliance with regulatory obligations. These include clause 15 (inserting clause 16J(3) into the Housing Act 1988), clause 65(1) and clause 90(2). In brief, they all provide it is an offence where a financial penalty has been imposed, and the conduct continues for more than 28 days, for example where a landlord has failed to provide a statement of terms following variation of a tenancy, where a landlord has failed to sign up

to a landlord redress scheme, or where a landlord fails to ensure they have an active landlord entry and active dwelling entry in the database. In these instances, the Bill is designed to create a regulatory hierarchy, whereby financial penalties can escalate into offences where there is a continuing failure to comply. We accept the logic of this approach where State action is involved, but would suggest that there are good reasons to enable tenants to seek an RRO at an earlier stage, when a financial penalty can be imposed, not simply after 28 days of failing to comply with a financial penalty. The provisions as they currently stand rely on local authority action, following which a tenant can act. Enabling a tenant to bring an RRO at the earlier stage would mean that an RRO is not dependent on action by the local authority, enabling the RRO to act (as it currently does in most instances) as a complementary enforcement mechanism for regulatory requirements. We therefore suggest that an RRO should be available where there is a breach of the obligations in clauses 64, section 16I HA 1988 (inserted by clause 15) and clause 90(2) (discussed further below).

RROs and the landlord database (clause 80(3) of the Bill)

5. We welcome that RROs will be available where a landlord provides false or misleading information to the database operator which, in a material respect, indicates compliance with the private rented sector database requirements. However, we are concerned that RROs are not available where landlords fail to ensure there is an active landlord entry and active dwelling in the first place. Lack of compliance with mandatory database registration requirements is a significant problem in Scotland and the Republic of Ireland. This undermines the overall accuracy of data in the register and inhibits enforcement activities by local authorities. This problem is mitigated in the HMO regime where failure to obtain a HMO licence can be subject to an RRO. This problem could be addressed if an RRO was available where a landlord fails to ensure an active landlord entry and dwelling entry, as required under cl.80(3). However, this is not currently a ground for an RRO under the Bill. While local authorities have powers to impose a financial penalty on landlords that do not meet the requirements of the database, there are significant variations in local authority enforcement practices, and we consider that the risk of exposure to an RRO, from the outset, would improve compliance with the database requirements.

RROs, licence conditions and the Housing Management Regulations

6. We are concerned that RROs are not available to many tenants whose properties are licensed, but where the landlord breaches the conditions of the licence and the local authority takes no enforcement action. Licensing will lose its credibility if the standards set by local authorities in licences are not enforced. This could be accomplished by adding the offences contrary to sections 72(3) and 95(2) of the Housing Act 2004 to those attracting RROs.

7. Mandatory licencing does not cover HMOs with fewer than five occupants. Many of these may present similar problems and dangers as larger HMOs, such as where small family houses not designed for shared living are let to three or four people. The Management of Houses in Multiple Occupation (England) Regulations 2006 apply to them, but they do not attract RROs (although breach is a criminal offence). It would be inappropriate to attach RROs to all breaches of the Regulations, as they include a range of obligations ranging from the comparatively unimportant to key areas like fire safety. We suggest, however, that it would be appropriate to give the Secretary of State a power to designate particular provisions in the Regulations as attracting RROs.

RROs and local authority enforcement

8. Steps need to be taken to ensure that RROs are accessible to the most vulnerable of tenants, many of whom may be on Universal Credit. Local authorities currently make little use of their power to make an RRO application. Our understanding is that this is because of the complexities where Universal Credit is involved. Consideration should be given to making the necessary universal credit data more easily available to local authorities, to extending the RRO to cover discretionary housing payments and to enabling local authorities to claim an RRO on behalf of the tenant where they make a claim for reimbursement of benefits.

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