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### Housing reform - a better deal for the mentally vulnerable?

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#### **\*Conv. 207** Introduction

The purpose of this article is to consider the current proposals for housing reform, set out in the Law Commission's Report, *Renting Homes*.<sup>1</sup> This report follows a period of wide consultation,<sup>2</sup> and is itself an interim measure, before the recommendations and draft Bill are produced in a Final Report.<sup>3</sup> The proposals, while intended to be in final form, are subject to possible alterations necessitated by translating them into a legislative format.

It is not the authors' intention to provide an exhaustive review of the individual proposals, but rather to consider how major elements of the proposed changes will affect housing provision for mentally vulnerable individuals, from the perspective of charities who are charged with or manage such housing provision. Nor is the intent to consider all groups of "vulnerable" individuals. For current purposes, the term "mentally vulnerable" comprises those suffering from clinically recognised mental disorders, such as schizophrenia; those with a form of organic brain malfunction, such as dementia or brain damage following injury; and those with a learning difficulty. These individuals face particular housing needs for a variety of reasons. Those with mental disorders are increasingly cared for within the community after the Community Care Policy was enthusiastically embraced in the 1980s, while the question of how to provide the most appropriate accommodation for those with organic brain difficulties is becoming increasingly problematic as the population ages and the incidence of organic brain difficulties increases.<sup>4</sup> Clearly, **\*Conv. 208** with appropriate care and support such individuals are, very often, able to manage in the community, yet their needs may dictate the type of accommodation which is suitable for them. Housing within the mainstream system may not be appropriate for such individuals, as it does not offer the additional support, which is frequently required.<sup>5</sup> Charities, and other bodies, play a vital role in filling the housing gaps for these particular groups.

#### **Housing the mentally vulnerable: the current framework**

Charities (and other bodies) engaged in housing the mentally vulnerable face a significant number of challenges beyond the general problems with housing provision caused by the multiplicity of governing statutes and statutory or other forms of occupational letting arrangement. These specific issues are explored in detail by the authors elsewhere,<sup>6</sup> but, briefly stated, stem from the current Community Care Policy as laid down in the National Health Service and Community Care Act 1990 and corresponding policy initiatives,<sup>7</sup> which at its inception divorced the question of providing appropriate support from the question of the availability of housing. The repercussions of this include a lack of adequate housing stock,<sup>8</sup> inadequate resourcing of support and housing services, difficulties in inter-agency working, both in balancing different funding regimes and in providing appropriate services,<sup>9</sup> and related problems caused by homelessness.<sup>10</sup> Reforms, such as the introduction of a Mental Health National **\*Conv. 209** Service framework, major governmental investment<sup>11</sup> and positive aspects of the Homelessness Act 2002, are welcome, but have not altered the essential nature of underlying problems, prompting the authors to conclude that "what is needed is a rethink of the relationship between mental health care and housing provision rather than a piecemeal series of related reforms."<sup>12</sup> While it would be tempting to reopen the debate on these issues, they fall well outside the remit of the current reforms to renting homes, and, while it is important to recognise these difficulties, the rest of this article will examine the practical and technical aspects of housing provision within the charitable sector.

The result of the outlined problems is that the housing needs of the mentally vulnerable are met by a

multiplicity of agencies, both governmental and charitable. Bodies providing housing range from Registered Social Landlords,<sup>13</sup> the majority of which are registered charities,<sup>14</sup> whose functions may involve long- and short-term lettings, through to charities managing housing resources for a registered social or other landlord, whose aim is likely to be settling occupants in long-term accommodation,<sup>15</sup> and charities or other bodies involved in providing temporary or other emergency accommodation for parties who otherwise fall through gaps in statutory provision--for example, those who are classed as intentionally homeless.<sup>16</sup>

The ultimate aim of the majority of lettings arranged or provided by charities to the mentally vulnerable will be to support the individual until he or she can live within the community, with or without support. This follows the various funding models for necessary medical and other support that currently exist.<sup>17</sup>

Where charities are involved directly in housing provision, they must choose between a variety of different letting arrangements \***Conv. 210** governed by various statutory regimes. If a charity wishes (or is required) to grant some permanence in the letting arrangement, the legal form usually adopted is a tenancy agreement; the format of which is now regulated by the Housing Act 1988 as amended by the Housing Act 1996.<sup>18</sup> Two types are available--the assured tenancy or the assured shorthold tenancy, the difference between them being that the assured shorthold, itself a form of assured tenancy, offers much more limited security of tenure than a fully assured tenancy.<sup>19</sup> In consequence, many charitable housing providers will choose to use an assured tenancy, which requires them to opt-in to the assured tenancy scheme, as all tenancies are assumed, by default, to be let on assured shortholds.<sup>20</sup> The grounds on which a charity landlord may recover the property are regulated by statute, and the tenancy must be ended by court order.

Charities dealing with the mentally vulnerable may also want to grant a licence arrangement, which is in many ways a more flexible method of letting, particularly where charities wish to carry out a "test" letting for assessment purposes, or need an arrangement which can be quickly and easily ended or adapted.<sup>21</sup> Licences, as they pass no estate in land, do not attract statutory protection,<sup>22</sup> with the exception that they must be ended by court order.<sup>23</sup> Regrettably, there are now a number of difficulties associated with a charity seeking to grant a licence, owing to an over-protective judicial stance which stresses the objective nature of the parties intentions over the purpose behind the lettings, thereby preventing private landlords avoiding rent control provisions.<sup>24</sup> The latest decision of the House of Lords on the \***Conv. 211** issue, *Bruton v London & Quadrant Housing Trust*,<sup>25</sup> provides a cautionary example, as a housing trust was held to have granted a tenancy, even though it expressed the letting to be temporary in order to fulfil its charitable purposes and had no estate in land out of which to grant a term of years.<sup>26</sup>

The distinction between different legal forms of letting, coupled with the influence of legislation, mean that providing the best housing package can be as much a matter of chance as design; the Law Commission has already found that there is widespread ignorance about the operation of legal regimes applicable to lettings.<sup>27</sup> This may be especially significant in charities, whose management boards may be more focused on carrying out the aims of the charity, than being familiar with the legal technicalities.<sup>28</sup>

### Overview of Law Commission proposals

The Law Commission sets out to create a comprehensive statutory scheme for residential letting arrangements. At the heart of the proposals is the suggestion that the mix of statutory provisions, contract law and property law which currently governs occupation arrangements should be replaced by a consumer contract, the terms of which should be "fair" and "transparent" in accordance with the principles underlying the Unfair Terms in Consumer Contracts Regulations 1999 (hereafter "UTCCR"). The occupation agreement should be produced in writing,<sup>29</sup> and sanctions are suggested to ensure that landlords comply with the requirement.<sup>30</sup> Statutory model agreements will be drafted and provided in the Act, which will themselves be UTCCR compliant, and all agreements will contain defined sets of terms.

The Commission proposes that only two main types of occupation contract should exist, the Type I and Type II agreements. The \***Conv. 212** distinction between a lease and a licence is to have no validity in determining whether a letting comes within the scheme, so that the new occupation contracts will govern all but a small number of excepted lettings, irrespective of whether the terms of the agreement confer an estate in land on the occupier.

The Type I contract, designed primarily for use by social landlords,<sup>31</sup> would replace most assured shorthold and other tenancies, with a monthly periodic tenancy. This tenancy would confer the greatest security of tenure, and could only be terminated by court order on one of two discretionary grounds for possession, and according to the particular proposals dealing with anti-social behaviour. Only in a prescribed set of circumstances would a social landlord be able to use a Type II contract, for example, where the landlord offers supported housing. The majority of charities engaged directly or indirectly in housing the mentally vulnerable would fall within the Type I arrangement as registered social landlords or by electing to confer long-term security of tenure on occupants. A significant number may also be involved in lettings under the supported housing exception.

The Type II contract is intended for widespread use in the private rented sector, and may be either for a periodic or fixed term. It is modelled on the assured shorthold tenancy, and is capable of termination on a notice-only ground of possession within three months.<sup>32</sup> A second mandatory ground, for rent arrears of a minimum of two months, demonstrates the lack of security of tenure offered. However, where the agreement is for a fixed term, it must be terminated by notice, otherwise it would continue as a periodic Type II tenancy.

The statutory scheme will have retrospective effect, and the Commission sets out detailed proposals to try and ensure appropriate conversion of existing arrangements to the scheme.<sup>33</sup> The proposals also deal with succession rights, exchanges, joint occupancy, and many other matters, which are beyond the remit of the current work.<sup>34</sup> The main provisions of the scheme as they affect charities providing for the mentally vulnerable will need greater attention.

### **\*Conv. 213 The occupation contracts**

The statutory structure of occupation contracts is likely to have a significant impact on lettings to the mentally vulnerable by charities. The fact that statutory protection will be available to all lettings falling within the scheme, whether they create a lease or a licence at land law, means that succession and transfer rights will be granted to all occupiers, and a sophisticated system is proposed to regulate these entitlements.<sup>35</sup> Similarly, the occupation contracts will attract all protective legislation currently applicable only to tenancies.<sup>36</sup>

The first major alteration is the increased security of tenure available under the Type I contract, which will govern the majority of long-term letting arrangements. Tenure is protected by altering the grounds on which a landlord may terminate the periodic arrangement.

#### ***Terminating the Type I contract--no mandatory grounds of possession***

Under the current assured tenancy scheme, charity landlords have the power to apply to terminate the tenancy on the mandatory ground of at least two months' rent arrears,<sup>37</sup> or on a notice-only basis of possession where the default assured shorthold tenancy agreement is used.<sup>38</sup> Provided that the relevant notices have been served (and the grounds proved), the court has no option but to grant the landlord possession to the premises, terminating the tenancy. Mandatory grounds of possession will no longer be available under the proposed Type I contract--termination will only be possible on one of two discretionary grounds, provided by compulsory minimum terms in the contract. The first is a general ground for breach of any of the terms or conditions in the contract,<sup>39</sup> the second on estate management grounds.<sup>40</sup> In stark contrast, a Type II contract would be capable **\*Conv. 214** of termination on mandatory grounds of possession; and the proposals retain the two grounds currently available under the assured tenancy regime.<sup>41</sup>

The proposal which is supposed to compensate landlords for losing the mandatory grounds of possession under the Type I contract involves a statutory structuring of judicial discretion when considering the grounds for possession.<sup>42</sup> In the landlord's favour, the court must consider the likely effect on the landlord's interest of making an order, as against not making the order sought. This should include their financial interests, but also any interest landlords may have in being able to meet housing needs or fulfil other housing factors.<sup>43</sup> This is an important issue in dealing with the mentally vulnerable, as it may be that it is in the best interests of the charity overall that a particular individual be re-housed, for example, where they no longer need the levels of support offered by the accommodation, or owing to anti-social behaviour there is a conflict of interest between housing one individual against housing several in a shared home. Equally, the court should consider the likely effect of a termination order on the home, family and private lives of the contractual occupier.<sup>44</sup>

Stating the factors which should influence the court's discretion in deciding an order for possession is

clearly an improvement on the current conflicting case law decisions, but it remains a complicated procedure to use, nor is it easy to predict the outcome as mandatory proceedings. The fact that a mentally vulnerable individual cannot simply be evicted from an agreement on notice-only grounds may complicate lettings for many charities, even if they do not realise that it might at this stage.

The omission of any mandatory ground for possession owing to serious rent arrears, for example, will be welcomed by many, particularly charities involved in managing housing and support services, rather than directly providing housing themselves. Rent arrears may be caused by administrative delays with the determination and/or payment of appropriate levels of housing benefit. Maladministration of housing benefit will no longer allow eviction without fault on the part of the occupier and, to that extent, is entirely welcome. Similarly, even where there are problems *\*Conv. 215* with an individual, many charities will not seek termination of the arrangement unless forced to do so. Charities, and charity management boards, concentrate on fulfilling their stated purposes.

Ironically, this means that charity landlords may not always act in their own best interests. Charities may choose what they perceive as the best form of letting for the mentally vulnerable individual they are seeking to house, without keeping a weathered eye on their own need to deal with any legal difficulties in evicting that person should the need arise. Hence, charities may decide to adopt a Type I contract, even where a Type II contract is available to them. Obligations on charity landlords under a Type I contract are increased from the current regime, and without any real compensation. In removing a simple and effective procedure to end an occupation agreement, should it be needed, the new proposals are essentially returning the regulation of social housing to the secure tenancy regime of the Housing Act 1985, albeit with some amendments of detail.

### ***The supported housing exception***

The major exception to the Type I regime proposed is where a relevant landlord is offering supported housing accommodation.<sup>45</sup> The Commission recognises that the definition of “relevant landlord” should include not only local authorities, registered social landlords and housing action trusts, but also charitable housing trusts which are not registered social landlords, and registered charities who provide supported housing.<sup>46</sup>

The current proposals create a two-stage exemption--lettings of less than four months will be lettings outside the statutory regime altogether,<sup>47</sup> lettings of over four months but less than *\*Conv. 216* two years in duration will be Type II contracts, allowing for more rapid eviction of the occupier if required.<sup>48</sup>

These exemptions may be of great value in housing the mentally vulnerable. The ability to let outside the scheme for assessment purposes, for example, will be important. There is evidence to suggest that many charities conduct their own assessments of an individual's needs rather than relying on a NHS statement. This allows them to provide or find accommodation for the individual which has an excellent chance of success. Similarly, the ability to use Type II contracts for longer lettings avoids any problems of terminating the agreement under the Type I scheme, allowing a charity to move someone on who no longer needs (or can pay for) support services, or who is otherwise deemed unsuitable for a more permanent occupation agreement.

One concern with the current proposals is the four-month ceiling imposed on lettings outside the scheme. The Commission admits that this is an arbitrary figure, and recommends that the Secretary of State be given power to amend the upper limit if necessary.<sup>49</sup> Given the nature of inter-agency working, and the fact that charities may have to work with many different funding and support bodies to co-ordinate housing for mentally vulnerable individuals, might not a limit of six months be more sensible? This too is an arbitrary figure, but it would reflect current practices within the Mental Health Act 1983 that recognises that six-month periods of care and treatment offer practitioners time to act, if not to solve problems.

There is reason to question the policy behind the supported housing proposals. There is a clear belief that supported housing is not necessarily in the best interests of the mentally vulnerable, in the quest towards integrated and independent living within the community.<sup>50</sup> Similarly, despite the importance of this exemption, it is clear that there is a paucity of funding and adequate supported housing stock available to house individuals, which means that even where supported housing is necessary, it is not always readily available.<sup>51</sup> Many of the requirements identified by the Commission as necessary to facilitate supported housing, are necessary for dealing with mentally vulnerable individuals, irrespective of the nature of housing that the charity is able to provide. It is strange that no restrictions are imposed by the *\*Conv. 217* current statutory regimes on letting under the Housing Act 1988.<sup>52</sup>

Charities will have to consider carefully the form of letting they adopt, and whether, if appropriate, they wish to let within the supported housing exceptions or to adopt the general contractual agreements.

### The impact of the consumer approach

The much trumpeted consumer contract approach has important implications for charities dealing with the mentally vulnerable. Occupation agreements will now be regulated by the Act, consumer legislation and the general law of contract as opposed to concepts of property law supplemented by specific legislation. It is important to recognise that while the proposals widen the application of existing principles of consumer legislation to renting homes,<sup>53</sup> they do not address significant underlying issues such as the inequality of bargaining power that exists in the rental market.<sup>54</sup>

However, of more significance to charities is that any letting arrangements under the statutory scheme will be governed by a contract between the parties. Lettings that are non-contractual, lacking either the necessary intention to create legal relations or appropriate consideration, will fall outside the scheme.<sup>55</sup>

In an attempt to standardise the structure and content of the contracts, certain categories of term must appear in every written agreement.<sup>56</sup> Briefly stated, these are key terms (terms which are essential, but the contents of which cannot be prescribed in advance, such as the name of the parties and the description of the property let), compulsory minimum terms (terms which must be included in the agreement, which cover security of tenure and possession, matters relating to the operation of the **\*Conv. 218** agreement and terms which mimic those currently implied by statute or common law) and special terms (terms which reflect social policy concerns, such as anti-social behaviour by the occupier). In addition, agreements should include a fourth category, "other" terms, which are made up of default terms (terms not already covered in the agreement, but which are nonetheless essential for the creation of a working occupation agreement, such as obligations to pay rent), substitute terms (terms negotiated between the parties which replace the default terms) and finally additional terms (which are issues agreed between the parties not covered by any other terms of the agreement). All of these terms in the agreement must be UTCCR compliant by being transparent and fair, with the exception of the key terms.<sup>57</sup> Statutory model agreements will be provided alongside the Act, and the model terms contained within them will automatically be transparent and fair.

Charities providing housing with or without support to mentally vulnerable individuals may, at times, need the flexibility of varying an occupation contract. Currently, under a tenancy agreement or licence, the parties are free to vary most terms of the occupation agreement,<sup>58</sup> subject to the guidance of the OFT in relation to particular clauses<sup>59</sup> or statutory intervention.<sup>60</sup> The new system will arguably be less straightforward and less flexible. It proposes that where a term is capable of being varied,<sup>61</sup> it may only be varied in favour of the occupier. This is a necessary consequence of the extension of the fairness test in UTCCR to most terms in the contract. The only exception to this is where the variation relates to the payment of rent.

For charities housing the mentally vulnerable under the Type I contract, landlords will have a unilateral power to vary the rent upwards annually, and a power to vary any of the other permitted terms by agreement with the occupier or following a prescribed period of consultation with the occupier.<sup>62</sup> Where a charity is permitted to use a Type II contract, if the contract is for a periodic **\*Conv. 219** term, the same powers are extended to vary relevant terms, with the exception that these powers will all be unilateral unless the charity landlord inserts an additional term prescribing consultation.<sup>63</sup> If the mentally vulnerable individual is housed under a fixed-term Type II contract, the default position is that the agreement is not capable of being varied, unless an additional fair and transparent term is included.

While it will doubtless be true that the system of variation will prove less problematic in practice than in theory, charity (and other) landlords may well ask what they will gain for the loss of freedom to alter all the terms of the agreement in line with carrying out their charitable purposes. There may well be situations where the variation of a default term of a statutory agreement may be necessary to follow a change in funding, or to alter the use of the premises to meet a mentally vulnerable person's needs. This could be problematic where the proposed variation could restrict the rights of occupation enjoyed by the individual, as it may not be classed as being in favour of the occupier.

The Commission's proposals on terms and agreements suggest at best a steep learning curve for charities and their professional advisors in using the new occupation contracts. The division and

nature of terms, while precise in theory, may be less so in practice. Drafting model terms on the basis suggested by the Commission is hugely ambitious, and in reality the scope of any model terms might be more limited than is expected.

### **Anti-social behaviour**

One concrete example of the potential effects of the new statutory scheme on housing mentally vulnerable individuals is that of anti-social behaviour emanating both from the individual concerned and/or the wider community.

#### ***The management of difficult behaviour***

Owing to the behavioural traits which are sometimes exhibited by mentally vulnerable individuals, such as auditory hallucinations and delusional beliefs, the issue of anti-social behaviour is frequently raised in connection with housing provision.<sup>64</sup> The **\*Conv. 220** Law Commission<sup>65</sup> has recognised the increasing difficulties associated with occupiers, or members of their households, who behave in an anti-social manner towards their neighbours. The impact of such behaviour is often significant and should not be underestimated. In addition, it is recognised that where antisocial behaviour is allowed to continue, the social fabric of a neighbourhood frequently deteriorates as fewer people wish to live in the vicinity thereby leading to the corrosion of the local community. However, it must not be assumed that anti-social behaviour always emanates from the mentally vulnerable individual alone; his vulnerability may equally cause him to be the victim of abuse.<sup>66</sup>

Anti-social behaviour may be interpreted in a variety of ways. Such behaviour covers:

“a disparate and broad range of behaviour ranging from the relatively mild, though annoying, tensions that can arise between neighbours to serious, violent and intimidatory behaviour, which makes the lives of those affected a complete misery.”<sup>67</sup>

Certain forms of anti-social behaviour, such as, noise nuisance, frequently stem from individuals being inconsiderate to the needs of others, while, violent and abusive behaviour is more often directed at specifically targeted individuals.

Effective action against such behaviour is essential. Currently, where inappropriate behaviour is uncovered, Pt V of the Housing Act 1996 provides a number of mechanisms to combat both the behaviour and its repercussions. Local authority landlords can let accommodation on introductory tenancies<sup>68</sup>; discretionary grounds for possession are available when nuisance or annoyance to neighbours materialise<sup>69</sup>; where possession proceedings are undertaken on grounds of nuisance or annoyance, expedited notice for possession is available; a new power of arrest exists for certain injunctions against breaches of a nuisance clause in an occupier's agreement<sup>70</sup>; and local authorities can restrain people **\*Conv. 221** other than occupiers from anti-social behaviour.<sup>71</sup> Provisions within the Noise Act 1996, the Protection from Harassment Act 1997 and the Crime and Disorder Act 1998 also offer mechanisms against different forms of anti-social behaviour.<sup>72</sup> In addition, under the Homelessness Act 2002 a local authority will potentially be liable to house a person who has been forced to leave their home because of anti-social behaviour by others. Therefore, a mentally vulnerable person who has been the victim of abuse from neighbours may still have a right to housing despite his decision to leave the accommodation, which has been made available for his use thereby counteracting the current legal difficulties associated with such individuals often being classed as intentionally homeless. Likewise, the Homelessness Act also states that any housing applicants, or members of their household, who are guilty of anti-social behaviour will not be treated as having a priority need to accommodation. Such individuals will not have a right to permanent or even temporary accommodation but will merely be offered assistance in locating accommodation.

The Commission has recommended that a general “target” duty should be introduced, which would impose upon local authority landlords a duty to take into account in the management of their rented accommodation the need to deal with antisocial behaviour on behalf of their occupiers. This duty would apply to both local authorities and registered social landlords. It has been suggested that one way to guarantee a right to live in accommodation free from anti-social behaviour would be to require social landlords to include in their Type I and Type II contracts, a term specifying that the landlord should take all reasonable steps to ensure that the occupier is able to live in the premises free of anti-social behaviour by the occupants of other premises owned by the landlord, or visitors of those properties. The term would also prohibit use of the property for criminal purposes, which would potentially combat difficulties associated with drug dealers targeting premises used by the mentally

vulnerable. The term may be enforced by possession proceedings or by injunction. Where an injunction is breached, the landlord will be able to seek a possession order if the court deems possession to be the next reasonable step. In addition, under the Contracts (Rights of Third Parties) Act 1999, express provision could be made *\*Conv. 222* within the agreement for members of the occupier's household, other than the occupier, to seek a remedy for breach of the provision. Additional powers for social landlords have been proposed by the Law Commission in the form of a free-standing injunction against anti-social behaviour. In the event that an occupier of property uses or threatens to use violence or where there is a risk of significant harm to a person in the locality of the property, the social landlord will be able to obtain an order excluding an occupier from the property. Where there is a need, a power of arrest may also be attached to the order.

Where serious housing-related anti-social behaviour occurs, the Commission proposes that there should be a single concept of serious housing-related anti-social behaviour which would trigger several powers. Serious housing related anti-social behaviour has provisionally been defined as:

“behaviour where the occupier or a person residing in or visiting the home has acted in a manner that caused or was likely to cause serious harm, harassment, alarm or distress to others where the behaviour is either linked to the occupation of the home and/or occurs in the locality of the home.”<sup>73</sup>

Where an individual resides under a Type II contract, a new summary eviction procedure is proposed. Where an eviction decision was found to be unreasonable or unlawful, the occupier would have a right to be re-housed and be awarded compensatory damages. Furthermore, a social landlord who lets property to an occupier on a Type II arrangement will be able to extend the initial probationary period from the normal period of 12 months to 18 months where the behaviour of the occupier warrants such an extension. This is particularly useful in light of the needs often exhibited by mentally vulnerable occupiers as further risk assessments may need to be carried out and charities will not be tied into permanent letting arrangements.

Where an individual resides under a Type I contract, anti-social behaviour will be dealt with by virtue of an accelerated notice of possession. Where injunctions to prevent anti-social behaviour by occupiers are obtained by social landlords, and are breached, a new power of arrest would be available as would eviction without the need for free-standing possession proceedings. A Type I contract may be demoted to a Type II contract upon the request of the landlord as an alternative to eviction. Demotion rather than eviction will only be considered by the court where the social landlord produces a plan of support. The demotion will last up to *\*Conv. 223* a year and after this time, the occupier will either be promoted back to a Type I contract with all the incumbent advantages, or another agreement will be made. It is anticipated that charitable landlords whose objective is to provide secure, long-term accommodation may favour demotion to a Type II contract as this will offer greater flexibility and will not jeopardise the aims of the charity in question.

The Commission's proposals surrounding the difficulty of antisocial behaviour are extensive yet only meet the problem of occupier-related anti-social behaviour. Although the Homelessness Act 2002 offers some scope to aid a mentally vulnerable occupier who has been forced to leave accommodation following abuse from the wider community, the Commission does little more to alleviate these obvious difficulties with the result that community hostility to supported housing is largely ignored.

### **The influence of factors external to the occupation contracts**

The effect of the proposals has been considered in relation to the way in which the new contractual arrangements work internally. There are issues outside the proposed statutory regime which are worthy of consideration, as they may affect the operation of the rental sector as a whole.

#### ***Continuing importance of lease/licence distinction***

There will be much agreement for those charged with housing the mentally vulnerable that inclusion within the scheme of letting need not be determined by the lease/licence distinction, and should be extended to all contractual arrangements of letting. Nevertheless, it is clear that the distinction between a lease and a licence will not completely disappear and will remain important in relation to the enforceability of rights by and against third parties to the occupation contracts.<sup>74</sup>

Charities housing the mentally vulnerable may need to transfer freeholds or superior leaseholds in a number of situations--to follow funding, to manage existing or introduce new stock (especially where a



charity plays a management role in the housing provision) or on merger of charitable bodies. The enforceability of the occupation arrangements they have entered into will be an issue in any of these situations.

**\*Conv. 224** The effect of the occupation contracts on third parties was considered in detail by the Commission.<sup>75</sup> The complete abolition of the lease/licence distinction was considered, but rejected as the Commission concluded that leaving the lease/licence distinction in place in relation to third-party rights would cause few problems in practice. Where licences were granted as a result of occupation contracts in land law, the Commission proposed that these interests could be made binding in a number of ways. One approach suggested was the inclusion of a default contractual term that an assignee of the reversion would guarantee that he would enter into a new occupation agreement with the occupier. It was recognised that this would only be a partial solution, as breach of this obligation would leave the licensee with no home, and redress only in damages against the original landlord for breach of covenant. The concerns caused by this apparent injustice would be met practically, as “[a] social landlord will normally be selling to an organisation with similar objectives who would in any event issue new licences to existing licensees.”<sup>76</sup>

Whatever the merits of this approach, the Commission failed to consider one major aspect of retaining the lease/licence distinction. They did not address the impact the proposed model agreements and terms would have on the *creation* of leases and licences. The wording of the model statutory agreements will, in most cases, be determinative of whether the agreement is a lease or a licence at land law. If the terms are drafted so as to negative a finding that the occupier has exclusive possession, then the arrangement will be a licence. This is emphasised by the fact that parties can only vary the terms or substitute additional terms where they are more favourable to a tenant. The model Type II contract for supported housing is likely to be a licence, for example, as it contains a mobility clause.<sup>77</sup> This is a very definite weakness in the current thinking, and may lead to more licences being created than the Commission itself envisaged.

Ironically, if the wording of the agreements leads to tenancies being created at land law, this also creates problems. The occupation contracts, while needing to be reduced to writing, do not need to be created by deed, unlike express leasehold tenancies.<sup>78</sup> **\*Conv. 225** The Law Commission considers that want of a deed will defeat the creation of a tenancy, as the written agreement will either result in an implied periodic tenancy, which is protected and need not be registered under the Land Registration Act 2002, or, where the principles of implied periodic tenancy do not apply, it could be protected as an equitable lease under *Walsh v Lonsdale*<sup>79</sup> as an overriding interest, due to actual occupation.<sup>80</sup> The irony is that these suggestions make a mockery of the fact that this would sanction the informal creation of rights, which bind outside the register; in direct conflict with the Commission's reasons for refusing to alter the existing principles of land registration to abolish the lease/licence distinction completely.<sup>81</sup>

The current proposals on enforceability of third-party rights would create an untenable halfway house situation in the lease/licence distinction, given that the Commission has failed to adequately consider the impact of their consumer contract approach on the creation of leases or licences in land law.

### ***Lettings outside the contracts--object of charity***

The current lease/licence distinction may have an even greater impact than the Commission has envisaged. The foundation of the new statutory scheme is the occupation contract, so if a mentally vulnerable individual occupies accommodation under a non-contractual licence, they would fall outside the scheme.<sup>82</sup>

The first hurdle is consideration, which is needed in “the common law sense”<sup>83</sup> to transform an agreement into a contract within the proposed statutory regime. The payment of housing benefit, which would be usual in such situations, or any other payment as compensation for occupation of the premises, would, it is suggested, fall within the meaning of valid consideration.<sup>84</sup> Therefore, a written agreement would be transformed into a contract, provided there was the necessary intention to create legal relations between the parties.

The major situation in which there may be no finding of intention, is where the letting is to the mentally vulnerable **\*Conv. 226** individual as an object of charity. In such circumstances, there is no intention to create legal relations and the only basis for the relationship between the parties is one of beneficence.

It is difficult to determine when a letting will be as an object of charity. Under the current system, the question arises in determining whether a letting arrangement creates a lease or a licence. The leading authority in this area is *Gray v Taylor*,<sup>85</sup> in which it was held that residents in an almshouse occupied as beneficiaries rather than as tenants, which invalidated a claim that the resident held under an assured tenancy.

Arguably, this case is an example of a benignant approach to the question of whether a charity grants a lease or a licence, rather than an illustration of the object of charity approach at work. Nevertheless, the Commission suggested, on the basis of the reasoning in this case, that lettings by almshouses would be exempt from the contractual scheme.<sup>86</sup>

The reasoning in *Gray v Taylor* itself, and the Commission's approach to it, are open to criticism. The finding that status as a beneficiary of a charity and holding under a contractual (or other) agreement are mutually exclusive concepts is questionable.<sup>87</sup> Indeed, while the case considered whether the arrangement between the almshouse charity and the resident created a lease or a licence, it is perfectly possible to consider the result of what was granted as a contractual licence between the parties rather than a simple permission. Sir John Vinelott did not consider that the parties lacked intention to create legal relations due to the occupation arrangement being on the footing as a beneficiary of the charity, simply that occupation *qua* beneficiary did not mean occupation *qua* tenant. If so, then a letting to a beneficiary could fall within the statutory scheme.

Where does that leave lettings to the mentally vulnerable? It creates a possibility, not apparently envisaged by the Law Commission, in which a letting might be outside the statutory occupation contracts. It may be that this is more likely to happen by accident than design, although if a charity adopts the position that it is letting to an individual strictly as a beneficiary, on current case law, and the Commission's understanding of it, this might allow the arrangement to exist outside the statutory regime. It is highly unlikely that this was the Commission's intention.

### **\*Conv. 227 Conclusions**

The proposed statutory scheme for renting homes has many significant benefits for charities and others involved in housing the mentally vulnerable. The replacement of the current system of letting by a comprehensive and self-contained system of contractual lettings is to be welcomed, particularly in relation to the extra powers available, where necessary, to deal with antisocial behaviour by occupiers.

Nevertheless, there are a number of weaknesses. One criticism that can be made of the proposed new scheme is the insistence with the framework to make all letting arrangements fall within one of the two proposed contractual occupation arrangements. This is a laudable aim, but groups like the mentally vulnerable, who may have definite and specific needs above and beyond the ordinary contractual occupier, demonstrate the weakness of this all-inclusive approach. The advantages enjoyed by lettings falling within the exemptions of the supported housing provisions, most of which are key to successful management of occupation by the mentally vulnerable irrespective of whether support can be offered, evidence the comparative weaknesses of the prescriptive regime. In a similar vein, the increased security of tenure in the long term, Type I contract, protected by a loss of mandatory grounds of possession, may not inure to the benefit of housing providers dealing with the mentally vulnerable.

The sheer scope of the reforms and the task the Commission sets itself means that some important questions remain unanswered, and some potential loopholes have been overlooked. The impact of the terms of the statutory model contracts on the lease/licence distinction and the possibility of circumventing the whole scheme through granting an occupational arrangement to an object of charity raise technical concerns with the proposed scheme.

These observations of the proposed regime need to be tempered with the very real possibility that they may be answered in the production of a draft Bill. The need to reduce the proposals to a legislative format might lead to a re-evaluation of the scope of some of the provisions, as they might prove impossible to draft in statutory language. At worst, potential concerns over the nature and form of statutory terms will be answered, either positively by negating any concern, or negatively, by confirming it.

Whatever the merits of the proposed reforms to renting homes, a number of significant underlying legal issues have not been addressed which are of major concern in letting to the mentally **\*Conv.**

**228** vulnerable. Questions of capacity of a mentally vulnerable individual as well as problems caused by the delay and maladministration of housing benefit, affect the everyday operation of letting arrangements by and to this group. Likewise, failure to fully recognise the impact of community hostility and uncaring attitudes among neighbourhoods where the mentally vulnerable reside, make it difficult to escape the feeling that landlords in this area will be forced to adapt to yet another scheme, which does not confer any tangible benefits on the operation of their housing purposes.

Clearly, there is an interesting period ahead for charitable and other housing providers dealing with the mentally vulnerable. There are a number of issues and concerns that must be addressed by the providers themselves and their legal advisors. The new scheme will introduce a steep learning curve, in which the importance of drafting terms will have even more significance than under the current regime, due to the almost universal application of the UTCCR principles of fairness to terms in the agreement. However, it may prove to be as technical and confusing, and as full of potential pitfalls as the system it seeks to replace. Only time will tell.

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1. Law Com No.284, *Renting Homes* (November, 2003) (hereafter referred to as "the Report").
  2. Law Commission, *Renting Homes 1: Status and Security*, Consultation Paper No.162 (April, 2002) (hereafter referred to as "Consultation Paper 162") and *Renting Homes 2: Co-occupation, Transfer and Succession*, Consultation Paper No.168 (September, 2002) (hereafter referred to as "Consultation Paper 168").
  3. A Final Report is expected to be published in Spring 2005. At the time of writing, no draft Bill has been produced.
  4. N. Glover-Thomas, "Making Decisions on Behalf of Mentally Incapacitated Adults" (2000) 10 *Reviews in Clinical Gerontology* 375.
  5. B. Dimond, *Legal Aspects of Care in the Community* (MacMillan, London, 1997), pp.530-541.
  6. N. Glover-Thomas and W. Barr, "Housing An Individual: Property Problems with the Mentally Vulnerable" in Hudson (ed.), *New Perspectives on Property Law, Human Rights and the Home* (Cavendish Publishing Ltd, 2003).
  7. For a detailed consideration of the Community Care Policy, see N. Glover-Thomas, *Reconstructing Mental Health Law and Policy* (Butterworths, London, 2002).
  8. Mainstream housing, for example, does not offer the additional support requirements needed by some mentally vulnerable individuals, and accommodation that has been specifically built or adapted to "special needs" is scarce. Where mainstream housing is suitable, lack of rent control following the Housing Act 1988 might render housing unavailable to relevant individuals, see further *ibid.* , pp.186-188.
  9. See, for example, the impact of the creation of the NHS Management Executive as governing body of health service provision under the National Health Service and Community Care Act 1990, *ibid.* , p.184.
  10. Homelessness is a major issue. Not only does homelessness itself trigger new or exacerbate existing mental health problems, but problems with a satisfactory legal definition of "homelessness" and a conflict between the priority need (s.189) and intentional homelessness (s.191) provisions under the Housing Act 1996 (unresolved by the Homelessness Act 2002) contribute to a situation where some mentally vulnerable individuals slip through the current statutory duties to be housed, *ibid.* , pp.188-196. See also, N. Glover, "Mental Health and Housing: A Crisis on the Street?" (1999) 21 *J.S.W.F.L.* 327.
  11. See, for example, Department of Health, *The NHS Plan--A Plan for Investment. A Plan for Reform*, Cm.4818-I (2000).
  12. Glover-Thomas and Barr, n.6 above, p.204.
  13. The organisations, formerly referred to as housing associations, are registered under the Housing Act 1996 with the Housing Corporation, the government agency responsible for funding and regulating social housing outside local government.
  14. There may also be a number of existing arrangements, regulated under the old secure tenancy regime of the Housing Act 1980 or the Rent Acts, but these are no longer capable of being created.
  15. This is a popular model in special needs accommodation, as it helps bridge a gap in Housing Corporation funding, see Glover-Thomas and Barr, n.6 above, p.198.
  16. Above n.10.
  17. One of the major sources of funding, *Supporting People*, is expressly designed as a working partnership of local government, service users and support agencies. See Office of Deputy Prime Minister's website at [www.spkweb.org.uk](http://www.spkweb.org.uk).
  18. In the past, charitable registered social landlords would have had to grant secure tenancies under the Housing Act 1985, or rent-protected tenancies under the Rent Acts. For a discussion of the current statutory regulation of housing in the rented sector, and a summary of the piecemeal nature of its development, see Consultation Paper 162, Pt II.
  19. In practice, no security of tenure is available beyond any fixed contractual period agreed by the landlord and tenant, see Housing Act 1988, Pt II, Ch.2: ss.19A-23.
  20. *ibid.* , s.19A and Sch.2A.
  21. *cf.* Carr, "The Sorting of Forks from the Spades: An Unnecessary Distraction in Housing Law?" in Cowan (ed.), *Housing: Participation and Exclusion* (1988), p.107, which argues that the lease/licence distinction creates a great deal of confusion to the detriment of vulnerable groups.
  22. It is this distinction which makes the licence attractive despite the flexibility afforded by the assured shorthold tenancy, which itself can be ended on a notice only ground of possession. In many cases, however, the assured shorthold tenancy will be the preferred letting arrangement, see Morgan, "The Casualisation of Housing" (1996) 18 *J.S.W.F.L.* 445.
  23. Protection From Eviction Act 1977, s.2B.

24. *Street v Mountford* [1985] A.C. 809. For charities, this is particularly unfortunate, as the evasion of prevailing legislation for commercial gain is rarely a motive behind a charity's choice to grant a licence, see further Barr, "Charitable Lettings and their Legal Pitfalls" in Cooke (ed.), *Modern Studies In Property Law, Vol.1: Property 2000* (Hart Publishing Ltd, 2001).
25. [1999] 3 W.L.R. 150.
26. The decision in *Bruton* blurs the distinction between a lease and a licence generally, and has attracted sharp academic criticism in this respect, see, for example Bright, "Leases, Exclusive Possession, and Estates" (2000) 116 L.Q.R. 7
27. Above n.18.
28. See Barr and Glover-Thomas, *Housing The Mentally Vulnerable: The Role of Charities* (2005, Charity Law Unit, University of Liverpool).
29. The occupation arrangement can be validly created orally, although it must be then evidenced in writing. This is designed to prevent avoidance of the statutory scheme: the Report, Pt VIII.
30. The principal sanction is to allow limited relief from liability for rent while the written agreement remains outstanding, *ibid.* , paras 7.37-7.53.
31. *ibid.* , paras 3.8 and 3.9.
32. The existing six-month moratorium on this ground of possession under the assured tenancy scheme would be removed, *ibid.* , paras 6.3-6.16.
33. *ibid.* , paras 6.49-6.62.
34. For an excellent and succinct summary of the proposals, see Partington, "Renting Homes" [2004] J.H.L. 9.
35. The Report, Pts XIII and XIV.
36. For example, Landlord and Tenant Act 1985, s.11, will now apply by implication to all lettings within the scheme of a period of less than seven years' duration.
37. Housing Act 1988, Sch.2.
38. The interface of the Disability Discrimination Act 1995 and *Manchester City Council v Romano* [2004] EWCA Civ 834 may have complicated this position--see Murdoch [2004] E.G. 141.
39. Occupiers would be protected from terms leading to unreasonable grounds for possession by the need for any term to pass the fairness and transparency tests under UTCCR, the Report, paras 9.26-9.29.
40. This ground will be based on the existing provisions of the Housing Act 1985, covering the need for "suitable alternative accommodation". These provisions are seen as a good (if not universally popular) balance between social landlords' need for efficient use of stock against the need to provide security and respect for home and family life, *ibid.* , paras 9.30-9.33.
41. *ibid.* , paras 9.45-9.59.
42. The combined aim of discretionary grounds for possession, coupled with structured discretion, is to ensure due process in terminating an agreement, *ibid.* , para.9.83.
43. Other interested parties are also to be taken into account--the landlord's other occupiers, people on any waiting list for the landlord's properties, other neighbours who are not renting from the landlord; and the local community.
44. Other relevant factors are listed in the Report, paras 9.82-9.90.
45. The definition proposed is where a landlord "is contractually obliged to provide support services and/or the purpose for which the accommodation is provided is the provision of support" (the Report, para.16.5). "Support services" include the provision of advice, guidance or counselling which relates to either physical or mental health.
46. "It is important to include both charitable housing trusts and charities who provide supported housing since they provide a range of valuable services to vulnerable people, while being subject to an appropriate regulation by the Charity Commission" (the Report, para.16.7). Many charities housing the mentally vulnerable will fall within this category, either as direct-supported housing providers or as managers of overall housing services. Charities acting as conduits to control and managing elements of funding may well be a popular model in supported housing provision, given the direct costs of support provision. It is possible, therefore, that a number of charities will fall through a gap in the proposed definition, as they are not acting directly as landlords.
47. The Report, paras 16.9 and 16.10. Technically, these short-term lettings cover many aspects of housing, defined by the Commission as "direct access accommodation" (which covers premises available to any member of a scheme, which is let on a day to day basis), "temporary supported housing accommodation" and, of particular relevance in the present context, accommodation provided for the purposes of assessment.
48. The Report, para.16.22.
49. *ibid.* , para.16.13.
50. Glover-Thomas and Barr, n.6 above, p.186.
51. *ibid.*
52. The Report lists a number of further exceptions to the statutory scheme, which cover probationary agreements due to known problems with an individual (for example, behaviour problems), or where the charity is discharging a duty to house a homeless individual, following a decision that full housing duties are owed to the applicant (Housing Act 1996, s.193). In both cases, security of tenure would make the temporary housing role too difficult to discharge under the scheme.
53. Office of Fair Trading, *Guidance on Unfair Terms in Tenancy Agreements* (OFT356, November 2001).
54. Similarly, no steps are made to improve the security of tenure for the majority of private sector rentals, which demonstrates the limits of consumer thinking, see Ball, "Renting Homes: Status and Security in the UK and France-- A Comparison in the Light of the Law Commission's Proposals" [2003] Conv. 38.
55. This is considered below at n.223.
56. The Report, Pt IV.
57. *ibid.* , paras 8.18-8.20.

58. This freedom may be restricted by the terms of the contract.
59. OFT, n.61 above, Groups 10-12. Generally, this relates to situations where a variation clause purports to give the landlord a unilateral right to vary terms.
60. Rent variations under an assured tenancy, for example, are limited to annual rent increases, Housing Act 1988, s.13.
61. The property itself (a key term) is incapable of variation; the other key terms may be varied according to specific procedures. Special terms can only be varied by legislative amendment. Compulsory minimum terms may be altered by the Secretary of State, or by the parties. Default and other terms of the agreement can only be varied if the contract provides a valid variation clause (from either the statutory model or as a fair and transparent substitute term), the Report, paras 8.89-8.98.
62. *ibid.*, paras 8.102-8.108.
63. There is also a prescribed notice procedure for the variation, *ibid.*, paras 8.112-8.120.
64. Cabinet Office Social Exclusion Unit, National Strategy for Neighbourhood Renewal, *Report of the Policy Action Team 8: Anti-social Behaviour* (March 2000); National Strategy for Neighbourhood Renewal, *Report of the Policy Action Team 7: Unpopular Housing* (October 1999).
65. The Report, Pt XV.
66. Preliminary findings from work carried out under an ESRC funded project, W. Barr and N. Glover-Thomas, *Housing The Mentally Vulnerable: The Role of Charities* (RES-000-22-0286), would suggest that anti-social behaviour directed towards the mentally vulnerable and facilities for the mentally vulnerable is a problematic aspect to mental health provision in the community. It has also been indicated that many charitable organisations that are involved in the provision of housing for the mentally vulnerable strive to house such people irrespective of their problems. In such circumstances, eviction is regarded as a failing within the organisation and therefore, efforts are made to persuade, instruct and offer incentives to occupiers not to act in an anti-social manner.
67. *ibid.*, p.233.
68. Housing Act 1996, s.124.
69. *ibid.*, ss.144 and 148.
70. *ibid.*, s.153.
71. *ibid.*, s.152.
72. See the Anti-Social Behaviour Act 2003. Under the Crime and Disorder Act 1998, s.6 also imposes a duty on local authorities together with the police, health authorities and probation services to produce and implement a local strategy to reduce crime and disorder.
73. Consultation Paper 162, Pt XIII, para.13.40.
74. The Report, para.6.20.
75. Consultation Paper 168, Pt VIII.
76. *ibid.* para.8.32. It is equally possible that charities may not consider the issue and treat the agreements as continuing, which might cause problems later, where, for example, a rationalisation of housing stock is required.
77. See *Westminster CC v Clarke* [1992] 2 A.C. 288.
78. Law of Property Act 1925, s.52(1)(b).
79. (1882) 21 Ch. D. 9.
80. Land Registration Act 2002, Sch.3, Para.2.
81. Above n.75.
82. Consultation Paper 162, para.9.41: "Arrangements that would currently be regarded as non-contractual licences would fall outside our scheme, because of the lack of contract, for instance, a permission to occupy granted as an act of friendship."
83. *ibid.*, para.6.31.
84. This may not be so with lettings by almshouses. Here, the question of "rent" was explained as an historical accident of housing benefit, rather than as a requirement that the relationship be granted, see *Gray v Taylor* [1998] 4 All E.R. 47.
85. [1998] 4 All E.R. 47.
86. The Report, para.6.25.
87. See, further, Barr, *Charitable Lettings and Their Legal Pitfalls*, n.24 above, pp.247-249.