

Housing Rights

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Policy Response

Report of Access to Justice (2)

February 2016

when everyone has a home

1.0 Introduction

Housing Rights was established in 1964 and is the leading provider of independent specialist housing advice services in Northern Ireland. It works to achieve positive change by protecting and promoting the rights of people who are in housing need and our policy work is based on the experience of our clients. Our services are delivered throughout NI and focus on the key areas of preventing homelessness, accessing accommodation, tackling affordability and poor housing conditions.

Housing Rights welcomes the opportunity to comment on the Report of Access to Justice (2). This response draws from many aspects of our original consultation response of 2015.¹

Overall, Housing Rights would like to commend the report on its positive message of retaining funding for housing cases and its particular reference to protecting people's homes. Nonetheless, Housing Rights does have a general concern that a significant group of people have been overlooked in the report. There is much emphasis in the report about preventing the loss of a person's home; and rightly so, as prevention of homelessness is a core area of work for Housing Rights. But, as discussed in its original consultation response, Housing Rights believes that the definition of homelessness should be considered in as wide a context as possible.

In accordance with the Housing (NI) Order 1988 (the 1988 Order), homelessness can cover an extensive range of situations including possession proceedings and notice to quit. It can also include someone trying to access suitable temporary accommodation, or someone looking to be rehoused because they can't manage in their home or can no longer afford their home. Housing Rights believes that the narrow interpretation of homelessness contained in the report does not reflect the statutory definition.

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http://www.housingrights.org.uk/sites/default/files/policydocs/Response%20to%20Scope%20of%20Civil%20Legal%20Aid_290115.pdf

Summary

In response to the report, Housing Rights would like to highlight the following:

- Homelessness should be given a broad definition to include not only those people who are at risk of losing a home that they already have but also those people who are roofless, sofa surfers or looking for suitable temporary accommodation; as reflected in the 1988 Order. Housing Rights believes that actions taken or defended by persons affected by the range of homelessness situations should have access to legal aid funding.
- The Department should consider alternatives to court action, encompassing all of the different alternative dispute resolution mechanisms which exist.
- Particular reference should be made to private rented tenants who currently have very little recourse other than the courts. The size of the private rented sector has grown significantly over the last number of years, with 21% of households now living in the sector.² However, the judicial system has not kept pace with the private rented sector to offer alternative means of redress.
- Whilst self-help tools can be useful, they can never entirely replace the provision of quality independent advice in person.

2.0 Scope of civil legal aid

Access to quality timely advice can be crucial to resolving disputes at an early stage. Housing Rights is encouraged with the recommendation that housing cases should remain within the scope of civil legal aid. As mentioned earlier, the organisation would like to stress the importance of applying a wide definition to homelessness, as under the 1988 Order; rather than solely when a person is at risk of losing the home they already have.

² <https://www.dsdni.gov.uk/publications/northern-ireland-housing-statistics-2014-15>

One of the most common issues dealt with by Housing Rights is the availability of suitable temporary accommodation. Depending on the circumstances, these cases very often entail the provision of legal advice and representation from the organisation's solicitors and the commencement of legal proceedings by way of appeal to the county court under the Housing (Amendment) Act (NI) 2010. These cases are as important as those cases where a client has a roof over their head.

Housing Rights would, therefore, ask the Department to reconsider the definition of homelessness which has been proposed i.e. *“proceedings which concern possession of the client's home, the client's legal status in the home or the obligations of a landlord or other person to keep the client's home in good repair and allow quiet enjoyment of the property.”* It recommends the adoption of a wider definition to include persons who are already without a home in line with the statutory definition provided in the 1988 Order.

The proposals set out that cases of debt should be removed from the scope of civil legal aid. Housing Rights' would like to point out that many cases of admitted debt involving rent or mortgage arrears involve potential defenses to possession proceedings, such as undue influence, mis-selling and/or human rights defenses. Additionally Housing Rights deals with many cases (often initially via Housing Possession Court Duty Scheme) where the legal action is not simply a claim for recovery of an “admitted debt” but also a claim for repossession of a home. Housing Rights would be very concerned if the consequences of implementing this proposed change would mean that legal aid would no longer be available to provide assistance in such cases.

Housing Rights would also like to raise some concerns about the proposed exclusion of housing cases involving ‘squatters’. It would like clarification on what the report means by the term squatter. There are people living in social rented accommodation who may be regarded as illegal occupants but who have been given ‘use and occupation’ in the property by the social landlord. These people continue to pay rent, but are denied many of the rights afforded to tenants e.g. right to repair. It is important that people with use and occupation are not also excluded from having access to legal aid if they have a genuine cause of action against the social landlord. Therefore, it is important that such

cases are not dismissed outright purely because the person may be regarded as an illegal occupant by their landlord. Their case should be considered on merit and dependent on the individual circumstances.

3.0 Alternatives to court action

3.1 Dispute resolution

Housing Rights welcomes the report's recommendation that alternative dispute resolution mechanisms should be more widely available. It agrees with the general principle set out in the report that one of the responsibilities of government is to *“ensure that the public, especially the poorest and most vulnerable members of society, have reasonable access to the full range of dispute resolution systems...”*

Housing Rights accepts that court action should only ever be initiated as a last resort after all other options have been fully explored. Its advisers already do this on a daily basis by carrying out negotiations to help reduce the likelihood of their clients having to resort to court. So, it knows full well the benefits of dispute resolution.

However, the current situation in NI means that for many people with housing issues their only recourse is the court system. This is especially the case for private rented tenants and owner occupiers. Having to resort to court in cases where an alternative remedy could suffice means that the courts' resources are not being put to good use and neither is the public purse. Furthermore, the prospect of going to court is extremely stressful for many clients, especially those who may be vulnerable in some way.

Housing Rights would therefore ask the Department to explore the range of alternative dispute resolutions methods that are available, including:

- Mediation
- Negotiation
- Conciliation

- Arbitration.

Alternative methods of dispute resolution would be particularly beneficial for tenants living in the private rented sector. Private tenants are at a disadvantage compared to social rented tenants as, in most cases, the only way for them to resolve a dispute with their landlord is to take court action.

Private rented tenant/landlord issues are common enquiries to the Housing Rights advice line. In 2014/2015 over 40% of enquiries received related to issues with the private rented sector. In many cases, Housing Rights' advisers act as an informal mediator in that they may contact a landlord and/or the agent to discuss the matter at hand and come to a resolution. Referrals may also be made to the local council Environmental Health Departments which have a role to play in enforcing certain aspects of housing law e.g. illegal eviction.

Currently, the only alternative dispute resolution mechanism available to private tenants is in relation to resolving tenancy deposit issues. Under the Tenancy Deposit Scheme, access to an adjudicator is a crucial element. Outside of tenancy deposit disputes, the only option for private tenants to resolve a housing matter is to resort to court action.

Housing Rights believes that there is great potential in making opportunities for mediation and dispute resolution more widely available to private rented tenants. Having access to an alternative dispute resolution can also have the potential to prevent homelessness occurring and can help to sustain tenancies where there is a breakdown in relationship between the landlord and tenant.

Housing Rights recommends that the Department investigates the possibility of establishing an independent dispute resolution agency, which could address housing disputes in the private rented sector without the need for court. Housing Rights is aware that there are various independent dispute resolution models, such as those operating in Scotland and the Republic of Ireland. Housing rights has recommended in its response to the Department for Social Development's recent review into the role and regulation of the private rented sector that it works with relevant stakeholders to

examine existing dispute resolution models with a view to developing a similar system in NI.³

Housing Rights would direct the Department to the developments in Scotland where tribunal reform is currently being considered. The Scottish Government has put forward proposals to establish a housing tribunal to deal with all housing issues. As there are currently no mediation services in NI for housing, Housing Rights believes that the establishment of a housing tribunal should be explored.

3.2 Ombudsman

Unlike tenants in the private rented sector, social rented tenants have access to a range of mechanisms for resolving complaints. They can make a complaint to their landlord via the landlord's internal complaints procedure. If they are unhappy with the outcome of the complaint they can then progress to the Ombudsman.

Whilst the Ombudsman offers a valuable service, it is only available in limited circumstances. Its remit is restricted to only investigating cases of maladministration. It cannot make a determination about the facts of a case. Other problems experienced by Housing Rights and its clients include:

- Long waiting times for the Ombudsman to reach a decision, due to the high demand for its service;
- The Ombudsman only accepting complaints from the client themselves rather than through a representative. Some clients do not have the capacity to formulate a complaint to the Ombudsman and need the help of an experienced adviser or legal representative do this on their behalf.

Housing Rights would like the Department to investigate what other options may be available for social rented tenants to resolve their complaints; especially those types of complaints which cannot currently be dealt with by the Ombudsman. This may involve

³ <https://www.dsdni.gov.uk/consultations/review-role-and-regulation-private-rented-sector>

widening the remit of the Ombudsman, enhancing its powers, ensuring that those who access the service have support to do so, making available alternative dispute resolution mechanisms or considering the development of a specialist housing tribunal.

4.0 Green Form advice and assistance

Housing Rights provides specialist advice on housing issues to hundreds of clients every week. It strongly believes that the availability of independent quality housing advice at an early stage is crucial in preventing matters from deteriorating.

It is concerned with the proposal that welfare benefits and debt should be removed from the remit of Green Form. Whilst there are many advice agencies that do provide good quality advice on these topics, Housing Rights is worried that, in the current financial climate, too much reliance is being put on voluntary sector agencies which have little or no guarantee of continued funding. It would not, therefore, be advisable to put additional strains on voluntary services which are already under pressure and which may not continue to operate in the future.

Housing Rights would oppose any removal of housing cases from the Green Form scheme. At present, Green Form can provide essential help towards the costs of advocating on behalf of clients and in ascertaining the merits of a case. For example, Green Form can pay to access a client's GP notes and housing file. These are crucial in establishing or investigating the grounds and merits for a housing action to proceed. Removing such cover would lead to an unacceptable risk of actions with merit being unable to proceed and would, therefore, deny many people access to justice.

5.0 Family legal aid

Housing Rights is pleased with the proposal for family legal aid to be given a high priority for funding. The organisation has much experience of dealing with clients whose housing situations have been negatively affected by the breakup of a relationship e.g. leading to threatened homelessness and selling up the family home.

It would call on the Department to make legal aid available, not only to help prevent homelessness in such cases, but also to help clients with accessing accommodation. As mentioned earlier, homelessness can include a wide range of circumstances. Emphasis should not just be placed on those people who are risk of losing their home, but also those who are looking for accommodation. For example, a client may need to challenge a decision about a reasonable offer of accommodation and may need legal aid assistance to pursue the matter by way of a county court appeal under the Housing (Amendment) Act 2010.

6.0 The merits test

Housing Rights accepts that public money should be carefully preserved for cases which have a good prospect of success. It would be financially negligent to fund actions with little or no chance of success. Housing Rights understands this and, in fact, works in a similar way with only progressing cases which pass its own case selection policy.

The experience of the Housing Rights' legal team is that the merits test generally works well. The protection of funding for borderline cases for preserving the home and human rights is a significant proposal which is to be welcomed. Again, it would argue that all homelessness cases should be included; not just those which concern the preservation of an existing home and would ask the Department to reconsider what constitutes a borderline case.

7.0 Self-help tools

Housing Rights recognises the need to offer more than one model of service delivery. Over the years, it has developed a range of self-help tools and online resources for people with housing problems; most notably our comprehensive public housing advice website www.housingadviceNI.org. Such tools can play an important role in helping some people to resolve their housing problems; but may not be the complete solution.

In our experience, the nature of the service and level of support required by each client depends not only on the capacity of the client but also on the complexity of the issue. Self-help is not always an appropriate option.

8.0 McKenzie friends

Housing Rights welcomes the recommendation that there should be more discretion from the courts in allowing the attendance of McKenzie friends. However, it is important to recognise that there are limits as to what a McKenzie friend can contribute at court. Although McKenzie friends can provide useful support to litigants, they can never replace the benefits which derive from representation provided by legally qualified representatives or experienced specialist advisers.

Housing Rights would call on the courts to refer clients to a specialist advice agency, such as Housing Rights, where a McKenzie friend who is attending does not have the experience or skill to properly provide the support needed by the litigant. This does place an onus on the court to identify any inadequacies; however, in circumstances where a home is at risk, it is arguably a reasonable safeguard.

9.0 Judicial review

Housing Rights is pleased to see that the report recommends the continuation of legal aid for judicial review proceedings. The right of an individual to challenge a government body is paramount in democratic society and should rightly be preserved. It is especially important that public interest cases are protected as they can lead to significant improvements in the lives of many.

10.0 Conclusion

Housing Rights is generally pleased with the report findings and welcomes the continued protection of many housing-related cases under civil legal aid and green

form. Housing Rights is happy to participate in any future discussions about housing related legal aid.

Housing Rights is pleased to provide additional information in support of this response. For further information contact:

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