

## Issue 129 April 2019

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### Housing matters

*Housing matters* is produced by Shelter for the NHAS and aims to provide a source of up-to-date housing and homelessness news, focus on important case law, cover key legal issues, and produce information for public use.

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### National Homelessness Advice Service

The National Homelessness Advice Service (NHAS) is funded by the Ministry for Housing, Communities and Local Government.

The service aims to prevent homelessness and remedy other housing problems through increasing public access to high-quality housing advice in England, including online information on the NHAS website at [www.nhas.org.uk](http://www.nhas.org.uk)

**The NHAS provides the following to local authorities, local citizens advice and around 100 other advice agencies in England:**

- **a national telephone housing advice consultancy service.** Call **0300 330 0517** from 9am–6pm, Monday to Friday, or send in an enquiry using the online enquiry form available on the members' areas of [www.nhas.org.uk](http://www.nhas.org.uk)
- **housing debt advice:** within our consultancy team we have specialist housing debt and welfare benefits advisers who can advise where clients are struggling to pay their housing costs. We can support you to work through your client's housing debt case.
- **free basic housing advice training courses** to develop housing advice skills, covering the main housing advice presenting issues and how to advise households effectively on homelessness prevention options
- **written briefings**, articles in *Housing matters* and *Adviser*, information on housing issues and other written materials
- **support** in the implementation of new homeless prevention initiatives.

### Contact details

For more information about NHAS training, please email [JoanneK@shelter.org.uk](mailto:JoanneK@shelter.org.uk) or call **0344 515 1676**.

For general enquiries about the NHAS service, please email [nhas@shelter.org.uk](mailto:nhas@shelter.org.uk) or call **0344 515 2268**.

Alternatively, please use the 'contact us' page at [www.nhas.org.uk](http://www.nhas.org.uk)



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# What's new?

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## Tenant Fees Act 2019

With effect from 1 June 2019 the Tenant Fees Act 2019 will ban a landlord or letting agent from charging a tenant any fee or charge unless it is a permitted payment. This will apply to assured shorthold tenancies (ASTs) granted by private landlords, licences and student lettings provided by the college or university.

The permitted payments are:

- rent
- tenancy deposit (up to maximum 5 or 6 weeks' rent, depending on the rent level)
- holding deposit (up to maximum 1 week)
- reasonable payment for a tenant's request to vary, assign or end the tenancy early
- payment in respect of council tax, utilities, communication services and TV licence
- payment if the tenant defaults (limited to reasonable evidenced costs in relation to lost keys and interest on overdue rent).

Other fees, such as for reference checks, tenancy applications, and inventory reports will be prohibited. The sanctions for non-compliance include invalidating a section 21 notice to end an AST until a fee has been repaid, and a fine between £5,000 and £30,000.

## Client money protection schemes

With effect from 1 April 2019, the Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc) Regulations 2019 SI 2019/386 introduce the requirement for property agents that hold money on behalf of a client to belong to a government-approved client money protection scheme. The government has published [guidance](#) for property agents.

## Succession: secure & flexible tenancies

In *Haringey LBC v Simawi* [2018] EWHC 2733 (QB), the High Court held that the succession regime in the Housing Act 1985 that treats differently children of divorced and deceased parents is not discriminatory and it is justified by the need for a fair distribution of social housing. An appeal is listed for hearing in the Court of Appeal in October 2019, on the grounds of incompatibility with Article 14 read in conjunction with Article 8 ECHR. Pending the outcome of this appeal, similar cases in the county courts should be stayed.

## British citizens ('Surinder Singh' route)

With effect from 28 March 2019, the [Immigration \(European Economic Area Nationals\) \(EU Exit\) Regulations 2019 SI 2019/468](#) amend the Immigration (European Economic Area) Regulations 2016 SI 2016/1052 to give effect to *Secretary of State for the Home Department v Banger* [2018] EUECJ C-89/17 to allow British citizens returning to the UK after exercising Treaty rights in another EEA country the right to be accompanied by extended family members, as well as close family members.

## EU Settlement scheme – an update

In the latest [Statement of Changes in Immigration Rules](#) the government has confirmed that the following groups will be able to apply under the EU Settlement scheme to continue living in the UK after its departure from the EU: EEA and Swiss nationals, their family members and individuals with derivative right to reside, including 'Zambrano' carers, 'Chen' carers and 'Baumbast'/'Ibrahim' carers.

## Right to rent scheme

In *R (JCWI) v Secretary of State for the Home Department* [2019] EWHC 452 (Admin), the High Court found the 'right to rent' scheme that requires private landlords to carry out immigration checks on prospective tenants is discriminatory and incompatible with the Human Rights Act 1998. The Home Office has been granted permission to appeal and has confirmed that there will be no immediate changes to the operation of the scheme.

## Anti-slavery handbook

The Passage has produced an [anti-slavery handbook](#) aimed at workers in the homelessness sector which identifies types and possible indicators of trafficking and modern slavery.

## Enforcement of possession orders

The Civil Procedure Rules Committee has launched a [consultation](#) on changes to the Civil Procedure Rules governing enforcement of possession orders. Currently, the systems operate differently in the High Court and in the county court. The consultation aims to see if the two systems can be harmonised. The deadline for responses is 2 May 2019.

# Fitness for habitation

**In this article Nicola McEwen explores how new legislation can help tenants tackle poor conditions in their home.**

**Nicola McEwen is a professional support lawyer at Shelter.**

The Homes (Fitness for Human Habitation) Act 2018 ('Homes Act') gives a tenant the right to take legal action to ensure their landlord makes their home fit for habitation.

## Which tenancies are covered

The Homes Act applies to tenancies in the private (where it is granted for a term of less than seven years) and social sectors. There are limited exceptions which reflect the exceptions to the repairing obligations placed on landlords under section 11 Landlord and Tenant Act 1985 ('LTA 1985').<sup>1</sup> The Act does not apply to licences.

## What the Act does

The new Act inserts new sections 9A, 9B and 9C into the LTA 1985 and amends section 10.

It implies a term into tenancies that the property will be fit for human habitation at the start and throughout the tenancy.<sup>2</sup>

A landlord cannot contract out of this obligation and any term in a tenancy agreement that says otherwise will be void.

As with section 11, the new provisions cover the rented property itself, and any other common parts of the building in which the landlord retains an interest.<sup>3</sup>

The government has published [guidance](#) for tenants, landlords and local authorities.

## When it applies

The Homes Act comes into force on 20 March 2019. Initially, it applies to new tenancies that are agreed on or after 20 March 2019.<sup>4</sup>

After 20 March 2019 it will apply when:<sup>5</sup>

- a fixed-term tenancy (that was in existence on that date) becomes periodic or is renewed
- an introductory tenancy becomes a fixed-term flexible tenancy
- a fixed-term flexible tenancy is demoted.

From 20 March 2020, the Homes Act will apply to all periodic tenancies that were in existence on 20 March 2019.<sup>6</sup> This includes periodic introductory tenancies which become periodic secure tenancies between 20 March 2019 and 20 March 2020.

## What makes a property unfit

Section 10 of the LTA 1985 is also amended by the new Act. It sets out what factors the court will consider when deciding if a property is fit for habitation.

Fitness is assessed by reference to the following 10 factors:<sup>7</sup>

- repair
- stability
- freedom from damp
- internal arrangement
- natural lighting
- ventilation
- water supply
- drainage and sanitary conveniences
- facilities for preparation and cooking of food and for the disposal of waste water;
- any prescribed hazard under the Housing Health and Safety Rating System (HHSRS). This covers both category 1 and 2 hazards.

Regulations set out 29 potential hazards.<sup>8</sup> There is [extensive guidance](#) explaining the hazards and associated risks. The HHSRS already imposed obligations on landlords to avoid these hazards, but until now tenants had to rely on the local authority to take action.

A property will be unfit for habitation:<sup>9</sup>

*'if, and only if, it is so far defective in one or more of those matters that it is not reasonably suitable for occupation in that condition.'*

The Homes Act does not require there to be disrepair, only that the property is defective in relation to one or more of the 10 factors above. The new implied term could require a landlord to carry out an improvement if this is necessary to make the property fit for habitation. Minor matters will not make a property unfit for habitation.

The landlord is not required to carry out work to address unfitness in certain circumstances, including where:<sup>10</sup>

- work is required as a result of the tenant's behaviour or breach of the tenancy
- the property requires rebuilding following destruction or damage by fire or natural disaster
- the landlord requires the consent of a third party (for example, a freeholder of the building) but consent has not been obtained despite the landlord's reasonable efforts to obtain it.

There will be argument over whether a property is 'not reasonably suitable for occupation'. Findings of unfitness will be a matter of fact for the courts to decide in each case. There is limited case law from the courts to give some guidance on this.<sup>11</sup>

### Notice

The Act does not include any notice requirements. It is likely that the same common law notice requirements will apply as with section 11. This means the obligation on the landlord to address any unfitness in the dwelling is not triggered until the landlord has been given notice of the matter. The notice requirement does not apply to common parts of the premises, which are in the possession of the landlord. For more information about notice requirements see *Repairs to common parts* in Housing matters Issue 114 published in October 2016.

### Practical implications

The new law is most likely to be useful with cases not previously covered by the landlord repairing obligations. This could include:

*Condensation damp and mould* - this is a problem area, as often this is not a result of disrepair. Damp is both a specified factor (see above) and a HHSRS hazard. Where the damp and mould are so bad that the property is not reasonably suitable for occupation, tenants will now have a directly enforceable remedy.

*Noise* - tenants have usually had no way of forcing a landlord to ensure adequate sound insulation to reduce noise disturbance between properties. 'Exposure to noise' can be a HHSRS hazard and there is potential for the Homes Act to be used in severe cases.

*Fire safety* - this is another area where tenants have previously not had any effective way of forcing landlords to ensure their homes are safe. The HHSRS includes 'exposure to uncontrolled fire and associated smoke' as a hazard and there is clear potential to use the Homes Act to improve fire safety.

*Excess cold* - this is a HHSRS hazard, and there may be scope to use the new Act to compel a landlord to improve an inadequate heating system or even install central heating.

The HHSRS also includes provisions relating to crowding and space, pests and refuse, and various types of falls, and it might be possible to use the new fitness standard in serious cases to require the landlord to improve the condition of the property.

### Taking the landlord to court

It is anticipated that the procedure will be the same as for section 11 disrepair cases. Cases will be brought in the county court (or the High Court if the level of compensation claimed justifies this).

Tenants can seek an injunction (order for specific performance) requiring the landlord to make the property fit for habitation<sup>12</sup>, and compensation for breach of the obligation. The disrepair pre-action protocol is likely to apply. It may soon be amended to include reference to the new fitness obligations.

Litigants in person may not always need expert evidence, for example where there or is no heating they can produce clear evidence such as photographs of severe mould growth. Legally represented tenants are likely to need expert evidence. Surveyors are likely to be able to give evidence on fitness points in cases where there is also disrepair, but advisers may wish to check this before instructing them. Environmental health officers may be an appropriate choice of expert where the unfitness relates more to the HHSRS than traditional disrepair.

Where the property is unfit because of the presence of a prescribed hazard, it is not a requirement that an environmental health officer has carried out an HHSRS assessment.

### Funding

Legal help and legal aid is subject to the same criteria as disrepair cases, namely that there must be a serious risk of harm to the health and safety of the tenant/their family. Further, funding will only cover the claim for works, and will not cover legal work to claim compensation.

Conditional fee agreements or damages based agreements can also be used to bring Homes Act claims. Legal firms should have a robust risk assessment process to assess merits and likely damages in any case, and are likely to be cautious, at least initially, in assessing prospects of success.

## Shelter Legal

### Fitness for human habitation

#### Footnotes

<sup>1</sup> s.9B(1)-(4) Landlord and Tenant Act 1985.

<sup>2</sup> s.9A(1) Landlord and Tenant Act 1985.

<sup>3</sup> s.9A(6) Landlord and Tenant Act 1985.

<sup>4</sup> s.9B(3) Landlord and Tenant Act 1985.

<sup>5</sup> s.9B(5) Landlord and Tenant Act 1985.

<sup>6</sup> s.9B(4) Landlord and Tenant Act 1985.

<sup>7</sup> s.10 Landlord and Tenant Act 1985.

<sup>8</sup> Housing Health and Safety Rating System (England) Regulations 2005 SI 2005/3208.

<sup>9</sup> s.10 Landlord and Tenant Act 1985.

<sup>10</sup> s.9A(2)-(3) Landlord and Tenant Act 1985.

<sup>11</sup> for example, see *Rendlesham Estates plc v Barr Ltd* [2014] EWHC 3968 (TCC).

<sup>12</sup> s.9A(5) Landlord and Tenant Act 1985.

# Co-operation between authorities

**In this article, Louis Farrington considers when local authorities and other bodies should cooperate, in particular when assisting those in housing need.**

**Louis Farrington is Senior Housing Solutions Officer at Sheffield City Council.**

Since 1 October 2018, certain public authorities have been under a duty to refer a service user who is homeless or at risk of homelessness to the local housing authority, where s/he consents.<sup>1</sup> It was envisaged that this duty would extend the responsibility for preventing homelessness beyond housing authorities and improve co-operation between public authorities.

The principle of co-operation to assist those in housing need is not new, and this article outlines some of the circumstances when public authorities and other bodies are expected to assist each other. Practice will vary between local authority areas. This will be compounded by the fact that not all authorities will publicise the arrangements that operate in their area.<sup>2</sup> The Ministry of Housing, Communities & Local Government has launched a [consultation](#) on how the government could improve local accountability for the delivery of homelessness services.

## Other housing authorities

Housing authorities can ask another housing authority (or social services or housing association) for assistance in discharging its homelessness functions under Part 7 of the Housing Act 1996. The other authority must co-operate where it is reasonable to do so. This could include providing information about a previous homeless application or helping accommodate an applicant who is at risk of violence in the council area to which they applied. Duties are also placed on housing authorities to provide information to another housing authority when they accommodate an applicant outside its area.

Co-operation between housing authorities is required where a referral is made on the basis of local connection or an earlier out of borough placement.<sup>3</sup> The question of whether the conditions for referral are met should be decided by agreement between the authorities concerned. The [Local Authority Agreement](#) provides guidelines to avoid, and where necessary resolve, disputes between authorities.

When referring an applicant during the relief stage (when helping a homeless applicant secure accommodation), the notifying authority must provide the notified authority with a copy of the applicant's housing needs assessment and (if the applicant consents) any personal housing plan.<sup>4</sup>

## Children

The Children Act 2004 allows local authorities to fulfil their duties to safeguard and promote the wellbeing of children by permitting arrangements to be made with partner organisations, including the NHS and youth offending teams. 'Safeguarding partners' are required to have agreed published protocols in place to work together and to provide information to each other in connection with this purpose.<sup>5</sup>

Local authorities must ensure its functions and services are discharged having regard to its duties under the 2004 Act, both in the formulation of policies and in individual cases. The duty as it impacts on a housing authority does not require that a child's welfare should trump other considerations, such as whether an applicant is to be found intentionally homeless. But it does mean that they identify and have regard to a child's principal needs when making a homelessness decision, including when deciding if an offer of accommodation is suitable.<sup>6</sup>

## 16 and 17 year olds

Homeless 16- and 17-year olds may approach social services or housing authorities for help, and in the majority of cases the primary responsibility for accommodation and other support needs lies with the former. Social services and housing authorities are expected to have joint written protocols that set out practical arrangements for providing services to young people and to prevent them from being passed back and forth.<sup>7</sup>

## Children in need

Social services can request the help of a housing authority in providing accommodation for a child in need. The housing authority must assist except where it would prejudice its ability to discharge its

own functions. Where assistance is refused the courts are likely to scrutinise the housing authority's reasons and actions with considerable vigour.<sup>8</sup>

A housing authority must inform social services of any applicant with children whom it has found ineligible for assistance or intentionally homeless, where the applicant agrees. Even if the applicant refuses consent, information may be disclosed where the authority has reason to believe that a child is at risk of significant harm.<sup>9</sup>

### Care leavers

Social services and housing authorities should develop a joint protocol in respect of services to those leaving care. And in dealing with a homeless application from a care leaver, a housing authority should involve the care leaver's personal adviser in the assessment process and the production of a personal housing plan.<sup>10</sup>

### Home Office

The Home Office must provide information to a housing authority about immigration status to assist with enquiries into the eligibility of a homeless applicant.<sup>11</sup>

### Law enforcement agencies

There is often a need to ensure homeless applicants with an offending history or who may be a risk to the public are suitably housed, for example in appropriate supported accommodation or away from other vulnerable persons.

The Ministry of Justice, police and probation services must co-operate with housing authorities in assessing and managing the risk posed by sexual or violent offenders. This may include information sharing and requires the publication of a memorandum explaining how co-operation will be facilitated.<sup>12</sup>

There are also requirements for prescribed information to be shared between police, housing authorities and other specified organisations. An example where this facilitates inter-agency cooperation is sharing information in cases of high-risk domestic abuse and when multi-agency risk assessment conferences are convened.<sup>13</sup>

### Housing and safety

Housing authorities must consult with fire and rescue authorities where fire hazards are identified in houses of multiple occupation or in common parts of shared buildings and

enforcement action under the Housing Health and Safety Rating System is contemplated.<sup>14</sup>

From April 2018 housing authorities have been able to:

- apply for a banning order prohibiting landlords or agents (convicted of certain offences) from letting or managing rented properties
- placing those subject to a banning order on the rogue landlord database

Housing authorities can request information from specified organisations when deciding if a banning order should be applied for or an entry on the database made.<sup>15</sup>

### Care and support

Social services must make arrangements with housing authorities and other relevant partners, such as the NHS, to co-operate in connection with its functions in relation to adults with care or support needs.<sup>16</sup>

Local authorities are required to set up a Safeguarding Adult Board (SAB) to help adults with care and support needs and a Health and Wellbeing Board to improve the health and wellbeing of the local population. Housing authorities can be asked to provide information to assist either body in its functions. In exercising their respective functions the NHS bodies and local authorities must cooperate with one another in order to secure and advance the health and welfare of the population.<sup>17</sup> In practice, this could occur where a housing authority has a homeless applicant with complex health issues and decides to call a multi-agency meeting with representation from a GP practice or mental health services to work out a way forward.

### Data protection principles

A person's consent for the sharing of their personal data between organisations is normally required. However, data can be shared without consent where it is necessary to comply with a statutory obligation or where there is a substantial public interest (subject to certain additional conditions). For example, sensitive data can be shared to:<sup>18</sup>

- protect an individual from harm where they cannot give consent or
- where to obtain their consent would place the individual at risk of harm.

## Shelter Legal

### Cooperation between departments

#### Footnotes

<sup>1</sup> s.213B Housing Act 1996.

<sup>2</sup> ss.208 and 213 Housing Act 1996.

<sup>3</sup> s.198 Housing Act 1996.

<sup>4</sup> para.10.43 Homelessness Code of Guidance .

<sup>5</sup> ss.10, 16E, 16G and 16H Children Act 2004.

<sup>6</sup> *Nzolameso v Westminster CC* [2015] UKSC 22; *R (E) v Islington LBC* [2017] EHC 1440 (Admin).

<sup>7</sup> para.8.23 Homelessness Code of Guidance.

<sup>8</sup> s.27 Children Act 1989; *R v Northavon DC ex p Smith* (1994) 26 HLR 659; *R (G) v Barnet LBC* [2003] UKHL 57.

<sup>9</sup> s.213A Housing Act 1996.

<sup>10</sup> paras.22.6, 22.12-14 Homelessness Code of Guidance.

<sup>11</sup> s.187 Housing Act 1996.

<sup>12</sup> s.325 Criminal Justice Act 2003.

<sup>13</sup> ss.17A and 115 Crime & Disorder Act 1998.

<sup>14</sup> s.10(2) Housing Act 2004.

<sup>15</sup> ss.19 and 35 Housing and Planning Act 2016.

<sup>16</sup> s.6(4) Care Act 2014 .

<sup>17</sup> s.43 Care Act 2014; s.199 Health & Social Care Act 2012; s.82 National Health Service Act 2006.

<sup>18</sup> s.8 and Sch.1 Data Protection Act 2018.

# Is your home fit to live in?

**This factsheet explains when your landlord has to take steps to make your home fit to live in, and what you can do if your landlord does nothing.**

A new law may mean your home must be fit for habitation.

## Who is covered?

The law applies if you are a private, housing association or council tenant. But it does not help all tenants straight away.

You are covered if you started or renewed your tenancy on or after 20 March 2019.

If your tenancy began before 20 March 2019 you will be covered:

- when your fixed term tenancy ends and you stay on as a tenant
- from 20 March 2020 if you don't have a fixed term tenancy.

## Who is not covered?

The new law does not help you if:

- are a licensee – this includes most lodgers
- your fixed term tenancy with a private landlord is for a term of 7 years or more
- you're in temporary accommodation waiting for the council to make a decision on your homeless application.

## What your landlord must do

Your landlord must make sure your home is fit to live in:

- when you move in, and
- throughout the time you are a tenant.

If it isn't, they must do whatever work is needed to make it fit.

## Is your home unfit?

There are many reasons why your home might be unfit, for example:

- there's severe damp or condensation
- the electrical wiring is faulty
- it's very cold throughout the winter
- the roof is leaking
- it's infested with rats or other vermin
- the toilet facilities are unsanitary

Minor problems won't make your home unfit, but this does not mean you can't ask your landlord to sort it out.

Sometimes your property will be unfit because your landlord has not carried out repairs. For information about what you also do about repairs see the factsheets [Responsibility for repairs](#) and [Taking action on repairs](#).

Your landlord won't be responsible for fixing the problem if you caused it.

## Report the problem

Tell your landlord about the problems in your home. Your landlord won't have to do anything until you do. If you ring them also put in it writing or an email so you have proof they were told.

This doesn't apply if the problem is in common parts of the building owned by your landlord – such as a lift or common stairwell. But it is always best to tell them anyway.

Some private landlords may take steps to evict you if you complain - you must weigh up this risk.

## Taking action

Many landlords will take steps to make sure your property is fit to live in. Some won't.

You can take your landlord to court to:

- order your landlord to do what's needed
- pay you compensation.

You could get legal aid if:

- there's a serious risk to the health and safety of your household, and
- you're on a low income or claim benefits.

Contact Civil Legal Advice on **0345 3454 345** to check if you can get legal aid.

You can also report the problem to your local council's environmental health team. They could order your landlord to carry out work if there's a risk to your health or safety.

## Further advice

You can get further advice from Shelter's free\* housing advice helpline (**0808 800 4444**), a local Shelter advice service or local Citizens Advice office, or by visiting [england.shelter.org.uk/housing\\_advice](http://england.shelter.org.uk/housing_advice)

\*Calls are free from UK landlines and main mobile networks.



**Note**  
Information contained in this factsheet is correct at the time of publication. Please check details before use.