

# CLOSING THE GAPS: HEALTH AND SAFETY AT HOME



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# EXECUTIVE SUMMARY

**The law relating to health and safety in people's homes is piecemeal, out-dated, complex, dependent upon tenure, and patchily enforced. It makes obscure distinctions, which have little relationship with everyday experiences of poor conditions. Tenants wanting to remedy defects face numerous and often insurmountable barriers to justice. The law needs to evolve; no longer should occupiers be treated as posing health and safety risks, instead they should be treated as consumers of housing with enforceable rights to ensure minimum standards are adhered to. The state needs to accept its role as the primary enforcer of those standards.**

**Not only does the law require reform, there also needs to be a cultural change, so that those responsible for the health and safety of occupiers become pro-active in fulfilling those responsibilities.**

**We recommend a new Housing (Health and Safety in the Home) Act which is tenure neutral, modern and relevant to contemporary health and safety issues, and which encourages and provides resources for pro-activity by statutory authorities.**

In particular, the Act should:

- Strengthen duties on local authorities to review housing and enforce housing health and safety standards
- Introduce a legal duty to review and update all guidance relating to health and safety in the home every three years
- Provide routes for occupiers to require local authorities to carry out housing health and safety assessments
- Remove unnecessary legal barriers preventing enforcement action being taken against local authority landlords and remove unnecessary procedural barriers which undermine the current regime
- Consolidate and up-date existing law
- Place clear responsibilities on bodies for breaches of fire and building regulations
- Provide routes for occupiers to hold landlords and managers to account for fire safety provisions
- Strengthen remedies against retaliatory eviction.

Such an Act, either working alongside or incorporating a Homes (Fitness for Human Habitation) Act, would not only improve health and safety outcomes for occupiers, it would signify also that, as a society, we accept responsibility for those standards.

# INTRODUCTION

On 14th June 2017, there was a fire at Grenfell Tower in the Royal Borough of Kensington and Chelsea. At least 80 people died. Grenfell Tower was a tower block of 24 storeys with around 120 flats. This was an appalling tragedy and the research team expresses its sympathy to everyone affected.

The Grenfell Tower fire was the latest in a line of tragedies affecting tower block residents. On 3rd July 2009, there was a fire at Lakanal House, a 14 storey tower block in the London Borough of Southwark. Six people died. There was a “super inquest”, which resulted in detailed narrative verdicts by the jury setting out the ways in which the refurbishment of Lakanal House had significantly contributed to the deaths. Following the inquest, the coroner wrote letters to local and national government, as well as the fire brigade and the Fire Sector Federation, to report the circumstances which had led to the fire. In these letters, the Coroner expressed a series of concerns, including a concern with the training of fire risk assessors, a concern about the adequacy of guidance in relation to undertaking fire risk assessments, and a recommendation that Building Regulations be reviewed.

Since the Grenfell Tower tragedy, there have been a range of responses led by central government, including but not limited to:

- A public judicial inquiry, chaired by Lord Justice Moore-Bick, into the circumstances surrounding the fire;
- The government’s decision to issue a Green Paper that focuses on social housing at some point in the future;
- An independent review of building regulations and fire safety, and interim mitigation measures regarding the cladding of buildings.

In this report, we discuss the range of legal gaps which exist in the law as appear to have affected or impacted on the tragedy at Grenfell Tower. We are concerned, in particular, as housing lawyers, academics, and human beings that no such tragedy should happen again. The law can only ever be one part of the context; even perfect laws (if there were such a thing) can fail in their implementation or as a result of judicial interpretation.

The intensity of concerns that have enveloped the Grenfell Tower tragedy has focused in part on the law. There has not been a more propitious moment for the public discussion of rights and obligations in housing perhaps since the 1960s, when the tower block debate began, and the mid and late nineteenth centuries, when the first significant interventions into housing conditions began in the name of public health.

This report is designed to contribute to that public discussion. We have tried to write it so that it can be read widely. Some of what we have to say may be shocking – for example, the Victorian heritage of much of the law in this area, which focused on public health and morals, as opposed to the safety of the occupants; some of what we have to say should be concerning – for example, the lack of coherence in the law and practice, and the different protections available depending on housing tenure; and some of what we have to say – like the inability in some cases to answer the often critical question, who has responsibility for a front door – is ludicrous, ridiculous and dangerous.

In our view, the health and safety of occupiers should not depend on tenure, class, or the history of housing policy. It should be designed to protect the health and safety of *all* occupiers.

## Scope of this report

It is in that context that the Universities of Bristol and Kent were commissioned by Shelter to address the following research issues:

- To set out clearly the gaps in current legislation which may make housing less safe and/or prevent households from remedying problems
- To set out where lack of enforcement undermines existing legal protections
- To identify legal remedies to strengthen protection for tenants.

It is important to make clear that this research is not into the circumstances surrounding the fire at Grenfell. The focus is on the law and regulations regarding the health and safety of occupiers of residential housing. This is partly because a review of fire safety law without examining the wider law regulating conditions would be inevitably too narrow, but also because – as many of our consultation responses highlighted – fire safety issues often arise in homes with other issues linked to poor conditions.

### Participant's comments:

[I live in] a 1 room apartment in South East London. [We had an] Infestation of pigeons then cockroaches from the roof void. Electrical sockets sometimes don't work, the waste pipe from the toilet has been leaking for over 2 years. There is a fire alarm for the building that goes off so often that people just ignore it, it is sometimes “muted” for days. I talked to the landlord's representative, who calls the landlord, and nothing happens usually, except the landlords representative usually ends up attempting to remedy by himself.

[Have you been successful in getting the problem resolved?]

It is difficult, now being evicted after section 21 and court order. Probably street homeless very soon.'

Having noted that limit to the scope of this report, it is equally important to be clear as to how we have interpreted the research objectives:

- We have adopted a broad approach to “legislation”, incorporating what is sometimes referred to as “quasi-legislation” – that is, secondary legislation, such as statutory instruments, and tertiary materials, such as codes of guidance and government circulars, all of which have different authority.
- Our research has ranged even more widely than legislation in that extended sense, as the rights and obligations implied into different occupation agreements by common law are relevant.
- Housing tenure is a *key determinant of legislative rights and obligations*. Our report cross-cuts all types of residential housing tenure. While the assumption may be that residents in tower blocks are “social housing tenants”, this is not a useful assumption in this context as the rights of social housing tenants can differ; nor is it likely to reflect accurately the tenure of residents. Housing tenure, in this context, refers both to the provider of the accommodation as well as to the type of agreement which the resident has. For example, a tower block owned by a local authority may have the following residents:

- a A long leaseholder – this is a person who has a lease of more than 21 years. They are likely to have bought their property under the right to buy. In housing tenure terms, they are regarded as an “owner”, but their rights and obligations are governed by the agreement between themselves and their landlord. They may be a “traditional” long leaseholder or they may have a shared ownership lease.
  - b A secure tenant – a person granted a tenancy or a licence by a public sector body like a local authority;
  - c An assured tenant – a person granted a tenancy, most likely by a housing association (termed in law “a private registered provider of social housing”);
  - d An assured shorthold tenant – this would be likely to arise in three types of circumstances: (a) where a housing association has granted an introductory type of tenancy to an occupier – such tenancies usually become assured after 12 months; (b) where a private landlord has granted a tenancy to a person – in the tower block scenario, this would most usually occur where a long leaseholder, who has bought their property under the right to buy, rents it out (as they are entitled to do); or (c) where there has been a sub-tenancy granted by a secure or assured tenant of the whole or part of the property that has been granted unlawfully.
  - e Other types of residential occupier, including, for example, lodgers and licensees, such as members of the family of the tenant.
  - f Short-term occupiers, such as those occupiers who have agreements governed, for example, by arrangements such as those prescribed by AirBnB.
  - g Unlawful occupiers, including squatters and those not entitled to occupy the property or part of it.
- It must also be remembered that the terms “social housing” and “social housing provider” are terms of convenience. They are umbrella phrases. To the extent that they imply a kind of uniform or simple model of provision of housing for households in need, we should be sceptical. Since the late 1980s, at least, the mixed economy of provision in this tenure means that its structuring and governance are complex.
  - So, for example, Grenfell Tower itself was owned by the local authority, but managed by a Tenant Management Organisation (“TMO”) under an agreement with the authority. It might have been managed alternatively by, for example, an arms length management organisation (“ALMO”). Under these kinds of relationship, although the authority remains the landlord, it has effectively contracted out its management obligations. TMOs and ALMOs have governing boards made up of tenants, councillors and independent persons. In such situations, it might be assumed that tenant members act on behalf of the tenant body; however, this is not necessarily the case, as conflicts might exist between the tenant as tenant and tenant as a member of a governing body.
  - Much of what was council housing no longer is. First, much has been sold off under the right to buy to existing tenants, and then often sold again and/or rented out privately. Secondly, under a process known as large scale voluntary transfer, much council housing has been sold to housing associations. The reasons for this were largely strategic and financial (prior to 2015, housing associations were classified as private sector for accounting purposes, and, therefore, any debt they incurred was off the public sector books). The outcome has been that most social housing is now provided by housing associations.
  - One of our concerns is that the rights and obligations of various parties should be meaningful. Rights can be symbolic in the sense that their enforcement requires positive action such as making a complaint or contacting a lawyer. We are aware from both past research and responses to our consultation that housing problems are often “lumped” by occupiers; that is, they are more likely to make do rather than complain, let alone seek the enforcement of their rights. Although there is no research which precisely engages with the point, there is a widespread view that private rented sector occupiers are less likely to complain about defects, for example, because of their more limited security of tenure, and the implicit threat of what is known as “retaliatory eviction” (ie where the landlord evicts tenants on a no-fault basis following requests to remedy a defect). It may be that people just feel grateful to have anywhere to live in an over-heated housing market. There are also issues, beyond those concerns, with ability to take legal action in an environment where legal aid may not be available. We discuss this further when we talk about the role of legal aid in chapter 2. In short, it does not make sense to strengthen protection for occupiers while simultaneously denying them the ability to enforce those protections because they cannot afford to do so.

### Methodology

Although the research team had different, but complementary knowledges of the relevant law, policy, and practice, we recognised that our knowledge was likely to be partial – based on case reports, the cases we had seen or come across, and the people to whom we had spoken over the years – and unlikely to represent the community of experience in the various sectors involved.

Within the necessarily short time frame for the research, we have sought to broaden our perspectives. In this section, we explain how we have done so.

### Advisory Board

The first approach was to seek and appoint experts involved in housing to an Advisory Board. Our design of the Advisory Board was that it should be representative of all interests. We recognise that our recommendations need to reflect the wide concerns of the various constituent parties involved, and we hoped that the Advisory Board would be willing to participate in the co-production of those recommendations. That is *not* to say that members of the Advisory Board were expected to agree, or accept, our recommendations. However, it is the case that our recommendations are better informed by the Board’s scrutiny.

The board had four purposes:

- To assist us in reaching our target groups for the questionnaire;
- To be an essential sounding board for the questions to be asked in the questionnaire;
- To provide a focus group to discuss the initial recommendations of the report; and,
- As experts in the field, they would lead with the publicity of the final recommendations within their communities and more broadly.

# INTRODUCTION (CONT)

We have been extremely grateful that the following leading experts in their field, representing leading organisations, accepted our invitation to join the Advisory Board:

- Dean Underwood, Barrister, Social Housing Landlords Association
- Sarah Salmon, Barrister, Social Housing Landlords Association
- Simon Marciniak, Solicitor, Housing Law Practitioners Association
- Tessa Buchanan, Barrister, Housing Law Practitioners Association
- Stephen Battersby, Independent Environmental Health and Housing Consultant
- David Smith, Policy Officer, Residential Landlords Association
- Judge Siobhan McGrath, President of the First Tier Tribunal (Property Chamber)<sup>1</sup>
- John Gallagher, Solicitor, Shelter
- Anthony Essien, LEASE

## Questionnaire

An online questionnaire was designed to pool different knowledges and experiences of diverse groups of professionals, and occupiers. Its purpose was to develop an understanding of the range of issues which presented themselves to the users, the gaps which exist professionally and practically, and for respondents to provide examples of their own housing-related problems to illustrate the report.

The questionnaire contained a short series of open and closed questions tailored to the identity of the particular respondent. The questionnaire itself appears as Appendix A to this report. At a broad level,

- Participants with professional expertise were initially asked their discipline. Those with legal professional expertise were asked in addition whether they normally acted for private or social landlords or tenants. This was a key question because it is recognised that the types of concerns that they were likely to have about the law and its enforcement might be different. Other professionals were asked if they were social landlords or another professional, including a fire professional, environmental health officer, surveyor or other. All professional participants were then asked about the adequacy of that law and regulation of housing conditions.
- Private landlords were asked to describe briefly their property, and then there were a series of questions designed to obtain information about problems, and health and safety concerns, which had been experienced with their property. There were then questions about whether occupiers had sought to deal with any problems or take enforcement actions against them. We also asked how, if at all, the enforcement process might be improved.
- For renters and owner-occupiers, we asked them to describe briefly where they live and their residential status. Limited to the last five years, we asked a series of questions designed to obtain information about problems, and health and safety concerns, which had been experienced with their property. There were then questions about whether and how, if at all, they had dealt with the problem that they had (if any) or take enforcement actions against them. We also asked how, if at all, the enforcement process might be improved.

- Finally, all respondents were asked questions about their ethnicity, age, gender, and sexuality. We asked these questions because we are aware that these background characteristics can have an impact on the experience of housing problems and what to do about them.

The questionnaire was designed to be completed within 20-30 minutes to minimise any potential attrition among respondents.

The questionnaire was hosted through the University of Bristol's online survey platform. It ran for a limited period from 25<sup>th</sup> August 2017 until 22<sup>nd</sup> September 2017. The questionnaire was publicised as follows:

- Our Advisory Group members publicised it to members of their organisations;
- The questionnaire was publicised on the Nearly Legal blog, which has around 30,000 readers a month;
- We used social media – particularly Twitter – to obtain respondents;
- We were assisted in particular by two people who piloted a draft of the questionnaire, and who publicised it within their networks, including the Housing Quality Network;
- Ongoing snowballing publicity through our personal contacts and those who completed the questionnaire;
- We were grateful to the Housing Law Practitioners Association for allowing us the opportunity to publicise the questionnaire at one of their meetings, "Housing Law after Grenfell"; and,
- Shelter publicised the questionnaire through its own networks.

## Limitations of the dataset

There are important limitations to this dataset, which should be borne in mind when considering our analysis.

- Given the timescale within which the research took place, it was *not* designed to be representative and was *not* seeking to obtain a representative sample of the user groups or issues. It was designed to provide a snapshot of the issues and provide illustrations of issues to which we refer in this report.
- The survey was online and was therefore likely to exclude a range of participants who were without access to the web.
- Our particular concern was to obtain as many responses from tenants and occupiers as possible. It is they who can be said to have (at least) "expertise through experience". We recognised the fact – which contributes to our appreciation of the tragedy of Grenfell Tower – that the residents were concerned about health and safety of the block, and expressed them in blogposts, but it is unknown whether or to what extent their concerns were considered by the local authority and its managing agent (the Kensington and Chelsea Tenant Management Organisation).

## Ethical considerations

The questionnaire was governed by the Statement of Ethical Principles promoted by the Socio-Legal Studies Association. Ethical approval for the questionnaire was obtained through the University of Bristol Law School's ethics committee.

<sup>1</sup> Siobhan McGrath's contribution was limited to discussion on the complexity of the adjudicatory space.



There were two particular ethical issues to which we draw attention here and which affected the structure of the questionnaire:

- We recognised that certain people – landlords and tenants and enforcement officers – might be affected by their responses, particularly if they have been involved in distressing situations. The most extreme example would be a respondent who might have been involved in the Grenfell tragedy. We publicised appropriate counselling organisations to participants at different stages of the questionnaire if their responses had triggered effects.
- We were particularly concerned that respondents did not make allegations of criminal offences against named or other individuals. A warning was provided on the questionnaire pages that respondents should moderate their responses by not including such allegations. The research team recognised that some comments might need to be reported to the police and the research team reserved their right to do so. In the event, there was no need for the research team to do so.

## Participants

By the end of the survey period, 947 participants completed the questionnaire. Table 1 identifies the proportion of respondents who completed the survey by category.

Type	Number	Percentage
Occupier (renter or owner)	642	68
Legal professional	45	5
Other professional	84	9
Social landlord	13	1
Tenant's association	26	3
Private landlord	130	14
<b>Total</b>	<b>940</b>	<b>100</b>

The over-representation among the survey data of occupiers was partly due to an over-representation of owner-occupiers (n=456). Table 2 breaks down the category of occupier further.

Type	Number	Percentage
Owner-occupier	456	71
Social tenant	84	13.1
Private tenant	68	10.6
Lodger	2	0.3
Other	32	5
<b>Total</b>	<b>642</b>	<b>100</b>

It would be fair to say that, even with the over-representation of owner-occupiers, we were encouraged by the number of participants in other categories. Of those who were “other”, the most common reasons for selecting this category were as follows: 13 were shared owners and 10 identified as leaseholders.

The category of other professional was selected as follows: environmental health (n=40); surveyor (n=13); manager or managing agent (n=10); architect (n=5); and planning (n=2). The others who selected this category were from diverse backgrounds with professions not necessarily related to housing itself.

## Summary of findings

We refer throughout this report to comments from the survey participants where they add new points to our analysis or amplify the points we make. What was striking, though, about the responses from the professionals (including social landlords, a total of 142 responses) was that **85 per cent believed that the current law is not fit for purpose**. And many of the remaining 15 per cent, although they might have regarded the formal law as being fit for purpose, stated that there were problems with the enforcement of the law. On this note, it was particularly striking that overall **94 per cent of those who expressed an opinion (118 of 125 professional responses) stated that the protections the law currently offers are undermined by a lack of enforcement**.

The complexity of the law, to which many of our professional participants referred, was reflected in the responses from the occupiers. A significant proportion of occupier participants, for example, did not distinguish between, on the one hand, disrepair, and health and safety, on the other. This had obvious implications for the proper resolution of the issues to which they drew attention. But it also made the significant point – by implication – that the law of housing conditions makes obscure distinctions, which have little relationship with the everyday experiences of poor conditions.

Throughout this report, we have drawn on the participants' comments and, in particular, comments of those occupiers' affected. These comments are presented as they appeared in the responses to our questionnaire, although a few have been edited for reasons of length.

## Structure of the report

In the next chapter, we provide a thematic analysis of the law and regulatory environment. We draw attention to its historical foundations, and lack of coherence. In the following chapter, we provide a summary of key legislative and other interventions. That summary begins with a brief explanation of what the law does, and how it does it, followed by a discussion of the gaps. In each of those chapters, we draw on our questionnaire data to amplify the points under discussion.

In the final section, we draw our analysis together and make recommendations for reform.

## 2 MIND THE GAP: A THEMATIC ANALYSIS

In this part, we provide a thematic analysis of the legal and regulatory environment, and argue that it lacks coherence. We argue that the law is based on a number of conflicting understandings and purposes. We draw attention to its historical antiquity – its foundation is Victorian – as well as five other themes: the role of the courts in interpretation; the role of local authorities in regulation; the complexity of what we refer to as the “regulatory space”; the role of tenants as regulators; and, finally, the adjudicatory space for housing. In each of these sections, we pinpoint particular issues.

Our argument is that the legal and regulatory environment has given very limited attention to the significance of the occupier; when it has done so, we are doubtful whether this has been any more than paying lip service to the role of the occupier. Moreover, we argue that various other laws, policies, and practices effectively work against the voice of the occupier being heard.

### A typology

The law may be considered to be of two types.

- The first type governs the relationship between landlord and tenant. For over 150 years, it has been clear that the contractual relationship between landlord and tenant is often incomplete in terms of setting out the rights and obligations of the parties regarding the state and condition of the property. Legislation and the common law have intervened to modify the contract and to impose certain terms into the contract.
- The second type is that which places the responsibility for the regulation of the state and condition of the property on some external agency. Today, the agencies most commonly involved in this regulation are local authorities.

### Our Victorian heritage

Both types of law may be regarded as “what the Victorians have done for us”. Interventions were considered to be in the interests of, and were stimulated by concerns about, public health. They derived from concerns about the insanitary conditions of working class housing, and the unhealthy condition of the working classes themselves. Legislative interventions were a response to housing activism. Evangelicals and philanthropists ran a moral crusade against immorality and the relationship between overcrowding and immorality.

During this period, working class housing became an issue in part through a “long succession of works whose literary merit and statistical accuracy may have varied, but whose cumulative influence was considerable” (Gauldie, 1974: 147). One particularly influential work was Reverend Andrew Mearns’ one penny pamphlet, *The Bitter Cry of Outcast London* (1883). This pamphlet provided shocking examples of apparent degradation and vice, from which the poor were said to be in need of evangelical rescue. The question asked by the Royal Commission on the Housing of the Working Classes in 1885 was “is it the pig that makes the sty or the sty that makes the pig?”. That question continues to reverberate throughout housing law and policy.

From this period, the following issues emerged:

- Legislation dealing with whether a property is fit for human habitation. This was introduced by s. 12, Housing of the Working Classes Act 1885, and applied to any contract “for letting for habitation by persons of the working classes a house or part of a house”. It did not apply above a certain rental threshold and no definition was provided of fitness for human habitation
- The failure of the common law to imply any similar principle, other than in the case of a short-term let of furnished property
- The link between statutory protections and particular types of agreement, notably the tenancy (and not other types of agreement, such as licences)
- A concern about ‘nuisances’ which are prejudicial to health, particularly the overcrowding of property
- The emergence of understandings about the proper role of the state in regulating the state and condition of property, though slum clearance and powers over new buildings.

### The limits of the law

These provisions and failure to deal with the state and condition of property are not just part of our inheritance, but are indicative of the limits of the current law.

The Victorian period was the beginnings of regulatory intervention into the relationship between landlord and tenant. The interventions – such as statutory nuisance discussed in chapter 3 – had a clear conceptual basis, public health. Whilst Victorian legislation may have been conceptually coherent, what characterises much of the twentieth and twenty-first century interventions is much less so, partly developing that Victorian inheritance, partly rejecting it.

Today, the law can be found across a range of statutes and in the common law. The focus on public health remains but it has been supplemented by and, to a certain extent, overtaken by other objectives, including:

- The health and safety of the particular occupiers of a particular property;
- A recognition that particular *types* of property are inherently dangerous and require control for the benefit of the occupants (such as, Houses in Multiple Occupation);
- An anxiety to ensure, particularly in the private rented sector but also the social sector, that properties are maintained and that repairs to properties get done, and that the allocation of responsibility for repairs is clear (Peter Brooke MP, HC Debs, vol 637, col 974, 27<sup>th</sup> March 1961; introducing what has become s. 11, Landlord and Tenant Act 1985);
- An increasing concern with improving the thermal efficiency of properties.

The lack of coherence in the underlying rationale of the legal provisions was recognised in particularly by our lawyer respondents, who pointed to obvious gaps. The limits of the law were obvious to social tenant lawyers. As one put it:



*In practical terms the law only allows enforcement by an occupier where there is “disrepair” or a “nuisance” both of which are legal terms of art defined over the decades to address a wide variety of circumstances not all necessarily related to tenants living in dwellings. As a consequence they are necessarily restrictive in the precise circumstances of a tenant living in a dwelling and do not ensure that a tenant is living in accommodation of a reasonable (or indeed, basic) standard. Currently it is possible for residential dwellings let to tenants to be entirely unfit for human habitation without a tenant having any legal basis to challenge the conditions.*

The incoherence of the law also reflects the modern debate about regulation.

- On the one side, the concern is that there should not be over-regulation of landlords, which can be unnecessarily burdensome. This is particularly the case in the private rented sector, where excessive regulation, it is argued, might lead to landlord flight from the sector. The private rented sector has been a key housing tenure since the 1990s, as households have been priced out of ownership and in the absence of sufficient social sector accommodation.
- On the other side, the concern is with the state and condition of property. Housing policy since the Second World War required that every person should have a decent home (within their means). The state has a legitimate interest in improving housing quality and intervening in housing that is not up to proper, modern standards.

To an extent, that debate has been resolved through the notion of risk. Regulation is justified if it works to reduce risk. For example, Houses in Multiple Occupation are more heavily regulated because they pose greater risks to their occupants. Risk is problematic though, particularly in circumstances where the risk of an event occurring may be relatively low, but, if it does occur, the consequences are catastrophic. Risks can also be perceived quite differently by regulators and by occupiers. Politics thus plays a key role in determining when interventions are legitimate. The end result is that in reality, most law and housing regulation is not thought through, and no attention is given to its overall coherence,

## Judicial involvement

A further theme is that judicial interpretations of housing legislation has tended to narrow the scope of statutory interventions. As one commentator put it, in 1974, drawing on the words of the great administrative lawyer of the time, the methods of statutory interpretation mean that social legislation itself “... may easily become unduly narrowed either by reason of the unconscious assumptions of the judge, or because [s/he] is observing principles of interpretation devised to suit interests we are no longer concerned to protect in the same degree as formerly” (Reynolds, 1974: 398).

It is important to note that, whether or not our contemporary methods of interpretation are more fit for purpose and our judges more understanding of the social basis of legislation, narrow judicial interpretations of earlier statutes presents a problem because meanings given to words or phrases at one point can be read across to those words or phrases in different pieces of legislation. We have more to say about this in the next chapter, where we refer to judgments limiting specific provisions and their effects.

## External regulation: The role and limit of local government

The next theme is the identity of the regulator. The early focus on *public* health demanded oversight and local authorities were selected for this task. The modern system of local government was developed during the nineteenth century, and it was perhaps natural for local authorities to be selected for their oversight role. This choice has had a significant impact on modern day practices for a range of technical reasons.

However, when local authorities operate under conditions of austerity, they have to make difficult choices about spending increasingly limited income. There are particular consequences over the relationship between compliance and enforcement practices. Enforcement tends to be expensive and contested. Compliance practices are encouraged, particularly in the regulation of housing standards, so that the local authority works with the landlord to bring their property up to the required standard. So, for example, the enforcement guidance for the Housing Health and Safety Rating System suggests that

Authorities will need to take a view of the spread of hazards in the local housing stock that have come to their attention, and prioritise action on those with the most serious impact on health or safety. It might be an inappropriate diversion of resources and effort to deal with modest hazards when there is evidence of more serious hazards elsewhere. Authorities should act consistently. The decision to take enforcement action will require a judgement as to the necessity for intervention, given the authority’s priorities and wider renewal policies and, where appropriate, their knowledge of a landlord and his or her compliance history. (DCLG, 2006: 2.2)

Local authority reluctance to enforce housing standards was noted by all our respondents, including those who worked in local authorities as environmental health officers. Two particular EHO responses illustrate the issues from their perspective:

*Housing enforcement is difficult labour-intensive work. Reductions in staffing levels to private sector housing teams in Council Environmental Health Departments (arising from cuts to local authority budgets) reduce the number of inspections that are carried out and complaints that are investigated. In two local authorities that I have worked for such cuts in resources have meant that Councils have [] cut back services to Housing Association tenants - complaints are now dealt with via a letter in the first instance and rarely result in visits/enforcement.*

## 2 MIND THE GAP: A THEMATIC ANALYSIS (CONT)

*Furthermore, such cuts have greatly reduced the number of student EHO placements on offer. Student EHO's nowadays are rarely paid during their placements at a local authority. There is a real shortage of qualified and experienced EHOs working in the privately rented sector in London. Often, Councils rely on self-employed contractors on short term contracts rather than permanent staff. Accordingly, the quality of work may be fall and the greater turnover of staff means that a tenant with a complex case may deal with a succession of Council officers. Licensing schemes are a useful way to recoup money but, particularly in the initial stages, the pressure to get licenses in and recoup funds makes it difficult to carry out enforcement work.*

*Suppose I, as a jobbing EHO, carried out a survey of Grenfell Tower and decided that it was a serious fire hazard on the 12th June 2017, and reported that to my boss; I rather suspect I'd be told to get real, not over react, that it complied with Building Regs, had been inspected by the Fire Service, etc etc., rather than being told "OK, go forth and serve an immediate emergency prohibition order under the Housing Act 2004, and we'll organise the evacuation and accommodation of the approximately 500 people who live there, no problem". If I'd been persuasive and persistent, then we'd have engaged the management rather than serving an Order - as Pandora's box would have been opened by such an Order, it would never, ever happen.*

These experiences were reflected in all the responses received across the board. The most common concerns expressed were that enforcement practices differed between local authorities (and within local authorities), there were compliance-led practices with limited follow-up, and different priorities. As one lawyer respondent reported:

*Councils' Environmental Health teams are under strain, and are usually not a reliable source of help for tenants in private sector rented accommodation, meaning that many of the remedies available to tenants cannot be used, as the enforcement powers are restricted solely to the local authority.*

### External regulation: Alternative involvement

Although the local authority might act as the formal regulator of housing standards, there are other regulators. This means that what academics describe as the "regulatory space" of social housing is complex. In this work, the following might be regarded as key regulatory agents: the Homes and Community Agency; private landlord associations; private finance and insurance. It was, perhaps, indicative of the remoteness of these kinds of regulatory organisations that only the Homes and Community Agency was referenced as part of the regulation of housing conditions by our participants, and even then, only two respondents mentioned it.

The Homes and Communities Agency (formerly the Housing Corporation and Tenants Services Authority) regulates those housing providers registered with it. It does so in various ways – for example, in its prospectus for funding the provision of new social housing – but, most significantly, through the setting and monitoring of regulatory standards. So, for example, at the time of writing, it is consulting on the development of its value for money standard, so that "It places value for money at the heart of the business, requiring registered providers to have an agreed approach to achieving value for money in meeting their strategic objectives" (HCA, 2017: 1.4). Its focus is therefore finance and financial viability, with little or no interest in regulating conditions or housing management.

The other two standards that are particularly relevant for this research are the Tenant Involvement and Empowerment Standard, and the Home Standard.

- The Tenant Involvement and Empowerment Standard requires that:
  - a Registered providers shall ensure that tenants are given a wide range of opportunities to influence and be involved in:
  - b the formulation of their landlord's housing-related policies and strategic priorities
  - c the making of decisions about how housing-related services are delivered, including the setting of service standards
  - d the scrutiny of their landlord's performance and the making of recommendations to their landlord about how performance might be improved
  - e the management of their homes, where applicable
  - f the management of repair and maintenance services, such as commissioning and undertaking a range of repair tasks, as agreed with landlords, and the sharing in savings made, and
  - g agreeing local offers for service delivery.
- The Home Standard requires that regulates ensure that their homes meet the Decent Homes Standard (published by the government in 2006), and ensure that they:
  - a provide a cost-effective repairs and maintenance service to homes and communal areas that responds to the needs of, and offers choices to, tenants, and has the objective of completing repairs and improvements right first time
  - b meet all applicable statutory requirements that provide for the health and safety of the occupants in their homes.

Although the HCA was set up by statute, a range of other organisations provide advice and regulation. Key among these are private landlord associations. Although the extent of their membership is not known, they provide advice and training to their members across a range of issues, including health and safety, and have the capacity to expel a member (where, for example, the member has not complied with the requirements of membership). This soft form of regulation can be more significant than other forms as it relies on a community of interest and the ultimate punishment (community expulsion).

Finally, regulation occurs in an even softer context through mortgage and insurance providers, which have a role to play in the management of rented property. Often, such providers appear to be passive, but the pervasiveness of their requirements operates as a potential corrective to practices and/or the state and condition of property which might be harmful to an occupier. Similarly, and perhaps more significant in terms of the leveraging of finance, ratings agencies have a role to play in regulation because of the impact of their rating (and downgrading their rating) on a housing association's ability to obtain mortgage finance at the best rates available to them.

## Tenants as Regulators: The problem of voice

In reality, irrespective of the legal rights and obligations of the parties, the relationship between landlord and tenant should be based on trust. Trust requires that the parties engage in open communication and act on each other's concerns. Anybody who has read the blogposts written by Grenfell Tower residents prior to the fire in which they express concerns about the fire safety of the block will immediately recognise that something went badly wrong in the relationship between landlord, managing agent, and occupiers. Those posts, read today, are heartbreaking.

And the issue is also reflected in our consultation responses. One of the biggest changes occupiers wanted to see related to improved communications with the landlord. Many reported similar concerns about not being heard, being passed from one department to another, and concerns and complaints being ignored.

### Participant's comment:

Asked about health and safety concerns, a Council tenant reported 'Front door is not a fire door. It is a plyboard door. Giving no protection from fire.' Asked if they had tried to get the landlord to do something about it, they stated 'Yes. Like talking to a brick wall.' Did they get it resolved, and if not, why? 'No. The amount of lying involved by the sub contractors to the council. So they would not be penalized.' What would make it easier? 'To cut the middle man out of the equation. I.e. the sub contractor. The private firm. Who look only after themselves.'

The Tenant's Charter, which came into being in the Housing Act 1980, does provide rights to information and consultation on most issues (except rent-setting). Professor Martin Cave entitled his report for government on the regulation of social housing, *Every Tenant Matters*. As he put it:

*The review's primary initial conclusion is that the regulatory arrangements need to be much more focussed on the needs of tenants. For the last thirty years or so, the focus of social housing regulation has been on regulating providers. The review concludes that now is the time to set a new long term strategic direction for the regulation of social housing. The focus for the future should be on regulating social housing for the benefit of consumers. This conclusion is grounded in the view that increasing consumer power and choice is what tenants want and that it will, over time, improve the performance of providers and reduce the need for more intrusive regulation. (Cave, 2007: 2.76)*

If this has been the purpose of the formal law and regulation, then one can justifiably pause to question whether they have met this end. Weak rights to consultation among social housing tenants, and no rights to consultation among private rented sector tenants, are of limited value unless there is a concomitant obligation on the landlord, or managing agent, to respond. As one social tenant respondent to our questionnaire put it: "We want building regulation documents, completion certificates, the paperwork to confirm these places are suitable for people to live in. We have nothing". Many respondents highlighted problems with chains of communication, which was exacerbated for some by repair work being sub-contracted: "Whenever contracts go out to tender there is a vacuum period when jobs already in progress get lost or ordered parts are not delivered and often we have to start again. Every contractor firm criticises the previous one's work, which undermines confidence in the housing association".

The problem of voice was particularly expressed to us as affecting households living with poverty, and households with an elderly or disabled person. The removal of legal aid was particularly mentioned as impacting on those with low and no incomes, and detrimentally affected their ability to challenge the housing conditions in their homes; but these were the households which were most likely to be affected by the issues. As one social tenant lawyer put it:

*I don't believe that the law has any impact on BME and most other protected characteristics. However, I do believe that it affects the elderly, the disabled and the poor more. The poor are more likely to be in poorly maintained accommodation. Items of disrepair, from my experience, are more likely to have an impact on those less mobile. The risk to health and safety is also increased when a person is less able to leave a property in an emergency due to a disability or frailty.*

A private landlord lawyer explained that:

*Grenfell House is the touchstone of the time as this set of queries makes clear. The elderly, children, black, minority etc persons cannot defend themselves as readily or at all - the casual disregard of the complaints made by the self-appointed guardians of the building to the managers is indicative of the way even with ability to raise the questions, lack of funding to follow up makes the position of weaker elements in the population at large to properly see things they recognise as not properly done attended to by those whose responsibility it is. That, as much as the state of the buildings themselves, is what is presently very wrong.*

A surveyor respondent noted that some landlords in the private rented sector actively choose to accommodate more vulnerable households because they are less likely to complain about the state and condition of the property:

*Vulnerable groups are always harder hit. They have problems raising their voices, may fear contact with authority (even one which is trying to help), may fear eviction if they make a complaint. Some landlords (I know of two in my town) specialise in housing vulnerable individuals, not because they want to help, but because they are easier to exploit. One of those landlords has since been prosecuted but the problems went on for years before it got to that point.*

## 2 MIND THE GAP: A THEMATIC ANALYSIS (CONT)

### Participant's comment:

A private sector tenant living in East London, with a leaking roof and health and safety concerns including 'extensive mould in the bathroom and a total lack of any fire safety equipment, no smoke alarms, fire extinguishers, blankets, ladders, nothing.' 'The landlord threatened eviction every time I brought up a problem.' Didn't take any action because they were 'concerned about reprisals from the landlord.'

Long leaseholders have stronger legal rights in connection with the control and management of their property. There is a statutory right to be consulted about major works and long term agreements under section 20 of the Landlord and Tenant Act 1985, lessees who are dissatisfied with the management of their properties can apply to the First Tier Tribunal (Property) Chamber to appoint a manager (under the Landlord and Tenant Act 1987), or, using the Right to Manage under the Commonhold and Leasehold Reform Act 2002 take over the management of the properties themselves. Lessees also have rights in certain circumstances to collectively enfranchise, i.e. collectively become the freeholder of the property.

The legislative basis for ensuring that views of long lessees are taken into account is more developed than with other occupiers, no doubt because of the greater financial stake long leaseholders have in their property. Even so, none of their rights are straightforward or uncontested, and lessees continue to campaign for greater rights. As one of our owner-occupier participants put it:

*The current consultation system is a blunt instrument. The tenants are presented with two/three quotes and the legislation puts pressure on the landlord to accept the cheapest. The minutiae of why a particular quote is cheaper is not usually apparent. At Grenfell for example it may have been that the cheaper cladding was accepted because there was pressure from leaseholders (and the legislation) to accept the cheapest quote.*

### Adjudicatory space

In their work on proportionate dispute resolution, the Law Commission used the term "adjudicatory space". This term was devised to draw attention to the range of mechanisms available to an aggrieved provider or occupier of residential housing. The first port of call should, properly, be the housing provider or landlord as this is the best way of resolving disputes in a situation where the parties are in an ongoing relationship (although see below for the particular situation of private rented sector tenants). If that is unsuccessful in resolving the problem, there are then the traditional modes of securing justice – through the Courts and Tribunal system. However, there are other less traditional mechanisms - including the Local Government Ombudsman, the Housing Ombudsman – and other types of forum, including alternative dispute resolution, such as mediation and conciliation. The Law Commission suggested that the lack of coherence here should give rise to a re-consideration of the values of adjudication.

The adjudicatory space was the subject of particular comment by our participants. Some long leaseholder occupiers expressed concern about the First Tier Tribunal. One long leaseholder suggested that this Tribunal "... acted only to escalate costs and support Professional Landlord. This Landlord who had a third of the freehold was un-cooperative, mean and trying create mountains of paperwork and forfeiture". The issue of enforcement was raised: "A more robust Tribunal system. I should have been given the option to go back to them for enforcement when it became clear that little would be done."

Environmental health officer respondents were particularly exercised about the information requirements for bringing cases to the Tribunal, which linked with their decisions whether to bring enforcement action in the first place:

*The appeals process is long winded and requires the local authority to produce reams of information and justification which is one of the reasons why Local Authorities and individual officers don't take enough enforcement action.*

*Tribunals take too long and landlords appeal simply to delay the process rather than because they disagree with the notice. Tribunal took over 4 months to reject an appeal when the paperwork requested was not submitted*

The ombudsman was regarded as problematic by those social housing occupiers who had used it. One social housing respondent expressed these concerns as follows:

*There is an internal complaint procedure. Unfortunately, it does not work as it should be. We were overcharged when it came to the water rates. It took 5 years to go through the internal procedure. I then made a complaint with the Ombudsman. After two years the Ombudsman found in my favour and we got a refund for the overcharging of the water rates. The Council has now to give us a yearly refund but what I really wanted was a water meter for my flat but the Council does not want it.*

In his speech to the Conservative Party Conference, Sajid Javid, the Secretary of State for Communities, mooted the development of a specialist housing court. Such a court already exists in the shape of the Property Chamber of the First Tier Tribunal, but it has more limited jurisdiction, and only hears a fraction of housing disputes.

### Legal aid and symbolic law

There are two further related issues which we raise here: the decline of legal aid; and, the symbolic nature of the law.

The decline of legal aid has had two particular effects. First, in individual cases, legal aid has largely disappeared. This has particularly been the case in disrepair matters. The reality of these cuts in disrepair claims was described by solicitors:



*The fact that legal aid is now so limited for disrepair cases and often non-existent, means that very many people go without a remedy at all. This is compounded by the fact that the courts are inaccessible to litigants in person, who are unlikely to be able to draft and present their claim in the way the court expects, and by the need to commission and pay for expert reports. Damages claims (except when in the form of a counterclaim) can realistically only be done by CFAs or DBAs, and only a small minority of tenants will be able to find a solicitor to act on this basis.*

*Legal aid is only available when there is a serious threat to health and safety, and then only for the purpose of obtaining an order for works; or where there is a counterclaim for disrepair. Once an injunction for works is granted, the legal aid falls away and the tenant is left to pursue the damages claim on his/her own (except in the rare cases where it can be done under a CFA or DBA). And, of course, the court does not take responsibility for enforcing its own orders, so even if the tenant succeeds in obtaining an order, s/he may still have to bring the landlord back to court if he does not comply with it, and s/he may need to apply for a charging order or other enforcement measure if the landlord fails to pay a damages award.*

There remains the possibility of obtaining legal aid in cases where there is a potential for damages to be a set off by way of defence to a possession claim based on rent arrears. However, the contingent nature of these areas where legal aid remain were emphasised by one example (among many) provided by a lawyer who acted for social tenants:

*I recently had a defendant to a possession claim living in a property with serious damp and mould. The defendant's main wish was for the disrepair to be resolved. The claimant's claim had a number of legal flaws and was quite rightly dismissed. Unfortunately, this also denied the defendant an opportunity to challenge the disrepair at the premises (as legal aid for such a case could only be justified as a counterclaim in possession proceedings for rent arrears). This means that the defendant must continue to reside at the premises still in a condition of disrepair and has no means to challenge this unless and until the claimant brings a further claim for possession.*

Secondly, the decline of legal aid for housing has led to "advice deserts". In some areas of the country, there is a dearth of solicitors with housing contracts for legal aid. This is an unsustainable position. Telephone advice, which is the first port of call for many, is a poor substitute for face-to-face provision by an expert in housing law. This is most particularly because, as the reader will already have determined from the above, and will appreciate in detail below, the law is complex and in key areas uncertain.

If a person has rights but no ability to enforce those rights, this gives rise to the belief that those rights are, in real life, "symbolic". We also recognise that rights can be symbolic for other reasons, most notably in the private rented sector. This is because of the limited security of tenure of most private rented sector tenants. It is assumed that they are unlikely to exercise their rights, or complain about the state and condition of their property, because they risk being evicted on a no fault basis if they do so. As one of our private rented tenants put it: "Letting agency ignored reports, threatened to not renew lease and leave me homeless again as there were only local agency that accepted housing benefits. I stopped complaining". One of our lawyer respondents provided an example of a case with which they had dealt, which interwove the problems of legal aid with retaliatory eviction:

*Mr R was a private tenant. His boiler broke and there was no heating or hot water for his family. Although this was covered by s11, he was ineligible for legal aid and could not afford a solicitor. He reported the matter to the LA who contacted the LL (after several complaints from Mr R that they were not taking any action). The LL threatened to evict Mr R and his family. The LA did not properly report this and so he had no protection from retaliatory eviction. Mr R took out a loan to fix the boiler himself. Yes, more generally AST tenants are so lacking in security of tenure that they are unable to require the landlord to remedy even serious damp within the 6 months standard tenancy. The landlord will simply not renew the tenancy if the tenant complains and will be free to re-let without repairs being carried out.*

## Conclusion

Although there was a clear basis for the involvement of the state in the regulation of the state and condition of housing at the outset – a concern for public health and morals – that basis has been dissipated and there are competing alternative rationales. This has led to piecemeal and incoherent law and diverse regulators with overlapping powers and responsibilities. The principal concern here lies in the complexity of the regulatory space. This also needs to be combined with the complexity of the adjudicatory space and the production of what are, in effect, symbolic rights because of the inability or unwillingness of many to enforce those rights.



# 3 MIND THE GAP: AN ANALYSIS OF LEGISLATION

In this chapter, we discuss the gaps in the law which appear to have been exposed by the Grenfell fire. We discuss certain specific provisions of legislation (in the broader sense advocated earlier). We consider those provisions in terms of what they set out to do, as well as impediments on their use and enforcement, with a consistent focus on the gaps as they have appeared. The specific pieces of legislation considered are as follows: Landlord and Tenant Act 1985 (repairing provisions); Housing Act 2004, Part 1; Environmental Protection Act 1990 (statutory nuisance provisions); Building and fire safety regulations; Landlord and Tenant Act 1985 (leasehold provisions); Deregulation Act 2015 (retaliatory eviction).

## Landlord and Tenant Act 1985

There are two important sections to this Act. Section 8, which relates to fitness for human habitation; and section 11, which relates to repairs.

### Fitness for human habitation

Section 8 implies into all relevant tenancy agreements a condition that the property is fit for human habitation at the start, and an undertaking from the landlord that it will be kept fit for human habitation during the course of the tenancy.

In determining fitness for human habitation, section 10 says that regard is to be had to the following matters:

- 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;
- and the house shall be regarded as unfit for human habitation 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.

This would be a powerful provision, but for one fact. It does not apply where the rent is above a certain level. The level has not been increased since the Housing Act 1957. The current levels are £80 in London and £52 elsewhere. Those figures are the annual rent. Hardly any properties will be caught by this provision.

The Law Commission for England and Wales (1996: 4.13-5) wondered aloud as to why the rent levels had not been increased. They suggested that: "It is probably explained by a number of factors (rather than by any particular one). These include the extension of local authority housing, the decline in private sector lettings engendered by the Rent Acts, and the rise in owner occupation". They further discuss two particular issues: the introduction of the repairing obligation; and the apparent belief that the provisions were outdated because of its Victorian origins in relation to the "working classes". Perhaps also, the regulation as burden argument militated against an increase in the rent levels.

In one 1984 Court of Appeal decision, *Quick v Taff Ely BC*, a Judge made the following critical comment:

When I read the papers in this case I was surprised to find that the plaintiff had not based his claim on an allegation that at all material times the house let to him by the defendant council had not been fit for human habitation. The uncontradicted evidence, accepted by the trial judge, showed that furniture, furnishings and clothes had rotted because of damp and the sitting-room could not be used because of the smell of damp. I was even more surprised to be told by counsel that the provisions of the Housing Act 1957, as amended by the London Government Act 1963, did not apply to the plaintiff's house. By section 6 of the 1957 Act, on the letting of a house at a specified low rent, a covenant is implied that the landlord will keep it in a condition fit for human habitation. For most of the time the plaintiff was in occupation of the house let to him by the defendant council it is arguable that it was not fit for human habitation. Unfortunately, the figures which were fixed as being low rents have not been changed for over 20 years. In 1965 a low rent outside central Greater London was one not exceeding £52 per annum. The present-day equivalent of that figure, when inflation is taken into account, is over £312. The plaintiff's rent of £6.75 per week in 1976 was well above the statutory figure. This case would seem to indicate that a new definition of a low rent is needed.

Three factors suggest that the time is well overdue for abolishing the rent levels, or, at least, increasing them:

- The Law Commission has long advocated their abolition;
- The Welsh Government have included the requirement about fitness for human habitation in their Renting Homes (Wales) Act 2016, without the rent proviso. They have reserved the power to themselves to specify the factors to be taken into account in determining fitness.
- On 19<sup>th</sup> January 2018, Karen Buck MP will have the Second Reading of her Private Members' Bill, the Homes (Fitness for Human Habitation and Liability for Housing Standards) Bill. This Bill has been drafted and much discussed by leading figures in housing law, and been the subject of extended discussion within the practising community. We discuss this further in the next chapter. The important point here is that this Bill proposes a new s.8 which is not limited by rent levels.

### Repairing obligations

In nearly all leases for less than seven years of a "dwelling-house", the law implies into agreements that the landlord is required:

- to keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes),
- to keep in repair and proper working order the installations in the dwelling-house for the supply of water, gas and electricity and for sanitation (including basins, sinks, baths and sanitary conveniences, but not other fixtures, fittings and appliances for making use of the supply of water, gas or electricity), and
- to keep in repair and proper working order the installations in the dwelling-house for space heating and heating water.

The repairing obligation is extended to any common parts of the building which are under the landlord's ownership or control. The obligation has particularly suffered from restrictive judicial interpretations since its introduction in 1961. This has led to the following problems (at least):

- a In order for there to be a requirement to repair, there must be *disrepair*. The landlord is only required to restore the property to its previous good condition. An inherent defect in the property is not, generally, *disrepair* (although it may cause *disrepair* to parts of the property affected).
- b As a general rule, except in relation to the common parts, the obligation to repair only arises when the landlord is put on notice as to the existence of *disrepair* in the property. The notice must be such as to put a reasonable person on inquiry as to the need for repair. This means that the first time some *disrepair* happens, such as a leak from a flat above, it is generally not remediable under section 11.
- c There is a line drawn between repair – which is the subject of the covenant – and improvement or renewal or replacement – which are generally not (unless the circumstances are such that the same inherent defect in the property will cause the same problems again and again). So, for example, in the *Quick* case, the property had an inherent defect which caused condensation at such a rate that the tenant's items became mouldy and ruined. The property was not regarded as being in *disrepair* because there was no evidence at all of physical damage to the structure and exterior of the property. In general, mould and condensation damp are not necessarily "*disrepair*" unless they are linked to the subject of the covenant.

#### Participant's comment:

'We told the housing association about the damp shortly after we moved in in December 2015, they eventually sent round their Maintenance Manager. He arranged (eventually) to have newer, supposedly better, extractor fans fitted in the kitchen and bathroom. But basically he told us it's our fault, for using the LPG gas central heating and not leaving the windows and front door open. Also, although he said I was doing the right thing by not drying clothes on the radiators, he criticised me for using a condenser dryer. He also suggested that we install insulating wallpaper in the cupboards and on outside walls (at our expense). We have installed electrical sockets in the cupboards, and little thermostatic airing cupboard heaters. There's no longer pools of water on the floor of the cupboards. But the building of 4 flats was built into excavated ground, most of our only bedroom is below ground level, with a brick retaining wall 3 feet from our bedroom window. So friends have told us that it was never properly insulated. They (the housing association) just seem to think we're stupid, because we live in social housing, that we're clearly not bright enough to know any better. But we are both ex nurses, have owned our own home, have renovated homes. We ended up in social housing because our mortgage insurance wouldn't pay out after my hubby was diagnosed [with cancer] as he lived 'too long'. We ended up having to sell our house and live off the equity until it was mostly gone, before we got any help.'

- d The relevant standard of repair is related to the age, character and prospective life of the property and the locality in which it is situated (section 11(3)).
- e While it is obvious that certain matters fall within the scope of the covenant, there are a range of other matters which are grey areas. So, for example, it is only since 2011 that there has been a definitive answer to the question of whether internal plaster forms part of the structure of the property. The question was whether it was "in the nature of a decorative finish" or not. The Court of Appeal held that it was part of the structure because it "ordinarily in the nature of a smooth constructional finish to wall and ceilings, to which the decoration can then be applied, rather than a decorative finish in itself". Other issues that remain are, for example, glass panels in a front door; window frames, but not the glass, have been said to be part of the structure and exterior of the property.

Our lawyer respondents were particularly scathing about the limitations of section 11:

*It is not possible to address dangerous properties or those with design features that pose a risk to health as invariably they are not in a state of disrepair, nor a statutory nuisance. This denies tenants any recourse in such circumstance; invariably they have to wait to suffer loss or damage before any form of legal redress is available.*

*The usual remedies ... are all found wanting when it comes to the range of poor housing conditions, health and safety, etc, and are of no use whatever in relation to fire safety. If the problem is one that is caused by a design issue (including condensation dampness arising from lack of adequate ventilation or insulation, by potentially hazardous materials, or by infestation of various kinds), the main contractual remedy based on the landlord's repairing obligations (whether under the tenancy agreement or s.11) has no application.*

*Tenant remedies limited to disrepair/EPA claims. No remedy for, for example, severe condensation mould growth caused by overcrowding. [I Encounter [this situation] weekly. No remedy for potential safety issues such as lack of fire safety measures/no banisters etc when no harm yet caused (save for with private/HA tenants JRing authority to take action). [I Encounter this situation] Monthly. No action available to tenants where there is dangerous exposed asbestos but no harm yet caused. [I Encounter this situation] Monthly.*

*[section 11] is severely deficient as it is outdated, doesn't take into account anything but the fabric of the building, and doesn't state specific times for repairs to be carried out in. It is also not very useful in dealing with health and safety/hazards that aren't specifically disrepair - such as damp and mould etc. (unless this arose as a result of disrepair). When it comes to fire safety, most landlords are not aware of their obligations. This isn't helped by the fact that the only point of reference is the LACORS guidance, which is long, piecemeal, outdated and not user friendly.*

## 3 MIND THE GAP: AN ANALYSIS OF LEGISLATION (CONT)

The significant limits on what otherwise might be a very effective provision need remedying urgently. Together with lifting or abolishing the rent levels for section 8 of the Act and implementing Karen Buck's private members bill, this would mean that tenants had available to them a more effective legal right to take action about the conditions of their homes. However, there is a limit on what can be achieved by individual tenants. Actions under private law require stamina and a confidence that courts would listen to you. Many tenants are vulnerable, or have too many other things going on in their lives to prioritise legal action. Moreover, taking legal action is particularly problematic when we suffer from an acute shortage of affordable housing

### Housing Act 2004

Part 1 of the Housing Act 2004 makes provision for the Housing Health and Safety Rating System (HHSRS). The HHSRS replaced the Housing Fitness Standard which was set out in the Housing Act 1985. The fitness standard had provided the primary method of ensuring minimum health and safety standards in housing since the early twentieth century. Last updated in 1990, it was replaced for a number of reasons. Its prescriptive nature was considered to be an inappropriately blunt instrument for effective regulation of housing standards; there was little statistical or scientific evidence to underpin judgements of environmental health officers under the fitness standard; there were wide variations in the interpretation of the "fitness standard" so it was inconsistently applied; and, finally, research by the Building Research Establishment showed that it did not cover the greatest risks to health and safety in the housing stock – for instance, fire.

### What is the HHSRS?

The HHSRS is 'a risk based assessment tool which is used by environmental health officers to assess the risk (the likelihood and severity) of a hazard in residential housing to the health and safety of occupants or visitors that arises from deficiencies which can be design, disrepair etc. The HHSRS is tenure neutral; it can be used to assess hazards in private and social rented housing and also in owner occupied housing'. Once having assessed risk, environmental health officers then have a range of enforcement tools available to them. We have considered the resistance of some environmental health departments to taking enforcement action earlier in this report.

The tenure neutrality of the scheme is particularly noteworthy in the context of Grenfell. It should be noted however that the HHSRS seems to have been primarily used as a tool to improve standards in the private rented sector. This may be because the then Government considered that the Decent Homes standard was the appropriate vehicle for improving standards in the social sector.

One of the issues which has arisen with the HHSRS is the extent to which the regulatory agency (the local authority through its environmental health officers) can enforce its obligations where it is the local authority itself which is the manager. Although the HHSRS was introduced only in the 2004 Act, this question had been the subject of litigation under previous provision.

In *R v Cardiff CC ex p Cross* (1983) 6 HLR 1, 11, the Court of Appeal held in relation to the obligations contained in Part II, Housing Act 1957 that a local authority could not serve a notice on itself (despite that having the effect that council tenants are in a worse position than other tenants); it, therefore, read the expression "any house" as "any house other than one owned and controlled by the local authority". It is said that this principle is of wide application, but the Court of Appeal was rather more circumspect and sought to limit its application. Lord Lane LCJ stressed that this conclusion was limited:

*It is confined strictly, because Sections 9 and 16 of the [1957] Act may in certain circumstances apply even though the house is owned by a local authority. For example it may apply where it is owned by a local authority outside that local authority's own area. It may apply where the local authority, even in their own area have an interest in the house but someone else is in control of the house: for example, it may be owned by the local authority, and yet it may be that a property company have taken a long lease from the local authority and the property company in turn may have let it to a tenant on weekly terms. The conclusion is limited to a case where the local authority in charge of the area is the body having control of the house.*

It has been suggested that this judgment applies equally to the 2004 Act and that the local authority is unable to issue notices against itself under the 2004 Act. It may be, however, that the ideas behind the judgment could be more limited where the local authority have contracted out the management of the property (and its control) to another party. To our knowledge, such a case has not been brought to final judgment (although judicial reviews have been pursued on this basis). At present, then, it appears that the principle from *Cross* remains good law and it significantly limits the operation of the HHSRS in relation to local authority housing. So, for example, a Tenant Management Organisation, although a "person having control", does not appear to fall within the definition of a responsible organisation because it has no relevant interest in the property (ie it does not have a freehold or leasehold). Given the intention to move management from a local authority to the Tenant Management Organisation (including decisions as to repair, improvement and maintenance), and given that the responsibility for choices about works is with the Tenant Management Organisation, this appears to be a triumph of form over substance.

Even if *Cross* is given a wide interpretation, the HHSRS as currently formulated imposes duties on local authorities under section 3 to keep housing conditions under review. This section must mean that local authorities should be aware of risks in its own properties and take action to address those risks. This is particularly important because of the vulnerability of many people housed in social housing, including on the upper floors of tower blocks. The failure of central government to issue directions under s3(3) of the Act to guide local authorities on how they should meet their duties and on the need to publish records of actions under the Act appears to be significant. Such a failure could be addressed very easily.

**Participant's comment:**

A physically disabled social tenant on the second floor: 'The stairs leading to my flat are slanted as [the building] is subsiding. I have repeatedly fallen on them, most recently a month ago, breaking my foot. It is frightening imagining trying to get out of this house in a fire; the landlord's response to Grenfell was to put up some arrows pointing to the stairs, and to refuse to consider a fire escape.'

The operating guidance to the HHSRS provides a very useful statement of the principles underpinning the provisions:

'Any residential premises should provide a safe and healthy environment for any potential occupier or visitor. To satisfy this principle, a dwelling should be designed, constructed and maintained with non-hazardous materials and should be free from both unnecessary and avoidable hazards'.

The Coalition Government conducted a review of the HHSRS the results of which were published in March 2015. The review was part of a broader review of legislation relating to the private rented sector and considered the role of the HHSRS in improving standards in the private rented sector. It was in part a response to criticisms that the HHSRS was too complex. The Government decided not to make any changes to the system but to produce a publication to extend awareness of its provisions amongst landlords and tenants in the private rented sector. Once again the scheme was treated as primarily relevant to the private rented sector.

**How does the HHSRS work?**

The HHSRS works by placing a strategic responsibility upon local authorities to keep housing conditions under review with a view to identifying any necessary enforcement action. If a local housing authority become aware of potential hazards in residential premises, either because of its own review of housing conditions, or for any other reason, for instance a complaint by an occupier, then they are required to inspect those premises. The purpose of the inspection is to determine whether a category 1 or category 2 hazard exists. Categorising the hazards in this way introduces an element of 'triage' into decisions about taking enforcement action.

If a category 1 hazard – a serious hazard – is found following an inspection the local authority is under a duty to take enforcement action. If a category 2 hazard – that is anything other than a category 1 hazard – is found, then it has the power to take action. There is a range of enforcement actions available to environmental health officers including serving an improvement notice, making a prohibition order, serving a hazard awareness notice, taking emergency remedial action, making an emergency prohibition order, making a demolition order or declaring the area in which the premises concerned are situated to be a clearance area. The most common enforcement action is service of an improvement notice.

The HHSRS recognises 29 types of housing hazard. Each hazard has a weighting which helps determine whether the property is rated as having a category 1 hazard or as category 2. One of the 29 hazards recognised is fire. The operating guidance, which provides greater details on the hazards, makes it clear that building design and construction are relevant to the prevention of the spread of fire and smoke. The guidance also says that assessments of fire hazards need to take into account the type/size of the building, the number of different dwellings, conditions in each individual unit, the degree of fire separation between each dwelling, and the effectiveness/presence of detection/alarm systems/primary firefighting equipment such as sprinkler systems. The operating guidance makes specific reference to Building Regulation Approved Document B and British Standards BS5588, Code of Practice 5839 and BS5446.

Section 4 of the Housing Act 2004 does provide for environmental health officer inspections to be triggered by 'official complaints'. These are statutorily defined as complaints in writing made by either (a) a justice of the peace having jurisdiction in any part of the district, or (b) the parish or community council for a parish or community within the district. We have no knowledge of how often local authority action has been triggered by official complaints. In practice, we suspect it would be difficult to find a JP who would be prepared to take action.

Further, there is no statutory mechanism for individuals to trigger an investigation, which, taken together with the lack of enforcement against local authority tenants, means there are serious flaws in this mechanism. A simple legislative change may be to add to the list of those bodies who can make an official complaint. For instance, it has been suggested that the FTT could make such a complaint, following an approach from occupiers.

**Participant's comment:**

Social Tenant: 'Windows are over 26yrs old and old sash windows they are all rotting and slam down like a guillotine and side windows don't open we had a fire and windows were deemed a fire hazard by the fire brigade I reported this a number of times by email and phone but went on deaf ears. [I am concerned] In case we have another fire and not being able to get out of the windows. I emailed [the landlord], rang them and wrote a letter to them for the past few years as windows need replacing I am at a loss.'

**Issues**

The HHSRS has the potential to be a very valuable tool for the improvement of housing standards and the elimination of serious risks within people's homes. It has particular importance because rights under the Landlord and Tenant Act 1985 are dependent upon a tenant's knowledge of the law and public funding. It also allows local authorities to effectively 'triage' complaints about housing. However, there are currently a number of limits on its effectiveness.

First, there are concerns, which were expressed by our respondents, that the legislative tools are not used as often as they should be, that there is unacceptable delay in taking action once hazards are found in premises, and, probably linked with both of these, local authorities lack sufficient resources to take full advantage of the legislative provisions.



### 3 MIND THE GAP: AN ANALYSIS OF LEGISLATION (CONT)

We discussed these concerns in the previous chapter. We consider that urgent attention should be given to the need for a legal route enabling tenants to request assessment and enforcement of the HHSRS.

Secondly, and related to that point, there were concerns expressed by our respondents about the subjective nature of the assessments made, which relates back to the point made in the last chapter about deskilling. Our Environmental Health Officer respondents were particularly concerned about this issue and argued strongly for a return to fitness standards:

*The legislation is heavily reliant on officer judgement and not prescriptive enough. Very difficult to get some hazards high enough to enforce work.*

*The whole HHSRS system is very bureaucratic and subjective. It is poor at addressing single defects in a property and you often have to fudge issues to make them rate high enough to address specific hazards. I encounter this issue on a weekly basis to the point of looking for alternative non-housing based legislation to deal with housing conditions.*

What some officers wanted was a clear set of standards that everyone, landlords, tenants and regulators can easily understand. The counter argument to this, and the reason why the HHSRS replaced fitness standards is that there is a need for professional judgment to be exercised in determining priorities for enforcement. Moreover, unlike the fitness standard, the HHSRS is underpinned by scientific and statistical data. One participant pointed out that judgements under the old fitness standard were extremely subjective in that they were breached when the local authority said they were breached. For that participant, the HHSRS – which requires officers to justify their judgements – is more objective. We would suggest that there is an urgent need to increase confidence in the HHSRS. One way to address this is to increase training opportunities not only for environmental health officers but also for members of the First Tier Tribunal as several participants in the survey suggested that inconsistent and unhelpful interpretation of the scheme limited local authority action. Regular training and updating for all those involved in the Act could be made a CPD requirement.

Related to this, many respondents noted that the operational guidance to the Act needed updating, in particular in relation to housing condition statistics, and there is a need for more borderline cases studies to be included in the guidance to assist those enforcing the law. As one Environmental Health Officer put it, “[The HHSRS is] too complex and statistics now out of date, small local authorities do not have the resources to update statistics. Worked examples are usually extreme cases - we need more borderline cases to assist with the scoring”. The guidance was also said to be wanting in terms of its interpretation. One EHO provided the following example: “The guidance left a number of items hanging in the air - for instance a definition of average - average for the house at the time of construction, or average now (typical for the area) after, improvements and alterations have been effected”. There was a lot of concern that the LACORS guidance is no longer being updated. The LACORS guidance was particularly valuable as it provided a common set of principles for enforcement across all local authorities and pulled together the HHSRS, HMO licensing and fire regulation.

Another concern was noted in terms of the evidence-gathering process. Just how deep should an investigation by an environmental health officer be? We were given examples of the kinds of assumptions that are made in the inspection process and the limits of an inspection in practice by two respondents who related their experience and knowledge of assessments to Grenfell Tower and Lakanal House respectively:

*When doing an assessment, in the case of Grenfell tower, for instance, it would be difficult to get all the information that you need, I doubt that I'd have thought about the cladding if doing a "fire" hazard assessment (though I would have welcomed it for the excess cold assessment!) and even if I did, I'd have taken it on trust that it was an acceptable material properly installed to comply with building regulations. ditto escape routes – I'd rely totally on the compartmentalisation, though know of the potential for pipes and cables to weaken that, and the protected escape route. HHSRS does not allow you to tailor the assessment to the occupier, and so a disabled person who relies on the lift for access to an upper floor would not factor into the assessment - where, clearly they would be severely at risk in a Grenfell situation where the lifts are not available, and this would put rescuers at risk too.*

*The HHSRS does not require anything more than visual inspection, dismantling, testing is not required. In the case of Lakanal House, "years of botched renovations had removed fire-stopping material between flats and communal corridors, allowing a blaze to spread, and that the problem was not picked up in safety inspections" (Wikipedia). Doing an HHSRS inspection, I'd have never been able to spot this either. I can think of other examples where fire precautions have been critically undermined by later work, the importance of the fire proof boarding not being realised, and the damage that was done to it by later work not spotted until a post fire investigation. Again, if I as an enforcement officer were to visit that property I'd have never spotted this.*

There is nothing in the HHSRS which stops environmental health officers requiring that landlords produce evidence that works have been carried out professionally or indeed evidence in connection with any matter on which those inspecting the property are unclear. What is concerning here is that there appears to be a reactive rather than a proactive approach to the HHSRS. It allows much more scope for action than these responses suggest.

Issues were also raised over the problems that Category 2 risks are not the subject of mandatory enforcement action.

*I've dealt with [housing association] and other Properties where owners have replaced their front doors with non-Fire Rated ones, not realising the importance of the door in compartmentalising them and protecting them, and the escape route, from a fire. There's probably conditions in the leases prohibiting this, building regulations probably apply, but it has happened on many occasions. Sometimes management would be up to spotting this and preventing this but I've seen situations where the management is in the hands of the individual flat owners and internal politics were a factor.*



*In terms of the HHSRS, it certainly increases the outcome element of the scoring, but the likelihood would remain unchanged, and it would be hard to see it scoring a Cat 1 so mandating action. Though it would be desirable, many local authorities would not enforce against Cat 2 hazards for resource reasons and concern that they'd be defeated in the event of an appeal.*

Again this appears to be a question of culture around the enforcement of the Act. Assessing the lack of a fire door as posing a Category 2 hazard does not prevent action, and it would be easy to justify any action because of the potentially fatal consequences. What this also suggests is that enforcement guidance needs to be updated to promote more enforcement activity.

It should also be said that our consultation responses highlighted that issues with non-fire doors are not limited to replacements by owner-occupiers.

#### Participant's comment

Social tenant in a large estate owned by a housing association, describing concerns which included 'Regular doors where there should've been fire doors and a front door that cannot open to its full capacity due to the wrong sized door and frame that's currently fitted [and] My bedroom is an "inner room" and I worry that if a fire were to happen in my living room I wouldn't be able to get out to rescue my children. I emailed [the landlord] the fire safety regulations in regards to the inner room situation. I also showed the surveyors the front door cannot open all the way. After many months of arguing my point re the inner room issue, they agreed that the room should be fitted with a fire door; and they did so. However they have ignored my plea for them to install a new front door of the correct size. Unfortunately they are not under obligation to change the use of the inner room from a bedroom to a bathroom or kitchen as the fire safety regulations re "inner rooms" on 2nd floor or above only apply to new builds.'

Finally, it may be that there is some misunderstanding of the scheme in the context of mixed tenure social housing. This misunderstanding is reflected in guidance provided by the DCLG. The guidance at present does not direct the freeholder to check the terms of the lease as a first step, but assumes that there is no right of access for most Right to Buy leases. It also does not suggest that future leases should include this right of access. Furthermore, whether or not a lease granted under the Right to Buy contains a right of entry for the freeholder, there is a duty to inspect under section 4 of the Housing Act 2004 where the local authority considers it is appropriate to inspect. Changing a front door, other indications such as other residents complaining about the impact of works being done, or the leaseholder seeking planning permission to change the layout of a flat would give rise to a duty to inspect. Guidance on this needs to be improved as a matter of urgency.

## Statutory Nuisance under the Environmental Protection Act 1990

Section 79 of the Environmental Protection Act 1990 requires local authorities to investigate complaints of statutory nuisance and take enforcement action to stop it. Premises will constitute a statutory nuisance if they are in such a state as 'to be prejudicial to health or a nuisance'. This criminal law provision is Victorian in origin. It is also highly subjective and has always suffered from the problem of persuading Magistrates that premises are indeed prejudicial to health and that the landlord is the person responsible for this.

Although at first glance these provisions suffer from the same defect as the HHSRS in that local authorities cannot take enforcement action against themselves, there is another route to action. Under s.82 of the Act individuals can make a complaint to the Magistrates' court, which, if satisfied that there is a statutory nuisance, can issue an abatement notice, including against a local authority. These provisions offer a tenure neutral route for tenants seeking to rectify poor housing conditions, where those conditions impact upon the health of occupiers.

### Issues

The tenure neutrality of statutory nuisance is a major advantage. However, there are a number of issues which arose among respondents to the survey, as well as more generally.

The first issue is that this route is not well-trodden ground – although there have in the past been several legal campaigns using the device. Overall, however, there is a lack of legal expertise which, combined with a lack of public funding, means that it is difficult to find a lawyer to pursue this course of action. Secondly, statutory nuisance is a relatively risky avenue for any occupier seeking to improve housing conditions because of the risks of costs and the criminal nature of the proceedings. One solicitor respondent neatly summarised the issues with this provision:

*There is no legal aid for an EPA prosecution, and in any event a criminal prosecution in the magistrates' court is the wrong process and the wrong court. The procedure is completely inaccessible to all except a very few people who may be able to find a solicitor willing to take the case under a CFA. There is a need for expert evidence which will be sufficient to meet the criminal standard of proof. Most magistrates will be completely unaware of their jurisdiction under the EPA, and will need a crash course in what it is about.*

In any event, even if this provision were opened out, there is a danger that local authorities would be swamped with actions relating to less serious nuisances, whilst more vulnerable occupiers in poorer housing conditions who may not have the abilities or energy to pursue solutions, might be neglected.

Overall though, the most serious criticism of the provisions is that they are anachronistic based in a Victorian understanding of public health. We would recommend that element of statutory nuisance which relates to housing be abolished, subject to enacting suitable replacement mechanisms for tenants to hold landlords to account for letting unsafe and unfit premises.

## 3 MIND THE GAP: AN ANALYSIS OF LEGISLATION (CONT)

### Building and Fire Safety Regulations

Building and Fire Safety Regulations have received a great deal of attention since the Grenfell Fire. This is not surprising. They provide the main legal provisions for ensuring that fire safety is built into new or significantly modified buildings, and that the built environment continues to be safe. The circumstances and consequences of the Grenfell Tower fire indicate that there are serious problems in the current iterations of both sets of regulations. We note that there is a protocol setting out the interrelationship between the two most important pieces of legislation relating to fire safety in homes, the Housing Act 2004 and the Regulatory Reform (Fire Safety) Order 2005. This protocol seeks to promote collaborative working arrangements between Local Housing Authorities, and Fire and Rescue Authorities (see [www.cieh.org/uploadedFiles/Core/Policy/Publications\\_and\\_information\\_services/Policy\\_publications/Publications/Fire%20Protocol%20final.pdf](http://www.cieh.org/uploadedFiles/Core/Policy/Publications_and_information_services/Policy_publications/Publications/Fire%20Protocol%20final.pdf)). We have been informed that, as the authority's duty to consult the fire and rescue authority is only "so far as it is practicable to do so before taking those measures", the extent and degree of that consultation varies between areas despite the protocol.

What has been of particular concern is that no consensus, even amongst experts, has been reached about what the Building Regulations *actually* require when it comes to fire safety, and the addition of cladding in particular.

#### Issues

We understand that the Construction Industry Council is undertaking a review of the regulations on behalf of the government. There is an important need for that review to pay attention to the recommendations of the Coroner following the Lakanal House fire to ensure that the provisions of both sets of regulations are clear and comprehensible to readers. It is neither adequate nor appropriate to say that these regulations are the domain of experts and that, therefore, laypeople are not required to understand them. *Everyone* has an interest in ensuring that the buildings they live in comply with fire safety requirements and should be able to understand those requirements. Further, as one social landlord respondent wrote:

*I agree with the Lakanal Coroner ruling 43 and their letter to the DCLG that describes building regulation Approved Document B as "the most difficult document to interpret" and "requires reference to additional documents for relatively straightforward answers to fire protection properties". Building Control Alliance Guidance Note 18 'Use of Combustible Cladding Materials on Buildings Exceeding 18m in Height' the third route (of a total of four) to compliance with the Approved Document B, which relies on 3rd party desk studies, these have not been completed and that is why we (the sector) have many buildings that do not comply.*

There is also a need to ensure that the regulations more clearly address the interface between building regulation requirements for environmental improvements and building regulations requirements for reducing fire risk, as well as the retrospective application of modern regulations to buildings constructed before their implementation. It should be clear that in the event of conflict, regulations ensuring that lives are not put at risk are always prioritised. One example provided of the overlap between building regulations and other legislation (HHSRS) concerned changes the front door of accommodation:

*Other issues are dealing with building work/changes which compromise fire breaks or compartmentalisation as if does not comply with building regulations but not clear when work carried out, this also seems a gap in the action that can be taken. Following recent assessment of properties been identified about 30 times. Leaseholders changing front doors onto communal corridors without deed of variation and approval which does not provide 30 minutes fire protection and may compromise fire spread from the housing unit into the main building or from the main building into the flat/accommodation.*

Both sets of regulations are 'outcomes' based. There are good arguments for outcomes based regulation as long as that regulation is kept updated. However, outcomes based regulation is very difficult to 'map' onto legal duties and responsibilities. There is a need for legislative clarity about the responsibilities of landlords and managers in connection with the breach of regulations. As one lawyer respondent succinctly put it, "*It is clear that there is insufficient legislation concerning the enforceability of building regulations*".

Some of these concerns would be addressed by implementing s.38 of the Building Act 1984. This provides for civil liability for breach of a duty imposed by building regulations that results in damage. Damage is statutorily defined to include death, injury and disease as well as any impairment of a person's physical or mental condition. The team would argue that such a provision is an essential element of an outcomes based form of regulation. It would also address the concerns of many respondents who raised questions about accountability for failures in relation to Building Regulations. The implementation of s.38 of the Building Act 1984 is one of the matters covered by the provisions of Karen Buck's private member's bill which is discussed below.

There are particular concerns about the Regulatory Reform (Fire Safety) Order 2005 as we discussed earlier. This order generally applies to workplaces, but also covers the common parts of multi-occupied buildings such as Grenfell Tower as well as the common parts and shared parts of houses in multiple occupation. This order introduced a risk assessment approach, where the person in control of premises (the responsible person) rather than fire authorities, is required to identify and address fire risks. In the case of Grenfell Tower, that person was the TMO. Like many in control of premises, it is understood that the TMO contracted out that responsibility.

Cost becomes a factor – including the charging rate of the expert, as well as the costs of the improvements that the expert recommends. Even if fire assessment is not contracted out, there are problems in the capacity of so-called Responsible Persons to carry out the assessment as our respondents suggested; one environmental health officer said “[Housing associations] do not have the resources or experience to carry out FRA adequately.’ Serious consideration needs to be given to increasing the role of the fire authorities in fire risk assessments in multi-occupied property to ensure that fire safety decisions are made independently of cost factors.

The lack of enforcement, and relative ease of complying with the fire safety regulations were a particular source of concern to our lawyer respondents:

*In my experience, there are problems with private buildings converted to self contained flats and sometimes in purpose built flats, simply not being up to modern standards for fire safety. These normally go under the radar as they are typically not included in local authority licensing schemes. The Fire Safety Order simply does not work effectively because responsible persons don't bother doing risk assessments.*

*When it comes to fire safety, most landlords are not aware of their obligations. This isn't helped by the fact that the only point of reference is the LACORS guidance, which is long, piecemeal, outdated and not user friendly.*

*[A decision not to serve a prohibition order under the fire safety regulations] leaves the individual tenant (or a tenants' association) who is concerned about fire safety in their building virtually no legal process for questioning or challenging the quality and effectiveness of fire safety measures, other than the fairly remote possibility of a judicial review of the Fire and Rescue Authority if they have declined to serve a prohibition notice, or arguably of a social landlord if it neglects to comply with such a notice.*

The fact that the regulation only applies to the common parts of tower blocks poses another question. If the HHSRS is not enforced by local authorities in social housing, which agency or person assesses the fire risks posed by the building as a whole, and in particular any fire risk posed by modifications of key design features, such as compartmentation?

### The Regulatory Reform (Fire Safety) Order 2005

One consequence of the debate about regulation discussed above was legislative moves to reduce the burden of regulation on the state. These moves are exemplified by the Regulatory Reform (Fire Safety) Order 2005. This order replaced the Fire Precautions Act 1971. That act, introduced after the death of 11 people in a hotel fire, required fire authorities to certify designated premises. In contrast the Order introduced a risk assessment approach where the person in control of premises (the Responsible Person), rather than fire authorities, is required to decide how to address identified fire risks.

The definition of ‘Responsible Person’ includes landlords or those employed by landlords to manage properties. The Order requires that fire risk assessments are carried out on a regular basis and re-assessment is required when there have been significant changes such as alterations or extensions to existing buildings and when building works are completed. Failure to comply with the provisions of the Order is an offence which is enforced, for premises such as Grenfell Tower, by the fire and rescue authority, who also have the power to prohibit occupation of premises if occupiers are placed at serious risk. Several participants in our questionnaire were particularly concerned about the inadequacy of this form of regulation. Here is one disturbing response:

*No drills, no customised fire and other safety instructions, no centralised emergency contact centre, lack of personal and general emergency equipment, no training in existing protocols and systems, no checklists for emergency action items prioritised for different events, no incident reporting system to councils or any national information centre. Residents do not know how the emergency lighting works. Residents do not know what must occur during and following an emergency. Residents do not know if they should stay or leave and stay away from a building when a fire occurs. We do not know if the lift returns to the ground floor under hydrostatic and gravitational effect if the power to the building fails during a fire emergency. Residents do not receive any de briefing following a real emergency or a false alarm. If false alarms are frequent, residents could develop begin to assume that all alarms are false alarms, especially when these occur at inconvenient times, such as at night, while in night clothes and the weather outside is cold, wet or cold and wet, freezing conditions etc.*

Many occupier respondents were exercised by the lack of fire safety concern in their buildings:

*In 2012 my building block had its external hanging tile cladding replaced with an insulated render-cladding. The cladding materials used are very similar to those described for the Grenfell tower block. On 27 June 2017 I wrote to the Council requesting technical composition of the components used in the re-cladding works but Council has not so much as acknowledged my letter. Residents are concerned for their safety because they believe that the materials used are not fire retardant.*

*There is only one narrow, (1.25 metres wide and 25 feet long with a dog leg), corridor for access and egress to and from the block of 56 flats over 7 floors. In an emergency escape would be difficult, as we found out when there was a fire within the block. The smoke escape shafts failed to operate so that when there was a fire the block was quickly filled with smoke. The Fire Doors also failed. There is an emergency gathering point on the roof but it is not easy to access as the heavy fire door code is not shared with all tenants.*

This indicates an urgent need for a legal route through which landlords can be held to account for failures in fire safety regulation.

## 3 MIND THE GAP: AN ANALYSIS OF LEGISLATION (CONT)

### Participant's comment:

Social tenant in a block in London. 'We called the fire brigade inspectors ourselves over concerns on fire safety in our block (prior to the Grenfell fire and Shepherds Bush fire), and on seeing a copy of an older FRA on our block. An FRA was requested by myself under FOI but initially I was not being sent this - it had to go to further complaint stage. As a result of our own initiatives I was sent an FRA which was hastily put together and not the FRA I requested which I had seen sight of. Many of the details were wrong on this and consequently that same copy was used to be copied and pasted from for other tower blocks. This resulted in information from my own block being put against other tower blocks wrongly, using the name of my own block and some information from internal layout wrongly applied to other blocks. ... FRAs should have to be put online by all Landlords so that these can be scrutinized by tenants and issues raised. Many old FRA outline problems that are then not followed through on and there seems to be no way for residents to check what happens with this.

The regulations provide a defence of due diligence, but it is unclear what kinds of conduct this covers. Does it for instance cover circumstances where, when an occupier has replaced a fire door with a door that does not protect occupiers from fire, the only action taken by management is to request that the door is removed – and there is no follow up? Concerns with replacement of doors falls under both the HHSRS and fire safety regulations. Some respondents suggested that there may be an issue with assessing risks caused by the replacement of a fire door with a non-fire resistant door – or other breaches of compartmentation or other regulatory breaches – as a Category 1 hazard. This suggests that, in the case of fire risk, there is an argument for prescribed minimum standards. There is currently a system for marking fire doors so it should be clear on the door that it complies with fire safety regulations. It appears, however, that this is not a legal requirement and any label can get painted over. We would suggest a requirement for all doors to be marked for fire safety compliance and for the label to be clearly visible -

### Leasehold and the provisions of the Landlord and Tenant Act 1985

Many of our owner occupier respondents expressed concern about the limitation of the consultation rights under the Landlord and Tenant Act following the decision of the Supreme Court in *Daejan Investments Ltd v Benson* [2013] UKSC 14. In effect, that decision limited the significant protections offered to long lessees by s.20 of the Landlord and Tenant Act 1985 to circumstances where breaches of the regulatory framework caused prejudice to those lessees.

There are also difficulties arising from the very restrictive nature of the consultation process that applies to qualifying works for which public notice is required. The works carried out at Grenfell Tower would fall into that category. These concerns are serious and should be addressed. However, they need to be addressed as part of a wholesale review of the law of long leaseholds, which is beyond the scope of this inquiry.

There are however some specific issues relating to leasehold which are relevant to an analysis of legal gaps following the Grenfell Tower fire. For example, the consultation requirements are rooted in a concern with the financial integrity of proposed works and are tied to the reasonableness of the charges and their payability under the lease. They are only tangentially concerned with health and safety.

Some local authority freeholders react to the multi-tenurial nature of such blocks of flats by appearing to limit their responsibilities to their own tenants. This is not only legally inaccurate, it is also dangerous because some actions by lessees, such as redesigning their flat and thus compromising the compartmentation, have health and safety repercussions which potentially impact upon all occupiers. We have been told that some social landlords provide fire safety information to their tenants, but not to all the occupiers of the building. This is a short-sighted approach when fire risks taken by lessees have implications for social tenants and vice versa.

Some freeholders have stated that Right to Buy leases do not include a right of access to inspect property. As discussed above, this is not necessarily the case. A number of Right to Buy leases do include a right of access to inspect, and freeholders should be encouraged to check the terms of their leases rather than assert the lack of the right, and the Guidance provided by the Local Government Association should be amended to make these points. Moreover, local authorities will have a right of access under the Housing Act 2004 in a very broad range of circumstances. However, we have recommended that a right of access with a very low threshold be instituted in connection with health and safety.

### Deregulation Act 2015

The relevant provision of the Deregulation Act 2015 for these purposes is that which is concerned with retaliatory eviction (section 33). This provision affects the private rented sector, and prevents the landlord from using the no fault ground for determining an assured shorthold tenancy after the tenant has made a complaint *in writing* to the landlord regarding the condition of the property. There are further conditions which blunt this power considerably: broadly, the landlord must not have responded adequately to the complaint within 14 days; the tenant then complained to the local authority which served an improvement notice or a notice requiring remedial action.

We attended a meeting of the Housing Law Practitioners Association. A specific question was asked as to whether any delegate had been involved in a case in which this provision had been relevant. Delegates expressed surprise that there was one case where it had been used because it was assumed that it was entirely otiose.



**Participant's comment:**

A private sector tenant in South London: 'The property has structural problems and has been held up by wooden plinths for 5 years. The council have served a works order and ignored it. Fire hazards Cock roaches. Mice. Floorboards with nails coming out. I had a minimal work done only after reporting it to the councils Environmental enforcement team I had some advice from a law centre. Not successful getting work done. They just issued me with a section 21. I tried to fight it with the deregulation act. The council were useless and did not help. The deregulation act is so difficult to prove it needs to be updated, [it is] seriously flawed There is almost no free legal advice to private tenants. If your not eligible for legal aid legal fees are extremely expensive. A lot of solicitors don't want to help with housing matters or are not up to date with regulations. The councils do not want to help private tenants My landlord owns the block of 80 flats and Everyone has had exactly the same problems and are too scared to saying anything as they do not want to be served a section 21 because they have raised the disrepair issues.'

The conditions restricting the use of this section effectively render it of limited value in practice. It is notable that the corresponding provision in the Renting Homes (Wales) Act is both simpler and easier to action. The Welsh provision is activated when the occupier has enforced or relied on the right to repair or the fitness from human habitation provision and "the court is satisfied that the landlord has made the possession claim to avoid complying with those obligations" (section 217).

**The life-styles of tenants**

A number of participants raised the issue of the life-style of tenants and other occupiers of housing. One for instance suggested criminalising the removal of self-closures on doors. Hoarding was also raised because it gives rise to specific fire safety concerns. It is an area where welfare concerns of the occupier may clash with other rights of the rest of the occupiers as well as the hoarders own rights. Whilst we are sympathetic to landlords trying to manage properties as well as respond to the particular needs of vulnerable individuals, we would make two points in connection with concerns about the capacity and life-styles of tenants. First, there has been extensive legislative activity in connection with nuisance and anti-social behaviour over recent years. Landlords have a range of tools available to them to respond to these problems. Secondly, all the available evidence suggests that the tragedy of Grenfell Tower arose from a failure of regulation and enforcement – a failure of government and not of the governed. Our report is focused on improving the effectiveness of regulation, in part by giving more power to tenants, and in part by encouraging more proactive approaches to regulatory responsibilities from authorities.

**Fire Doors**

For the sake of clarity, and because of the significance of the risk posed by doors which are not compliant with fire safety regulations, we have decided to group together all of the points made in relation to front doors. In summary, there are serious legal problems in connection with ensuring front doors comply with fire safety regulations. The first problem is that both lessees and social tenants are known to change their doors without the knowledge of the building managers. Even painting the doors may obscure information that the door is fire safety compliant. Secondly, in the case of leasehold property, it is often not clear whether or not the door forms part of the demise to the lessee. Then, thirdly, it is not clear who is responsible for ensuring that the door is made compliant. We suggest that urgent attention is paid to the issue of doors to flats, and that easy and clear statutory devices are put in place to ensure that freeholders are responsible for the fire safety compliance of doors, and that there are simple and straightforward remedies requiring doors to be made fire safety compliant. How difficult can this be?



## 4 FILLING THE GAPS

In this chapter, we discuss how the gaps in the law discussed in the previous two chapters might be filled. We draw on our own experience as well as that of the professionals who responded to our survey questions regarding changes to the law.

### Rationale

One of the key questions addressed in chapter 2 was the underlying basis for the law regarding housing conditions. We demonstrated that no clear governing rationale emerges. Rather, different preoccupations at different moments in time have led to partial changes, which have been set alongside the previous law.

The first and most pressing question, then, is to have a clear underlying rationale, which justifies the involvement of the state through legislation into the condition of a household's home; and, by "home", a justification which extends beyond that internal and into the common parts of a building.

Our research participants confirmed our view that the underlying rationale should relate to the **health and safety of the occupiers of the building in the context of consumer protection**. The state has a legitimate role in protecting consumers of housing. It has been the goal of government housing policy since the Second World War that people should be entitled to a *decent* home within their means. That has always been a cross-party aim. That policy goal has not been facilitated by the law and its enforcement.

We recognise that a focus on health and safety may be the subject of derision. David Cameron, the then Prime Minister, argued in 2012 that the health and safety culture had become an albatross around the neck of British business. While we understand this concern about over-regulation in the name of health and safety, there are powerful justifications for drawing on it in this particular context:

- Most occupiers of buildings are not experts, but laypersons who have a right to expect that their homes are healthy and safe. It is perfectly proper that everyone should feel that their health and safety is not being compromised by their accommodation in the same way that everyone should not feel that their health and safety is compromised at work.
- An occupier of a building (or even a visitor) is a consumer. Consumers are said to need protection in a position of asymmetry of knowledge and expertise between themselves and those who provide goods or services. In this context, the provision of accommodation is a good. Recognition of all occupiers as requiring protection is only paternalistic to the extent that
- Health and safety already underpins at least part of the law in this area.
- A focus on health and safety implies that the nature of a person's occupation of property is irrelevant. Whether a person is a long leaseholder, tenant, licensee, lodger, or other lawful occupier is and should be irrelevant. Fire is not tenure specific.
- A focus on health and safety implies a graduated approach. So, for example, it is already recognised that certain buildings (Houses in Multiple Occupation) are inherently unsafe due to fire risk, which is why they are regulated more closely than others.

- A focus on health and safety implies a multi-agency approach. It recognises that expertise is dispersed among different professionals.
- A focus on health and safety should change the dynamic about regulation. Of course, over-regulation is burdensome; but, if the focus is on whether the goods or services supplied are unhealthy or unsafe, regulation can properly be justified.
- Health and safety should also change the way in which we think about, and focus our resources on, housing conditions. The most salient evidence from our research participants in this respect was the disproportionately negative effects of the current law on the poor.
- All of the above is not to say that landlords should be over-burdened. However, health and safety implies that there is a minimum threshold below which property should not be the subject of an occupation agreement.

We also think the tide has turned. The current government has indicated that it is willing to regulate landlords, implementing for instance a requirement for electrical safety checks for private rented properties in the Housing and Planning Act 2016, and ensuring that from April 2020 all rental properties meet minimum standards of energy efficiency. But more needs to be done. Below we discuss two mechanisms which we recommend for improving the health and safety of occupiers.

### The Homes (Fitness for Human Habitation and Liability for Housing Standards) Bill

We support the provisions of the Homes (Fitness for Human Habitation and Liability for Housing Standards) Bill, which is due a Second Reading in January 2018. This would make it a requirement of all tenancy agreements that a home is fit for human habitation – judged against modern standards – while used as a home and create liability on a landlord for failing to do so. This Bill addresses and provides redress for the gaps which currently exist in the private law of landlord and tenant regarding the state and condition of the property; the restrictions on a landlord's repairing obligations; and updating the criteria for determining fitness.

This is a Private Members' Bill. It has been drafted in conjunction with senior members of the legal profession with intimate knowledge and appreciation of the current deficit in the law. It has been introduced previously and been "talked out" as a result of concerns about the over-regulation of private landlords. The data we have presented in chapters 2 and 3 of this report make the case for its adoption unassailable. In short, the regulation of the relationship between landlord and tenant as regards the state and condition of the property is woefully lacking.

Although we fully support the Bill, we have made clear in this report that the main responsibility for improving the health and safety of people's homes must lie with the state, and that position informs our key proposal.

## A new Act – The Housing (Health and Safety in the Home) Act

The fire at Grenfell Tower demonstrated (i) the need for a major culture change in the regulation of health and safety in people's homes and (ii) that the law requires consolidating, updating and reforming. New and innovative remedies are required which enable occupiers to hold the state to account for breaches of housing standards, building regulation and fire safety requirements. To achieve this end, we recommend a new Housing Act – the Housing (Health and Safety in the Home) Act – which not only brings the various tentacles of the law together and fills the gaps, but would effect the necessary cultural change. Such an Act would either work alongside Karen Buck's Bill, or incorporate its provisions. There are technical benefits of this kind of legislation – all the relevant law would be in one place; it would be drafted in a way which is understandable to its ultimate consumers (both landlords and occupiers); and, it would empower occupiers. But it would do something more than simply provide technical remedies for the problems in regulation that we have uncovered. A new Act would provide a much needed statement that the state has learned from the tragedies at Lakanal House and Grenfell Tower, and accepts that its proper role is to act on the health and safety concerns of tenants and other occupiers.

As part of the reform process the current law should be tested to see whether it is itself fit for purpose.

### Is the law fit for purpose?

It will be apparent from our discussion in chapters 2 and 3 that it is our view, and the view of 85 *per cent* of those professionals who completed our survey, that the law is currently not fit for purpose.

A range of reforms are required that clarify and strengthen the obligations upon the state and upon landlords to ensure that, in people's homes, rigorous health and safety standards are maintained and give occupiers greater voice and ability to enforce their concerns:

**a Retaliatory eviction:** Across the UK, the devolved and Westminster governments have made provision against retaliatory eviction. This type of provision facilitates government policy because it stops a landlord evicting an occupier who complains about the state and condition of their property only to rent it out again to another occupier. The Westminster government's provision in the Deregulation Act 2015 provides the weakest protection of all these provisions. It does not provide any succour to a tenant who wishes to complain about the state and condition of their property when they know that their landlord has the ultimate power of determining their occupancy.

**b Health and safety enforcement:** There is considerable evidence among our survey data that health and safety enforcement by local authorities is, at best, uneven; and that certain issues that matter to occupiers may be of less relevance to the local authority in making their assessment and determining the appropriate course of action.

Many of our respondents wanted provision that enabled individual occupiers to be able to enforce the HHSRS standards against their landlords. The risks of this kind of provision are that, if such an individual right does exist, there is less incentive for a local authority to take enforcement action. We know from the law on unlawful eviction that few local authorities prosecute landlords, because of the expense and uncertainty in the law, preferring instead that occupiers rely on their civil law rights. Nonetheless, we recommend that the law provides for a legal route which will enable occupiers to force local authorities to inspect and assess their homes for health and safety hazards.

- c Review of the HHSRS:** The HHSRS is a potentially powerful tool, which fits neatly within the focus on health and safety. We see it as central to any new regime of health and safety in the home. It has the power to achieve better housing standards for vulnerable and socially excluded occupiers who might find it difficult to activate individual private law claims. However, the evidence presented in this report tells us that, after more than a decade, there is a need to review the HHSRS, with a view to
- strengthening the duties upon local authorities in connection with the Act;
  - providing national guidance on how local authorities should review housing conditions within their areas, including a requirement for publication of decisions under the Act.
  - Extending the bodies who can make an official complaint under the Act
  - eliminating unnecessary procedural requirements;
  - clarifying any legal doubts raised by First Tier Tribunal decisions
  - providing guidance on the elimination of delay;
  - making it clear, particularly in connection with Category 1 hazards, that local authorities' primary role is enforcement and not collaboration with landlords
  - re-drafting the operational guidance so that its relevance to the social sector is made clear;
  - updating the statistical base for the HHSRS and providing more worked examples in the operational guidance; and,
  - providing guidance that encourages enforcement action as appropriate where a category 2 hazard is found on premises.

Ultimately, though, the HHSRS can only be an effective tool in delivering better housing standards if it is properly resourced and there is a cultural shift which means that all local authorities take the duties and the powers available to them under the Act seriously. One further point, which was mentioned by a number of survey participants specifically interested in the private rented sector, is that consideration should be given to creating a criminal offence when a landlord continues to rent out a property after a category 1 hazard has been found on the premises and the renting continues against the advice of environmental health officers but prior to enforcement action being taken.

## 4 FILLING THE GAPS (CONT)

**d HHSRS and social housing:** There is one matter on which all participants who discussed this issue were agreed – it is entirely illogical that certain housing tenures should be exempted from the HHSRS. This is the position as a result of the court's decision in *Cross*. We recognise that enforcement would raise internal issues for the local authority's own environmental health officers, and their relationship with other parts of the local authority. However, if our underlying basis is health and safety which is tenure neutral, then the impediment in *Cross* should be removed. It may be that the way forward is to create a power for other local authorities to take action in those cases where there is a need for assessment and enforcement action against a local authority landlord – although the current lack of enforcement of housing standards may suggest this has limited potential.

**e Fire safety:** Our survey respondents clearly identified fire safety as being a particularly prominent issue. Occupiers expressed concerns about a range of fire safety issues. Professional respondents were highly critical of the limits of the current regulations. We share the view that fire safety regulations have given overly due regard to the burdens of regulation, and have been inappropriately delegated to often ill-qualified landlords and managers. They require reconsideration urgently. There should be a greater duty on the independent fire authority to make recommendations, the scope of the defence of due diligence should be reviewed with the aim of ensuring that it applies in only very limited circumstances. In particular, it cannot be right that fire risk assessors are not necessarily required to have minimum qualifications. We note there is guidance on appointing competent and accredited fire risk assessors available from the fire risk assessment competency council.

We believe that, as fire safety is so key to the health and safety of occupiers, fire safety regulations should be able to be enforced by a wider range of parties, including occupiers and Environmental Health Officers, including a requirement that proper fire assessments are undertaken. A number of survey participants also recommended that critical attention should be given to the need for joined up working between Fire Rescue Authorities, social landlords and environmental health officers. Legislation should make clear where responsibilities for fire safety lie.

**f Building regulations:** In addition to any substantive reform to building regulations, government should ensure that the regulations are comprehensible to readers and deal with the interface between the various types of building requirements. They should also make explicit the legal duties and responsibilities of the various stakeholders in building construction and refurbishment. The government should implement s.38 of the Building Act 1984 to address the current lack of accountability for breach of the regulations. We understand that the implementation of s.38 is provided for in Karen Buck's Bill. In addition, consideration should be given to whether the privatisation and marketisation of building control work is appropriate (another issue which was raised by many of our participants).

**g Access:** Throughout this project and others, we have seen documents and media which raise concern about landlord and regulator access to properties, particularly where a building is multi-tenured with property owned on a long leasehold. For the sake of clarity, landlords and regulators should have rights of access to all properties on reasonable notice to check for potential health and safety breaches, irrespective of provisions in agreements to the contrary or silence in those agreements. The uncertainties in connection with ensuring that doors are fire safety compliant must be addressed urgently.

**h Statutory nuisance:** In a modern and effective system of regulation that priorities the health and safety of occupiers, statutory nuisance is anachronistic. Its Victorian roots, the complexity and risks involved in its use, and the fact that it is adjudicated upon by the Magistrates Court which has very limited expertise in housing, make it not fit for purpose. We would recommend, subject to the enactment of Karen Buck's Bill and enactment of the new routes for enforcement by occupiers of the HHSRS and fire safety regulations, that s.82 of the EPA should be abolished or amended so as to exclude action on housing conditions.

**i Monitoring and Audit:** One of the issues we have discussed in the previous chapters has been the different operation of the legislation between different areas, and between officers in the same area. This is a common problem with rules which rely on discretion for their operation. We recognise that discretion is an important tool (and, in any event, as a generation of researchers have pointed out, discretion will be found in rules anyway). However, one way of encouraging reflective practices and greater discussion across local authorities would be the production of a statistical database from which unusual activity could be drawn. It is, surely, good practice for DCLG to collect these statistics to act alongside its other statistical datasets. This could lead to the development of monitoring and audit practices.

### Is adjudication fit for purpose?

We have raised concerns throughout this report regarding symbolic law – a law which either is not enforced or is incapable of being enforced. If our overriding concern is health and safety, then a system of legal aid that enables occupiers to access their rights is likely to be cost-effective because of its positive effect on the state and condition of the stock of housing.

What has become most apparent during the course of this project is the patchwork nature and lack of underlying rationality of the adjudicatory space. A variety of adjudicatory agencies potentially have involvement, and it is not altogether clear (sometimes even to seasoned professionals) what the most appropriate forum is for the hearing of a dispute. In any event, in most cases, litigation represents a failure because it is likely to be based on a breakdown in the relationship between landlord and occupier, and that relationship (particularly in social housing) is likely to be an ongoing one. There is clearly a greater role for alternative dispute resolution mechanisms. Complaints by occupiers about health and safety need to be given more weight.

# REFERENCES

The idea of a housing court has been mooted again, this time by the Secretary of State for Communities. Rather than engaging with that discussion – and the arguments in favour and against such a court have been much discussed since the 1970s – we see a greater role for a specialist tribunal, like the First Tier Tribunal (Property Chamber). Although some of our survey participants were negative about some of its decisions and procedures, there appears to us to be a greater role for this tribunal in relation to health and safety concerns because of its specialist personnel and its long experience of inspecting premises.

## Conclusion

This research has demonstrated that the law regarding the state and condition of property is in a mess. It is old and out of date; it does not provide appropriate remedies for modern concerns; its enforcement is variable; and, at least some of it is of symbolic value only. It desperately requires reform. A new Act which takes a principled approach, prioritises proactive and effective enforcement of requirements ensuring the health and safety including the fire safety of occupiers, which is tenure neutral, provides a voice for occupiers and provides substantive protections from eviction where complaints in connection with health and safety are made, would make housing safer. The responses to the research questionnaire were thoughtful and concerned, but there was also, quite understandably and appropriately, anger and outrage. Also of note is that there was evidence from the professional responses that there are some misunderstandings of the HHSRS which urgently need to be addressed. The responses are significant and need to be taken seriously. A new Act would demonstrate that the government does respect their views and would also provide some sort of acknowledgement of the failings leading to the Grenfell Tower tragedy.

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### Participant's comments:

A private sector tenant in East London, in a property where 'Door handles were broken on internal doors for well over a year meaning that if they shut (i.e. when the wind blew them shut when the windows were open) someone else would need to open the doors from the side to let anyone in the room out. **We were concerned about getting out in the event of a fire!** Also our letterbox was constantly broken which was a security concern as someone could have reached in through the front door to let themselves in. General mould and damp conditions caused by broken extractor fan.'

[Did you try and get your landlord to do anything about it?] 'We had to constantly email and call and chase. The agency were aware of the door handles for at least a year. They only finally did something after the Grenfell tragedy when we stressed constantly that this was a fire risk. Even then, their initial contractor told us we'd have to wait at least a month. I feel like the only reason we got a response was because of our constant calling and the fact that we highlighted the fire risk when this was such a sensitive topic. **There seemed to us to be very few mechanisms to get these repairs done.** Unless we constantly chased we were met with apathy or just fobbed off. These were mostly really simple fixes that would make a big difference in the event of a fire etc. **We felt completely helpless in getting things done. Who could we ask for help? We only felt that we had some clout after the Grenfell tragedy raised the risk of reputational damage for the agency/landlord should something similar happen to their tenants.'**

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