

# **Licence and Tenancy Agreements under *Pathway to Home***

## **Submission of Mercy Law Resource Centre**



## **1. Introduction**

1.1 As part of *Pathway to Home*, current homeless and housing support services are being reconfigured. The *Pathway* proposal is that services be delivered in such a way that the service user (i.e. the person who is homeless) is provided with incentives to follow a pathway out of homelessness towards his/her own home.

1.2 Under the proposal, the pathway to be followed begins with a licence to reside in temporary emergency accommodation (e.g. hostels), moves on to a starter or probationary tenancy linked to the provision of housing support services and finally leads to an established tenancy with full security of tenure. The main features of each step can be summarised as follows:

- **Step One – Licence to reside**
  - Temporary emergency accommodation put on legal footing
  - Minimum standards re physical building
  - Minimum standards re management (to include housing support services and in-reach health and welfare services)
  - Care and case management plan and holistic needs assessment delivered under inter-agency protocols within 6 months
  - Identification of behavioural issues and interventions needed to change problem behaviour
  - Preparation for move to tenancy (pre-tenancy awareness training, etc.)
  
- **Step Two – Starter tenancy**
  - Tenancy Agreement with Approved Housing Body (AHB)
  - Probationary period of 6 months which can be extended to 12 months (this can be further extended to 18 months in very exceptional circumstances)
  - Engagement with housing support services is to be a condition of the Tenancy Agreement
  - Termination without grounds on 28 days' notice (7 days for anti-social behaviour)
  - Disputes resolved by way of *Pathway* care and case management inter-agency protocols
  - Review after 6 months – leading to established tenancy, extension of probationary period or repossession
  
- **Step Three – Established tenancy**
  - Tenancy Agreement with AHB
  - Condition of engaging with housing support services removed
  - Greater security of tenure (not specified)
  - Possibility of extension of Residential Tenancies Act to AHB lettings to persons with general needs - not special needs
  - Breaches of Tenancy Agreement/anti-social behaviour issues to be addressed at an early stage in accordance with *Pathway* suggested housing management process
  - Care and case management protocols to be followed including case conference – repossession viewed as a last resort
  - Provision of housing support services to be a possibility if required

1.3 There are many welcome developments in the *Pathway* initiative such as the placing of all accommodation on a legal footing, the provision of tailored incentives and support to enable people to progress towards a sustainable tenancy and the emphasis on addressing behavioural issues with multi-agency cooperation. However, it does raise a number of questions and issues which require to be considered.

## **2. Licence Agreements**

2.1 Currently, although there are no written agreements in place, residence in temporary emergency accommodation is most probably governed by an implied licence, the terms of which are to be found in established custom, house rules, etc. Under these arrangements, the rights of the residents and the need to respect fair procedures have received little or no consideration and, due to the transient nature of the accommodation, have been subject to little or no legal challenge.

2.2 The *Pathway* model proposes a switch to a written agreement which is to be welcomed. However, no template is provided and little consideration seems to have been given to the actual terms and conditions of such an agreement. Careful consideration needs to be given to these matters if fairness is to be observed between the parties, bearing in mind especially the imbalance in bargaining power between the accommodation provider and the resident.

2.3 The key issue which arises in temporary emergency accommodation is termination of the licence (whether express or implied) due to breach of house rules (terms and conditions of the licence). This is more commonly known as being barred.

2.4 It is clear that where large numbers of residents are living together at close quarters, the managers of the accommodation will require flexible powers allowing them to deal quickly and effectively with conflicts that are potentially dangerous. The safety of residents and staff is a serious concern. Nonetheless, the need for such powers must be balanced with the need for fairness towards individual residents. This necessitates respect for their rights under the law and the imperative to apply due process even, or perhaps especially, in situations of tension and conflict. Perceived injustice can frequently lead to escalation of conflict.

2.5 A decision to bar a resident from a hostel is highly prejudicial to that person's interests and inimical to their entitlements under the licence agreement. Such decisions are normally held to be subject to the legal requirement to observe fair procedures. This normally requires the following steps:

- (i) An investigation of the complaint against the person to be barred.
- (ii) Informing the person concerned of the details of the complaint against him/her in advance of any meeting about the complaint (a short written summary will usually suffice).
- (iii) Giving the person concerned an adequate opportunity to be heard and to respond to any complaint(s) made (usually by way of a meeting with the decision-maker).
- (iv) Allowing the person concerned to be accompanied/represented by a third party if they wish.
- (v) Informing the person concerned in writing of the decision and the reasons for it.
- (vi) A right to appeal the decision to an independent and impartial body.

2.6 It is important that a written licence agreement provides a procedure for dealing with disputes which follows the steps outlined. This may be used to deal with any complaints or grievances, including those raised by residents, but it is most important that it be followed when terminating the licence. It is also possible to insert a clause in the licence agreement to deal with exceptional circumstances e.g. where there is a real and imminent risk of injury to a resident or staff member. In such circumstances, the agreement could provide for the immediate suspension of the agreement and the removal of the resident from the premises pending a subsequent investigation and hearing. If the investigation and hearing subsequently vindicate the resident concerned, the resident should be reinstated under the licence as soon as possible. Such a clause provides the necessary balance between management and safety concerns and respect for the rights of the individual resident.

2.7 Consideration also needs to be given to the question of an independent forum to hear disputes arising from such licence agreements. Strictly speaking, such disputes should be taken to the courts, as a licence is a contractual agreement and therefore subject to the jurisdiction of the courts. However, seeking remedies in court is time-consuming and expensive, particularly where termination of the licence is concerned. Instead, the licence agreement could provide for any disputes to be referred to a panel of independent arbitrators whose decision would be final, subject to an appeal on a question of law to the Circuit Court. Alternatively, the remit of the PRTB could be extended to include these disputes.

### **3. Starter tenancies**

3.1 There is no difficulty with the idea of a starter tenancy for a period of 6 months. The power of the AHB to terminate the tenancy on 28 days' notice without having to give reasons is akin to the power landlords have for the first 6 months under the Residential Tenancies Act 2004.

3.2 An issue does arise in relation to the power of the landlord to extend the probationary period of the tenancy to 12 months (or 18 months in exceptional circumstances). This puts tenants in the voluntary AHB sector at a disadvantage compared to tenants in the private sector who receive significantly greater security of tenure after 6 months<sup>1</sup>. It is noted that this impacts adversely on the equality of outcome sought for persons in all forms of move-on housing<sup>2</sup>. Persons moving on to the private rented sector with the help of Rent Supplement payments will be in a significantly better position than tenants of AHBs. At a minimum, the decision to extend the probationary period should observe the fair procedure steps outlined at 2.5 above and the tenant should have the right of appeal to an independent body.

3.3 Similarly, the review of the tenancy at the end of 6 months should follow the basic steps of fair procedure as outlined at 2.5 above so that tenants will have a right to be heard

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<sup>1</sup> Section 28 Residential Tenancies Act 2004. See Article 14 European Convention of Human Rights which provides that "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*" In the case of *Larkos v Cyprus* (Application No. 2951/95) Judgment of the European Court of Human Rights of 18 February 1999, a State tenant claimed a violation of Article 14 in conjunction with Article 8 on the basis that he enjoyed less security of tenure than a tenant of a private landlord. The ECtHR held that no reasonable and objective grounds were provided by the State for not extending the protections available to private tenants, to State tenants.

<sup>2</sup> Homeless Agency, *Pathway to Home* (2009), Para 4.3.2

on whether the period should be extended (or the tenancy terminated) together with the ancillary rights mentioned including a right of appeal to an independent body.

3.4 By far the most controversial proposal of the *Pathway* model, however, is the proposal to insert a condition into starter tenancies requiring tenants to engage with housing support services. This is to be a standard condition which applies irrespective of whether a household has been assessed as requiring support or not. The proposed wording is as follows:

*“The tenant shall engage with such support services that are deemed necessary and appropriate to address issues identified as potential causes of homelessness.”<sup>3</sup>*

3.5 “*Support services*” are not defined or specified. It is proposed that details of the support services are set out in a Schedule along with the respective roles and responsibilities of both landlord and tenant. However, the wording of the operative clause is designed to be sufficiently flexible so as to allow changes or additions to the support services required at any point during the tenancy. This is to ensure early intervention when problems arise and consequent reduction of the risk of loss of the tenancy.<sup>4</sup>

3.6 It should be noted that the wording used in the template of a starter Tenancy Agreement is even more non-specific: *“The tenant is required to engage with the Housing Support service (where applicable).”<sup>5</sup>* This is to be read with Part 3 of the Agreement which states: *“During the starter period the landlord can insist on the acceptance by you, the tenant, of housing support services as a condition of your continued residence.”*

3.7 The Homeless Agency Licensing and Tenancy Working Group has been advised by counsel that conditions going beyond statutory requirements may be inserted into the Tenancy Agreement provided they are *bona fide*, fair and consistent with the concept of a tenancy. The example of a no smoking policy was cited. On this basis, it was suggested that conditions such as the requirement to attend addiction counselling or to provide information relating to medication could reasonably be inserted.<sup>6</sup>

3.8 In order for a proposed condition to be fair, it needs to be clear and precise about the obligation being placed on the tenant. It is one thing to ask a tenant specifically to attend addiction counselling for a period of 6 months; it is another to ask a tenant to participate in an open-ended programme of activities which may be applied or not or changed at any time by the decision of the landlord. It is quite possible that a court would find the latter condition to be unfair for lack of clarity and unreasonable in the extent of its obligation.

3.9 The Tenancy Agreement also needs to be clear about the consequences to be faced by the tenant if the condition is breached. The *Pathway* proposal is not at all clear as to the consequences of a breach of this condition. It is stated that housing support services need to be differentiated from housing management policy in relation to breaches of the Tenancy Agreement and that failure to participate in an agreed programme of housing support cannot automatically be taken as equivalent to a breach of the conditions of the Tenancy

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<sup>3</sup> Homeless Agency Licensing and Tenancy Working Group, *Licensing and Tenancy Arrangements under the Pathway to Home Model of service provision in Dublin: Final Report to the Homeless Agency Implementation Advisory Group* (July 2010) 5.2, p.15.

<sup>4</sup> *Ibid.*

<sup>5</sup> Model Tenancy Agreement for *Pathway to Home*, 5.6

<sup>6</sup> Final Report, 4.1, p.11-12; Appendix 1, 3.4, p.34.

Agreement.<sup>7</sup> Yet it is proposed that participation in the programme be inserted as a condition of the Agreement and the template Tenancy Agreement provides at Part 3:

*“ Failure by you, the tenant, to comply with this condition and refusal by you to participate in and engage with the housing support service provided can become grounds for a written notice to quit being served on you.”*

3.10 This lack of clarity about the exact status of the condition re housing support services and the consequences of its breach makes it extremely difficult for a tenant to be clear about where they stand under the Agreement. Independent legal advice furnished to a prospective tenant under such an agreement would have to warn of the potentially extremely onerous nature of this condition and the fact that any breach, however trivial, could lead to termination of the tenancy.

3.11 A further difficulty in relation to this condition is whether it is consistent with the concept of a tenancy. A tenancy differs from other contractual agreements in that it conveys a proprietary interest in land. Terms and conditions in tenancy agreements normally relate in some way to the property conveyed - to the nature of the interest conveyed, the consideration paid for it (i.e. rent), the interest retained by the landlord, protection of the property itself, etc. A no smoking policy, for instance, protects the condition of the property in question. Conditions may also deal with relations with other tenants or neighbours e.g. anti-social behaviour. It is rare, if not unprecedented, to insert conditions of a purely personal nature, e.g. to attend addiction counselling, into a tenancy agreement and it is questionable whether such conditions are in fact consistent with the concept of a tenancy. It is also questionable whether one of the required elements of a legal agreement, an intention to create legal relations, could be said to be present in such a commitment.

3.12 Allied to this is the way this condition allows landlords to vary at will the obligations involved and the fact that the conditions involve activities of a very personal and challenging nature, such as counselling. This leads to the conclusion that such a condition would give landlords a degree of control over the personal affairs of tenants that is paternalistic, unfair and entirely inappropriate to the relationship of landlord and tenant.

3.13 It is accepted that the purpose of inserting this condition is to give tenants a clear incentive to change problem behaviour that could cause them to lose a tenancy. However, one cannot lose sight of the fact that one cannot *make* another person change in the way envisaged by this condition. To benefit from an activity such as counselling, the person concerned has to *want* to change. Personal choice must be respected, even if it leads to negative consequences at a later stage e.g. where choosing to continue with problem behaviour leads to loss of one's tenancy.

3.14 It is obviously good to seek to influence a tenant to take steps to deal with behavioural issues that could put their tenancy at risk. The question is to what extent the law can be invoked in this process. The many questions and objections which arise when one seeks to make purely personal choices (as opposed to e.g. paying one's rent or engaging in anti-social behaviour) the subject of legal agreements highlight the fact that there are matters which are not susceptible to the realm of positive law.

3.15 It should also be pointed out that, in any case, the landlord's interests are well protected during the starter period of the tenancy as it is proposed that the landlord should have power to terminate the tenancy without need for grounds on giving 28 days' notice. It

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<sup>7</sup> Final Report, 5.2, p.16.

is therefore not necessary to make the engagement with housing support services a condition of the Tenancy Agreement.

3.16 What would make more sense is to ask the tenant to sign a declaration promising to engage with housing support services to the best of the tenant's ability. Tenants should be told that this will not form part of the legal agreement and therefore will not be legally enforceable. However, the efforts made by the tenant to engage with the services will form part of the review to be conducted by the landlord at the conclusion of the starter period and the tenant's performance of their promise will therefore influence the decision as to whether or not they are able to progress to an established tenancy. This would give the landlord and the housing support services the required flexibility in liaising with the tenant and also provide the tenant with the required incentive to engage actively with the services while avoiding the difficulties that making this engagement subject to law would bring.

#### **4. Established tenancy**

4.1 It is not clear what additional security of tenure is to apply once a tenant becomes entitled to an established tenancy. If the Residential Tenancies Act 2004 is extended to tenants of AHBs with general needs and if tenants entitled to an established tenancy are held to fall within this category, then the provisions of this Act will govern the termination of the tenancy. This means that the tenant becomes entitled to a secure tenancy under Part 4 of the Act which operates in 4 year cycles. During those cycles, the landlord can only terminate the tenancy on grounds outlined in the Act (which include breach of the Tenancy Agreement) except for a six month period at the start of each 4 year cycle. The tenant also becomes entitled to progressively longer periods of notice as time goes on.

4.2 It is submitted that, at a minimum, tenants under an established tenancy should be entitled to the protections afforded to private tenants under the Residential Tenancies Act.<sup>8</sup> It is further submitted that the provision allowing the tenancy to be terminated without grounds in the six month period at the start of the four year cycles should not apply to tenants of AHBs.

4.3 We welcome the emphasis in *Pathway to Home* on seeking to prevent problems leading to loss of tenancies. We particularly welcome the use of an early warning system including verbal and written warnings, the provision of support services where needed, the use of inter-agency case conferences and *Pathway* dispute resolution protocols and the acknowledgement that repossession is a last resort.

4.4 We submit that it would be most helpful to incorporate these elements into a formal written policy which would also include a commitment to apply the basic steps of fair procedures outlined at 2.5 above wherever a formal step (such as issuing a warning or convening a case conference) is to be taken.

#### **5. Powers of AHBs**

5.1 The position of AHBs as landlords is somewhat anomalous as pointed out in the advice provided by Counsel. AHBs are involved in the exercise of the public functions of local authorities in respect of housing but they are not themselves local authorities and, for the most part, are not entitled to exercise the powers of local authorities as landlords.

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<sup>8</sup> Supra n.1

5.2 It is noted that it has been advised by the Law Agent of Dublin City Council that AHBs have the same powers as local authorities for evicting and dealing with anti-social behaviour under the Housing (Miscellaneous Provisions) Act 1997.<sup>9</sup> This is not entirely correct. AHBs do indeed have power under Section 13 of that Act to seek excluding orders in respect of persons living with or visiting tenants who are engaging in anti-social behaviour. It should be noted that excluding orders cannot be obtained against tenants themselves. AHBs also have power under Section 15 Housing (Miscellaneous Provisions) Act 1997 to seek information from a local authority in relation to a person residing in their premises.

5.3 However, the power normally relied upon by local authorities to evict tenants for anti-social behaviour reasons is Section 62 of the Housing Act 1966. This allows the local authorities to evict tenants simply by serving a Notice to Quit. They are not obliged to give any reasons and the courts do not have the power to examine the merits of the case. The lack of any independent appeal or review of the merits of the case has led to Section 62 being found to be incompatible with the European Convention on Human Rights (ECHR)<sup>10</sup> and it is also possible it may be found to be unconstitutional. There are, therefore, strong question marks over the continued use of Section 62 by local authorities. In any event, however, it is a power that is not available to AHBs.

5.4 As the law currently stands, AHB tenancies fall outside the remit of the Residential Tenancies Act 2004<sup>11</sup>. They are therefore governed by the law of contract as it applies to landlord and tenant relationships and legislation of general application in the area of landlord and tenant. This means that the powers of AHBs to terminate tenancies are determined primarily by the terms and conditions of the Tenancy Agreement.

5.5 Under the terms of the starter Tenancy Agreement, AHBs can terminate the tenancy without reason by service of a Notice to Quit, giving the tenant 28 days' notice. However, service of a Notice to Quit does not, by itself, entitle a landlord to recover possession if the tenant refuses to hand up possession. Instead, it is necessary to apply to court for an order for vacant possession which will normally be done by way of Ejectment Civil Bill for overholding in the Circuit Court.

5.6 Where AHBs wish to terminate a tenancy on grounds of breach of tenancy obligations such as non-payment of rent or anti-social behaviour, forfeiture is the appropriate method of doing so. This arises where there has been a breach of a *condition* of the tenancy agreement (even where the agreement does not contain a proviso for re-entry) or where there has been breach of a *covenant* of the tenancy agreement *if the agreement contains a proviso for re-entry for such breach*<sup>12</sup>. Therefore, in order to obtain an order for possession

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<sup>9</sup> Letter from Law Agent, Dublin City Council dated 13 January 2010

<sup>10</sup> See cases *Donegan v Dublin City Council* (2008) IEHC, 288, *Leonard v Dublin City Council* (2008) IEHC, 79, and *Pullen & Others v Dublin City Council* (2008) IEHC 379. Declarations of incompatibility were made by the court in the cases of Donegan and Gallagher in relation to Article 8 ECHR (right to respect for private and family life, home and correspondence), and Article 6 ECHR (right to independent hearing) and declarations on incompatibility were made in relation to Article 8 ECHR in Pullen. This was predominantly because of the absence of an independent tribunal examining the merits of the decision to evict. The court in Pullen also found that the Council were in breach of section 3 of ECHR Act 2003 and awarded €40,000 damages under section 3(2).

<sup>11</sup> Section 3(2)(c)(i) Residential Tenancies Act 2004 as amended by section 100(2)(a) of the Housing Act 2009.

<sup>12</sup> As this is a very technical area of law, it is considered wiser in all cases to include a re-entry clause in the Agreement.

for breach of a tenancy agreement, one must show that the term in question was a condition of the Tenancy Agreement or that it was a covenant and the Tenancy Agreement contains a re-entry clause permitting the landlord to re-enter and take possession of the premises in the event of a breach of covenant. Before forfeiture can take place, a notice must be served by the landlord on the tenant under section 14 of the Conveyancing Act 1881<sup>13</sup>. This gives the tenant an opportunity to repair the breach. If the tenant fails to remedy the breach, the landlord can make a demand for possession and re-entry may be effected only if it can be done peaceably, otherwise proceedings may be issued to recover possession based upon forfeiture by means of an Ejectment Civil Bill on the Title in the Circuit Court. This allows the court to determine whether or not there has been a breach of the tenancy agreement such as would allow the landlord to re-enter and recover possession.

5.7 It should be noted that the current wording of the template tenancy agreement does not allow for such re-entry and repossession proceedings. This could make it very difficult for AHBs to recover possession on the grounds of breach of covenant if the tenants have an established tenancy requiring grounds for termination. However, the position will be entirely different if the Residential Tenancies Act is applied to AHBs as the powers and remedies available to landlords under that Act will then be available to them.

5.8 With regard to licences, the powers of the AHB to terminate the residence of the licensee will be determined according to the terms and conditions of the licence agreement. Once reasonable notice to leave is provided and the licence has been validly terminated, the licensee no longer has a right to remain on the property and is guilty of trespass if he/she refuses to leave. If the termination subsequently proves to be unlawful, any remedy the resident has will be in damages and/or judicial review together with an order to be reinstated as a resident.<sup>14</sup> Unlike a tenant, a licensee does not have any proprietary interest in the land and does not have exclusive possession against the accommodation provider. It is therefore not necessary for an accommodation provider to get a court order for possession before ejecting the resident. For this reason, it is most important to ensure that the agreement in question is indeed a licence and not a tenancy before proceeding to act without a court order.

## **6. Equality of outcomes**

6.1 *Pathway to Home* states at 4.3.2 that there should be equality of outcomes for the person residing in all forms of move-on housing. For this reason, distinctions between tenancy agreements across different forms of rented housing should be diminished and tenancies should be legally established and secured.

6.2 As pointed out above, the option to extend the probationary period of starter tenancies puts tenants in the voluntary AHB sector at a disadvantage vis-à-vis tenants in the private sector.<sup>15</sup> A much graver problem is the fact that, due to the summary nature of the eviction procedures under Section 62 of the Housing Act 1966, tenure in local authority tenancies is, ironically, less secure than tenancies either in the private sector or in the voluntary AHB sector. This is because the law applicable in these sectors allows for review of the decision of the landlord by the PRTB or by the courts respectively. There is no provision for any

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<sup>13</sup> Unless the tenant is in arrears, though a demand for rent is advisable.

<sup>14</sup> The law of equity might intervene in certain circumstances by granting an injunction to restrain revocation contrary to agreement.

<sup>15</sup> *Supra* n.1

independent review of the local authority's decision. Consequently, the procedure is fundamentally flawed and the security of tenure of its tenants seriously weakened.<sup>16</sup>

6.3 If equality of outcomes is an objective that is to be achieved, reform of the Section 62 procedure is required urgently.

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<sup>16</sup> *Supra* n.10