

Rented dwellings (licensing) regulations Jersey

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Introduction

On 18 July 2023 the States Assembly approved in principle the Draft Public Health and Safety (Rented Dwellings) (Licensing) (Jersey) Regulations 202- [P.40/2023], which seek to improve rental property conditions in Jersey. Because of concerns raised by social housing providers and private landlords the draft regulations have been referred to the Environment, Housing, Infrastructure Scrutiny Panel for further scrutiny. The aim of the Panel's review is to explore what impact and/or unintended consequences there may be for landlords and tenants as a result of the introduction of a licensing scheme. The Panel has indicated that it would like to hear my views. In order to do so it is necessary to look at the proposal in context

My qualifications for commenting are that I have substantial experience of public policy in the UK and Jersey, as chair of two government-owned businesses and one regulator in Jersey, chief executive of major UK trade associations and author of a number of papers on consultation and policy development. I also have experience in housing as the former Chair of Andium Homes, the Jersey Development Company, a large UK housing association and the Housing and Finance Institute.

Summary

A licensing or registration scheme for rental properties is sensible in principle in that it can facilitate effective enforcement of other laws. But unless well-structured and managed such a scheme runs the risk of damaging unintended, but predictable, consequences.

A significant policy measure such as this proposal needs to be evidence-based. The proposal includes virtually no analysis of the rental market. It is important to know how many properties enter and leave the market every year, how many properties may be in the rented sector for only a short time and the importance of the informal part of the market.

Given that the stated purpose of the regulations is “to ensure that minimum standards are adhered to and that tenants and their families are living in safe homes” it is absurd that social rented housing is included and even more absurd to argue that this is to ensure a level playing field.

Including short term lets and flat sharing in the scheme could well have the unintended consequence of reducing supply.

The differential treatment of existing and new rentals is unjustified. Either new rentals should be notifiable within say a month of taking effect or there should be a requirement for a licence to be issued – or refused – within a week of an application. If this is not done there is the risk of new rental agreements being unnecessarily delayed.

It is not clear how the risk-based approach to deciding whether to inspect new rentals will work – or even that it can work. A risk-based approach requires an evidence-based analysis of risks.

More flexibility is needed in respect of notifying when a property ceases to be rented so as to avoid unintended consequences.

Although the minimum standards currently exist, they are not universally adhered to and enforced. There is a risk that enforcement will concentrate on documentation not substance, and attempting to apply the standards to property that may be let for a short time could simply result in properties not being let.

The regime could be made more effective and proportionate by adopting some of the suggestions in this paper. At present there is little evidence to suggest that it would meet either test, or that the power to refuse or withhold a licence would be more effective than using existing powers.

The risk of unintended consequences is greatest in the cheapest part of the market, much of which operates on a fairly informal basis. The

attempt to bring this part of the market within a formal licensing, or even registration, scheme may reduce supply.

The scheme could better meet the tests of effectiveness and proportionality and reduce unintended consequences if –

- Social housing, some short term lets (eg winter lets) and subletting by tenants are removed from scope.
- After launch date new rental properties should be capable of being registered without the licence being obtained in advance.
- There should be no requirement to notify when a property ceases to be rented if the intention is to relet it in the licensing period.
- An independent assessment of the operation of the regime should be conducted after one year.

The proposal

On 18 November 2022 the Environment Minister announced his intention to bring forward a licensing scheme for the regulation of private rented dwellings. The proposed [regulations](#) were published on 5 June 2023 and were approved in principle by the States Assembly on 18 July.

The stated purpose of the licensing regime is to “allow significant compliance issues to be tackled, making it easier to give effect to these minimum standards” (set out in the [Public Health and Safety \(Rented Dwellings\) \(Jersey\) Law 2018](#)). The main features of the proposed regime are –

- Each individual dwelling in a block of flats or apartment block would require a licence.
- The fee would be £60 per property for a two-year licence.
- Existing rented properties can be licensed automatically but may be subject to inspection.
- Properties for which licence applications are received after the start date may be inspected before a licence is issued, subject to a risk-based assessment.
- Government officers will be able to withhold or withdraw a licence if a property is deemed to be unsafe.

General comments

Housing markets are complex. Each housing unit has its own characteristics and there are many different providers ranging from owner-occupiers, through large landlords to people renting out a single property or sharing a rented property. In the rental sector there is scope for malpractice by both providers and consumers. In many jurisdictions there are minimum standards that must be complied with. But

enforcement is difficult for a variety of reasons, in particular an imbalance of power between landlord and tenant and difficulty in identifying ultimate landlords. For this reason a register of rented properties has its merits if it enables all rental units and landlords to be easily identified. A licensing scheme goes further and may enable action to be taken more easily against landlords who do not comply with minimum standards.

However, registration and licensing schemes also come with downsides –

- The cost involved in managing the scheme, which falls on the public – as tenants, landlords or taxpayers. The costs including managing the scheme, monitoring and enforcement action and compliance costs that landlords have to meet.
- The risk that at the margin the supply of rented housing may fall because there is a reduction in the attractiveness of letting property.
- Unrealistic expectations that merely having a register or a licensing scheme will in itself contribute to dealing with problems.

Registration or licensing schemes must therefore be carefully designed and managed if the benefits are to outweigh the costs.

Need for an analysis of the market

A registration or licensing scheme should be based on analysis of the market and of the “mischief” that the scheme is designed to address. Without such an analysis it is difficult to judge whether a proposed scheme is justified.

There has been no market analysis. Data are needed in three categories -

- A breakdown of the private landlord market – how many units are owned by landlords with one property, 2-5 properties, 6-10 properties etc and the number of shared rental units.
- There seems to be an assumption that the private rental market is fairly static. In practice many properties come on to the market or leave the market every year. There is for example a market of “winter lets”.
- Data from enforcement officers and charities should be collated and analysed so it is known what the problems are and with what category of landlord.

The absence of such data makes it difficult to comment on the likely effectiveness of the regime and the risk of unintended consequences.

Some data is already available and can be supplemented by discussions with market participants and also careful analysis of the Jersey Property Rentals Facebook page, which has 27,600 members and around ten new

posts a day. The preamble to the regulations cites a written answer to a question in the Assembly on inspections and enforcement action. This is useful analysis, but the usefulness is reduced by it being a written answer rather than a government report and not included in a proper market analysis.

Any significant policy proposal should be accompanied by an impact statement – the expected costs and benefits. This is standard practice in most jurisdictions and there are readily available templates that can be used for such statements. The only impact assessment is on Children’s rights. There is no assessment of the effect on the housing market. Not only does this make it difficult to assess the effectiveness of the proposal but it also makes monitoring the impact of the regime difficult, in particular whether the effects are intended or unintended.

So as to be able to assess the impact of the scheme and therefore make any necessary modifications –

- Within one month of the start date an analysis of registrations should be published with a breakdown of how many units are owned by landlords with one property, 2-5 properties, 6-10 properties etc.
- Quarterly figures should be published on new registrations, registrations ended and enforcement action.
- After one year, an independent assessment of the effects of the regime should be undertaken.
- At the end of two years a second assessment should be undertaken covering in particular changes in the register.

The subject of licensing of private landlords has been on the agenda for some time and there was a consultation in 2019. But the current proposals are new and it is unfortunate that a new consultation document, including a market analysis, was not published. It is equally unfortunate that there is no mention on the Government website of the current proposals. They can be found only on the States Assembly website. And it is equally unfortunate that the current review is not mentioned on the Panel’s page of the Assembly website.

Scope of the regime

The stated purpose of the regime is “to ensure that minimum standards are adhered to and that tenants and their families are living in safe homes”. However, the proposal embraces social housing providers. This is unnecessary for three reasons –

- The social landlords and their properties are already known.

- There is no evidence of the malpractice that is being used to justify the regime.
- If there was malpractice the government has other means of addressing it, particularly in respect of Andium Homes, which the government wholly owns.

The stated justification is “to ensure a level playing field” between social housing providers and social landlords. This is absurd. Andium was gifted its initial estate for nothing (although the annual contribution it makes to the Treasury can be regarded as partly equivalent to what it would have paid in loan interest had it bought the properties at current use value) and does not charge more than 80% of market rent. Private landlords pay a market price for their properties and therefore are less able to charge below market rents.

There is also a case for excluding winter lets and properties that are being let for a short term because the owner is, say, working abroad for a year. If this is not done then there is a risk that some such suppliers of rented property would simply prefer to keep their properties empty for the short time that they would otherwise be let.

It is noted that -

Where a person who is both the owner and occupier of a dwelling permits that dwelling to be occupied, for reward, by up to two other persons, then that dwelling is not a rented dwelling for the purposes of this Law.

It is therefore assumed that a tenant who sublets is caught by the law. This would catch arrangements that are typical among young people who share a home – only one is the formal tenant with the others paying their share of costs. It would be useful to clarify this so as to ensure a level playing field between owner-occupiers and tenants.

Differential treatment of new and existing units

The current proposal is that properties rented before the start date will automatically be granted a licence without pre-inspection if the application is made before the start date. Subsequently, units for which a licence is sought “may be inspected before a licence is issued, subject to a risk-based approach”.

This two-tier system, besides being discriminatory, has two drawbacks –

- Giving someone a licence without a test is inherently dangerous – and those who tend to avoid regulations shout the loudest that they

are “licensed by the Government”. A registration scheme is more logical – and in effect that is what the scheme is.

- Post the launch of the scheme landlords will not be allowed to let a property unless first given a licence. This could delay a letting and at the margin reduce the supply. The wording in the proposal is –

landlords who may be intending to let out a dwelling for the first time would be encouraged to contact the department well in advance to avoid any licensing difficulties so that tenants only move in after a licence has been issued.

This is worrying – particularly the expression “well in advance”. It is vague and could easily be interpreted as one or more months in advance. Sometimes properties are let at short notice and the requirement for prior approval adds unnecessary grit to what can already be a difficult process.

It would be better to equalise the arrangements such that post launch date landlords simply have to notify within say one month of a property being let. And if this is not done then there should be a requirement for a licence to be issued, or refused, within a week of an application.

Inspections

The regime envisages that a “risk-based” approach will be used in deciding whether to grant or withdraw a licence. The inspection regime is described as follows –

officers would be able to carry out proactive, targeted, risk-based inspections and have much easier access to details of the landlords for each property should it be necessary to contact them. There would also be random inspections, so that landlords will not know whether or not an inspection was the result of a complaint or just random selection.

Regulators generally use a risk-based approach but this requires knowledge of the risk factors. It is difficult to see how the data that will be provided by landlords, and existing information from enforcement activity, will enable a series of risk factors to be identified.

Random inspections are a useful regulatory tool but difficult to do in respect of rented housing. Both landlord and tenant have to know about the inspection in advance so that inspectors have access. Perceived problems, such as electrical safety or overcrowding, may be the responsibility of the landlord, but equally may be the responsibility of the tenant. For example, what action is proposed if a two-bedroom flat is rented to a couple with one child, who then invite, say, parents or other relatives to move in to share the costs?

It is common for regulators and policy makers to argue for greater powers and tough sanctions. Often, however, the necessary powers exist and the issue is the inability or unwillingness to use them.

In the case of rented properties the current relevant law is the Public Health and Safety (Rented Dwellings) (Jersey) Law 2018. Under this law the Minister has the power to –

- Inspect dwellings.
- Require information from any relevant person – so including landlords.
- Take any action considered appropriate including a prohibition notice stating that use of the dwelling as living accommodation is prohibited, unless and until action is taken to remove the hazard or reduce the risk posed by the hazard.
- Take remedial action and recover the cost from the landlord.

Contravening any requirement or prohibition is a criminal offence. There is a right of appeal to the Royal Court.

These seem to be strong powers, compared with the provision in the draft regulations to prohibit a property from being let, and include that provision. The argument for the licensing regime is set out in the preamble -

While minimum standards are already a legal requirement, the Infrastructure and Environment Department, which is responsible for enforcement, continues to identify rented dwellings that are in a state of non-compliance. The Regulations would provide Environmental and Consumer Protection Officers in the Housing and Nuisance Team with a complete data set of rented dwellings. Using this, officers would be able to carry out proactive, targeted, risk-based inspections and have much easier access to details of the landlords for each property should it be necessary to contact them. There would also be random inspections, so that landlords will not know whether or not an inspection was the result of a complaint or just random selection.

and

Currently, criminal prosecution is the only way to deal with non-compliance and it is well known that there is a high bar to successful prosecution. Criminal prosecution is resource heavy and a relatively clumsy way of dealing with non-compliance.

There are valid points but subject to the points made in this paper about the difficulty in practice of doing random inspections. However, notwithstanding the comment about criminal prosecution the reality is

that renting out a property without a licence (whether because a licence has been refused or withdrawn or not applied for) is a criminal offence in exactly the same way that failure to comply with a notice under the existing law is a criminal offence.

The issue therefore is whether the drawbacks of a licensing regime are more than compensated for by having a register of rented properties which will make identification of landlords easier and allow for random inspections.

Notification that a dwelling is no longer being rented

The draft regulations require the Minister to be notified within 28 days “if the dwelling is no longer being used as a rented dwelling”. This is stated as an absolute, although it cannot and would not be enforced. As drafted a landlord would need to notify that a property is not being rented when a tenant leaves and then reregister when there is a new tenant. The reality is that people will not notify, so any thought that at any one time there will be a register of rented properties is wrong; there will be a register on properties that are or have been rented. At the end of each two year licence period many properties will not be reregistered. The licensing team will need to pursue all those cases to identify where properties are not being rented and other cases.

To bring this requirement in line with reality it should be changed to –

the dwelling is no longer being used as a rented dwelling and is not intended to be used as a rented dwelling during the licence period.

Need for joined-up policy

It seems odd that almost simultaneously one part of government is seeking to impose a new residential tenancy law while a separate department is seeking to introduce regulations for licensing rented properties – and the two measures seem to have been prepared in isolation. There is a single reference to the draft regulations to the residential tenancy law and in the proposed residential tenancy law to the licensing proposal, neither of which are substantive. The fact that including social rented properties on “level playing field” grounds” in the regime reflects this silo approach.

Impact on the supply of rented housing

It can be argued that the requirements should have no effect on the supply of rented housing on the grounds that the minimum standards are already a legal requirement and the licensing proposals simply require notifying certain information. This is to misunderstand the market. A number of examples have already been given in this paper of how the requirements at the margin may reduce the supply of rented housing.

Taken together, and given other requirements, the effect could be more than minor. This will depend on how the requirements are implemented.

There is a fear with any regulatory regime that enforcement concentrates on process not substance – because it is easier. The requirement to have an electrical safety certificate is a good example. In the most informal part of the market – person-to-person lets arranged through personal contacts or the Jersey Property Rentals Facebook page – one suspects that electrical safety certificates are far from universal. According to checktrade “The average cost of an electrical safety check roughly starts at £215”. £215 is not a lot for a long term tenancy with a rent of £2,500 a month. £215 is a significant amount for a four-month winter let on a bedsit at £750 a month. As drafted, the requirement applies to each new rental or five years with the same rental. Policing this is much easier (and less useful) than policing really serious problems. It may be sensible to review the minimum requirements, for example by exempting the requirement for a new certificate for rentals within two years. Again, there is a need for a joined-up approach between two different regulatory requirements.

Conclusion and the unintended consequences

As drafted the consequences of the licensing scheme for landlords are –

- For social landlords, an increase in expenditure with no benefit of £150,000 a year.
- For large scale and high-end landlords, particularly those using letting agents, in practice no direct adverse consequences given the modest fee and documentation requirements – but the risk of yet another perceived “anti-landlord” measure.
- For people renting out one or two properties, winter lets and people sharing a rented property with one being the named tenant, a significant change in the nature of the role to be licensed, which for some may be one policy measure too much.

Only a tiny number of tenants will be directly affected – those who have grounds for complaint but do not complain and who may benefit from the consequences of a random or risk-based inspection.

To the extent that the indirect consequences at the margin on top of other measures encourage some marginal landlords to leave the market or in effect discourage flat sharing then there may be a reduction in the supply of rented housing, particularly at the lower end of the market and housing provided informally.

The scheme (which in reality is a registration scheme not a licensing scheme) could meet the tests of effectiveness and proportionality better and reduce unintended consequences if –

- Social housing, some short term lets (eg winter lets) and subletting by tenants was removed from scope.
- After launch date new rental properties should be capable of being registered without the licence being obtained in advance.
- There should be no requirement to notify when a property ceases to be rented if the intention is to relet it in the licensing period.
- An independent assessment of the operation of the regime should be conducted after one year.