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Protection standards of homelessness laws in the UK after devolution *

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1. Introduction.

The UK has a unique legal framework that places duties on local authorities¹ regarding homeless people. The main duty is that of providing accommodation to homeless people in certain cases, but there are also other duties like that of providing temporary accommodation, prevention and assistance, among others. This homelessness law has differed, since the creation of the first Homelessness Act, in Scotland, Wales, England and Northern Ireland.

The first law that contained provisions for homeless people was the National Assistance Act 1948, which set the obligation to provide residential accommodation for people who needed care and attention by reasons of age, illness or others and temporary accommodation for people who were in urgent unforeseeable need². This duty was therefore only to some people who fulfilled certain conditions³.

The Housing (Homeless Persons) Act 1977 is the first law specifically on the duty to provide accommodation for homeless people. It had been clear prior this Act that the provision of the National Assistance Act was not enough⁴ and this Act widened the

* Articolo sottoposto a referaggio.

¹ And the Northern Ireland Housing Executive in the case of Northern Ireland.

² *National Assistance Act 1948*, section 21: "residential accommodation for persons who by reason of age, infirmity or any other circumstances are in need of care and attention which is not otherwise available to them" and "temporary accommodation for persons who are in urgent need thereof, being need arising in circumstances which could not reasonably have been foreseen or in such other circumstances as the authority may in any particular case determine".

³ According to COWAN "The 1948 Act was really just an extension of the old Poor Law even to the extent of using the same accommodation for its recipients (...). Families were separated; people were afraid to apply in case their children were taken into care; the accommodation provided was sometimes in the form of a dormitory." (COWAN, D., *Housing Law and Policy*, Cambridge University Press, Cambridge, 2011, p. 148.)

⁴ FRIEDRICHS, J. (ed.), *Affordable Housing and the Homeless*, Walter de Gruyter, Berlin, Nueva York, 1998, p. 134, "increasing numbers, increasing concern, increasingly effective pressure group activity and

obligations of the local authorities in relation with homeless people, as the Introductory Text stated⁵.

The law has been changed several times. The Housing (Homeless Persons) Act 1977 applied to Scotland, England and Wales. The Housing Act 1985 applied only to England and Wales, while in Northern Ireland the law was and is in the Housing (Northern Ireland) Order 1988 and in Scotland it was in the Housing (Scotland) Act (H(S)A) 1987. Homeless law, therefore, differs from 1985 on. Later, in England and Wales there were changes in the law with the Housing Act 1996 and in Scotland there were no changes until the Homelessness Act 2003, made after devolution. Housing is part of the devolved matters in Scotland, Northern Ireland and Wales⁶. Although there have been important changes in homelessness law in Scotland and Wales after devolution⁷, it has to be taken into account that there were already differences before⁸, but they were not so relevant.

Currently, in Wales the main regulation is in the Housing (Wales) Act 2014, in England there are the Housing Act 1996, the Homelessness Act 2002 and the 2002 Homelessness (Priority Need for Accommodation) (England) Order, in Scotland the Housing Act 1987 and the Homelessness Act 2003 and in Northern Ireland the Housing (Northern Ireland) Order 1988⁹. Homelessness law has been changed the least in Northern Ireland, while, after devolution, Scottish and Welsh laws have sought to differ from English law in some aspects, making homelessness law more inclusive regarding some provisions. Devolution has been

increasing identification of homelessness as a housing problem led to a series of policy adjustments in the 1970s”.

⁵ "An Act to make further provision as to the functions of local authorities with respect to persons who are homeless or threatened with homelessness; to provide for the giving of assistance to voluntary organisations concerned with homelessness by the Secretary of State and local authorities; to repeal section 25 of the National Assistance Act 1948; and for connected purposes”.

⁶ Information available in: <https://www.parliament.scot/visitandlearn/Education/18642.aspx>, <https://www.gov.uk/guidance/devolution-settlement-northern-ireland>, http://www.assembly.wales/NAfW%20Documents/yes_vote_leaflet.pdf%20-%2004032011/yes_vote_leaflet-English.pdf

⁷ MACKIE, P., THOMAS, I., BIBBINGS, J., “Homelessness Prevention: Reflecting on a Year of Pioneering Welsh Legislation in Practice”, *European Journal of Homelessness*, Volume 11, No. 1, May 2017, p. 84: “Since the start of devolution in 1999, whereby powers were transferred from the UK Government to parliament in Scotland and National Assemblies in Wales and Northern Ireland, approaches towards homelessness policy have diverged”.

⁸ WILCOX, S., FITZPATRICK, S., STEPHENS, M., PLEACE, N., WALLACE, A., RHODES, D., “The impact of devolution. Housing and homelessness”, *Joseph Rowntree Foundation*, 2010, p. 13: “even prior to 1999 there had been a substantial degree of devolution in housing policy in practice, albeit that politically the lines of reporting were to Secretaries of State appointed from Westminster”.

⁹ A particularity of Homelessness law in Northern Ireland is that, while in England, Scotland, and Wales, homelessness duties are fulfilled by local authorities, in Northern Ireland “housing is allocated by the Northern Ireland Housing Executive (NIHE) (...) rather than by local authorities”: CASSIE BARTON, W. W., “Comparison of homelessness duties in England, Wales, Scotland and Northern Ireland”, Briefing paper, House of Commons library, Number 7201, 2018, p. 16.

different in Scotland, Wales and NI. In Wales, there was not full power to make laws until 2011¹⁰ ¹¹. Three years later the Housing (Wales) Act (2014) was created, so Welsh homelessness law has been the same as in England for longer than Scottish law and the changes are quite recent.

The law establishes different duties by local authorities towards homeless people. There is a definition of homeless in the law, and there are further criteria under which duties vary. An important distinction is that of people in "priority need", which means that they fulfil a series of characteristics stated in the law. Pregnant women, people with dependent children, people who are homeless due to a disaster such as a flood, among other categories of people, are considered people in priority need. Another category is that of "intentionality"; there are fewer duties towards people considered intentionally homeless. People are considered intentionally homeless if they do or fail to do anything that has as a consequence that they cease to occupy accommodation that is available and reasonable to occupy for them. In general, people in the category of "priority need" and considered not intentionally homeless are more protected by the laws. These are two separate categories, so that a person can be considered in priority need and intentionally homeless. However, in Scotland, since the abolition of priority need, the law can provide permanent accommodation to a wider part of the population¹².

2. The impact of devolution in the definition of legal standards.

In Scotland, the most important difference created after devolution is the abolition of priority need. In 1999 a "Homelessness Taskforce" was created by the Scottish Executive¹³ which resulted in a report, which, regarding priority need stated that the rights possessed by

¹⁰ Gov. Uk, Guidance. Devolution settlement: Wales, available in:

<https://www.gov.uk/guidance/devolution-settlement-wales>

¹¹ Crisis, "The plan to end homelessness", Chapter 2 Public policy and homelessness: "Following the advent of primary law making powers for the Welsh Government in 2011, the priority of tackling homelessness through improved legislation soon emerged". Available in:

<https://www.crisis.org.uk/ending-homelessness/the-plan-to-end-homelessness-full-version/background/chapter-2-public-policy-and-homelessness/>

¹² On the other hand, in some specific areas related to prevention the law has been said to be stronger in England and Wales: WILCOX, S., FITZPATRICK, S., STEPHENS, M., PLEACE, N., WALLACE, A., RHODES, D., "The impact of devolution. Housing and homelessness", *Joseph Rowntree Foundation*, 2010, p. 8: "Homelessness prevention activity has had a major (and controversial) impact in England and Wales, much less so in Scotland and Northern Ireland" and MACKIE, P., THOMAS, I., BIBBINGS, J., "Homelessness Prevention: Reflecting on a Year of Pioneering Welsh Legislation in Practice", *European Journal of Homelessness*, Volume 11, No. 1, May 2017, p. 92: "The new Welsh legislation appears to have been successful in reorienting services towards homelessness prevention and it also seems to have driven a change in service ethos".

¹³ Crisis, "The plan to end homelessness", Chapter 2 Public policy and homelessness, available in:

<https://www.crisis.org.uk/ending-homelessness/the-plan-to-end-homelessness-full-version/background/chapter-2-public-policy-and-homelessness/>

those considered in priority need should be extended to all homeless people¹⁴ and recommended the elimination of the priority need distinction by 2012 until which date the definition of priority need would be gradually expanded (28). On the other hand, the category of "intentionality", which means that some people have less protection by the law, as they are considered intentionally homeless, was supported (32). Intentionality has been kept in Scottish law, although there is the possibility of not assessing intentionality, so that it does not always apply. This is another aspect of Scottish law, which it shares with Welsh law, that makes the law more effective against homelessness.

The abolition of priority need in Scotland is a very fundamental change which widens the application of part of the law to a large group of the population. Without the condition of priority need, more people are secured accommodation. Although this does not mean that everyone is provided with accommodation, because there is still a distinction between people who are considered intentionally homeless and people considered unintentionally homeless and other eligibility conditions, it has extended this duty to many people. It was established in the Homelessness (Scotland) Act 2003, although it was not effective until 2012 with The Homelessness (Abolition of Priority Need Test) (Scotland) Order 2012.

The differences that exist in Scotland have been explained in diverse ways, among them, as a consequence of the social housing supply¹⁵, as an attempt to address single homeless people¹⁶, and as a approach with a stronger social justice foundation¹⁷. Also, the causes of homelessness are different in Scotland and England¹⁸, which may be related to legislation.

¹⁴ Scottish Executive, "An Action Plan for Prevention and Effective Response, Homelessness Task Force Final Report", 25: "we see a strong case, in principle, for extending the rights currently possessed by those assessed as being in priority need to all those assessed as homeless".

¹⁵ WILCOX, S., FITZPATRICK, S., STEPHENS, M., PLEACE, N., WALLACE, A., RHODES, D., "The impact of devolution. Housing and homelessness", *Joseph Rowntree Foundation*, 2010, p. 8: "The legislative framework has now diverged significantly across the UK, with Scotland having a far more extensive statutory safety net than elsewhere, enabled by the (diminishing) relative advantage it enjoys with respect to social housing supply".

¹⁶ Shelter, "Changes to homelessness law and practice in Scotland, Wales and England", 2016, p. 6: "Since devolution in 1999 there has been a significant divergence between English and Scottish homelessness legislation. The changes to homelessness legislation in Scotland have sought to address a lack of provision for single homeless people, and were driven by a commitment to end rough sleeping in major towns and cities".

¹⁷ ANDERSON, I., SERPA, R., "The Right to Settled Accommodation for Homeless People in Scotland: A Triumph of Rational Policy-Making?", *European Journal of Homelessness*, Volume 7, No. 1, August 2013, p. 15: "While there remains a need for more robust evidence of any Scottish collective commitment to social democracy and egalitarian social policy, the devolved approach to homelessness merits consideration as having a stronger social justice foundation than evident in other parts of the United Kingdom".

¹⁸ SHELTER, "Changes to homelessness law and practice in Scotland, Wales and England", 2016, p. 8: "At present, the drivers of homelessness in Scotland are not comparable to England. The lower rate of evictions in Scotland suggest a less challenging private rented sector, although unaffordability is a growing issue. A dispute within a household is the single main reason for homelessness in Scotland.

There have also been differences in both housing sectors, although many of these are said to have declined¹⁹. It has also been said that Scotland made homelessness an early priority post-devolution²⁰. It is a fundamental provision as it makes the greatest duty towards homeless people the same regardless of their personal circumstances. Regarding prevention, people are considered threatened with homeless in Scotland if it is likely that they will become homeless within 2 months²¹, while the time to be considered threatened with homelessness in Wales and England is 56 days, and in Northern Ireland is 28²². The legislation in Wales has placed a stronger focus on homelessness prevention, creating greater duties towards some people who have already been helped by the local authority but whose accommodation is not likely to be available for occupation for at least six months²³, an approach that can prevent homelessness earlier.

Even if the abolition of priority need is a fundamental change that makes Scottish law different to the law in England, Wales, and Northern Ireland, the importance of the Housing (Wales) Act 2014 must also be highlighted, since it introduces important differences in relation to English law, among them the possibility of disregarding intentionality in some

This is in contrast to England where the ending of a tenancy in the private rented sector is the main driver of homelessness. Only 18% of homeless applicants in Scotland were previously living in the private rented sector, whereas almost half of applicants were previously residing with friends, family or a partner. Similarly, the rate of eviction across all tenures is far lower in Scotland than in England".

¹⁹ GIBB, K., "Is Scottish housing policy diverging from policy in England? The complexity of devolution in practice", *Housing Finance International*, International Union for Housing Finance, 2012, p. 22: "The Scottish housing sector has traditionally been different from England but many important 'real' aspects of that separateness have declined over time. Until only recently, Scotland was much less of a home owning country (see Table 1) but this has changed as a result of income growth, the right to buy and the backwash of UK-wide policies such as mortgage deregulation and dis-investment in public housing (as well as decline in home ownership in the other home nations)".

²⁰ KING., F., "Scotland: Delivering a Right to Housing", *Journal of Law and Social Policy*, Volume 24 A Road to Home: The Right to Housing in Canada and Around the World, Article 9, p. 158: "By making homelessness an early priority post-devolution, Scotland's politicians showed a high level of cross-party cooperation, marking a point of departure from the Westminster government".

²¹ *Housing (Scotland) Act 1987*, s. 24.

²² *Housing (Wales) Act 2014*, s. 55, *The Housing (Northern Ireland) Order 1988*, 3.6, *Housing Act 1996*, s. 175.

²³ Welsh Government, "Code of Guidance for Local Authorities on the Allocation of Accommodation and Homelessness", 2016, 14.7: "When the s.73 duty to help to secure accommodation comes to an end either because the period of 56 days has expired or because before the end of the 56 days the Local Authority is satisfied that reasonable steps have been taken to help to secure that suitable accommodation is available for the applicant but accommodation that is likely to last for a period of at least 6 months is not available to the applicant, the Local Authority must review the applicant's assessment to determine if they now owe the S.75 duty to secure accommodation", and 14.9: "The S.75 duty is owed to applicants who meet specific criteria. i) not have suitable accommodation available for occupation that is likely to last for a period 6 months: the Local Authority must be satisfied that, having taken reasonable steps, the applicant has no suitable accommodation available to them that it is likely to last for a period of at least 6 months. For the purpose of determining the 6 month period it starts on the day the applicant is notified that he or she is no longer entitled to the S.73 duty".



cases, as well as the obligation to secure accommodation for more groups of people considered intentionally homeless than in the other laws, something that only takes place in Welsh law.

Although these differences in legislation are very positive, structural conditions are necessary for legislation to work and it cannot be assumed that these provisions would work equally if they were established in England²⁴. The legislation cannot work if there are not enough available homes²⁵, although lack of housing could be solved with adequate public policies.

In conclusion, although the law in the UK represents in general a very advanced protection of homeless people in relation to other countries, there are differences in the levels of protection, of which the most important ones have arisen after devolution. Devolution has made it possible to adapt the law to different conditions and the development of different policies in relation to a greater or lesser social orientation of the governments. This has resulted in a greater protection regarding some aspects in Wales and Scotland. In general, devolution has created a broadening of the protection standards in this field with respect to previous legislation.

3. What being homeless means in the different territories.

There is a definition of homelessness within the legal framework. Definitions of homelessness vary; they may consider homeless someone who lives on the street or they may be wider and consider homeless those who are in insecure accommodation. The definition given by FEANTSA²⁶ considers homeless people those who do not have a place to stay in or that, having it, it is unfit for habitation, or people who temporarily stay with friends or family or in shelters, among others.

Definitions of homelessness are different in Scotland, England, Wales and Northern Ireland. In Scotland people are homeless when they do not have accommodation (people are considered to have accommodation if they, as well as the person who normally resides with them or the person that it is reasonable that resides with them, have an interest in it or a court order that entitle them to occupy it, permission to occupy it or if they occupy it by virtue of any enactment or rule of law giving them the right to remain in occupation or restricting the right of any other person to recover possession). They are also homeless if they

²⁴ Shelter, "Changes to homelessness law and practice in Scotland, Wales and England", 2016, p. 9: "local authorities in England have made it clear that the removal of priority need would be unmanageable in the context of current housing supply and demand pressures".

²⁵ KING., F., "Scotland: Delivering a Right to Housing", *Journal of Law and Social Policy*, Volume 24 A Road to Home: The Right to Housing in Canada and Around the World, Article 9, p. 161: "The most evident impact of the recession on the homelessness commitment is that the legal duty to provide a home to all unintentionally homeless households is only real if there are homes available".

²⁶ European Federation of National Organisations Working with the Homeless.



have accommodation but they cannot secure entry to it or if it is probable that occupation will lead to abuse, or it is a movable structure and there is no place where to place it, or if it is overcrowded and unhealthy or it is not permanent accommodation when immediately before its occupation a local authority had the duty to secure permanent accommodation under this same law. It is not considered that a person has accommodation if it is not reasonable for them to continue to occupy it²⁷. Accommodation is considered available only if it is available for a person and the people who might reasonably be expected to reside with them²⁸.

A person who is staying with friends or relatives will not be considered homeless in principle in Scotland, unless the accommodation counts as not relevant. Women's shelters can be considered accommodation, but not reasonable accommodation²⁹. Living at someone else's house or in a shelter do not allow a regular life. In other cases it can also be considered that the accommodation is "not reasonable to continue to occupy", as it can be the case when someone is staying long term with a friend or a relative. Overcrowding is only relevant for the definition of homelessness if it is a danger to health³⁰, but overcrowded accommodation can still be considered not reasonable to occupy.

There is not a definition of "reasonable". The authority can take into account the condition of housing in the area when assessing reasonableness³¹. This lack of definition means that many circumstances can make the accommodation not reasonable to continue to occupy, but it can also leave much to the discretion of the authority as well as to the conditions of housing in a given area. In practice, there could be whole areas with poor housing and with a much lower standard than in other areas. An objective definition of what is reasonable or not for accommodation would improve the definition of homelessness. To this end, the guidance that there is for this purpose could be considered compulsory.

In England and Wales the definition of homelessness is very similar to that in Scotland. The difference is that there are not the circumstances of abuse and of unhealthy overcrowding, and that related to the local authority's duty of securing permanent accommodation³². In Wales, accommodation is considered available only if it is available for a person and those who normally reside with them or might reasonably be expected to reside with them³³. Although the circumstance that the occupation of the accommodation will lead to abuse does not make a person homeless under Welsh law, it is considered not reasonable

²⁷ *Housing (Scotland) Act 1987*, s. 24.

²⁸ *Housing (Scotland) Act 1987*, s. 41.

²⁹ MULLEN, T., *Homelessness and the law*, Legal Services Agency, Glasgow, 2010, p. 23.

³⁰ MULLEN, T., *Homelessness and the law*, Legal Services Agency, Glasgow, 2010, p. 24.

³¹ *Housing (Scotland) Act 1987*, s. 24, 2B: "Regard may be had, in determining whether it would be reasonable for a person to continue to occupy accommodation, to the general circumstances prevailing in relation to housing in the area of the local authority to whom he has applied for accommodation or for assistance in obtaining accommodation".

³² *Housing (Wales) Act 2014*, s. 55, *Housing Act 1996*, s. 175.

³³ *Housing (Wales) Act 2014*, s.56.

to occupy accommodation if it is probable that it will lead to abuse to a member of the household³⁴. In England, this is similar³⁵, and in both cases accommodation is only considered available for someone if it is available also for the people who normally or who might reasonably be expected to reside with them³⁶. In both cases, in determining if it is reasonable to occupy accommodation, regard may be had to the general circumstances in the area³⁷.

The definition is the same in Northern Ireland as in England and Wales but, in this case, similarly to Scotland, people are considered homeless if they have accommodation but occupation will lead to violence or threats of violence from other people living in it³⁸. Accommodation is only considered available if it is available also for the people who might reasonably be expected to reside with the person³⁹.

There is not much difference between the definitions of homeless. The wider definition is that found in Scottish law. It takes into account circumstances of abuse and unhealthy overcrowding. Likewise, in Northern Ireland the definition is also wider than in England and Wales since there is a circumstance more that it is taken into account (if occupation will lead to violence or threats of violence from other people living in the accommodation).

4. Securing permanent accommodation.

People who are considered to be in priority need are generally more protected than the rest of the population, and, except in Scotland, where priority need has been abolished, they are the ones who are entitled to more rights under the laws.

Since in Scotland abolition of priority need was introduced in 2003⁴⁰, and put into application in 2012⁴¹, for people who are not considered intentionally homeless there is the duty to secure that permanent accommodation becomes available for their occupation⁴² and for those unintentionally threatened with homelessness there is the duty of taking "reasonable steps to secure that accommodation does not cease to be available" for their occupation⁴³.

³⁴ *Ibid.*, s. 57.

³⁵ *Housing Act 1996*, s. 177.

³⁶ *Housing (Wales) Act 2014*, s. 56, *Housing Act 1996*, s. 176.

³⁷ *Housing (Wales) Act 2014*, s. 57, *Housing Act 1996*, s. 177.

³⁸ *The Housing (Northern Ireland) Order 1988*, s. 3.

³⁹ *Ibid.*, s. 4.

⁴⁰ *Homelessness etc. (Scotland) Act 2003*. 2. Abolition of priority need test (1)From such day as the Scottish Ministers may by order made by statutory instrument appoint, the question whether an applicant has a priority need is to be left out of account in determining the duties of a local authority under - (a)section 31 (duties to persons found to be homeless), and (b)section 32 (duties to persons found to be threatened with homelessness), of the 1987 Act.

⁴¹ *The Homelessness (Abolition of Priority Need Test) (Scotland) Order 2012*.

⁴² *Housing (Scotland) Act 1987*, s. 31.

⁴³ *Ibid.*, s. 32.

In England only unintentionally homeless people in priority need are secured accommodation. There is, therefore, no obligation to secure accommodation for people who are not in priority need, although the authority may do so if they are not considered intentionally homeless⁴⁴. This provision has been introduced by the Homelessness Reduction Act 2017, which has made important changes in English homeless law⁴⁵ and has made English law closer to that in Wales⁴⁶, which can be considered a positive effect of devolution regarding protection standards. Interaction between the law in the different territories has taken place so that provisions created in some of them have been adopted by others.

In Wales, as well as in England, for unintentional homeless people in priority need the authority must "secure that suitable accommodation is available for occupation by the applicant"⁴⁷. But in Wales, people considered intentionally homeless and in priority need are secured accommodation as well if they also fulfil other conditions stated in the law⁴⁸. Another important difference between Welsh legislation and that in England and NI, is that the local authority may not have regard to intentionality in some cases⁴⁹, in which people who otherwise might be considered intentionally homeless will be due the main duty of being secured accommodation. This is not unique to Wales, since in Scotland there is also the possibility of disregarding intentionality, which applies since 2019, although the legal

⁴⁴ *Homelessness Act 2002*, s. 5.1.

⁴⁵ According to Crisis "(...)the most significant change to homelessness legislation in 40 years, with the introduction of The Homelessness Reduction Act (2017) which brings about new duties to prevent and relieve homelessness", Crisis, "The plan to end homelessness", available in: <https://www.crisis.org.uk/ending-homelessness/the-plan-to-end-homelessness-full-version/background/chapter-2-public-policy-and-homelessness/>

⁴⁶ CASSIE BARTON, W. W., *op.cit.*, p. 3: "The Homelessness Reduction Act 2017 came into force in England on 3 April 2018, meaning that authorities now have new prevention and relief duties along the same lines as those in operation in Wales".

⁴⁷ *Housing (Wales) Act*, s. 75, *Housing Act 1996*, s. 193.

⁴⁸ *Housing (Wales) Act*, s. 75.

⁴⁹ *Ibid.*, s. 78. Deciding to have regard to intentionality (1)The Welsh Ministers must, by regulations, specify a category or categories of applicant for the purpose of this section. (2)A local housing authority may not have regard to whether or not an applicant has become homeless intentionally for the purposes of sections 68 and 75 unless (a)the applicant falls within a category specified under subsection (1) in respect of which the authority has decided to have regard to whether or not applicants in that category have become homeless intentionally, and (b)the authority has published a notice of its decision under paragraph (a) which specifies the category. (3)Subsection (4) applies where a local housing authority has published a notice under subsection (2) unless the authority has (a)decided to stop having regard to whether or not applicants falling into the category specified in the notice have become homeless intentionally, and (b)published a notice of its decision specifying the category. (4)For the purposes of section 68 and 75, a local housing authority must have regard to whether or not an applicant has become homeless intentionally if the applicant falls within a category specified in the notice published by the authority under subsection (2).

provision is from 2003⁵⁰. This is one of the important aspects in which these laws have diverged from English homelessness law.

5. Priority need.

This is one of the main differences that there are between the different laws in Scotland, Wales, England, and Northern Ireland. The abolition of priority need in Scotland, which was established in the Homelessness (Scotland) Act 2003, is one of the most important divergences that has come after devolution.

There are differences in what is considered priority need, a category that means that people are in certain circumstances stated by the law. In England people with priority need are people who are vulnerable for the reasons specified in the law or for "other special reason", pregnant women, people with dependent children, or, in these cases, those with whom they reside or are expected to reside, people who are homeless or threatened with homelessness due to disasters such as a flood⁵¹, and other categories that were added in 2002: people who are 16 or 17, in some circumstances, people under 21 who were looked after, accommodated or fostered between 16 and 18, and some further categories but only if the circumstances related to them make the person vulnerable: people over 21 who were looked after, accommodated or fostered, people who were in the naval, military or air forces, people who have served a custodial sentence or were committed for the reasons specified in this law or were remanded in custody and people who had to leave their home because of violence or threats of violence⁵². Regarding what is considered "vulnerable", there are some indications about vulnerability in a Code of Guidance: the authority "should determine whether, if homeless, the applicant would be significantly more vulnerable than an ordinary person would be if they became homeless" (8.15). They may take into account the support from family (8.16). The priority need condition implies, therefore, a complicated test that includes many factors and personal circumstances. Even with the guidance, there may be difficulties around the decisions on vulnerability.

It is similar in Wales but there are some differences: some of the circumstances are the same as in England (pregnant woman, person with dependent child, person vulnerable for some special reason, person who is homeless as a result of a disaster, people between 16 and 17) and others are different: people under 21 and over 18 who were looked after, accommodated or fostered while being under 18, people between 18 and 21 who are at a particular risk of sexual or financial exploitation, people who have served in the regular armed forces and have become homeless afterwards (without the requirement of vulnerability),

⁵⁰ *Homelessness etc. (Scotland) Act 2003*, s. 4. See also: Scottish Government, Homelessness: code of guidance, 2019, 6.2, available in: <https://www.gov.scot/publications/code-guidance-homelessness-2/pages/7/>

⁵¹ *Housing Act 1996*, s.189.1.

⁵² *The Homelessness (Priority Need for Accommodation) (England) Order 2002*, ss. 2-6.

people who are homeless as a result of being subject to domestic abuse. Finally, people who are vulnerable as a result of having served a custodial sentence, having been remanded or committed to custody or having been remanded to youth detention accommodation, as well as people with whom they reside or might reasonably be expected to reside⁵³. The priority need category is wider in Wales, and it also takes into account, in all cases, people who reside or might be expected to reside with people who fall in one of these categories, who are taken into account in the English law in less cases.

In Northern Ireland people with priority need are pregnant women, a person who is vulnerable as a result of old age, mental illness, physical disability or other special reason, or, in these two cases, people with whom they reside or might reasonably be expected to reside, people with dependent children, people made homeless by a disaster, young people between 16 and 21 who are at risk of sexual or financial exploitation, people without dependent children who have been subject to violence and are at risk of further violence if they return home⁵⁴.

Some of the categories for priority need are ambiguous, as is the case with vulnerable people or those who are made vulnerable by some circumstances. In relation to priority need, it has been criticised that the distinction “relegated the needs of single homeless people and was fundamentally unjust since there was no duty to provide housing for those found to be non-priority”⁵⁵. This focus in some categories of people means that part of the population is outside the protection. The difference in Scotland may have been motivated by the aim of providing single homeless people with accommodation⁵⁶. Although the reasons under the category of priority need are not difficult to understand, it is not less true that people not considered in priority need also needs housing. It is, however, also a fact that the removal of priority need implies a greater need of available housing and it cannot work otherwise.

⁵³ *Housing (Wales) Act 2014*, s. 70.

⁵⁴ *The Housing (Northern Ireland) Order 1988*, s. 5.

⁵⁵ KING., F., “Scotland: Delivering a Right to Housing”, *Journal of Law and Social Policy*, Volume 24 A Road to Home: The Right to Housing in Canada and Around the World, Article 9, p. 157: “The most contentious of these, priority need, placed an emphasis on households with children and other vulnerabilities as a priority group within those who had been classified as meeting the legal definition of homelessness. There was a clear rationale for this distinction, yet it relegated the needs of single homeless people and was fundamentally unjust since there was no duty to provide housing for those found to be non-priority. This is what the 2012 Commitment sought to change; to remove the priority/non-priority distinction and to make it clear that having passed the homelessness test was enough of a priority, regardless of your household’s composition or circumstances”.

⁵⁶ Shelter, “Changes to homelessness law and practice in Scotland, Wales and England”, 2016, p.6: “Since devolution in 1999 there has been a significant divergence between English and Scottish homelessness legislation. The changes to homelessness legislation in Scotland have sought to address a lack of provision for single homeless people, and were driven by a commitment to end rough sleeping in major towns and cities”.

6. Intentionality.

Intentionality is a circumstance that exists in Scotland, Wales, England and Northern Ireland's laws, although there are differences to how it is regulated. Lesser duties are due to people who are considered intentionally homeless.

Intentionality means that a person is considered to be homeless intentionally if they do or fail to do anything in consequence of which they cease to occupy accommodation which is available for their occupation and which it would have been reasonable for them to continue to occupy. An act or omission in good faith may not be treated as deliberate⁵⁷. The Scottish law and the Northern Irish law also include a definition of threatened with homeless intentionally⁵⁸, but the Welsh and English laws do not do so.

It is important, however, to notice that in Wales the local authority may not have regard to intentionality in general, except for categories of applicants previously established and if the local authority has published a notice about the decision to have regard to intentionality⁵⁹. The Homelessness (Intentionality) (Specified Categories) (Wales) Regulations 2015 has specified the categories of applicant for this purpose. Local authorities decide if they have regard to intentionality for people in these categories and must publish a notice of this decision. For all the cases that are not specified in this notice, the local authority may not have regard to intentionality⁶⁰. This is a fundamental difference in Welsh law with respect to English law, introduced in the Housing (Act) Wales, a possibility that also exists in Scottish law.

In Scotland, when it is considered that there is intentionality, there is the duty to "secure that accommodation is made available for the applicant's occupation for such period as they consider will give him a reasonable opportunity of himself securing accommodation for his occupation" and of giving advice and assistance⁶¹.

In England there is always the duty of taking "reasonable steps to help the applicant to secure that suitable accommodation becomes available for the applicant's occupation" for a time⁶². This is regardless priority need or intentionality, for all homeless people who are

⁵⁷ *Housing (Scotland) Act 1987*, s. 26, *Housing (Wales) Act 2014*, s. 77, *Housing Act 1996*, s. 191, *Housing (Northern Ireland) Order 1988*, s. 6.

⁵⁸ *Housing (Scotland) Act 1987*, s. 26.2: "A person becomes threatened with homelessness intentionally if he deliberately does or fails to do anything the likely result of which is that he will be forced to leave accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy", *Housing (Northern Ireland) Order 1988*, s. 6: "A person becomes threatened with homelessness intentionally if he deliberately does or fails to do anything the likely result of which is that he will be forced to leave accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy".

⁵⁹ Only for the purposes of sections 68 and 75.

⁶⁰ *Housing (Act) Wales 2014*, s. 78.

⁶¹ *Housing (Scotland) Act 1987*, s. 31. 3.

⁶² *Housing Act 1996*, s. 189 B.2.

eligible for assistance. A difference between these two laws is that, while in Scotland the duty is to secure that accommodation is available for a time until it is considered that the applicant will have an opportunity of securing accommodation, in England there is a legally established time. The Scottish provision depends on what a "reasonable opportunity" is considered, being more ambiguous, but also more flexible regarding the applicants' needs. However, the main difference between these two laws is one of a degree of obligation, since in Scotland the duty is that of securing that accommodation is available, while in England the duty is only of taking "reasonable steps to help the applicant to secure that suitable accommodation becomes available" so that there is not an exigency of a result, and the duty will be fulfilled even if the applicant is not secured accommodation in the end. This duty in England "comes to an end at the end of the period of 56 days" or when the applicant has suitable accommodation for at least 6 months, among other circumstances (such as not being longer eligible for assistance)⁶³⁶⁴, so that the duty ends in any case at the end of 56 days, whether accommodation has been made available or not. If the authority has taken reasonable steps to help the applicant to secure suitable accommodation and the 56 days have passed, the duty is considered to be fulfilled even if the applicant has not secured accommodation.

However, for people considered intentionally homeless and in priority need, there is a further duty (similar to the one established by Scottish law), when the above mentioned duty has come to an end: to "secure that accommodation is available for his occupation for such period as they consider will give him a reasonable opportunity of securing accommodation for his occupation" and to provide the applicant with advice and assistance⁶⁵. Since in Scotland there is not priority need, more people are protected by this type of provision.

On the other hand, in Wales there is the "duty to help to secure accommodation for homeless applicants"⁶⁶ for all homeless people. This duty is similar to that in England since there is also no obligation of a result and it ends after 56 days. It can also end before the 56 days if the local authority is satisfied that reasonable steps have been taken⁶⁷. The protection in both cases depends on the meaning of "help" and "reasonable steps" but there is not a duty to secure accommodation, that is, a duty to reach an expected result⁶⁸. There is also the duty

⁶³ *Ibid.*, s. 189 B.4.

⁶⁴ *Ibid.*, s. 189 B.7.

⁶⁵ *Ibid.*, s. 190.

⁶⁶ *Housing (Wales) Act 2014*, s. 73.1: 73Duty to help to secure accommodation for homeless applicants (1)A local housing authority must help to secure that suitable accommodation is available for occupation by an applicant, if the authority is satisfied that the applicant is (a)homeless, and (b)eligible for help.

⁶⁷ *Ibid.*, s. 74.

⁶⁸ Shelter, "Help to secure you accommodation": "Once the council has decided that you are eligible and homeless, it must take 'reasonable steps' to help you secure suitable accommodation. This does NOT mean that the council has to house you, only that it must take 'reasonable steps' to help you find somewhere suitable to live". Available in: <https://sheltercymru.org.uk/get-advice/homelessness/help-from-the-council/what-help-can-the-council-provide/help-to-secure-you-accommodation/>

to “secure that suitable accommodation is available for occupation by the applicant” when that duty comes to an end⁶⁹ if there is priority need and the person is not considered intentionally homeless as well as for people considered intentionally homeless and in priority need if they also fulfil some conditions related to their personal circumstances⁷⁰. This duty does not end with time since in this case there is an obligation to secure that suitable accommodation is available for occupation. This is the main difference with English and Scottish law, since, for some people who are considered intentionally homeless, there is the obligation of securing accommodation.

In Scotland there is a greater duty towards homeless people since there is a duty to secure temporary accommodation for all homeless people, while in England and Wales the duty towards homeless people in general is only of taking reasonable steps to help or to help the applicant to secure accommodation, without the obligation of reaching a result. On the other hand, in Wales there is a greater final duty than in England since, for some people considered intentionally homeless and in priority need, if they fulfil some conditions, there is the duty to secure accommodation, an obligation which in England is only towards people in priority need and not considered intentionally homeless.

Intentionality is a problematic concept, since people may be considered intentionally homeless if they have abandoned accommodation for a less secure one and this is not restricted to the last accommodation but it goes further in time so that previous accommodation is taken into account. There are limitations to how far the authority can go to assess if the person is intentionally homeless or not and, although good faith cannot result in a person being considered intentionally homeless, it depends on how each case is assessed. The concept of intentionality comes from (“(...) the belief that some people would make themselves homeless in order to take advantage of the beneficial effects of the Act. This was variously expressed as 'self-induced' homelessness, 'self-inflicted' homelessness, or 'intentional' homelessness. (...) it was believed that such people would make themselves homeless to 'jump the housing queue’⁷¹. It is related to the idea of blame and it is ambiguous. It can also result

⁶⁹ *Housing (Wales) Act 2014*, s. 75.

⁷⁰ Ibid: (...) e)the applicant is (i)a pregnant woman or a person with whom she resides or might reasonably be expected to reside, (ii)a person with whom a dependent child resides or might reasonably be expected to reside, (iii)a person who had not attained the age of 21 when the application for help was made or a person with whom such a person resides or might reasonably be expected to reside, or (iv)a person who had attained the age of 21, but not the age of 25, when the application for help was made and who was looked after, accommodated or fostered at any time while under the age of 18, or a person with whom such a person resides or might reasonably be expected to reside, and (f)the authority has not previously secured an offer of accommodation to the applicant under this section following a previous application for help under this Chapter, where that offer was made (i)at any time within the period of 5 years before the day on which the applicant was notified under section 63 that a duty was owed to him or her under this section, and (ii)on the basis that the applicant fell within this subsection.

⁷¹ COWAN, D., *Housing Law and Policy*, Cambridge University Press, Cambridge, 2011, p. 151.

in an unfair use of discretionality by the authority. Regarding interpretation, it has been stated that "some local authorities (...) have in particular interpreted intentions in respect of homelessness in a remarkable way"⁷². There is a code of guidance, but, although it must be taken into account, it is not compulsory. There are some factors in the Scottish Code of Guidance which the authority may take into account to determine intentionality, such as youth, inexperience, education or health, as well as mental illness and learning disabilities when considering if the person acted deliberately or not⁷³. The Code of Guidance that applies to England states that "the non-payment of rent or mortgage costs which arose from financial difficulties which were beyond the applicant's control" should not be considered deliberate, or when the housing authority thinks that the applicant cannot manage their affairs due to, for example, age, mental illness or disability, the act or omission should not be considered deliberate⁷⁴. Although guidance is useful, interpretation will still depend on any specific case and circumstances. It has been said of *Davenport v. Salford CC* (1983) 8 HLR 54 that it was "a judgment which in effect gave a legal blessing to those local authorities who wished to ignore DoE guidance"⁷⁵. Intentionality is a complicated concept due to the multiple and complex causes of homelessness, which are not easy to determine. Finally, intentionality seems related to the idea of homelessness as an individual problem and not a social one. People who are considered intentionally homeless may not be able to solve their situation on their own, so that the inclusion of the concept of intentionality in the law makes it less effective in solving homelessness.

7. Duties to those threatened with homelessness.

In this section we will see a category which is different to those previously seen since it affects not homeless people but people threatened with homelessness. This means that the

⁷² FRIEDRICHS, J. (ed.), *op.cit.*, p. 36.

⁷³ Examples in the guide of what is considered intentionality are circumstances like someone who has decided to sell their home or "lost it because of wilful and persistent refusal to pay rent" and examples of what is not considered intentionality are circumstances such as not being able to pay the loan repayment and having to sell the house, not being able to pay rent because of being unemployed, working part time or other financial difficulties, among others: Scottish Government, Homelessness: Code of guidance, 2019, available in: <https://www.gov.scot/publications/code-guidance-homelessness-2/pages/7/>

⁷⁴ Other examples are: if someone is forced to sell their home or has lost it due to financial difficulties, they would not be considered intentionally homeless; on the other hand wilful and persistent refusal to pay rent or mortgage payments, selling the home when there was not risk of losing it, or eviction because of anti-social behaviour, among others, may result in considering the person as intentionally homeless: Ministry of Housing, Communities & Local Government, Homelessness code of guidance for local authorities, 2019, available in: <https://www.gov.uk/guidance/homelessness-code-of-guidance-for-local-authorities>

⁷⁵ LOVELAND, I., *Housing homeless persons: administrative law and the administrative process*, Clarendon Press, Oxford, 1995, p. 83.

law provides for different duties which are oriented to prevention. In the laws there are definitions of what is being homeless and also of being threatened with homelessness. The latter are people who are at risk of becoming homeless soon. The duties are different to homeless people and people threatened with homelessness. The period of time to be considered threatened with homelessness varies: In Scotland, a person is threatened with homelessness if it is likely that they will become homeless within two months⁷⁶, 56 days in Wales and England and 28 days in Northern Ireland⁷⁷.

The duties towards people considered threatened with homelessness are different too: in Wales there is a duty to help to secure that suitable accommodation does not cease to be available for occupation by an applicant that is threatened with homelessness⁷⁸. In Northern Ireland the general duty towards people threatened with homelessness is only of providing advice and assistance; if a person is considered in priority need and threatened with homelessness not intentionally, the Executive will take reasonable steps to secure that accommodation does not cease to be available for their occupation⁷⁹.

Regarding England, if a person is threatened with homelessness, the authority must take reasonable steps to help the applicant to secure that accommodation does not cease to be available for the applicant's occupation⁸⁰. In Scotland, the duty to a person that is considered threatened with homelessness not intentionally is that of taking reasonable steps to secure that accommodation does not cease to be available for their occupation; for the other cases they shall provide advice and assistance⁸¹.

The duty to people threatened with homelessness is greater in Wales and in England, since it is always the same regardless of the existence of priority need or intentionality (the authorities must help to secure that suitable accommodation does not cease to be available for occupation); on the other hand Scotland and Northern Ireland have less prevention in this case since in Scotland the similar duty of taking reasonable steps to secure that accommodation does not cease to be available is only towards people considered threatened with homelessness not intentionally (for other cases there is only the obligation of providing advice and assistance) and in Northern Ireland it is towards people considered in priority need and threatened with homelessness not intentionally. It can be said therefore that prevention in this case is stronger in England and Wales, since there is a general duty of helping to secure that accommodation does not cease to be available for all people threatened with homelessness. It must be taken into account that this general duty towards all people considered threatened with homelessness has been introduced in England with the Homelessness Reduction Act 2017, which is, in many aspects, similar to Welsh homelessness

⁷⁶ *Housing (Scotland) Act 1987*, s. 24

⁷⁷ *The Housing (Northern Ireland) Order 1988*, s. 3.6, *Housing Act 1996*, s. 175, *Housing (Wales) Act*, s. 55.

⁷⁸ *Housing (Wales) Act*, s. 66.

⁷⁹ *The Housing (Northern Ireland) Order 1988*, s. 11.

⁸⁰ *Housing Act 1996*, s. 195.2.

⁸¹ *Housing (Scotland) Act 1987*, s. 32.

law⁸². Therefore, devolution has had a positive effect on the broadening of the protection standards in England which, following the Welsh model, are greater than in Scotland in some aspects regarding prevention.

Finally, in Wales, for people whose accommodation is not likely to be available for the following six months, and who are in priority need, there is the duty to secure that suitable accommodation is available for occupation if it is considered that there is not intentionality or if it is considered that there is intentionality but the applicant is in certain established circumstances⁸³, so that it can be considered that prevention duties are greater in Wales.

8. Conclusions.

Homelessness law had differed before devolution, but some of the main changes have come after devolution and it has been an important matter after it. When Wales had the full power to make laws after 2011, it created its first homelessness law, in 2014. This law clearly made some differences in relation to English law. In Scotland, as well, shortly after devolution there was a focus on homelessness law with the creation of the Homelessness Task Force, which made a report with a series of recommendations for the law.

Although the law in Northern Ireland has varied very little, there have been fundamental changes in Scotland and Wales after devolution, which have distanced their law from English law. The wider protection for homeless people is in Scotland, since there is not the category of priority need since 2012, and in Wales, where there are greater duties in relation to the prevention of homelessness and also towards people considered intentionally homeless. Both have made their legislation differ from English law, making Scottish and Welsh homelessness law dissimilar to English law in areas in which the differences may have a great impact.

The abolition of the category of priority need in Scotland means that the obligation of securing accommodation applies in relation to more people regardless of their personal circumstances. This difference has been explained as a consequence of different housing sectors, a focus on single homeless people in Scotland, and a stronger social justice

⁸² CASSIE BARTON, W. W., "Comparison of homelessness duties in England, Wales, Scotland and Northern Ireland", *op.cit.*, p. 7, lists some of the changes that the Homeless Reduction Act 2017 introduced that are "similar to those introduced in Wales under the *Housing (Wales) Act 2014*".

⁸³ Housing (Wales) Act 2014, s. 75 Duty to secure accommodation for applicants in priority need when the duty in section 73 ends (1)When the duty in section 73 (duty to help to secure accommodation for homeless applicants) comes to an end in respect of an applicant in the circumstances mentioned in subsection (2) o r (3) of section 74, the local housing authority must secure that suitable accommodation is available for occupation by the applicant if subsection (2) or (3) (of this section) applies. (2)This subsection applies where the local housing authority (a)is satisfied that the applicant (i)does not have suitable accommodation available for occupation, or (ii)has suitable accommodation, but it is not likely that the accommodation will be available for occupation by the applicant for a period of at least 6 months starting on the day the applicant is notified in accordance with section 84 that section 73 does not apply (...).



foundation. However, the abolition of priority need requires an adequate housing supply, so that it would not necessarily work in other places.

The duties are partly wider in Scotland for the reason that there is no priority need and therefore no difference among the people who are not considered intentionally homeless. Also, in Scotland there is temporary accommodation for people considered intentionally homeless for a period that the authority thinks will give the applicant a reasonable opportunity of securing accommodation, while in Wales the duty towards this category of people, if they are not in priority need, is that of helping to secure accommodation and in England, if they are not in priority need, there is a duty to take reasonable steps to help the applicant to secure accommodation, without having to actually secure accommodation for the applicant in order to fulfil this duty .

Although the abolition of priority need is the greatest difference between the different homeless laws, there are also other important divergences. The law in Wales also protects a wider part of the population since it has more categories of people considered in priority need. There is also the possibility of disregarding intentionality in some cases, which also exists in Scottish law. However, a unique aspect of Welsh law is that there is a greater duty towards some people considered intentionally homeless and in priority need if they fulfil some conditions, which is that of securing that accommodation is available for their occupation, a provision that in Scotland and England exists only for people considered unintentionally homeless.

On the other hand, in 2017, England also made important changes to homeless law. The Homelessness Reduction Law 2017 has made some changes that have made the law closer to that in Wales, like the extension of the time for someone to be considered threatened with homelessness. It has been said that this act is the most significant change to homelessness legislation in 40 years. We can see that Welsh law has had an influence in the changes that have been introduced in English law, a positive influence because it has broadened the standards of protection in England, so that devolution has created an interaction between the legal systems that has improved social protection.

In conclusion, it is clear that there has been a divergence after devolution between the different laws, with Scotland and Wales being a pioneer in some important changes, and making the law more protective in some aspects. Devolution has made it possible to introduce a wider protection in this area, with a greater social orientation where the GDP is lower. It can also be argued that the changes introduced in Wales have had an influence in English law, so that the protection in England has improved in many aspects, which can be due to the existence of more protective models after devolution. However, in the case of some of the differences introduced after devolution, such as the abolition of priority need, which is in itself positive, it has been argued that it is not advisable to extend it to England, since the law would only be effective with sufficient housing provision. In this sense, it is stated that for the law to work there need to be the necessary structural conditions and, although the changes after devolution in some laws have been very positive, they would not necessarily work in



other places. However, structural conditions depend on public policies and the legislation should go forward to an aim of protecting all homeless people and creating the necessary conditions to be able to do so.