Shelter

Home Owner and Debtor Protection (Scotland) Bill

Evidence from Shelter Scotland, October 2009

Summary of main points

- The Scottish Government's initiative to provide additional help for struggling home-owners is welcome; the Bill is only one part of this package of measures.
- The Bill is justified as a response to the recession. Mortgage actions initiated by lenders have risen by 20 per cent and decrees granted by over 50 per cent in the last year. However, even without an economic downturn, there was a strong case for reform of law and practice on mortgage repossessions.
- The centre-piece of the Bill is section 4 which sets out what lenders must do before taking repossession action. This is a statutory equivalent to the Pre-Action Protocol in England. However, in the absence of draft regulations, we do not have a complete picture of what these pre-action requirements will be. In our briefing we seek to suggest some options.
- We do not believe that the measures will unduly restrict lenders or burden the courts; there are a number of compensating measures which will offset burdens.
- The Bill is an important starting point in dealing with the immediate fall-out from difficulties in the housing market. But it needs to be accompanied by measures to ensure a more balanced housing market in the future.

1. Introduction

Shelter Scotland is delighted to give evidence on the Bill. Our comments mainly focus on part 1 of the Bill as this draws directly on the work of the Repossessions Working Group on which we were represented. Part 2 of the Bill has wider proposals on debt which include proposals designed to prevent or mitigate homelessness which we touch on briefly.

2. Why is the Bill needed?

The Bill directly picks up on the work of the Repossessions Working Group and the Debt Action Forum. In turn, this emerged from several discussions during 2008 about the likely impact of the recession on increasing levels of debt and, ultimately, people losing their homes. The Repossessions Working Group included representatives of lenders, legal professionals, local government, academia and consumer organisations and reached consensus on a remarkable number of recommendations.

There is very little dispute that more difficult economic times lead to higher levels of mortgage debt and repossessions. Lenders' bodies have argued, quite correctly, that the single most important driver of mortgage problems is unemployment: the SPICe briefing[1] on the Bill shows clearly the extent to which unemployment in Scotland has risen. However, the scale and nature of the impact on mortgage problems depend on other variables like interest rates, the extent to which home-owners are exposed to economic conditions, and the availability of state protection. We can say with some confidence that mortgage possessions will rise proportionate to unemployment and this rise is likely to be amplified by rises in interest rates above the current very low base. But we cannot say precisely how large those rises might be or what the mitigating effect of public policy might be.

The Scottish Government has rightly argued that Scotland is ill-served by data on mortgage possessions and arrears. The principal providers of data, the Council of Mortgage Lenders and the Financial Services Authority do not provide data for Scotland anything like as well as is the case for the UK as a whole or England specifically. In Scotland all we have are Sheriff Court data, which are shown below.

Mortgage actions in the Sheriff Courts April 2007 – August 2009

	Actions taken to court	Decrees granted for lender
April 07-March 08	7364	4351
September 08 – August 09	8861	6628

Source: Scottish Court Service. Note: data collection methods changed between the two years

The table suggests that there has been a 20 per cent rise in actions taken to courts and a 52 per cent rise in decrees granted for the creditor in just over a year. We do not believe that a rise of this magnitude can be explained by changes in data collection methods.

The data also show that lenders appear to have become much firmer about pursuing actions. In 2007-08 decrees granted were about 60 per cent of actions initiated. In the most recent year this had risen to 75 per cent.

Not all decrees result in an actual ejection of the occupier – earlier research[2] suggests that around 60 per cent actually lead to the occupier losing his or her home but this should be treated as order of magnitude only. This would suggest around 5,000 – 5,500 actual repossessions in the current year. This is broadly consistent with a CML forecast of around 65,000 repossessions in the UK as a whole in 2009.

[1] SPICe 09/73, 22.10.09

[2] Mortgage Arrears and Repossessions in Scotland, 2003

However, it would be misleading to see the Bill as being solely a response to a rising trend in repossessions. With or without the recession there is a strong case for revamping the current legislative protection, as the Mortgage Rights Act 2001 has not proved as effective as it could be[3]. In that sense, the current recession simply acts as a **prompt** for further legislative reform rather than a **reason** for it.

It would have been possible for the Scottish Government to have developed a close equivalent of the English Pre-Action Protocol. However, Shelter's experience of the Pre-Action Protocol in England is mixed[4]. At best, it is prompting already responsible lenders to review more carefully all of the options prior to seeking repossession. However, the Pre Action Protocol is not binding on lenders and a judge in England has no sanction if a lender declines to follow it. In Shelter's research, the least scrupulous lenders (who tend to have the borrowers most at risk) seem to be least likely to adhere to it.

That is why Shelter strongly supports the Scottish Government's view that the best way to develop a pre-action protocol is through primary legislation and this is what section 4 of the Bill seeks to do.

3. What benefits will the Bill bring?

Part 1 of the Bill has a number of proposals which strengthen the position of borrowers. Fundamentally, these are about developing time and space in which options which are for the benefit of the borrower can be looked at thoroughly. In Shelter's view this can be critical in ensuring that clients can be given rounded advice on how best to manage debt and ensuring that income is maximised through access to benefits or tax credits, for example. It is particularly important where the 'shock' that has caused payment problems is likely to be short term – unemployment or a period of illness, for example. However, there are also occasions when the change in circumstances might be longer term – relationship breakdown might be an example – and the time and space is also about looking at arrangements that could be more sustainable for these new circumstances.

But this only really makes sense if seen in the wider context of actions to help struggling home-owners. While a lot of attention has been paid to the legislative reforms proposed, the bulk of the Repossessions Working Group's recommendations were not legislative in nature. That does not mean that they are any less important, however. Improving the availability of advice, for example or making sure that paperwork from lenders or courts is in plain English – to name but two – are as important as changing statute. Indeed, the best responses to problems faced by home-owners can take place before matters ever get to court.

That is one part of the context. The other important point is that it may not be in the best interests of a household to remain as a homeowner. As in previous recessions, we are now seeing the dark side of the boom, in that home-ownership has been promoted above other housing options when,

[3] The Mortgage Rights Act 2001 introduced new protections for homeowners by allowing debtors to apply to the courts for the rights of creditors to repossess property to be suspended for a time. However, there is broad consensus that the Act is only invoked in, at best, 10 per cent of cases. This is partly because not all mortgage repossession cases necessarily call in court; specifically, the fact that the Act has to be invoked by the borrower means that potential users have to be aware of it before benefiting from its protections.

[4] See 'Mortgage and secured loan arrears', Shelter et al, April 2009

for a minority of households, it is simply not sustainable. So the Bill will allow the time for those households to move on in a planned rather than crisis-prompted way. But if we simply respond to the current housing market downturn by clearing up the debris, we will have missed a critical lesson on the need for a more balanced housing market in the first place.

The corollary of greater time to consider options is that it may simply prolong proceedings and add further debt and liability for charges to already burdened households. If the sheer volume of cases now coming to court causes their work to silt up, that problem might be accentuated. Further, it has been argued that lenders might be less keen to exercise forbearance if they believe that a case might lie at court for many months. However, Shelter thinks that such fears have been overstated for a number of reasons:

- The Bill amends the process by which mortgage actions go to court, from the more cumbersome ordinary cause procedure to the simpler summary application.
- There is still provision for a borrower to agree to voluntary surrender without needing to go to court if he or she believes that to do so would simply prolong the debt to no real end.
- The Financial Services Agency has said that it will look at unfair charges levied on borrowers, something that the Repossessions Working Group also signalled as an issue.
- Finally, the Scottish Government has also stated that it wants to free up court time by reducing the 20,000 eviction actions from social landlords that clog up Sheriff Courts each year. Following dialogue with Shelter it has now agreed to convene stakeholders to discuss this in the second half of November.

We cannot be certain that there will not be additional pressures on courts. But the rights and wrongs of legislation should not be driven primarily by court capacity. As Lord Gill's review of civil justice has recommended, the organisation and capacity of courts themselves are likely to be subject to change in the years ahead.

4. Pre-action requirements

As above, the critical part of the Bill is section 4 which sets out a framework for statutory pre-action requirements. However, the text on the face of the Bill is fairly broad – as primary legislation tends to be. Most of the substance of the detail will be in secondary legislation, as signalled in section 4(8), which, at the time of writing, has not yet been published. This is a pity as it is only in looking at the secondary legislation, together with section 4 on the face of the Bill that we can tell how comprehensive the package of pre-action requirements is likely to be.

In the meantime, we can compare what is currently in section 4 to the English pre-action protocol[5]. The pre action protocol in England is, inevitably, more expansive than the draft legislation in Scotland. The table below illustrates a number of areas which might benefit from being spelled out in Scottish legislation and regulations:

Pre Action Requirements In Scotland – what's missing	**Examples/Benefits from the 'Pre Action Protocol'**
Details of 'reasonable' forewarning to debtor of creditors' intention to start a possession claim.	5.7 If the borrower fails to comply with an agreement, the lender should warn the borrower, by giving the borrower 15 business days notice in writing, of its intention to start a possession claim unless the borrower remedies the breach in the agreement.
Forbearance where a debtor is seeking financial assistance	6.1 A lender should consider not starting a possession claim for mortgage arrears where the borrower can demonstrate to the lender that the borrower has submitted a claim to: • The DWP for SMI • An insurer under a mortgage payment protection policy (and has provided all the evidence required to process a claim) • A reasonable expectation of eligibility for payment from DWP or from the insurer
Alternative resolutions	7.1 Alternative resolutions, such as: • Extending the term of the mortgage • Changing the type of mortgage • Deferring payment of interest due under the mortgage • Capitalising the arrears

It may well be the intention of ministers in Scotland to spell out just such details in the secondary legislation under section 4(8). At the moment, we cannot tell.

[5] The English protocol is replicated in the SPICe briefing 09/73. In addition a pre-action protocol standard checklist has recently been published: see http://www.cml.org.uk/cml/policy/issues/4084

5. Bankruptcy and the family home

Our focus has been mainly on part 1 of the Bill and even within that only on some aspects of the proposals in part 1. We have not, thus far, commented on the proposals in part 2 as we have been less involved in their development. However, we make one observation here.

Firstly, the proposals in section 11 of the Bill to introduce processes analogous to section 11 of the Homelessness Act 2003 are welcome. These require trustees in bankruptcy cases to notify the relevant local authority where action is to be taken involving the sale of the family home. This echoes provisions in the 2003 Act, where lenders have to notify local authorities of impending repossession action. However, our experience of section 11 of the 2003 Act (which has only been live for seven months) suggests at least three important lessons:

- The need for robust monitoring systems to ensure that the provisions are actually being complied with.
- The lack of any sanctions on lenders (or trustees) who fail to comply.
- The fact that local authorities are not obliged to do anything as a result of being notified of impending action to recover the family home.

We recognise that other reforms for in bankruptcy proceedings are also designed to mitigate the effects of or head off threatened homelessness.

6. Tenants of defaulting borrowers

The Repossessions Working Group discussed the position faced by tenants of home-owners who were faced by repossession action. As the Scottish Government acknowledges, the term being used in both Scotland and England is 'unauthorised tenants' which is unfortunate as it conveys an impression of fault on the part of the tenant. The 'authority' here refers to the failure of the property owner to notify the lender that the property is being let out. The tenant is an entirely innocent party.

There is general agreement that tenants who are paying rent in good faith need additional protection. Case law in Scotland suggests that lenders who are recovering property from a debtor also need to take a separate action under the Housing (Scotland) Act 1988 to recover the tenancy. In Shelter's experience lenders will do so, if this is brought to their attention, but that this is far from being universally the case. It does seem that the main statute on standard securities – the 1970 Act – was not uppermost in the minds of the drafts-people working on the main statute on private tenancies – the 1988 Act.

The Repossessions group was unable to reach conclusions as to the best way forward – largely as a result of time, rather than any intractable technical problems. The Scottish Government has therefore issued a separate consultation paper with a view to amending the current Bill at stage 2 or amending other Bills due in the first half of 2010. Three proposals are set out in that paper. The first two seek to bring tenants into the picture when repossession proceedings are taking place; the third seeks view on lenders taking on the obligations of the tenancy until its due expiry date.

Shelter strongly supports the policy intention here. Indeed, in both England and Scotland Shelter has consistently raised concerns that tenants might be the forgotten victims of the recession. We have also raised some questions with the Scottish Government as to the way proposals are set out and, at the time of submission of this paper, we are still discussing these. We would aim to provide further views to Committee in due course. In the meantime we would want to suggest the following general points to the Committee.

- That it cannot be right that tenants who paying rent in good faith to a landlord should be penalised for a landlord's failings. Tenants in this situation should be no worse off than tenants generally.
- Lenders have consistently pointed out that repossession is a last option for them simply because they will lose out if forced to sell the property at a knock-down price. That being so, there must be a strong incentive to retain tenants who are providing a secure income at market rents.

7. Conclusion

We have not covered every aspect of the Bill in which Shelter has an interest. We believe that the Bill may need strengthening or clarifying in a number of areas. For example:

- Whether the recall provisions (section 6) will actually achieve the policy intention – which is to allow cases to go back into court even at the point of Sheriffs Officers coming to the door.
- What the criteria will be for the appointment of lay representatives; what discretion will be offered to Sheriffs to refuse lay representatives and whether these standards are consistent with other parts of civil law in which lay representation is permitted.

Since the Bill is working to a condensed timetable, consideration of these and other matters is still evolving. It may be that we can discuss some of these at oral evidence session and, where necessary provide further supplementary evidence in advance of the stage 1 report being prepared.

These comments notwithstanding, Shelter Scotland strongly supports the Bill. We believe that its policy intentions are largely the product of consensus; and a consensus that drew on a wide range of expert opinion. We urge MSPs to ensure its swift passage into the statute book, the better to prevent avoidable homelessness at a time when the 2012 homelessness commitment looms ever closer.

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