

Consultation Response

Better Dispute Resolution in Housing: Consultation on Introduction of a New Housing Panel for Scotland

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Shelter
Scotland

The Need for Change

1. In Shelter Scotland's view, there is considerable dissatisfaction with the existing court procedures for dealing with housing disputes for the following reasons:
 - The time required to get disputes resolved which can be influenced by delays before the case is heard and the sisting of proceedings;
 - The formality of the proceedings which can be off-putting to lay people. This formality finds expression in the procedures used, the use of legal language including, for example, expressions set out in Latin and, even, the use of wigs and gowns;
 - The cost, particularly if legal aid is not available for legal representation. In addition to the costs of a legal representative, there may also be court costs and, if the action fails, the possibility that the court may require the other party to meet the costs of the other party.
 - The "adversarial" style of the court process in which the parties or their legal representatives set out their case in front of the judge. This approach is often contrasted adversely to the so called "inquisitorial approach" typically used by tribunals whereby the tribunal members question the parties or their legal representatives, possibly following written representations.
 - The constraints on lay (i.e. non legal) representation. The scope for lay representation in Sheriff Courts is to be expanded following recent legislation, but it will still be circumscribed. There is a stronger tradition of the use of lay representatives in tribunals and these may be more suitable for many types of housing disputes;
 - The lack of specialised expertise and knowledge of housing law by many Sheriffs who have to deal with a variety of criminal and civil cases.

The Assessment of Options for Change

2. Shelter Scotland is supportive of promoting the prevention of housing disputes, including the use of mediation (option 1 in the Consultation Paper). Prevention can be promoted through good housing management practice and the Housing Regulator and professional training bodies such as the Chartered Institute of Housing (CIH) have a role to play here. It is also important that mediation is available, where appropriate, but this requires agreement by both parties and an agreement to implement the suggested way forward and its use is inevitably circumscribed. In our view, there will always be a need for formal procedures for dealing with housing disputes that cannot be prevented or are not amenable to

mediation. We consider that a new housing panel is the best way of dealing with disputes that require formal procedures and that option 1 is not, therefore, a viable alternative. Indeed, we consider that a housing panel could help to promote the use of mediation.

3. Shelter Scotland is strongly opposed to option 2 – a pre court housing panel. In our view, this would simply establish another stage in the dispute resolution process leading to further delay in many cases. A pre court panel would have all the costs of a housing panel, but the panel would simply be limited to making interim orders which could only be enforced by reference to the courts. In our view, this is not a practical solution and any advantages that might result in particular cases, for example, a suggested way forward agreed by the parties, could equally be achieved through the full housing panel option without the requirement for cases to be referred on to the courts where there is a need for enforcement.
4. Shelter Scotland strongly supports the establishment of a full housing panel on the grounds that it has the potential to rectify the weaknesses of the current system as set out in paragraph 1 above. We give more detail below on how we consider this housing panel should be established and operate.
5. There is one further option that is not identified as explicitly in the Consultation Paper which needs to be addressed. This is, in effect, the continuation of the status quo with the addition of the Gill reforms to civil court procedures in Scotland as described briefly in paragraphs 4.5 to 4.10 of the Consultation Paper. If a housing panel is not established, the housing disputes which are not dealt with informally will continue to go through court procedures modified, in due course, in line with the agreed elements of the Gill reforms. Although the Gill reforms seek to address many of the current weaknesses set out in paragraph 1 above, we consider that there is a strong case for a specialised housing panel which could, in time, deal with virtually all the housing disputes that currently end up in the courts. The Gill reforms are wide ranging, covering all forms of civil action, and could take up to a decade to be implemented since the intention is to fund the appointment of new summary sheriffs from the savings resulting from the reduction in the number of existing Sheriffs as they reach retirement age. In addition, the scope for specialisation within the new third tier court structure will inevitably be weakened by the predominance of criminal actions in this new court – estimated at 70% to 80% of the total caseload – and the existence of other types of civil actions such as family and child law. Overall, the more effective approach for dealing with housing disputes must be to set up as a distinct and discrete new housing tribunal which the Consultation Paper refers to as a new housing panel (option 3).

A New Housing Panel – How would it work?

Establishing the Housing Panel

6. Legislation will be required to determine the composition and powers of the proposed housing panel. The panel should be given broad powers to deal with the generality of housing disputes (for more detail see below) but it would be sensible to allow for the phasing in of the work of the panel by the selective commencement of the relevant legislation relating to the to the scope of its activities. In our view, the initial priority should be to bring all disputes in the private rented sector within the scope of the work of the panel for the reasons given in paragraph 1.14 of the Consultation Paper i.e. the consideration currently being given to providing greater security of tenure to private sector tenants.
7. Notwithstanding any phasing in of the housing panel's powers, we consider that the Government should commit at the outset to the establishment of a full housing panel taking responsibility for virtually all housing disputes between tenants and landlords and with an agreed timetable to move to this position.

The Structure and Operation of the Housing Panel

8. We believe that the housing panel should be established as a new body rather than an extension of the current Private Rented Housing Panel (PRHP) which has a very narrow remit. It should be known as the Housing Panel for Scotland and be part and parcel of the Scottish Tribunal Service with an appropriate upper tier to deal with appeals.
9. Members of the housing panel should be appointed following open competitions organised by the Scottish Tribunal Service. Members should include lawyers with expertise and experience in housing law, who would normally chair specific tribunals established to consider particular disputes, and other persons with relevant housing expertise including building and housing management expertise and other lay persons including tenants and persons with knowledge of housing policy and practice. Members should also receive suitable training drawing on the experience of preparing training packages for new members of other types of tribunal.
10. It is essential that the new housing panel has appropriate administrative and IT support. The number and level of the staff should be commensurate with the scale and nature of the workload.
11. Disputes referred to the housing panel would be sifted initially by the staff in consultation with the President or Vice President of the panel with a view to deciding the nature of the number and expertise of the panel members needed to

consider the case and whether a site visit is required. The panel will require members throughout Scotland and be able to arrange suitable premises to hold meetings. At an early stage, panel staff may want to suggest mediation if that seems appropriate and they should routinely signpost the parties to sources of legal advice and lay representation.

The Scope of a Housing Panel

12. Leaving aside any “phasing in” of the scope of the Housing Panel’s powers, we consider that it should, in due course, assume responsibility for:

- Disputes between landlords and tenants currently dealt with by Sheriff Courts
- Disputes currently dealt with by existing tribunals or other procedures
- Disputes over clear legal rights where there is currently no formal enforcement procedure short of a petition to the Court of Session for a judicial review.

Our detailed suggestions are set out in the table below:

Type of Dispute	Examples
Currently dealt with by Sheriff Courts	<ul style="list-style-type: none"> • Repossession (eviction) • Conversion of Scottish secure tenancy to short Scottish secure tenancy • Refusal of subletting/assignment/ addition of joint tenancy • Variation in terms of Scottish secure tenancy • Prevention of unlawful eviction including re-instatement and compensation • Abandonment by tenant

	<ul style="list-style-type: none"> • Compensation for improvement • Permission for alterations • Alleged discrimination by landlords
<p>Currently dealt with by existing tribunals/other procedures</p>	<ul style="list-style-type: none"> • Fair and market rents (PRHP) • Right to buy disputes (LT) • Home loss and disturbance payments (LT) • Repairs in the PRS (PRHP) • Factoring in the private sector (PRHP) • Return of deposit (appointed persons)
<p>Disputes over legal rights where there is currently no formal enforcement procedure</p>	<ul style="list-style-type: none"> • Acceptance on a waiting list by a social landlord • Assessment as homeless by local authority • Standards of repair in the social rented sector • Consultation rights in the social rented sector • Succession disputes in the social rented sector • Access for inspection/repair by landlords

13. Although, the housing panel should consider repossession cases linked to anti-social behaviour, we would not advocate giving the panel powers to grant anti-social behaviour orders since anti-social behaviour can manifest itself in a variety of forms and is not intrinsically linked to housing matters.
14. We have limited the scope of the housing panel to disputes between tenants and landlords – as suggested in the Consultation Paper. There may be a case, in due course, to extend its powers to include mortgage repossession cases in the private sector currently dealt with by the Sheriff Courts.
15. There may also be a case, in due course, to extend the work of the housing panel to consider neighbour disputes relating to repairs, maintenance and improvement works in the private sector and in mixed tenure blocks within the framework of the relevant property legislation. However, this would need further careful consideration.

Support for those Involved in Housing Disputes

16. At present, in some circumstances, tenants can receive legal aid to pay for legal representation in the Sheriff Court. Legal representation may be less relevant for tribunals established by the housing panel, but we imagine that many landlords would still wish to appoint a lawyer. To ensure that the new housing panel operates in an equitable and effective manner, it will be important to ensure that the parties can obtain free legal advice and that resources are made available for this. In addition resources will be required to allow to ensure that properly trained lay representatives are also available free of charge. It is also essential that the principle of free access, as currently is the case for the PHRP, is extended to the new housing panel.

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