

Shelter's response to the Communities and Local Government Consultation –

Tolerated Trespassers: Successor Landlord Cases

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Shelter

Shelter is a national campaigning charity that provides practical advice, support and innovative services to over 170,000 homeless or badly housed people a year. This work gives us direct experience of the various problems caused by the shortage of affordable housing across all tenures. Our services include:

- A national network of over 20 advice centres
- Shelter's free advice helpline which runs from 8am-8pm
- Shelter's website which provides advice online
- The Government-funded National Homelessness Advice Service, which provides specialist housing advice, training, consultancy, referral and information to other voluntary agencies, such as Citizens Advice Bureaux and members of Advice UK, which are approached by people seeking housing advice
- A number of specialist services promoting innovative solutions to particular homelessness and housing problems. These include Housing Support Services which work with formerly homeless families, and the Shelter Inclusion Project, which works with families, couples and single people who are alleged to have been involved in anti-social behavior. The aim of these services is to sustain tenancies and ensure people live successfully in the community.
- We also campaign for new laws and policies - as well as more investment - to improve the lives of homeless and badly housed people, now and in the future.

Introduction

Shelter welcomes the opportunity to respond to the consultation paper.

Before addressing the specific questions raised in the paper, we would like to make some general points in order to explain our perspective on the issues raised. This should enable us to answer the questions in brief form.

As we have commented elsewhere, we warmly welcome the reforms to be brought about by Schedule 11 of the Housing and Regeneration Act 2008. The concept of the tolerated trespasser, and the line of cases which has flowed from it, has been disastrous for the law of landlord and tenant and has led to significant injustice. The House of Lords, in its timely judgment in the cases of *Knowsley Housing Trust v White*; *Honeygan-Green v London Borough of Islington*; *Porter v Shepherds Bush Housing Association* [2008] UKHL 70, 10th December 2008, has reflected the damage done to the law of residential tenancies by this conceptual nightmare. In relation to the issues raised by the status of tolerated trespasser, Lord Neuberger commented that "While [such issues] may be of interest to lawyers, they are simply not the sort of issues which legislation designed to protect residential tenants should require to be resolved."

The effective abolition of the tolerated trespasser achieved by Schedule 11, together with the creation of new tenancies for existing tolerated trespassers, will ensure that the law is no longer tainted by the irrational consequences of this doctrine. For the same reasons, we have welcomed the beneficial effects of Schedule 11 however, we have been critical of the omission of successor landlord cases from the benefits of these changes.

The benefits (and obligations) of having one's tenancy restored are well documented, and clearly the Government is persuaded of those benefits. As a matter both of principle and of practicalities, there appears to us to be no rational basis for denying the benefits of the Act to those tolerated trespassers living in properties the ownership of which happens to have changed during the 'termination period'. There is no sensible reason for this discrimination. If the property in question had remained under the ownership of the local

authority, the occupier would have a new secure tenancy. If the property had previously been in the ownership of the same registered social landlord, the occupier would have a new assured tenancy. Why should the occupier be deprived of that benefit not through any fault or agency of theirs, but because of the accident of the transfer of ownership to another social landlord?

There is nothing peculiar to the arrangements on a stock transfer that justifies this differential treatment. While no doubt the transferee landlord might wish to have the untrammelled freedom to deal as it pleases with its tolerated trespassers, that does not justify the perpetuation of a 'status' which has been totally discredited and which would not survive except in this one pocket. If the registered social landlord has in fact granted a new tenancy to the tolerated trespasser already, well and good: that tenancy will not be affected.

It is most unlikely that the transferee landlord's view of tolerated trespassers would have been played any, or any significant part, in its decision to proceed with a stock transfer. But even if it did, there is ultimately no convincing reason why such a landlord should seek to maintain the 'limbo' status of the tolerated trespasser. It would be entirely contrary to the unanimous opinion of the House of Lords in *Knowsley B.C. v White* to seek to maintain the doctrine in any circumstances. The balance both of convenience and of fairness overwhelmingly favours the disappearance of the tolerated trespasser from the spectrum of housing law. Its retention in one corner of the housing world would be a complete anomaly, and one that would inevitably attract challenges under Articles 8 and 14 of the ECHR (the differential treatment being based on an 'other status' within the meaning of Article 14). There would certainly be applications to vary the possession order and to revive the lost tenancies (a prospect expressly contemplated by Arden LJ in her judgment in the case of *Helena Housing Ltd v Pinder*).

We now turn to the specific questions raised in the Consultation Paper.

Existing landlord practice relating to transferring tolerated trespassers

- 1 What is the usual practice of successor landlords when dealing with tolerated trespassers? Will tolerated trespassers generally be offered a new tenancy and, if**

so, what type of tenancy will they be offered? Does this differ from the type of tenancy offered to transferring tenants?

2 In what circumstances would tolerated trespassers not be offered a new tenancy?

Clearly, only transferee landlords will have the evidential base necessary to answer questions 1 and 2. In so far as tolerated trespassers are offered new tenancies by the new landlord, it may be that they suffer no practical detriment compared with those whose tenancies are intact when the transfer takes place. We would comment only that occupiers in the same, or broadly similar situations, should be treated in the same way, and that they should not be the subject of different policies, or the lack of them, on the part of different landlords. All too often, it must be the case at present that many occupiers continue as tolerated trespassers and no attempt is made to enhance their status, either because there is no will to do so or because they fall through the net.

3 Is it possible to identify occupants who have transferred as tolerated trespassers and who have not been offered a new tenancy (ie, who continue as tolerated trespassers?) If so, is it considered that the numbers are likely to be significant or relatively small?

Again, only transferee housing associations will have the evidence necessary to provide an informed answer. We would suggest that the complexities of the law of tolerated trespass (often involving the analysis of the wording of particular court orders) make it unlikely that the status of every occupier can be definitively determined. Furthermore, in any transfer of ownership involving large numbers of properties, it is likely that many occupiers would simply continue living under the conditions of the same court order, without any attempt being made to address the question of their status.

4 Are there any benefits to landlords in the existing situation and, if so, what are they?

We accept that some transferee landlords may consider that there are certain advantages to them in retaining control over whether or not to grant a new tenancy, and what kind of tenancy to grant. We are also aware of such landlords who would regard the continuation

of tolerated trespassers in any context as unwarranted. As the Paper states in para 27, the majority of landlords and housing professionals who responded to the original consultation in August 2007 supported a change in the law to the benefit of both future and existing tolerated trespassers. Exactly the same reasons for reform apply to stock transfer situations as to the circumstances where the landlord has remained the same.

5 Are the benefits to landlords sufficient to outweigh the disadvantages, particularly for tenants?

For the reasons outlined above, we are strongly of the view that any benefits to landlords of retaining the *status quo* in this limited area are far outweighed by the benefits to occupiers/tenants of implementing the reforms across the spectrum; and by the need for consistency in the way that the law treats people in situations which are broadly equivalent.

Legislating for successor landlord cases

6 Should the Government introduce secondary legislation to ensure that tolerated trespassers whose landlord has changed, but who have not been granted a tenancy by the new landlord, have their status as tenants restored?

For the reasons given, we are strongly of the view that secondary legislation should be introduced to this end. We entirely endorse the comment in para 35 of the Consultation Paper, that it is unfair for a change of landlord, which is outside a tolerated trespasser's control, to determine whether they have their tenancy status restored or not. We also consider that it is inevitable that if some tolerated trespassers are excluded from the reforms, this will lead to further litigation.

Change of RSL landlord due to merger or takeover

7 Should tolerated trespassers who transfer from one RSL to another RSL

(and who are not granted a new tenancy by the successor landlord) be issued with the same sort of tenancy as the original one?

We agree that occupiers in these circumstances should be granted the same sort of tenancy as the original one. It is not sufficient, however, that the legal nature of the tenancy should be the same: the terms and conditions should also be broadly the same. This is especially necessary with 'starter' tenancies, in which the tenant needs a contractual obligation on the part of the landlord to enlarge his/her status into that of a full assured tenant after the starter period.

8 If this resulted in tolerated trespassers receiving an assured tenancy on starter tenancy terms (because the original tenancy was a starter tenancy), would this cause difficulties for landlords?

We cannot see why this should cause any difficulty for landlords. As stated in our reply to question 7, it is necessary to ensure that where the original tenancy was a 'starter' assured shorthold tenancy, the replacement tenancy mirrors the original tenancy, particularly in terms of the entitlement to have the tenancy upgraded to a full assured tenancy after the initial 12 months, or whatever starter period is employed.

Change of local authority landlord due to boundary adjustment

9 Should tolerated trespassers who transfer from one local authority to another local authority (and who are not granted a new tenancy by the successor landlord) be issued with the same sort of tenancy as the original one?

Yes.

10 Where the tolerated trespasser had originally held an introductory tenancy but the successor local authority landlord does not operate an introductory regime, should he or she be issued with a secure tenancy?

Yes.

Change of landlord from local authority to RSL following large-scale voluntary transfer

- 11 Where no new tenancy has been signed, should transferring tolerated trespassers who originally held a demoted tenancy under the 1996 Act be offered a new demoted tenancy under the 1988 Act?**

We agree that in principle the tenant should receive like for like.

- 12 Where no new tenancy has been signed, should transferring tolerated trespassers who originally held an introductory tenancy be offered an assured shorthold tenancy or a full assured tenancy?**

We accept that it is appropriate, and in accordance with the tenor of Schedule 11, that tolerated trespassers who originally held an introductory tenancy should be offered the nearest equivalent under the Housing Act 1988, which is an assured shorthold tenancy (AST). However, in one respect, an AST is significantly inferior to an introductory tenancy, in that it does not confer a right of review if the landlord should decide to terminate the tenancy before it has run its course. We suggest therefore that an AST is only acceptable as a replacement tenancy if it is provided in secondary legislation that the tenant should have a right to a review of an adverse decision on a similar basis to introductory tenants.

- 13 Where no new tenancy has been signed, should transferring tolerated trespassers who originally held a secure tenancy be offered an assured shorthold tenancy or a full assured tenancy?**

Without any doubt, a former secure tenant should be offered a full assured tenancy as a replacement tenancy. The offer of nothing more than an AST would be wholly inconsistent with the scheme of the Act in offering like for like, and would create unfairness which would almost certainly lead to litigation.

We are concerned by the implication in para 51 that some landlords, in anticipation of the Act coming into effect, may take advantage of their tolerated trespassers' lack of awareness of their rights by offering lesser tenancies, principally ASTs, to those who

would otherwise receive full assured tenancies when Schedule 15 comes into effect. The paragraph suggests that it should be a matter of good practice that successor landlords should "consider recommending that the occupants seek legal advice on what this will mean for them". This is not at all satisfactory. Regulations should provide that if a landlord wishes to offer an occupier a tenancy of a different kind from that which he would receive by operation of law (whether more or less beneficial to him) on commencement day, the occupier should receive a written explanation of the nature of the choice facing him. The written information should also be required to contain a recommendation that the occupier seeks legal advice.

- 14 Are there any other options in relation to transferring tolerated trespassers (who have not signed a new tenancy) which might be considered? If so, please provide details on what these are and the advantages which they would bring.**

We believe that the only feasible options are those set out in the Consultation Paper.

Demoted and introductory tenancies

- 15 Where the proposals under consideration would result in a tolerated trespasser being granted a new demoted or introductory tenancy, should the trial period apply in full, or should they only last for the balance of time left over from the original tenancy?**

This question invites conflicting responses. On one hand, the occupier may feel that he deserves credit for the amount of time that he served under the original tenancy, and that he should only be required to serve the balance of the probationary period, especially if he feels harshly done to by the order which terminated the original tenancy. On the other hand, we must assume that he was in breach of the conditions under the first tenancy, and that this is obviously a relevant factor in considering whether he should be required to serve a full probationary period under the replacement tenancy. As the latter is in accordance with the general scheme of the Act, we agree that the trial period should apply in full.

Private landlords

16 Are there likely to be transferring tolerated trespassers in the private rented sector and, if so, what is likely to be the scale of the problem?

We agree with the sentiment in para 53 of the Consultation Paper. We consider that the issue of tolerated trespassers is likely to be of minimal significance in the private rented sector.

Applying the provisions in Part 2 of Schedule 11 to successor landlord cases

17 Should newly restored tenants who are already a successor under the original tenancy be entitled to succeed under the new one?

Again, on the principle of 'like for like', we consider that a tenant who had already succeeded to the original tenancy, should not be able to transmit the tenancy to another person under a further right of succession. Care must be exercised, however, in determining whether the tenant is indeed a successor. For example, if one joint tenant gave notice to quit to terminate a joint secure tenancy and the local authority then granted a sole tenancy to the other joint tenant, that tenant is not a successor (*Bassetlaw D.C. v Renshaw*).

18 Where newly restored tenants are not already a successor, should the succession rules which apply to them be those which are appropriate to the new tenancy, or the original tenancy?

The answer to this question is found in the principle that the newly restored tenant should be in exactly the same position as other persons who had not lost their tenancies at the time of the transfer. Those secure tenants who became assured tenants following the stock transfer would have the far more limited succession rights under the assured tenancy scheme, unless the new landlord agreed by contract, under a new tenancy agreement, that they would retain the more extensive rights which they formerly had (principally, the right of a family member other than a spouse or partner to succeed). So far as the newly restored tenant is concerned, if the new landlord had a practice of offering

new tenancies incorporating more extensive terms of succession to existing secure tenants, regulations should provide that assured tenancy agreements on equivalent terms should be offered by way of replacement tenancies.

19 Should the “termination period” count towards qualification for the preserved right to buy, as it does for tolerated trespassers issued with new tenancies under the 2008 Act whose landlord has not changed?

We agree that this should be so, both because it matches the position with regard to the new tenancies to be offered to tolerated trespassers generally under Schedule 15; and also because this is in keeping with the tenor of the House of Lords decision in *Honeygan-Green v L.B. Islington*.

20 Under Part 2 of Schedule 11, where landlords have taken decisions regarding individuals' voting rights based on their status as tolerated trespassers, these decisions cannot subsequently be challenged on the ground that the local authority failed to include people in the consultation process whom they should have included, or vice versa. Should this be extended to successor landlord cases so that similar provisions would apply to any consultation carried out by either the original or the new landlord during the termination period?

Yes.

21 Part 2 of Schedule 11 gives the court discretion to treat the new tenancy as the same as the original tenancy so that they can allow claims relating to the period when the tenant was a tolerated trespasser. This applies to claims by both landlords and tenants for breach of tenancy agreement, or for the tenant to claim for breach of statutory duty. Should this be extended to successor landlord cases for the purpose of a claim involving the new landlord and the old landlord?

Again, we agree that this must be the case. There is no reason why the original landlord should be exempt from potential liability merely because it has divested itself of the property. Their position is sufficiently protected in that the court is likely to exercise its

discretion to treat the tenancy as continuous only in cases where the potential claim appears to be well-founded.

- 22 Part 2 of Schedule 11 provides that the possession order and other court orders made in respect of the possession proceedings will apply as far as practicable to the new tenancy. Should similar provision be made for successor landlord cases, so that any orders in the possession proceedings apply to the new tenancy, so far as practicable?**

We agree that such provision should be made.

- 23 If so, should this depend on whether the new landlord has been made party to the proceedings?**

We consider that the order itself may attach to the new tenancy, but that if the new landlord wishes to take any action in pursuance of it – e.g. to issue a warrant of possession or apply for a variation of it – they must apply to the court for an order substituting them for the previous claimant.

- 24 In seeking to apply the provisions in Part 2 of Schedule 11 to successor landlord cases, are there any other issues which we have not identified and which would need to be considered?**

We are not aware of any further issues at this stage.

Impact assessment

- 25 Does the impact assessment correctly identify the nature and extent of the costs and benefits associated with the four options which are considered?**

We believe so.

- 26 Is it considered that any group is/groups are represented disproportionately amongst tolerated trespassers in successor landlord cases?**

No. We consider that the highly technical nature of the tolerated trespasser issue means that it does not affect any particular group disproportionately.

27 Is there any evidence to suggest that the options under consideration would discriminate on the grounds of race and ethnicity; disability; age; gender and gender identity; sexual orientation; religion and/or belief?

No. For the same reason as in 26 – the technical nature of the problem – we consider that the options under consideration do not discriminate.

Conclusion

Shelter remains convinced that there is no rational justification for a tolerated trespasser to be deprived of the benefits of a replacement tenancy purely because of the accident of the transfer of ownership to another social landlord. If there is no reason for maintaining the 'limbo' status of the tolerated trespasser in cases where the landlord has remained the same, and indeed every reason for restoring his or her tenancy, there can equally be no reason for preserving that status where there has been a change of landlord, whether following a stock transfer or any other transfer of engagements.

Shelter

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For further information please contact John Gallagher, Principal Solicitor, on 0844 515 2158 or at john.g@shelter.org.uk