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

Lender repossession of residential property: protection of tenants

From the Shelter policy library

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This document contains information and policies that were correct at the time of publication.

Shelter

Shelter is a national campaigning charity that provides practical advice, support and innovative services to over 170,000 homeless or badly housed people every 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 projects 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.
- A number of children's services aimed at preventing child and youth homelessness and mitigating the impacts on children and young people experiencing housing problems. These include pilot support projects, peer education services and specialist training and consultancy aimed at children's service practitioners.
- 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 and Summary

Shelter strongly supports this consultation on protection of tenants in cases of landlord mortgage default. We have actively campaigned for better legal protection for tenants for over a year, and continue to see numerous cases of sudden eviction following landlord repossession, through our face to face and helpline advice services.

- In November 2008 we supported a proposed amendment to the Banking Bill to grant courts more discretion in these cases
- We have raised awareness of the issue through parliamentary and media work
- In March 2009 we published the briefing 'A Private Matter?' in partnership with Citizens' Advice, the Chartered Institute of Housing and Crisis, and supported an Early Day Motion laid by Sally Keeble MP calling for legislative reform
- Shelter has also been engaging in constructive dialogue with both Government officials and industry representatives to develop new proposals and promote best practice

We wholeheartedly support the objective and methods proposed. Whilst the majority of tenants - particularly in buy-to-let properties - should expect to be protected from sudden eviction by lender good practice, it is important that a legal minimum exists for those tenants who are not. In particular, tenants of amateur or unprofessional landlords, or lenders who are wilfully unscrupulous or simply ignorant of their legal obligations with regard to occupiers.

We agree that the best combination of legislative options is Option 2 plus Option 4. Option 2 would give courts the power to defer possession where a tenant has made themselves known. Option 4 would then create further opportunities for tenants who might not come forward in the first instance. However, we suggest some minor amendments to Option 4 to ensure it is sufficiently robust. Our proposal is outlined in Figure 1, and discussed in more detail below.

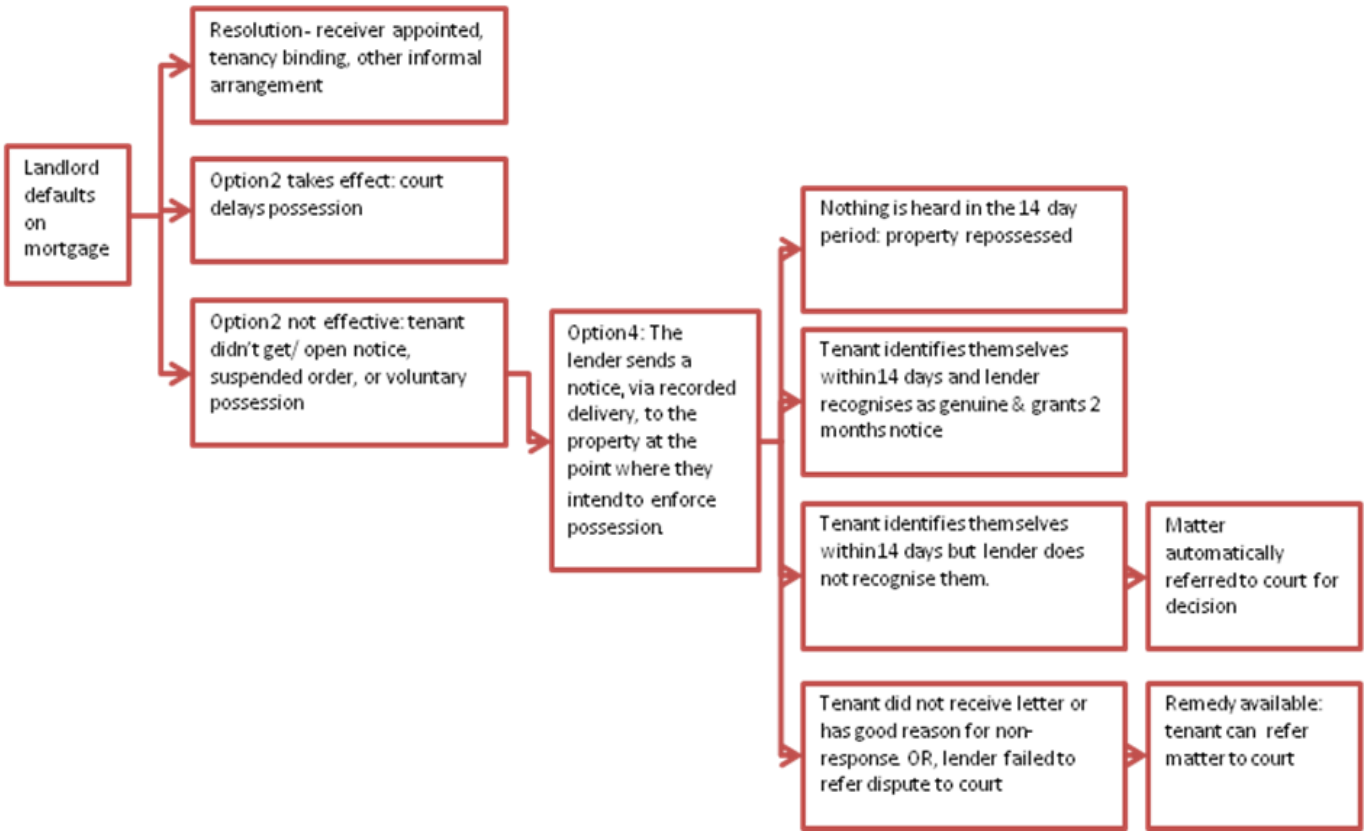

Figure 1: Overview of proposed legal protections

Q1: Do you have any further evidence to contribute to our modelling? Please provide.

We have no further evidence to contribute to this modelling, which we consider to be reasonable. The potential number of tenants affected by landlord default is extremely difficult to predict. One further variable that might be considered is increased incidence of defaulting sale and rent back landlords – we have seen several cases of sudden eviction where a sale and rent back business has gone into administration.

The only additional indicator that we can provide is the number of clients seeking advice about landlord repossession:

- Shelter's website advice page on this topic, 'Repossession by a landlord's lender' has had over 12,500[1] page views since June 2008.

[1] 12,636 page views, as at 06 October 2009

- Shelter advisers see a steady stream of clients seeking advice following a threatened or actual repossession of their property by their landlord's lender. Analysis of a sample of 310 Shelter case files revealed significant underlying problems – for example in 71 cases where advisers had noted the frequency of landlord contact with the tenant, more than half were never in touch.

However, evidence from advice agencies can only indicate the tip of the iceberg – many tenants who are faced with an unexpected possession order or eviction notice may use their remaining time to seek new accommodation rather than contact an adviser.

Furthermore, we agree with the CLG view that whilst the numbers affected may be relatively small, the detriment to tenants can be manifestly unjust. Negative effects for tenants where their landlord faces repossession can range from having to move sooner than expected, to sudden homelessness through no fault of their own. Two recent Shelter case studies illustrate some of the problems faced:

A client came to Shelter after finding that bailiffs had changed the locks on his door following the landlord's mortgage default. The client and his flatmate were concerned about regaining their possessions, and worried they would be stolen. After negotiations with solicitors the clients were given a time to access the property to collect their belongings. Suddenly and unexpectedly homeless, the client had to stay with friends.

A single man in Yorkshire opened a notice, addressed to the landlord and any other occupiers, which was a warrant for eviction effective within two weeks. The landlord claimed that the arrears had been paid, but on contacting the bailiffs the client found that the eviction was in fact due to go ahead as stated. As a non-priority case, he was unlikely to receive help finding new housing from the Local Authority in the timeframe required. The client was able to find new private rented accommodation before execution of the warrant, but clearly had disruptions to his home life and had to renegotiate housing benefit payments.

Q2: We would like to know whether or not you support the proposal to give courts the power to postpone the date of possession to allow unauthorised tenants time to move, and why.

We fully endorse the proposal to give the courts more power to postpone the date of possession. This would only apply where the tenant had received notice of the possession hearing and made

representation to the court, and where the order for possession was an outright order. We believe that this change has the potential to:

- Put 'unauthorised' tenants on a similar footing to other 'authorised' tenants, thus helping to eliminate the manifest unfairness that results from the current situation whereby one lawful tenant is in a worse legal position than another because their landlord has no consent to let.
- Give tenants who have to move some breathing space to find new accommodation, helping to eliminate last minute evictions which can lead to disruption to home life, complications with benefits, unexpected cost, and in the worst cases, homelessness.
- Create a solid legal minimum for tenants where their landlord and lender do not exercise good practice, or follow existing legal requirements.

It is worth stressing that 'unauthorised' tenants are usually unaware of their landlord's mortgage arrangements. There is nothing in the usual processes of tenancy negotiation to alert them to this, and nothing to indicate to them that they are in a more vulnerable position than other tenants.[2] Also, the unauthorised tenant will still not be in the *same* position as his/her authorised counterpart. The latter will not actually be evicted on the expiry of the two months' notice: if s/he needs longer to find other accommodation, the landlord will need to begin possession proceedings, obtain an order and apply for a warrant of possession, a process that will take a further 8-10 weeks. The unauthorised tenant will be evicted shortly after the two month period, because the lender has already obtained its possession order.

It is desirable that the court should have some flexibility in deciding how long to allow the tenant(s) to remain in occupation, taking all the circumstances into account – the interests of any children for example. However, CLG has recommended that this period will not exceed two months, i.e. the same period that a private tenant evicted using a Section 21 notice would receive. There will be cases where a tenant has entered into a fixed term agreement - say of twelve months - and the lender is seeking possession mid-way through the fixed term. That tenant will still lose the remainder of the fixed term which was set to run its course. Whilst unfortunate, the tenant will at least now have more 'breathing space' in which to move under the current proposals.

Finally, we wish to stress that the process must be accessible to tenants – easy to explain in plain English, and with minimum or no legal cost.

[2] They could in theory arrange for a search of the Land Registry charges register for the property, which may reveal the existence of a mortgage, but it is unrealistic to expect a prospective tenant to realise the reason for doing this or to have the opportunity to do so when there is a queue of potential tenants.

Q3: We would be grateful for views on Options 3, 4 and 5.

Option 3: Enhance the notification of proceedings

The benefit of this option would be to maximise the likelihood of tenants opening the notice to occupier, and then – where an alternative such as appointment of a receiver was not agreed – having recourse to the legal protections outlined in Option 2.

Encouraging more tenants to open notices is extremely desirable. We hope that to some extent, this will be improved through changes already underway, for example changing the addressee on notices to 'the tenant or occupier', rather than 'the occupier'. However, we note the increased cost burden that further requirements such as hand delivery would entail, and agree with the CLG view that this could be a disproportionate response. Lenders should be encouraged to follow good practice to 'find' tenants, for example analysing their books to search for any scenarios where it is likely a tenant is in situ.

Option 4: New notice of intention to enforce possession with a mechanism for tenants to apply for a delay of enforcement

We believe that this option is the most attractive complement to Option 2, as it would:

- Give tenants a reasonable degree of clarity about their situation
- Cover both suspended and outright possession orders, as well as voluntary possessions
- Not cause too much delay or additional cost to lenders

However, there are some aspects of this option that could be improved to ensure that *all* tenants get a fair deal.

1. Firstly, if the new notice is to come from lenders rather than the court, we believe it should be broadly standardised across all lenders to ensure it contains all the relevant details and also signposts to free advice services. We agree that the notice should be delivered in a way that maximises the chance of the tenant opening it – hand delivery is ideal, and we understand that some lenders already deliver notices in this way. However, this may be disproportionately costly to lenders given the volume of notices sent. Therefore, we believe

that recorded, signed delivery would be the simplest way for lenders to demonstrate and verify that they had sent the notice to the tenant/occupier.

2. We are concerned that the lender has full discretion in deciding whether or not a tenant is genuine. In particular:

- Shelter sees numerous tenants who have scant evidence of their tenancy. At present there is no legal obligation for landlords to provide a written tenancy agreement.
- Lenders will not be equipped to decide upon the legal status of tenants, given the complexity of tenancy law.
- Lenders may be less inclined to accept tenants who are in rent arrears.

Therefore we consider that if a lender decides not to recognise a tenant and therefore grant a two month delay, the matter should be automatically referred to the court for a final decision. There would be an obligation on the lender to notify the court accordingly and provide the court with the necessary materials. This takes the onus away from the tenant having to make an appeal. It might also encourage lenders to take the decision very seriously, as they will be aware any 'rejections' will be automatically referred to court. A further advantage of this system, rather than the appeal system proposed in the consultation document, would be to dis-incentivise fraud – if occupiers are aware that matters will always be referred to court (where costs may be awarded to the lender where the occupier has no arguable case) they are less likely to make spurious claims for a two month delay.

3. We are also concerned that there is no remedy available for the tenant if they do not receive, or are unable to respond to, the notice. For example, a very unscrupulous lender, with a vested interest in vacant possession, might fail to send the notice. Human error could mean that the notice is not delivered properly. Alternatively, the notice may have been sent correctly but the tenant unable to respond within the 14 day window – for example if they have been out of the country, or in hospital. Similarly, if a lender had failed to declare a dispute to court, a remedy should be available to the occupier.

We propose that tenants should be able to remedy these situations, prior to eviction. We estimate that the number of tenants in this situation would be very small, so it is unlikely to cause a large burden to either courts or lenders. But we would suggest that there must be a

remedy of some kind in the event that the Option 4 process is not followed: having created a right, the legislation would need to make some provision in the event that the right is frustrated. The remedy should be a tenant appeal to the county court, which could grant or refuse the extra two months as appropriate.

4. We also question the proposal that "we would not expect a person who is not paying rent to be afforded the additional two months' notice period". Rent arrears could be severe or very small, so this does not seem to be a proportionate response. Arrears may be the result of complications with housing benefit, for example, and thus largely outside of the tenant's control. As we are trying to achieve parity with tenants who are evicted by a landlord, the two month breathing space should still apply.

We believe that with these changes, Option 4 would provide the right level of protection to tenants without causing undue delay or cost.

Option 5: New mechanism for a two-month stay in enforcement

We consider that Option 5 is a viable legislative response, and would work well in conjunction with Option 2. This route would put most of the decision making into the hands of the court, which we consider to be beneficial. It also appears to be a simpler process than the one outlined in Option 4, although it does not address the situation where the landlord has voluntarily given up possession.

However, if the estimated additional costs of this option, largely incurred through delays to possession, are accurate, we accept that this may make Option 5 a disproportionately expensive response.

Q4: Do you think that the impact assessment broadly captures the types and levels of costs, benefits and impacts associated with the policy options? If not, please explain and provide any further information or evidence.

The costs and benefits as assessed seem reasonable, although as the document states, there are a number of key sensitivities in the data which make accurate analysis difficult.

One assumption that may need further clarification is the cost of delaying possession under Option 5 – this is assumed as £31,900,000 p.a. in Option 5, but delaying possession in Option 4 is only

assumed to be £4,000,000 p.a. As there would only be between 2-3 months' difference in delay under these two options, we question the large difference in cost.

Q5: Are there any other options that you think might better meet the policy objective than those above? If so, what and why?

We are satisfied that Option 2 plus the amended Option 4 would meet the policy objective effectively, for the reasons outlined above.

Q6: Do you think that the Government's preferred approach as set out above would achieve a reasonable balance between the interests of lenders, unauthorised tenants and borrowers? Please give reasons for your response.

We agree that a reasonable balance has been struck. As has been highlighted there can be a huge emotional and financial strain on households who are forced to move very suddenly, particularly where children or vulnerable people are involved. Whilst the changes proposed will mean more cost to lenders and borrowers we do not believe this to be disproportionate. The delays in possession will only be around two months, during which time property values are unlikely to decrease significantly.

Q7: How would you define and limit the tenancies that should be affected by these changes? Are there any parallel provisions that you recommend drawing on?

Tenants who pay an annual rent of more than £25,000 are not recognised as Assured Shorthold Tenants. These people ('occupiers with basic protection') do not therefore receive the legal benefits of an AST, such as the right to deposit protection. We urge the Government to press ahead with proposed legislation that would raise the upper AST limit to £100,000 per annum. In the meantime, it is not desirable that such tenants should also be excluded from this reform and we propose that anyone who can be defined as a 'tenant' of residential accommodation should be affected by these changes.

However, as the policy goal is to ensure parity of rights between eviction by a landlord and eviction by a lender, we would assume that lodgers ('excluded occupiers') would be excluded from the legislation, as this reform would grant greater legal rights than they presently have.

Q8: Several options include a requirement for notices to be delivered in a manner that gives a high confidence that they will reach their target. However we do not wish the burden of delivery to be excessively onerous. What suggestions do you have about the service of notices to achieve this?

We think that recorded delivery is a reasonably cost effective and reliable way of ensuring that notices reach the right people.

Q9: What documents do you think should be provided as evidence of a tenancy? Are there any examples you recommend?

The most straightforward evidence that a tenancy exists would usually be a written tenancy agreement. However, in Shelter's experience, many tenants are not given such an agreement at the outset of their tenancy, and private rentals can often shade into informality. Therefore, lenders must be prepared to take a flexible approach and consider taking evidence from a range of sources, including but not limited to:

- Notifications of tenancy deposit protection or deposit receipts
- Rent books
- Housing benefit documentation
- Bank statements showing regular payments to the landlord
- Letters between the landlord and tenant
- Tenant proof of address (such as a council tax statement)

The House of Lords judgment in the case of *Street v Mountford* (1985) set out the hallmarks of a tenancy (as opposed to a licence) as:

- An obligation to pay rent
- A clear term (e.g. monthly)
- Exclusive possession of at least one room

Lenders deciding on the status of a tenant's application will need to analyse the background to each letting in these terms, and may require training in tenancy law to ensure that they have the relevant expertise.

Q10: Under several of the options, the "tenant" would have a right to appeal the lender's decision that he is not entitled to a notice period. On what grounds do you think such an appeal should be allowed?

We have proposed an alternative to the appeal mechanism in Question 3 above, whereby decisions against a tenant's rights to notice would be automatically referred to court. However, were Option 4 to be adopted as proposed, in any situation where the existence of a tenancy is contested or other matters are in dispute, the occupier should be able to appeal. Common situations where an appeal is needed might include where:

- There is a dispute about the nature, validity or quality of evidence provided
- The tenant is unable to provide any evidence other than his/her own testimony
- There is an outstanding (legal) dispute with the landlord
- There is a problem with rent arrears or housing benefit
- The landlord is not contactable and/ or is unable or unwilling to verify information
- The lender has not followed due process

Q11: We are considering whether we need to provide in the legislation that a new tenancy would not arise if a lender accepts rent from an existing tenant. We would be grateful for your views.

We do not believe that this is usually a problem. Although lenders and receivers are understandably concerned that their actions should not be seen as creating a new tenancy, case law indicates that these concerns are largely unjustified. The courts have consistently been unwilling to hold that payment and receipt of rent *by itself* creates a fresh tenancy.[3] This is particularly so where the receipt of rent is clearly referable to a pre-existing tenancy. For a tenancy to be created, the law requires that there should be an intention on both sides to enter into the legal relationship of a tenancy. Where such an intention is clearly (and genuinely) absent, no tenancy will arise. If a lender or receiver wishes to put the matter beyond doubt, it can simply record in a letter to the tenant that rent paid and accepted is not to be taken to create any new contractual relationship.[4]

[3] See *Morrison v Jacobs* (1945) KB 577; *Clarke v Grant* [1950] 1 KB 104; *Sopwith v Stuchbury* (1983) 17 HLR 50; and *Burrows v Brent L.B.C.* [1996] 1 WLR 1448, HL.
[4] *City of Westminster v Basson* (1991) 23 HLR 225

We do not therefore consider it necessary that legislation should provide that a new tenancy will not arise in these circumstances. However, if it proves necessary to assuage lenders' misgivings, we would have no objection to making provision in statute to answer these concerns.

Shelter Policy Unit
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For further information please contact Nicola Hughes, Policy Officer, on 0344 515 2055 or at nicola_hughes@shelter.org.uk