HOUSING LAW PRACTITIONERS ASSOCIATION

A New Deal for Renting: Resetting the balance of rights and responsibilities between landlords and tenants

Consultation response on behalf of the Housing Law Practitioners Association

October 2019

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About HLPA

1. The Housing Law Practitioners Association (HLPA) is an organisation of solicitors, barristers, advice workers, environmental health officers, academics, and others who work in the field of housing law. Membership is open to all those who use housing law for the benefit of the homeless, tenants and other occupiers of housing. It has members throughout England and Wales.

2. HLPA has existed for over 25 years. Its main function is the holding of regular meetings for members on topics suggested by the membership and led by practitioners particularly experienced in that area, almost invariably members themselves.

3. HLPA is regularly consulted on proposed changes in housing law or on legal changes which may impact on housing law (whether by primary or subordinate legislation or statutory guidance). HLPA's responses are available at www.hlpa.org.uk.

4. Membership of HLPA is on the basis of a commitment to HLPA's objectives. These objectives are:
    - To promote, foster and develop equal access to the legal system.
    - To promote, foster and develop the rights of homeless persons, tenants and others who receive housing services or are disadvantaged in the provision of housing.
    - To foster the role of the legal process in the protection of tenants and other residential occupiers.
    - To foster the role of the legal process in the promotion of higher standards of housing construction, improvement and repair, landlord services to tenants and local authority services to public and private sector tenants, homeless persons and others in need of advice and assistance in housing provision.
    - To promote and develop expertise in the practice of housing law by education and the exchange of information and knowledge.

Introduction

1. HLPA warmly welcomes the proposal to abolish the ability of landlords to recover possession under section 21 of the Housing Act 1988 ("HA 1988"). HLPA's view is that section 21 has failed. It has caused serious insecurity for tenants, who face losing their homes without good reason and with only two months' notice. It has increased the burden on local authorities, who are responsible for rehousing the families made homeless as the result of a section 21 notice. Moreover, it is now so complicated that it no longer represents, for landlords, a quick and certain way of recovering possession.

2. Reform of the private rented sector is not a substitute for social housing and HLPA deeply regrets the decline of this sector. However, in circumstances where private sector tenancies are the most prevalent form of renting, it is vital that the current serious imbalances between landlords and tenants (in favour of landlords) are addressed.

Questions for all respondents

In which region do you live?

N/A

In which capacity are you completing these questions?

Other – organisation.

Questions for other organisations

If you are replying on behalf of an organisation, which of the following best describes you?

Sector representative body/legal sector

Question 1: Do you agree that the abolition of the assured shorthold regime (including the use of section 21 notices) should extend to all users of the Housing Act 1988? If not, which users of the Housing Act 1988 should continue to be able to offer assured shorthold tenancies?

3. Yes, with qualifications: HLPA agrees that the abolition of section 21 should extend to all users of the Housing Act 1988. There are no reasons why housing associations or other social landlords should be exempt: indeed, it would probably be regarded as nonsensical if such landlords could evict their tenants more easily than private landlords.

4. However, whilst HLPA agrees that section 21 should be abolished for all landlords, HLPA does not agree that all the various other measures being proposed should also apply to all landlords. If this happened it would represent a serious deterioration in the right of social tenants. The consultation document rightly notes that *"the assured regime is available for a wide range of landlords"* and it is important that reforms to the private rented sector do not inadvertently lead to degradation of the social housing sector. In particular, in relation to the assertion at paragraph 2.11 of the consultation document that *"tenancies granted by local authority landlords in their own stock will generally be under different legislation, namely the secure tenancies regime in the Housing Act 1985 and will not therefore be directly affected by these changes"*, HLPA notes that many local housing authorities have divested themselves of all their housing stock, meaning that all new allocations of housing accommodation made under Part 6 of the Housing Act 1996 will be assured tenancies. This makes it even more important that the social housing sector does not become collateral damage in this process.

Question 2: Do you think that fixed terms should have a minimum length? If yes, how long should this be?

and

Question 3: Would you support retaining the ability to include a break clause within a fixed-term tenancy?

5. HLPA deals with Questions 2 and 3 together as the answer to one depends on the answer to the other.

6. HLPA understands the consultation to be proposing that:
    a. Tenants, but not landlords, will be able to terminate a tenancy at the end of any fixed term or during the fixed term by exercise of a break clause (paragraph 3.2); and
    b. Landlords will be able to increase the rent, if and as contractually agreed, during any fixed term.

7. HLPA would support minimum-length fixed terms only if:
    a. Break clauses exercisable by the landlord are not permitted;
    b. Break clauses exercisable by the tenant are permitted; **and**
    c. The landlord is not permitted to increase the rent within the period of the fixed term.

8. If these conditions are not met then HLPA does not support minimum fixed terms. This is because the fixed term only presents a real benefit for tenants if it constrains the ability of the landlord to seek possession, or increase the rent, during this period. If the landlord can end the tenancy pursuant to a break clause or increase the rent during a fixed term then all the fixed term does is put limitations on the tenant. In fact, a tenant under a fixed-term tenancy of this type could be in a worse position than a periodic tenant. The consultation does not say how a landlord break clause could be exercised, namely whether the landlord would have to make out one of the Schedule 2 HA 1988 grounds or whether he or she could simply serve a notice to quit. If the latter – which HLPA would strongly oppose – then a fixed-term tenant would have less protection than a periodic tenant, because a periodic landlord has to rely on one or more of the grounds set out at Schedule 2 HA 1988. Further, a periodic tenant has the (admittedly limited) protection provided by section 13 HA 1988 in respect of rent increases whilst the fixed-term tenant may find themselves having to agree to onerous rent increases in the tenancy agreement in return for the illusory benefits of a fixed term. Paragraph 2.27 of the consultation paper states that:

> The Government is clear that there must not be any mechanism for landlords to force a tenant to leave the property by including clauses in fixed term tenancy agreements which hike up the rent by excessive or unreasonable amounts just before the agreement

is due to expire. It intends to legislate to prevent this from occurring by preventing tenancy agreements from containing any clauses that would change the contract after the fixed-term has ended…

9. However, it is clearly inadequate only to restrict rent increases to after the end of the fixed term. This would allow a landlord to agree a long fixed term (of, say, 6 years) reserving an unlimited power to increase the rent during this period, which could then be used by the landlord to force the tenant out at will at any point, effectively providing an alternative mechanism for no-fault evictions.

10. If there is to be a minimum fixed term, then HLPA supports a tenant break clause. The tenant's circumstances may change in a way which renders the tenancy no longer appropriate: for example, the tenant may lose their job and be unable to afford the rent. It would not be beneficial for either party to require the tenancy to continue in that position. Equally, the pressure on housing is such that a landlord seeking a new tenant is likely to find one fairly quickly, so the prejudice arising from a tenant break clause is limited.

11. If the Government does decide to allow landlord break clauses then these should only be exercisable pursuant to one of the grounds under Schedule 2. Currently only grounds 2, 7A, 7B, 8, 10, 11, 12, 13, 14, 14A, 15 and 17 can be relied on during the fixed term (and then only if the tenancy agreement makes provision for this): HA 1996, s7(6)(b). HLPA would strongly oppose allowing any landlord break clause to be exercisable by a notice to quit, because – as stated above – this would put a fixed-term tenant in a more vulnerable position than a periodic tenant and would make the abolition of section 21 meaningless for such tenants.

Question 4: Do you agree that a landlord should be able to gain possession if their family member wishes to use the property as their own home? If not, why not?

and

Question 5: Should there be a requirement for a landlord or family member to have previously lived at the property to serve a section 8 notice under ground 1? If you think there should be such a requirement, explain why?

and

Question 6: Currently, a landlord has to give a tenant prior notice (that is, at the beginning of the tenancy) that they may seek possession under ground 1, in order to use it. Should the requirement to give prior notice remain? If not, why not?

12. HLPA are not opposed to this extension of Ground 1, but consider that it should be more narrowly confined than the proposals in the consultation document. HLPA would support the extension of this ground on the following conditions.

13. Prior to the commencement of the tenancy, the landlord or a family member lived at the property or the property was acquired with the intention of a landlord or family member living there. HLPA consider that removing the requirement for prior residence altogether would render this ground too wide and possibly open to abuse. Equally, HLPA recognise that there may be situations where, for example, a property is purchased as a family home but circumstances have changed. If there is a requirement that the property was lived in, or was intended to be lived in, by the landlord or a family member, this will ensure that this ground is only used when it genuinely is or has been a family property. Whilst it recognises that subjective intent is not always easy to prove or disprove, the Court is used to grappling with such questions, as for example when required to determine whether a tenant intended to return to his or her property (and therefore retains security of tenure) or did not intend to do so (and has therefore lost security of tenure). Proof of this intention would be greatly assisted by the retention of the requirement to give notice at the outset of the tenancy, particularly if such notice is required to specify the family member(s) for whose benefit the ground might be exercised.

14. The landlord gave the tenant notice that possession might be recovered on this ground before the commencement of the tenancy. If this ground is to be expanded, then it should not be possible to dispense with notice as is currently the case. The ground is capable of having very harsh consequences for the tenant, given that they may be required to move out shortly after moving in, and in a wider variety of circumstances than at present. If, as suggested under paragraph 12 above, the landlord or a family member previously lived or intended to live there, then it should not be onerous to give this notice.

15. *"Family member"* is exhaustively defined as a spouse/partner, dependent parent, or child.

16. It is only a mandatory ground if the landlord will be providing the tenant with suitable alternative accommodation (with suitability requiring, *inter alia*, that the accommodation is of the same quality and is made available on no less advantageous terms). If not, it is a discretionary ground.

17. The landlord or family member is required to move into the property within a defined period following the execution of the warrant, and then to remain there for a minimum further defined period. If this does not happen, the tenant should be able to apply to the Court for the warrant and possession order to be set aside with the tenant granted re-entry or (if the tenant has found alternative accommodation) for compensation for the loss of his or her home. Currently, warrants once executed can only be set aside on very limited grounds: the tenant must show that there has been oppression or abuse of process. HLPA consider that, in order to guard against abuse of this ground, a tenant should be granted re-entry to the property if after eviction it transpires that the family member (or landlord) is not living there, or lived there only for a brief period in order to appear to comply with the order. This is a safety valve which would prevent this ground being misused.

Question 7: Should a landlord be able to gain possession of their property before the fixed-term period expires, if they or a family member want to move into it?

18. HLPA do not consider that this ground should be available during the fixed term of any tenancy. This is because a landlord who grants a fixed-term tenancy is contracting that the tenant may live in the property for that period. They are guaranteeing its availability. There is no reason why the Government should interfere with this contract. The landlord does not have to agree to a fixed term: it could have granted a periodic tenancy. If it has made a mistake or misjudgement there is no reason why the tenant should be punished for it.

Question 8: Should a landlord be able to gain possession of their property within the first two years of the first agreement being signed, if they or a family member want to move into it?

and

Question 9: Should the courts be able to decide whether it is reasonable to lift the two year restriction on a landlord taking back a property, if they or a family member want to move in?

19. HLPA consider that the landlord should not be able to gain possession of their property on this ground within the first two years of any agreement being signed. HLPA also consider that the Court should not be given a discretion to disapply this restriction. No party entering into a tenancy can be certain as to what the future holds. However, there is no reason why the burden of changed circumstances should fall on the tenant, who is more likely to be vulnerable, on a lower income, and less able to find alternative accommodation.

Question 10: This ground currently requires the landlord to provide the tenant with two months' notice to move out of the property. Is this an appropriate amount of time?

and

Question 11: If you answered No to Question 10, should the amount of notice required be less or more than two months?

20. HLPA is content with this time frame but solely on condition that the ground will only be mandatory if suitable alternative accommodation is available and, if not, it will be discretionary. If these proposals are not implemented – i.e. if the ground remains mandatory but without any requirement for other accommodation – then the landlord should be required to give at least four months' notice. HLPA do not consider it appropriate to evict someone from their home, in circumstances where they are not at fault, simply so that somebody else can live there, on only two months' notice.

Question 12: We propose that a landlord should have to provide their tenant with prior notice they may seek possession to sell, in order to use this new ground. Do you agree?

and

Question 13: Should the court be required to grant a possession order if the landlord can prove they intend to sell the property (therefore making the new ground mandatory)?

21. HLPA has serious reservations about this new ground. The situation is very different from that of a landlord who wishes to move into the property (or to move a family member into the property). A landlord wishing to move into the property obviously cannot do so with the tenant in possession. However, a landlord wishing to sell the property is in a different possession. A property can be sold with a sitting tenant. It is fair to note that this may adversely affect the price which a landlord can obtain for the property. But the landlord's profit should not be assessed as more important than the tenant's need for a home.

22. HLPA consider that if this ground is to be introduced then it should be subject to the following conditions:
    a. The landlord must have given notice to the tenant before the tenancy starts that he or she may seek possession on this ground. This notice must be clear and prominent and not buried in the tenancy agreement. The tenant should be asked to sign the notice (separately from any other agreement) confirming that they understand possession may be recovered on this ground.
    b. It is only a mandatory ground if the landlord will be providing the tenant with suitable alternative accommodation. If not, it is a discretionary ground.
    c. The landlord is required to sell the property within a defined period following the execution of the warrant. If this does not happen, the tenant should be able to apply to the Court for the warrant and possession order to be set aside with the tenant granted re-entry or (if the tenant has found alternative accommodation) for compensation for the loss of his or her home.

Question 14: Should a landlord be able to apply to the court if they wish to use this new ground to sell their property before two years from when the first agreement was signed?

23. No, HLPA consider that the landlord should not be able to gain possession of their property on this ground within the first two years of any agreement being signed. A landlord should not be granting a tenancy if they anticipate seeking possession so quickly afterwards. If the landlord needs to sell as a matter of urgency, it can do so with the tenant in situ.

Question 15: Is two months an appropriate amount of notice for a landlord to give a tenant, if they intend to use the new ground to sell their property?

and

Question 16: If you answered 'no' to question 15, should the amount of notice required be less of more than two months' notice?

24. Two months' notice is appropriate only if the ground will only be mandatory if suitable alternative accommodation is available and, if not, it will be discretionary. If these proposals are not implemented – i.e. if the ground remains mandatory but without any requirement for other accommodation – then the landlord should be required to give at least four months' notice.

Question 17: Should the ground under Schedule 2 concerned with rent arrears be revised so:

- **The landlord can serve a two week notice seeking possession once the tenant has accrued two months' rent arrears.**

25. It is already the case that a landlord can serve a two-week notice where the tenant has accrued two months' rent arrears, pursuant to section 8(4B) HA 1988.

- **The court must grant a possession order if the landlord can prove the tenant still has over one month's rent arrears outstanding by the time of the hearing.**

26. HLPA is strongly opposed to this proposal and believes it would led to more evictions, increased homelessness, and a greater burden on local housing authorities.

27. There are several reasons why HLPA disagrees with this proposal:
    a. For tenants who are managing on a limited income, it is extremely easy to accrue one month's (and indeed two months') arrears. This can happen for any number of reasons: problems with benefits, loss of a job, illness, unexpected expenses arising.

It does not mean that the tenant is deliberately not paying his or her rent, or that he or she is not a good tenant, or that the arrears will continue into the future.

b. This proposal would be capable of operating extremely harshly. At common law, rent becomes in arrears at the end of the day on which it is due (*Aspinall v Aspinall* [1961] Ch 526). This means that a person could fall foul of this new ground even if he or she is only one day late with his or her rent.

c. This ground ignores the realities of the benefits system. A large proportion of HLPA's clients are in arrears because of problems with their benefits. The issues with Universal Credit are infamous. A tenant whose benefits are delayed in starting, or which cease for some (often unknown) reason, can fall into arrears extremely easily. This ground would punish tenants whose difficulties arise through no fault of their own.

d. It is particularly troubling that this could apply not just to tenants in the private rented sector but also to tenants of housing associations. This would be a serious reduction in their security for which no justification has been given.

e. HLPA believes that this expanded ground would be indirectly discriminatory. Reducing the mandatory threshold to one month will impact more harshly on people who rely on benefits because (1) it is very often the case that the arrears are not of their making but due to problems beyond their control and (2) they are less likely to be able to pay off the arrears before the hearing. There is statistical evidence to show that recipients of Housing Benefit are more likely to be disabled and/or female. This means that this new ground would have a disproportionate effect on women and the disabled. HLPA do not consider that this could be justified. This would mean it was unlawful under the Equality Act 2010. In addition to this, people in receipt of benefits are highly likely to constitute a *"status"* for the purposes of Article 14 ECHR so expanding Ground 8 would be unlawful under this provision as well.

f. HLPA's understanding is that this new ground is proposed a response to landlords who complain that their tenants "play the system" by reducing their arrears to just below the eight-week threshold before the hearing in order to avoid an order. HLPA does not consider this to be "playing the system" any more than a landlord who waits for the arrears to reach eight weeks before serving a notice is playing the system. In any event, HLPA does not consider this new ground would address this problem. If it is genuinely the case that solvent tenants are simply trying to avoid

their rental liabilities by "playing the system", then they will continue to do so under a new threshold. All this new ground would do would be to operate extremely harshly against tenants who are genuinely struggling, whilst not catching those who are in fact able to pay their rent.

g. The consultation document notes (at paragraph 3.27) that landlords have expressed *"concerns over the time taken to gain possession of their property using ground 8"*. Lowering the threshold will do nothing to change this. The only way that the process will be sped up is by properly resourcing the courts so that hearings can be listed expeditiously and the waiting time for bailiffs is reduced.

h. This new ground would have serious consequences which are not contemplated in the consultation document. It will lead to more evictions, which will increase levels of homelessness. This will exacerbate the burden on local housing authorities and social services, who will have to accommodate the families evicted under this new ground.

i. The measure is counter-intuitive. It will punish people who have reduced their arrears. A person who owed over two months' rent at the date of the notice and over one month at the date of the hearing will have paid off more than half of their arrears. This is something to be welcomed, not punished.

j. The measure is simply not necessary. If it is correct that tenants are routinely playing the system by reducing their arrears just below two months without ever paying them off, then the landlord can seek possession on Ground 10 or 11 Schedule HA 1988. The consultation document does not address why these are insufficient and appears to place little trust in the ability of the experienced district judges to assess the reasonableness of eviction.

k. HLPA does not agree with Ground 8 as currently drafted. The threshold is already too low and operates too harshly. However, it notes that the eight-week limit represents the Government's assessment as to where the line should be drawn between arrears which it *may* be reasonable to expect a private landlord to tolerate – perhaps subject to a suspended possession order – and arrears where this may not be reasonable. The Government is proposing a fundamental shift in favour of the landlord. This is a change which must be carefully considered and reasoned. It cannot be arbitrarily introduced in response to complaints by landlords. It may be that landlords want to get possession more quickly, but this does not explain why it

is now the case that one month's rent is unacceptable when previously it was double that. The Government does not provide a reasoned basis for this proposal.

l. It is well-established that a possession order *"should only be made as a last resort in a clear case, otherwise the remedy is disproportionate to the problems and a breach of Article 8 is likely to be incurred"* (*Stonebridge Housing Association v Gabbidon* [2002] EWHC 2091 (Ch)). HLPA consider this proposal would breach Article 8 ECHR.

- **The court may use its discretion as to whether to grant a possession order if the arrears are under one month by this time.**

28. HLPA agree that where the arrears are under one month, the Court should have a discretion as to whether or not to grant a possession order.

- **However, if the landlord can prove a pattern of behaviour that shows the tenant has built up arrears and paid these down on three previous occasions, then the judge must consider it a mandatory ground.**

29. HLPA consider it to be deeply troubling that the Government is even considering making rent arrears of less than one month a mandatory ground for possession, in any circumstances. HLPA's view is that it should never be mandatory for possession to be ordered where the arrears are less than one month. A change this profound in the Housing Act 1988 would require a fully reasoned, evidenced justification, which is entirely lacking from the consultation document. It would require in-depth research into the cause of arrears; how arrears are considered by the Court (for example, at what level of arrears the Court typically adjourns generally, or makes a suspended possession order, or makes an outright order); and how and why the current system is said to be defective. There is none of this in the consultation document. There is no consideration at all as to why arrears accrue, and to what extent it is the fault of the tenant. There is no rationale for why less than one month of arrears, even where there are recurrent arrears, is so significant a burden that the balance must always fall in favour of the landlord. There is no consideration of how this will impact on homelessness or on local housing authorities' discharge of their duties under Part 7 of the Housing Act 1996.

30. This does not mean that a landlord simply has to tolerate recurrent arrears. If it is reasonable to make a possession order, the Court has the power to do so under Ground 10 or 11 HA 1988. What this proposal indicates is that the Government considers that a possession order in these circumstances should be made even if it is not reasonable to do so. This is wrong.

Question 18: Should the Government provide guidance on how stronger clauses in tenancy agreements could make it easier to evidence ground 12 in court?

31. HLPA do not have any objections to this, to the extent that it simply seeks to achieve clarity between landlords and tenants from the outset of the tenancy as to what behaviour might engage Ground 12, based on existing case-law. If a tenant has signed an agreement setting this out, it will of course be easier to prove in court that s/he was aware that his/her subsequent behaviour might amount to nuisance for the purpose of Ground 12. The guidance must not, however, be allowed to lower the threshold for what constitutes nuisance or the burden on the landlord to prove any allegations of nuisance behaviour that are disputed.

Question 19: As a landlord, what sorts of tenant behaviour are you concerned with?

and

Question 20: Have you ever used ground 7A in relation to a tenant's anti-social behaviour?

32. Not applicable.

Question 21: Do you think the current evidential threshold for ground 7A is effective in securing possession?

33. HLPA consider that the evidential threshold in Ground 7A is extremely low. It is difficult to see how it could be lower. All that a landlord has to do to make out Ground 7A is show that one of the applicable previous findings has been made – so, for example, that the tenant has been convicted of a relevant offence, or been found to have breached an anti-social

behaviour injunction, or to have been subject to a closing order. In HLPA's view, Ground 7A is problematic not because it is ineffective in securing possession but because it is misused. The Government has been clear that it should only be used in the most serious cases, but in HLPA's experience it is routinely used for fairly minor offences or breaches. This is wrong.

Question 22: Have you ever used ground 14 in relation to a tenant's anti-social behaviour?

34. Not applicable.

Question 23: Do you think the current evidential threshold for ground 14 is effective in securing possession?

35. Yes, HLPA consider it is effective and should not be lowered.

Question 24: Should this new ground apply to all types of rented accommodation, including the private rented sector?

36. HLPA do not oppose the extension of this ground to the private rented sector. However, HLPA's view is that the best protection for victims of domestic violence is to ensure they have somewhere safe to go. Evicting the perpetrator after they have gone may punish the offender but it does not assist the victim. To this end, the Government should properly fund refuges and ensure that the Domestic Abuse Bill is brought back in the next Parliament.

Question 25: Should a landlord be able to only evict a tenant who has perpetrated domestic abuse, rather than the whole household?

37. Yes, HLPA consider that it should be possible to seek possession against the perpetrator of the domestic abuse, and not the whole household. This should, however, be a discretionary ground. The Court is best placed to assess what is reasonable in all the circumstances.

Question 26: In the event of an abusive partner threatening to terminate a tenancy, should additional provisions protect the victim's tenancy rights?

38. Yes, HLPA warmly welcome this proposal. The act of terminating a tenancy to render the occupier, or other joint tenant, homeless is in itself abusive. The position of a victim in these circumstances is very difficult. It is possible to apply to the family court for an order under the Matrimonial Causes Act 1973, the Family Law Act 1996, or the Children Act 1989 preventing the tenant from serving a notice to quit but this must be done before the notice is served. Often the victim does not know in time that the perpetrator can serve a notice ending the tenancy, or that it can be prevented. If the notice to quit has been served, then the tenancy will be over and there is little or nothing the victim can do.

39. HLPA are in any event concerned about the ability of a joint tenant to serve a unilateral notice to quit. Although HLPA recognises that this has been held to be lawful (*Sims v Dacorum Borough Council* [2014] UKSC 63), it is still troubling that a person can be deprived of their tenancy without their consent. HLPA would recommend the Government review this area.

40. HLPA consider that the Government should consider amending the Housing Act 1988 to provide that:
    a. Possession cannot be obtained on the basis of a notice to quit where:
        i. The notice has been served by the tenant against the wishes of their joint tenant or another occupier;
        ii. The tenant and their joint tenant or occupier were married or living together as husband and wife (including actual or de facto civil partners); and
        iii. The person who served the notice to quit was the perpetrator of domestic violence against the other joint tenant or occupier.
    b. Where a notice to quit has been served in these circumstances, a statutory periodic tenancy is deemed to arise as between the landlord and the other joint tenant/other occupier.

Question 27: Should a victim of domestic abuse be able to end a tenancy without the consent of the abuser or to continue the tenancy without the abuser?

41. A victim of domestic abuse who is a joint tenant together with his or abuser is already able to end the tenancy unilaterally: *Sims v Dacorum Borough Council* [2014] UKSC 63. HLPA is still of the view that, as a matter of principle, it is wrong for one joint tenant to be able to deprive the other joint tenant of their tenancy unilaterally, even though it recognises that this may be one of the few circumstances in which this mechanism does not operate unduly harshly.

42. HLPA consider that if the Government brings in the reforms canvassed at question 25 (namely enabling a landlord to evict only the tenant who has been responsible for domestic abuse rather than the whole household) then this will provide a sufficient safeguard for victims who wish to remain in the tenancy. The Government can then legislate to reverse the decision in *Sims v Dacorum*.

Question 28: Would you support amending ground 13 to allow a landlord to gain possession where a tenant prevents them from maintaining legal safety standards?

43. HLPA would only support this if:
    a. Ground 13 remained discretionary;
    b. The ground could only be used where the tenant routinely prevented the landlord from maintaining legal safety standards;
    c. A failure to gain access would put the landlord in significant breach of legal safety standards; and
    d. The landlord can show that all other reasonable efforts to gain access have failed.

Question 29: Which of the following could be disposed of without a hearing?

44. HLPA wish to make a preliminary point about the wording of the list contained within this question. Items 6, 7, 7A, 7B, 8, and *"new"* contain reasonably accurate summaries of the ground corresponding to that number. However, items 1 to 4 simply refer to prior notice of a certain matter having been given. In so far as these are intended as summaries of Grounds 1 to 4, they are wrong. Grounds 1 to 4 require more than just that prior notice was given. They also require that certain criteria are met (such as that the landlord lived at the property prior to the tenancy and wishes to do so again, under Ground 1, or a mortgagee requires possession, under Ground 2).

45. HLPA do not consider that any of these matters could be disposed of without a hearing. HLPA considers that the very question is premised on a misunderstanding. Paragraph 3.53 of the consultation document states that under the accelerated possession procedure the case is *"decided without a hearing – the landlord's case, and any defence put forward by the tenant, are dealt with in writing"*. Similarly, paragraph 3.55 states that *"An accelerated process means that the case is determined without the need for a hearing"*. This is simply wrong. In HLPA's experience, if the tenant files a defence then the matter is almost invariably listed for a hearing. Although the Court has the power to make a possession claim on the papers even where the matter is defended, it would be highly unusual for it to do so. That being the case, the Government is wrong to assume that in order to achieve some sort of equivalence with section 21, it should be possible to determine any or all of the new grounds without a hearing.

46. In any event, HLPA do not consider that any of the grounds could be dealt with without a hearing. All that section 21 required, at least at its inception, was service of a valid notice. These grounds, however, require the court to be satisfied of some substantive matter – whether that there are arrears, or anti-social behaviour, or the landlord wishes to live in the property. These are not matters which are suitable for determination on the papers. They should be listed for a first possession hearing under CPR 55.5 in the ordinary way. The first possession hearing is an important safeguard in ensuring that a just result is achieved: it is for many tenants the first opportunity they will have had to seek legal assistance. If the matter is not defended then clearly the matter can almost certainly be disposed of summarily then. If, however, it is genuinely disputed on grounds which appear to be substantial then directions should be given to progress the matter, in accordance with CPR 55.8.

Question 30: Should ground 4 be widened to include any landlord who lets to students who attend an educational institution?

47. No. This would make Ground 4 alarmingly wide. Prima facie it would seem to include a mature student living with their family; or a part-time student studying over several years. No cogent reasons have been given for extending this ground: the position of a landlord who *"until the previous group of students have given notice…cannot be sure of gaining*

possession of the property within a certain time scale" is no different from that of any other landlord who cannot be sure of when a tenant may leave. In addition, there is no reason why students should have less security than other tenants.

Question 31: Do you think that lettings below a certain length of time should be exempted from the new tenancy framework?

48. No. HLPA consider that this provision would simply invite abuse. The Government will be aware that under the Rent Acts, landlords would frequently claim tenancies were licences in order to avoid the strictures of those Acts. HLPA consider that this provision would be used similarly, with landlords purporting to grant shorter tenancies in order to avoid the proposals contained in this consultation.

49. HLPA consider it is in any event unnecessary. A tenancy is only assured if the tenant, or one of joint tenants, occupies the property as his or her only or principal home: section 1(1)(b), HA 1988. A person occupying a property as a second home is unlikely to meet this criterion and would not therefore be subject to this regime in any event.

Questions 32 to 35: religious workers and agricultural tenancies

50. HLPA is unable to comment on these matters.

Question 36: Are there any other circumstances where the existing or proposed grounds for possession would not be an appropriate substitute for section 21?

51. No.

Questions 37 to 44: impact and timing of implementation

52. These questions ask for statistical evidence from landlords and are not applicable to HLPA.

Question 45: Do you think these proposals will have an impact on homelessness?

and

Question 46: Do you think these proposals will have an impact on local authority duties to help prevent and relieve homelessness?

53. Yes. HLPA considers the proposal to abolish section 21 will reduce homelessness. However, HLPA considers that the proposals to expand the statutory grounds under Schedule 2 HA 1988 could increase homelessness, and in particular that the proposal to lower the Ground 8 threshold to one month (or even less than one month in some circumstances) will almost certainly have this effect. HLPA is strongly opposed to this proposal.

54. HLPA considers that that the effect on local authority duties to help prevent and relieve homelessness will be commensurate with this. The expansion of Ground 8 will increase the burden on local authorities because if the proposals are implemented a tenant owing one month, or even less than one month, of arrears would be likely to be threatened with homelessness as defined by section 175 HA 1996. The local authority will then be required to comply with its prevention duty under section 195 HA 1996. This could include paying off the arrears or giving the tenant a deposit to move elsewhere. This is expense which is much less likely to be incurred under the present legislation, as tenants in one month or less of arrears are unlikely to be subject to a mandatory order.

Question 47: Do you think the proposals will impact landlord decisions when choosing new tenants?

55. HLPA accepts this may be better answered by landlords, but notes that as these proposals will apply universally there is no obvious reason why they should impact landlord decisions when choosing new tenants.

56. However, HLPA is concerned that the Government should take steps to ensure that they do not lead to an increase in landlords and agents refusing to let to people in receipt of Housing Benefit. HLPA considers that this practice is indirectly discriminatory against women and disabled persons, because such people are more likely to be in receipt of Housing Benefit than men and non-disabled people respectively. HLPA is therefore confident that this measure would not survive scrutiny in the courts but it would be deeply regrettable if there

was any increase in it. HLPA would welcome confirmation from the Government that this practice is unlawful.

Question 48: Do you have any views about the impact of our proposed changes on people with protected characteristics as defined in section 149 of the Equality Act 2010?

57. As stated above, HLPA is concerned that expanding Ground 8 is likely to be indirectly discriminatory in respect of women and disabled people contrary to the Equality Act 2010, as these groups are more likely to rely on benefits. Given the problems endemic to the benefits system, people who rely on benefits to pay their rent are more likely to be affected by the expansion of Ground 8. For the same reason, the measure is likely to offend Article 14 ECHR.

58. HLPA is also concerned that the Government should take steps to ensure that the abolition of section 21 does not lead to an increase in the practice of refusing to let to applicants purely because they are in receipt of benefits. HLPA considers that this practice is unlawfully indirectly discriminatory contrary to the Equality Act 2010 because, as stated above, it has a disproportionate effect on women and disabled people.

Question 49: If any such impact is negative, is there anything that could be done to mitigate it?

59. The Government should publicly confirm its view that refusing to let to applicants purely because of their receipt of benefits is unlawfully indirectly discriminatory.

60. If the Government insists on expanding Ground 8, it should legislate to overturn the decision in *North British Housing Association v Matthews* [2004] EWCA Civ 1736 as a result of which Courts cannot adjourn possession claims brought under Ground 8 even where a tenant has applied for benefits, the application has not yet been determined, and there is no evidence that any delay was due to the fault of the tenant.

Question 50: Do you agree that the new law should be commenced six months after it receives Royal Assent?

61. Yes.

October 2019