



**A Response to the Law Commission Issues Paper:
Housing: Proportionate Dispute Resolution.**

Response by Social Housing Law Association

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About SHLA

The Social Housing Law Association ('SHLA') is an organisation of social housing professionals and their lawyers. Its members work or regularly act for social landlords (local authorities and registered social landlords).

SHLA aims to:

1. Further the interests of social landlords.
2. Promote and develop better solutions to the legal problems faced by social landlords.
3. Provide a forum where its members can exchange and discuss ideas and information.
4. Assist in the development and training of its members.

The issues paper contains general references as to why an alternative dispute resolution system may be necessary and before dealing with some of the specific issues SHLA believes that it would be helpful to make a general comment about existing practice and whether change is needed.

Part 2 Solving Housing Disputes – Existing Practice

General Comments

- 2.1 The paper appears to suggest that landlords and tenants have little, if any, communication before the matter reaches Court and that there is little advice available to tenants who are suffering “housing unhappiness”. As a result, the paper concludes that this has caused the County Courts to be inundated with possession actions, which could be avoided if there was some alternative for proportionate dispute resolution.
- 2.2 The above however is a misconception and the real problem with the existing system is not that there is no alternative, but that there is inconsistent and ineffective decision making coupled with insufficient resources to enable it to work efficiently. The lack of resources is not merely in the Court system itself, but also in the funding available to tenant advisers and unless any alternative is given more resources than the current system, then it will simply lead to similar problems in a very short time.
- 2.3 In practice, a much more realistic example of a typical case that ends up in Court is as follows - we have used a rent possession case as an example:

The social landlord notes that a tenant’s housing benefit had stopped. The social landlord, in accordance with its rent arrears policy and procedure, writes to the tenant advising of the apparent problem. The social landlord also contacts the housing benefit department and is told that the tenant has failed to file renewal forms. There is then a period when the landlord contacts the tenant in writing, by telephone and by personal visit to ascertain why the renewal forms have not been completed and offers to help the tenant complete them. The tenant does not respond to any written communication and it is only some months later when the housing officer manages to catch the tenant at home, that the tenant responds saying that she has filled in and returned the forms. Another month passes and further rent arrears accrue and still no housing benefit is paid. The social landlord contacts the housing benefit department again to be told that the renewal forms have still not been received and, again, the social landlord attempts to contact the tenant in writing, by telephone and personal visit, without success. By this time, the arrears are now normally in the high hundreds and the social landlord is left with no alternative but to consider more effective action, namely possession proceedings. A Notice Seeking Possession is therefore served giving the tenant two or four weeks to contact the landlord and either arrange a reasonable instalment plan for clearing the arrears and to remedy the ongoing problem created by the tenant not completing renewal forms. The tenant may

(but very often does not) respond to the Notice Seeking Possession and agree with the landlord to pay off the arrears at a rate of say £5.00 per week. The tenant also promises to complete renewal housing benefit forms and to make a claim for backdated housing benefit. The tenant may then make one instalment of £5.00 and thereafter makes no payments whatsoever. Social landlords of course are non-profit making and must rely on rental income to maintain their stock and continue to provide affordable housing. They are also under regulatory guidance which monitors the level of their rent arrears and, in a case such as the above (which is very typical), is left with no option but to apply to Court for a possession order.

Possession proceedings are issued and served on the tenant and a hearing date listed (normally 6 to 8 weeks away), during which time the tenant still does not pay any rent or a sum towards the arrears. The first and only time that the tenant takes the matter seriously is on the morning of the Court hearing, at which time she makes various promises to the Court to send back her housing benefit renewal forms and pay the arrears at a couple of pounds per week. The proceedings are adjourned to enable the tenant to comply with her promise to the Court and another hearing is not set for a further 4 to 8 weeks. The tenant does not comply with her promise and no rent is paid during the intervening period. By the time of the next hearing, the arrears are in the thousands of pounds. At that next hearing, despite the tenant having failed to comply with any of her promises, the Court does not make an outright possession order but makes an order postponed on terms that the tenant pays the arrears at a rate of a couple of pounds per week.

Even then, the tenant will invariably default and ultimately a warrant for possession is applied for. The tenant is advised by the Court and the social landlord of her right to apply to suspend the warrant, which she will invariably do and it is then common practice in the majority of County Courts to suspend warrants on numerous occasions, during which time the arrears creep up and up and it is commonplace to find individual rent arrears above £5,000.

- 2.4 The above, which as we have said is a typical example of current practice, shows that tenants are already provided with a “triage plus” system by their social landlord. Virtually all social landlords have an arrears procedure which involves repeated attempts to contact the tenant and assist them with their problem; many social landlords offer themselves or via other support agencies a debt advice service and great efforts are made to avoid Court proceedings. The sad reality of the situation is that it is not the lack of available advice that leads to so many possession actions being taken, but:
- a) the tendency of courts to devalue the work done by social landlords in avoiding court proceedings by allowing tenants to ignore these efforts and still obtain adjournments
 - b) the willingness of courts to undermine the importance of possession orders by allowing tenants to succeed in making multiple applications to suspend warrants over many years (often despite the fact that the arrears increase), and

- c) as a result of the above the unwillingness of tenants to take the matter seriously or deal with their problem until they are faced with a Court hearing.
- 2.5 Social landlords are therefore concerned that any alternative housing dispute resolution system should not add another step or hurdle which a landlord must go through before being able to obtain its ultimate remedy. Existing experience shows that sadly the majority of tenants against whom Court action is taken (particularly for rent arrears), will not address the problem, regardless of how much advice or assistance you give them until legal action is taken.
- 2.6 The Law Commission may be aware that some social landlords have obtained their Board's approval for using mandatory Ground 8 for rent arrears cases. This is not because those landlords want to evict their tenants, but because they need to keep their rent arrears to a minimum:
- a) in order to avoid burdening their non-defaulting tenants with the arrears of others, and
 - b) as required by the Housing Corporation.
- And, when faced with the above experience in Court on a repeated basis, they are left with no alternative but to take away the Court's discretion and rely on a more effective ground for recovering arrears.
- 2.7 The experience of those landlords that use Ground 8 we believe shows up the real problem. Many were concerned that social landlords should not be using Ground 8 as it would lead to hundreds, if not thousands of evictions. However, the opposite has in fact been the case. Those landlords that use Ground 8 have found that actual evictions are in fact few because once the tenant understands and appreciates that service of a Ground 8 NOSP means that you are highly likely to lose your home if you do not manage the debt properly and reduce the arrears to a reasonable figure. As a result they take the matter seriously and take action to control their finances at an early stage. This, in turn, has lessened the actual possession actions needed to be taken because, through newsletters and word of mouth, those tenants of landlords who use Ground 8 know that they must make payment of their rent and completion of their housing benefit forms a priority.
- 2.8 Social landlords' complaint therefore about the existing system is not that we need some alternative but that the existing system needs to be more effective both in terms of the decisions that are being made by judges and the delays that are being experienced in the Court system due to insufficient resources.
- 2.9 It can take 6 to 8 weeks just for an initial hearing date, during which time rent arrears are building up, which cannot assist either the landlord or the tenant who is faced with an even larger debt at final determination. Currently, there are also many Courts that are not able to comply with the requirements of Part 55 (which states that possession hearing dates must be listed within eight weeks of issue) and are having to list matters twelve weeks away. When challenged, the Court's response is that they simply do not have

sufficient judges and have insufficient resources to recruit deputy district judges.

2.10 We have talked above a lot about rent arrears possession cases because these are by far the largest area of legal proceedings being dealt with by the current Court system.

2.11 However, there are, of course, other housing disputes but the issues paper does not appear to appreciate that there is already a considerable amount of “triage plus” that already takes place before other forms of Court action are considered. There is extensive investigation and liaison with numerous agencies, offers of mediation and all manner of discussion that takes place before Court proceedings are ultimately issued in anti social behaviour cases. Similarly, now that there is the Pre Action Protocol for Disrepair, many disrepair cases are resolved before proceedings are issued. Having said that, there is still a large problem with tenants suddenly “springing” disrepair counterclaims upon landlords in response to rent arrears possession claims. Such disrepair claims are currently excluded from the Pre Action Protocol and are frequently used as a delaying tactic by tenants and their advisors to string out possession claims even though they have no legitimate disrepair claim and would not have been able to get a claim off the ground if they had been required to comply with the Pre Action Protocol. The existing system would be capable of dealing with this problem if judges honoured CPR 55.8(2):

‘Where the claim is genuinely disputed on grounds which appear to be substantial’ the claim will not be decided and case management directions will be given.

2.12 Turning now to some specific questions asked in the issues paper:

Why do housing disputes arise?

2.13 We believe these fall into two categories:

- a) Because one party does not comply with its legal obligations.
- b) Because one party has a higher expectation of what he or she is actually entitled to.

2.14 The first is self-explanatory. The second is probably best explained by way of an example. In the issues paper there is reference to “housing unhappiness”. An example is given of a tenant who is unhappy because, amongst other things, her kitchen is “outdated” and her flat suffers from condensation. The tenant may feel that she is “entitled” to a new kitchen simply because her old one is out of date. For this reason, she feels unhappy which may ultimately lead to a housing dispute. However, in law, the landlord is not required to improve a property and is only liable for statutory and contractual disrepair. The tenant’s unrealistic expectation of what she is entitled to is leading to her unhappiness. Similarly, just because her property has condensation, does not mean that the landlord is necessarily liable to take steps to remedy it.

Despite what many tenants think (and sometimes their advisors either encourage them in this false thinking or fail to disabuse them of it), landlords are not liable for everything that occurs, or does not occur, in the property. This problem should be addressed by courts dealing with these 'non-existent claims' more robustly, possibly with effective cost penalties being levelled against tenants or their advisors.

Provision of Information and Advice

- 2.15 As we have said above, the majority of social landlords already themselves offer advice and assistance to their tenants as part of their service. In addition, as the paper recognises, there are already a number of agencies offering effective information and advice in the local community. The majority of those agencies are for the benefit of tenants and not much is said about advice given to landlords.
- 2.16 However, on the whole, the vast majority, particularly of social landlords, already receive specialist legal advice.

Values

- 2.17 The issues paper lists accuracy and effectiveness as 2 values for any proportionate dispute resolution. We believe these are two of the most important values and, in particular, accuracy, which the paper describes as “ensuring that the system produces the right answer and where the issue is a legal one, the outcome should be legally correct”. The vast majority of housing disputes do involve legal issues due to the substantial statutory and common-law regulation that has built up over many years in the area of housing law. Every rent arrears case, every disrepair case, every anti social behaviour case and every homelessness case is governed by statutory and common-law principals which means that any resolution process is going to have to involve a legal determination by whichever dispute resolution process is chosen. As the Court system already has legal adjudicators in place, it would seem sensible that the Courts continue as the appropriate forum for resolving housing disputes.

Failure to deal with underlying problem

- 2.18 The paper suggests that “many possession proceedings are actually about the inadequate administration of housing benefit”. Although it is true that some problems are generated by ineffective housing benefit administration, often problems are described as a “housing benefit problem” when in fact they are a failure by the tenant to complete housing benefit forms on time or to supply information requested by the housing benefit department. These are not housing benefit administration problems, but reflect a bigger underlying problem which is the attitude of many tenants who end up facing Court action

which is to refuse to engage or take responsibility until they are faced with a judge ordering them to.

- 2.19 It is difficult to see how any other dispute resolution mechanism can address this underlying problem. Indeed any alternative system is likely to lack the force of law which is the quality that makes the court system effective.

Triage Plus

- 2.20 As we have said above, we believe there is already an extensive system of “trriage plus” which is offered by not only social landlords themselves but also by the numerous advice and support agencies. The system already “catches” those tenants who are willing to accept and act upon such advice and thereby avoid Court action. It is difficult to see how you can force tenants who are currently unwilling to accept advice to go along with a triage plus system. If triage plus is made compulsory (as to its use), then what will be the penalty for refusing it? Any penalty would have to be fairly severe so that refusal of triage plus did not simply create further delay.
- 2.21 We also feel it is important that any triage plus advisor should be legally qualified. As we have mentioned above, there are extensive statutory and common-law principals and provisions that govern nearly every housing issue and in order to give effective advice and recommend a particular course of action, that advisor must have a full and thorough understanding of each parties’ legal obligations. This would be particularly important if any element of triage plus was compulsory.
- 2.22 Currently the majority of tenant advisors give advice and make recommendations based on the tenants’ interests alone. For example, as mentioned above, “throwing in” a disrepair counterclaim to a rent possession action is a common practice amongst many tenant advisors and used simply as a delaying tactic without any legal grounds for bringing such a claim being considered.
- 2.23 How is a triage plus advisor going to deal with these sorts of conflicting interests?
- 2.24 For the above reasons, any triage plus advisor must not only be legally qualified and have extensive housing law knowledge but must also be independent.
- 2.25 The LC envisages the ‘leadership role’ in organising will be taken by the Legal Services Commission but states that ‘there will need to be significant input from local government’ which would be likely to work ‘in partnership’ with the LSC in developing triage plus. We would be concerned if in reality this meant responsibility for implementation being imposed on local authorities with no adequate additional funding and the LSC in an enforcement role.

- 2.26 The paper recognises that many local authorities fund provision of independent advice. This can be both directly by way of advice units for tenants of private (non-social) landlords and through financing of CABs etc. Triage plus would be advantageous if it replaced the CAB/Law Centre system, which tends to draw the tenant into a contentious approach at an early stage.

Management Responses

- 2.27 Every social landlord is already bound by extensive systems for checking that they have effective policies and procedures in all areas of their work and that those are adhered to. The Audit Commission very effectively inspects social landlords and brings them to account for any area in which they are lacking. In addition, there is already a requirement for social landlords to comply with Best Practice and they are subject to extensive government or housing corporation guidance.
- 2.28 All social landlords must also offer a thorough complaints procedure which culminates in the matter being dealt with by an independent ombudsman.
- 2.29 Social landlords are therefore already fully accountable for their actions and no further “management” system is needed.
- 2.30 In the paper, it is suggested that a focus on management responses would lead to a more appropriate use of possession proceedings so that they are not taken unless prior issues such as housing benefit problems have first been sorted out. This statement shows a lack of understanding of the real reason why the vast majority of possession proceedings reach the Court. It is not because there is a housing benefit administration problem, but because the tenant has failed to complete housing benefit forms or supply necessary information, either at all or on a timely basis. If landlords had to wait until “housing benefit problems” were sorted out before it could commence possession proceedings, it could be waiting indefinitely for the tenant to fill in the appropriate forms!
- 2.31 The ‘new public management’ with the 7 ‘management tools’ is clearly an accurate model of how post Best Value local government operates and accordingly the housing management function within it. The paper criticises such a system as being limited by the targets chosen. However, for housing in common with other services, the main targets or performance indicators are imposed by central government and these may indeed function more as ‘outputs’ rather than ‘outcomes’.

Ombudsman

- 2.32 Currently the Local Government Ombudsman and the Independent Housing Ombudsman are meant to deal with complaints made by tenants and

applicants in relation to a policy or procedural irregularity by the social landlord. On the whole, the Local Government Ombudsman limits his investigations to maladministration and does not intervene when there is a clear legal remedy. However, the experience of many Registered Social Landlords of the Independent Housing Ombudsman is that they will often go way beyond their jurisdiction and make decisions about legal issues which they have no knowledge or understanding of. Many social landlords are therefore extremely concerned at any extension of the Independent Housing Ombudsman's jurisdiction, unless the Ombudsman is legally qualified and has extensive knowledge of housing law. Otherwise, it leads to decisions which are not right in law or fair and gives tenants a false expectation of what they are entitled to. There is no effective appeal process against an Ombudsman's decision and it is currently a cause for concern for many social landlords.

Mediation

- 2.33 Mediation is already used extensively as an alternative dispute resolution, particularly in anti social behaviour cases involving low-level nuisance. In appropriate cases, it can be very effective.
- 2.34 However, it cannot be compulsory as it is not appropriate in all cases, particularly where violence or threats of violence are involved.
- 2.35 It may be appropriate for consideration in some other housing cases but it cannot be a compulsory step which the parties have to go through before an ultimate resolution can be obtained. Social landlords already invariably seek to resolve problems before engaging in the time consuming and costly process of court proceedings and it would not be helpful for this informal problem solving approach to be formalised into mandatory mediation. For the reasons set out in the practical examples referred to above, it will not resolve the vast majority of cases which involve the tenant refusing to engage or accept advice and, if it is a compulsory step, it will simply lead to further delay before an ultimate solution can be obtained.
- 2.36 If mediation is to be more widely used in the areas for which it is appropriate, the various types of mediation need to be brought together and underpinned by a statutory framework with a mechanism for enforcement. We understand that the Civil Mediation Council is presently working on this.
- 2.37 Concerning mandatory mediation, the experience of London Boroughs who participated in the Central London County Court scheme for disrepair claims was that it was not successful in promoting early resolutions and merely introduced a further period of delay.

Court or Tribunal

- 2.38 We already have an established system for resolving disputes – namely the Courts. As the majority of housing disputes will involve legal issues, anybody making a decision on that dispute must be able to deal with legal issues; otherwise it will be completely ineffective. As the Court system is already in place, there seems little point in changing the system to a Tribunal.
- 2.39 If we are to take our recent experience of the LVT as an example of extending the jurisdiction of Tribunals then we believe they will not necessarily provide better justice for either party. In particular, we find it has a lack of understanding of legal issues, that enforcement mechanisms are underdeveloped compared to those of the courts and the powers for awarding costs are too limited.