



January 2019

CJC response to the Ministry of Housing, Communities and Local Government (MHCLG) document:

Considering the case for a housing court: a call for evidence, 13 November 2018

General remarks:

The Ministry of Housing, Communities and Local Government (MHCLG) states that it is “seeking views on the experiences of people using courts and tribunal services in property cases, including whether a specialist Housing Court is needed.” A report following a qualitative research study commissioned by the MHCLG is published along with the ‘consultation description’: “*A qualitative research investigation of the factors including the progress, time scales and outcomes of housing cases in county courts*”, November 2018 (“the Burns Report”).

It is stated that “The government wants to explore whether a Housing Court could make it easier for all users of court and tribunal services to resolve disputes, reduce delays and to secure justice in housing cases.”

The paper both seeks evidence about court users’ experience and opens a consultation on the merits of a specialist housing court. However, the focus of the call for evidence is just one only of the range of ‘housing’ cases dealt with by the courts and the property tribunal: private sector possession actions, specifically for assured shorthold tenancies. The call for evidence appears to be prompted by concerns expressed by private landlords; at para 16 it is stated that landlord groups argue that a barrier to longer tenancies in the private rented sector is the belief that it is difficult for landlords to repossess their properties quickly and smoothly if the tenant defaults on the tenancy agreement and forces the landlord to apply to the court for possession. However, it is acknowledged at para 19 that the perception of the length of time taken for private landlords to gain possession is “less than previously thought”.

The CJC is not in a position to provide evidence based on experience of using the courts in possession proceedings but responds to the consultation regarding the establishment of a “specialist Housing Court.”

Answers to specific questions

Part 1: The private landlord possession action process in the county court [Questions 1-10]

These questions are directed to the personal experience of consultees when using the court for possession cases. The questions appear to relate only to claims against assured shorthold tenancies as they commence by seeking information as to whether possession was sought using the “Section 8 process” or “Section 21”. These refer to claims for

possession under the Housing Act 1988 section 8 (which requires the landlord to prove a ground for possession) or section 21 (the 'no fault' procedure).¹ The CJC is not in a position to provide evidence in response to these questions but notes the narrow focus of the call for evidence. Para 30 of the paper records that private landlord claims involving Housing Act 1988 section 8 comprise approximately 21% of all 'section 8' possession claims (24,000 of a total of 114,000). The statistics referred to are difficult to understand as the latest quarterly figures published by the Ministry of Justice record that 59% of all possession claims are brought by social landlords (which would include local authorities for whom 'section 8' claims do not exist), 21% are accelerated claims and 20% private landlord claims. What is clear is that the majority of claims for possession are brought by social landlords and it is not suggested that social landlords have expressed concerns about delays in obtaining or enforcing orders.

Part 2: Enforcing a possession order [Questions 11-16]

It is recorded that the feedback received from landlord groups suggests that the enforcement procedure is the stage at which delay is most likely to be experienced. This is also borne out by the Burns Report (see para 1.2.3).

The consultation paper states at para 28 that "To resolve some of these issues, HMCTS are undertaking a Possession project, which is due to start in 2019. Early opportunities have been identified to simplify the process for possession cases, improve engagement between parties and HMCTS and digitise the end to end service for all claims, providing support for users that need it. The shorthold tenancy possession claim process will be made digital. As a first step, administrative processes will be improved, automated and streamline to make them more efficient and reliable." The CJC was unaware of this project and has concerns that it is intended that the possession claim process for shorthold tenancies is to be 'made digital', particularly if the aim is to 'digitise the end to end service' without clear information about the digital assistance that is to be provided for those who need it.

The CJC would be concerned if it is proposed to 'digitise' the possession process such as to remove the automatic listing of a face-to-face hearing for claims for possession when evidence of breach is required and/or the court has discretion as to the making of an order. Where the tenant's home is at risk the tenant should have the right to attend a face-to-face hearing.

Again, these questions are directed at the personal experience of the process of enforcing possession orders in both the county court and the High Court and the CJC is not in a position to respond to these questions. However, the CJC notes that the Civil Procedure Rules Committee consulted on the enforcement of suspended orders for possession and the alignment of procedures in the County Court and the High Court in June 2017. The consultation ended in August 2017 but the outcome of the public feedback has yet to be published.

Part 3: Access to justice and the experience of court and tribunal users [Questions 17-23]

This section relates to consultees' experience of using the county court and/or tribunal for "property cases" and includes generic questions including asking consultees whether they

¹ Although these provisions are also available to the Private Registered Providers of Social Housing (social landlords) many of the technical requirements do not apply to such landlords and the questions are clearly addressed at private not social landlords.

agree or disagree that the county court or tribunal “provides fair access to justice for property cases.” It is unclear what is meant by “property cases” and the CJC questions whether the responses are likely to inform the case for a specialist housing court.

Again, these questions are directed at the personal experience of using the county court and /or the tribunal and the CJC is not in a position to provide such evidence.

Part 4: The case for structural changes to the courts and the property tribunal [Questions 24-34]

This section sets out the four options under consideration: Option 1: establishing a new, specialist housing court; Option 2: making structural changes to the existing courts and property Tribunals; Option 3: making changes to the enforcement process in the County Court; Option 4: no changes but strengthening the guidance to help users navigate the courts and tribunal process.

Option 1: establishing a new, specialist housing court

It is unclear what is meant by the establishment of a new, specialist housing court. However, if it is proposed that all housing cases, including claims for possession, should no longer be dealt with in the county court (or High Court) but instead heard by a newly created type of court or tribunal dealing solely with housing issues, the CJC does not think that the case has been made that there are current issues that cannot be dealt with by minor changes within the current court system. Further, housing cases often involve complex technical issues relating to the law of contract, tort, equity and public law and it is unclear why it would be desirable for such cases to be heard in a specialist tribunal outside of the mainstream civil courts.

Delay

The call for evidence appears to have been prompted predominantly by the perception amongst some private landlords that there is unnecessary delay in the process of obtaining and enforcing possession orders. However, as the Burns Report confirms, for a section 21 possession claim the median period of time from the issue of a claim to the making of a possession order is just 5.3 weeks.

In reality much of the perceived and actual delay occurs both prior to the claim being issued and after the order has been made. As is acknowledged, a landlord may choose to negotiate with a tenant in the first instance and the law requires the service of a two month notice under the section 21 procedure. The Burns Report records that the median period of time from the order being made to gaining possession is 10 week of which 6.8 weeks occurs following the issue of the warrant.

The Burns Report suggests that many landlords are unaware of the requirement to make a further application for a warrant after a possession order is made. It is also clear that the shortage of bailiffs is a problem in some geographical areas.

Also, where unnecessary delay does occur this appears to be a result of under-resourcing, under-staffing and court closures, which is affecting all cases in the county court.

If what is being considered is that the Residential Property Tribunal become a specialist housing court it should be noted that the perception of a better service in the Tribunal is likely to be a function of its significantly smaller caseload. As is set out at paragraph 30 of the consultation paper the volume of the Tribunal’s caseload is recorded as 9000 cases

compared to 114,000 claims for possession brought solely under the Housing Act 1988 (this does not include possession claims brought by local authorities which comprise the majority of possession claims or any other type of 'housing case' dealt with in the County Court). If the Tribunal were dealing with the volume of cases currently being dealt with by the County Court a massive injection of resources would be needed.

Complexity of law and procedure

Delays that may occur appear in part to be caused by landlords' and agents' errors and lack of knowledge of the technical requirements when granting assured shorthold tenancies. However, these technical requirements are substantive legal requirements and not procedural requirements applied by the court. The law provides that a landlord who has not complied with the technical requirements cannot serve a lawful s.21 notice and this would be the case whether a case was heard in the county court or in a specialist housing court/tribunal.

The Burns Report also suggests that landlords complain that when tenants are able to obtain advice they are encouraged to defend claims but this is not a feature of court or procedural delay but the fact that a defended claim necessarily takes longer to resolve than an undefended claim. It must be remembered that what is at stake for the tenant is the potential loss of their home and that the procedure must give the tenant the opportunity to obtain advice and, if appropriate, to defend a claim for possession.

In fact, in many of the claims for possession in which a landlord relies on a statutory ground, it is often the *absence* of available legal advice and support contributes delay: courts often adjourn cases involving arrears of rent for benefit problems to be resolved but if the tenant is unable to obtain assistance to resolve the benefit issues the case may return weeks later with no progress having been made.² Similarly, tenants who raise issues such as disrepair at the first hearing may be ordered to file and serve a fully pleaded Defence and Counterclaim but be unable to find a solicitor or adviser with the capacity to help and similarly return to court with no progress having been made.

Specialist knowledge of judges

There is a suggestion that some issues are caused by judges not having specialist knowledge of housing law. If this is an issue it could be resolved by the courts adopting a 'ticketing' system similar to that under which judges are 'ticketed' to deal with family cases.

In fact, most district judges deal with a large volume of housing possession cases on a weekly basis and quickly develop a level of expertise in housing law. But a ticketing system could encourage an element of specialisation.

Tenants defending claims for possession

One issue which is raised as causing frustration and delay is the fact that under the Civil Procedure Rules a tenant can attend the first hearing and indicate that the claim is defended, without having filed a defence or given any advance indication of the nature of the defence. However, this is because there is no summary judgment procedure in possession claims, which reflects the importance of the issues for a tenant facing the loss of his/her home. Again, it is likely that the reduction of advice and assistance for tenants facing possession proceedings is exacerbating this problem. It is often the case that tenants obtain

² Assistance for welfare benefits was removed from the scope of legal aid in April 2013 and many advice agencies no longer provide such help.

advice for the first time at court from a duty adviser.³ If early advice and assistance were available for tenants facing a possession claim the number of cases in which a tenant puts forward a defence at the first hearing would be likely to reduce.

The Burns Report also refers to landlords complaining of delays whenever claims are defended by tenants and/or when tenants do not agree to leave until the date of execution of a warrant. First, it will always take longer for defended claim to be resolved and any unnecessary delay within the system is a consequence of the volume of cases dealt with by a court or tribunal and the resources available. As for the issue of tenants waiting until a warrant is executed it is recognised in the Burns Report that this often occurs because the tenants apply for homelessness assistance from local housing authorities and are advised to wait until that time before assistance will be given. As the Burns Report also confirms, the Homelessness Reduction Act 2017 aimed to prevent this from happening by making provision for local housing authorities to provide early assistance to assured shorthold tenants facing possible homelessness. The Act only came into force in April 2018 so it is probably too early to know whether it is succeeding in preventing this practice.

The stated aim of the MHCLG is “to secure justice in housing cases” which means also considering the position of tenants who may have a defence to claims for possession.

In summary

The CJC does not accept that a case has been made for a “Specialist Housing Court” to be created.

The call for evidence/consultation papers focuses on the narrow issue of private landlord possession claims against assured shorthold tenants. The cause of much of the perceived delay identified by private landlords appears to be caused by a combination of lack of knowledge amongst landlords of substantive and procedural requirements inherent in the granting and termination of assured shorthold tenancies. There does appear to be evidence that some delay in the procedure is caused by lack of resources within the court services, in particular, insufficient numbers of bailiffs in some county court areas. This could be resolved by the appointment of additional bailiffs where there is a shortage.

If there is an issue of lack of knowledge of housing law amongst district judges this could be resolved by introducing a system of ‘ticketing’ of judges to deal with housing issues.

The CJC would not support a major redesign of and/or transfer of cases within the courts and tribunal service for housing cases at this time. This is particularly so at a time when the court reform programme and the increasing digitalisation of procedures within the courts and tribunal service is yet to be completed or evaluated. The creation of a specialist housing court would involve a large commitment of resources which would be better applied to the current court system so as to ensure a satisfactory level of service to all users.

³ See *LCN v Lord Chancellor* [2018] EWCHC 1588 (Admin).