

Garden Court Chambers Submission to the Housing, Communities and Local Government Committee's Inquiry into the Impact of Covid-19 (coronavirus) on homelessness, rough sleeping and the private rented sector

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SUMMARY

1. We set out below submissions in respect of homelessness and the government's actions around the private rented sector.

Summary of homelessness (section 1)

2. We commend the Minister for the **Everyone In** letter (26 March 2020) and the guidance to local authorities to support rough sleepers and other vulnerable homeless persons into appropriate accommodation. WE note that the guidance needs clarification, as to who might be considered at risk of sleeping rough. It fails to deal with the specific issue of people who are, or might be homeless due to leaving accommodation as a result of experiencing violence, where they are likely to return to that accommodation if not housed, rather than sleep rough. We also note that the guidance does not explain the division of responsibilities between local authorities.
3. We recommend that the guidance is recast as statutory guidance and that the advice to support rough sleepers and others into accommodation should fall within local housing authorities' duties at Part 7 Housing Act 1996. We also recommend that the priority need be abolished for the period of the crisis, or at the very least that the categories of priority need be extended to include those with specific Covid-19 risk factors and those leaving accommodation as a result of domestic violence. We further recommend that the Committee urges the Secretary of State to clarify to local

authorities that the duties under **Everyone In** are to be undertaken regardless of any eligibility, immigration status, or recourse to public funds status. If necessary, the general power of competence at s.1 Localism Act 2011 should be amended to make it explicit that it extends to providing accommodation to anyone in order to prevent a breach of human rights, and the boundaries of that power at s.2 Localism Act 2011 do not apply during the period of the Covid-19 emergency.

4. We are concerned that gypsies and travellers are not moved on or evicted from their encampments, whether those are authorised or unauthorised sites, without the provision of alternative sites on which to camp.
5. We note that the crisis has shown that rough sleeping can be abolished. Since the government has, in any event, committed itself to achieving this during the lifetime of this Parliament, we hope that the measures taken during this crisis for public health reasons can be continued once the crisis has passed, so that emergency accommodation can be provided for all.

Summary private rented sector (section 2)

6. We consider that the government response to protecting renters during the crisis has been insufficient and unacceptably delayed. There is no suspension of rental liability during the crisis. The moratorium on possession claims is limited to 30 June 2020. We anticipate that the number of claims for possession will substantially escalate once the moratorium is lifted. The availability of s.21 no fault evictions and Ground 8 mandatory ground for possession upon eight weeks' rent arrears means that many tenants who faced financial difficulties as a result of the Covid-19 emergency will be evicted without any consideration of their personal circumstances, or of the reason for the accrual of arrears. We recommend that the moratorium is extended beyond 30 June 2020, that s.21 is abolished (in line with the government's stated intention in the proposed Renters' Reform Bill) and that Ground 8 is abolished, so that all claims for possession on the grounds of rent arrears can consider the reason for the arrears and the tenant's personal circumstances, as well as giving the Court the flexibility to make a possession order suspended upon terms that the tenant pay current rent and repays the arrears within a reasonable period.

Summary of recommendations

7. We recommend that the Committee
 - a. Urges the Minister to reissue his letter as statutory guidance and clarify the terms “rough sleepers”, “those at risk of sleeping rough”, to clarify the requirement to provide accommodation to those leaving accommodation due to violence, and to clarify the division of responsibilities between local housing authorities;
 - b. Urges the Minister to provide, by way of statutory guidance, that the accommodation secured as a result of the letter has been secured under the functions at Part 7 Housing Act 1996;
 - c. Urges the Secretary of State to exercise his power under 189(2) of the Housing Act 1996 to make an order classifying all persons as being in priority need for accommodation;
 - d. Alternatively:
 - i. Urges the Secretary of State to make an order classifying those people with specific Covid-19 risk factors as identified by Public Health England as in priority need; and
 - ii. Urges the Secretary of State to amend the Homelessness (Priority Need for Accommodation) (England) Order 2002 to remove the additional vulnerability requirement in relation to priority need for those fleeing violence.
 - e. urges the Secretary of State to clarify to local authorities that the duties under **Everyone In** are to be undertaken regardless of any eligibility, immigration status, or recourse to public funds status, and/or to amend the general power of competence at s.1 Localism Act 2011 to make it explicit that it extends to providing accommodation to anyone in order to prevent a breach of human rights, and the boundaries of that power at s.2 Localism Act 2011 do not apply during the period of the Covid-19 emergency;
 - f. emphasises to the Secretary of State that gypsies and travellers should not be moved on or evicted from their encampments, whether authorised or unauthorised, without the provision of alternative sites on which to camp;
 - g. Considers long-term measures to reinforce rather than deconstruct improvements made to homelessness provision during the Covid-19 pandemic;

- h. Requests the extension of the eviction-delaying measures both under section 81 and schedule 29 of the Coronavirus Act 2020, and under Practice Direction 51Z, for a period of 3 months beyond the easing of restrictions. This will enable tenants a brief period to seek work and stabilise their finances in a highly uncertain economic environment;
- i. Requests that the placing of the measures contained in Practice Direction 51Z onto statutory footing;
- j. Urges the abolition of section 21 evictions;
- k. Urges the abolition of ground 8 of schedule 2 Housing Act 1988, allowing the courts to consider the reasonableness of making possession orders in **all** rent arrears claims and giving the Courts the flexibility to make possession orders suspended upon terms that the tenant pays current rent and repays the arrears within a reasonable period, where appropriate.

INTRODUCTION

- 8. Garden Court Chambers is the largest barristers' chambers in London, comprising 192 barristers including 27 Queen's Counsel. We are a multi-disciplinary chambers, including criminal law, immigration law, civil liberties, family law and housing law amongst our specialisms. Our Housing Law Team is one of the largest specialist housing law teams in the country and has a reputation for excellence in this area. We are ranked in Band 1 for social housing by Chambers and Partners 2020 and are described in the directory as "*an outstanding set known for its superb representation of tenants, Garden Court maintains its position at the forefront of social housing issues*"
- 9. We cover all aspects of housing law including possession claims, unlawful eviction, homelessness, allocation of social housing, disrepair and housing benefit. Our practitioners also have specialist expertise in many of the discrete areas within housing law including Romani Gypsy and Traveller Rights, disability issues, welfare benefits, anti-social behaviour, community care, unfair terms in tenancy agreements, general planning matters, grants, licensing of houses in multiple occupation, housing standards, and the housing health and safety rating system. We are committed to representing tenants, other occupiers and homeless people.

10. Our barristers appear in high-profile test cases in the senior Courts (recent examples are Al-Ahmed v Tower Hamlets LBC¹, James v Hertsmere Borough Council² and Bromley LBC v Persons Unknown³). We also regularly appear in County Courts, undertaking work which may not be legally ground-breaking but concerns whether our clients can remain in their accommodation or not.
11. Our barristers are authors of several leading practitioners' textbooks in the area of housing law including Housing Allocation and Homelessness: Law and Practice (Luba, Davies, Johnston, Buchanan, LexisNexis, 5th ed, 2018), Housing Conditions: Tenants' Rights (Luba, O'Donnell, Peaker, Legal Action Group, 2018) and Housing Law Manual (Cottle et al, Law Society, forthcoming).
12. We have responded to the Covid-19 lockdown by continuing to represent our clients where Court hearings have been listed (generally by way of remote hearings). We have conducted webinars on the government guidance and other emergency measures concerning homelessness, rough sleeping, rent and possession. We communicate regularly with solicitors, housing advisers and others advising our client base.
13. Our response to the Inquiry is based upon our day-to-day experiences and issues that have arisen as a result of the Covid-19 emergency, together with regular discussions with our solicitors and client base. We also provide our opinion on the legal framework underpinning the government's measures.
14. We are all individually members of the Housing Law Practitioners' Association and have seen, contributed to, and support their response dated 1 May 2020. This response is intended as complementary to their submission.

HOMELESNESS AND ROUGH SLEEPING

The Everyone In scheme

¹¹ [2020] EWCA Civ 51, CA

² [2020] EWCA Civ 439, CA

³ [2020] EWCA Civ 12, CA

15. The Minister for Rough Sleeping and Housing, Luke Hall MP, in his letter to Local Authority leaders on 26 March 2020 outlined the government’s strategy in relation to rough sleepers and homeless persons during the Covid-19 pandemic.⁴ The letter stated that “*it is now imperative that rough sleepers and other vulnerable homeless are supported into appropriate accommodation by the end of the week*” (Sunday 29 March 2020), and set out a range of expected actions to be taken by local authorities in achieving this aim.
16. We are fully supportive of the stated aims of the letter and the Everyone In scheme. It is entirely appropriate and necessary during this public health crisis that shelter is provided to all, regardless of status and circumstances.
17. However, now a month on, there remain significant numbers of rough sleepers and homeless persons throughout the country who have not been supported into accommodation. The ongoing presence of homeless persons on the streets has been observed in the national press.⁵
18. We are concerned at omissions in the guidance, its relationship with the functions and duties at Part 7 Housing Act 1996 (“homelessness”), and the position of those who do not have a priority need under Part 7 Housing Act 1996, and the position of those who do not have recourse to public funds (No Recourse to Public Funds: NRPF).
19. Local authority accommodation duties and powers are a complex tapestry of distinct statutory frameworks. No one piece of legislation contains anything close to a general power to accommodate rough sleepers.

4 Letter from Luke Hall MP to Local Authority Leaders, 26 March 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876466/Letter_from_Minister_Hall_to_Local_Authorities.pdf.

5 “London is so strange and sad: the sacked hospitality workers sleeping rough” Guardian 27 April 2020 <https://www.theguardian.com/society/2020/apr/27/london-coronavirus-sacked-hospitality-workers-sleeping-rough> [accessed 28 April 2020].” “Rise in people sleeping rough at Heathrow as councils fail to provide accommodation” Guardian 21 April 2020, <https://www.theguardian.com/society/2020/apr/21/rise-in-people-sleeping-rough-at-heathrow-as-councils-fail-to-provide-accommodation> [accessed 28 April 2020].

20. Many homeless, both rough sleepers and the precariously housed, are continuing to fall through the gaps between the various statutory frameworks and support provided by the charitable homeless sector. This response addresses a number of specific concerns in turn.

Omissions

21. The guidance exhorts local authorities to “*focus on people who are, or are at risk of, sleeping rough and those in accommodation where it is difficult to self-isolate, such as shelters and assessment centres*”. The focus on rough sleepers is clear, and welcome. There is no guidance as to who might be at risk of sleeping rough. It would be helpful for government to give additional guidance as to what “*at risk of sleeping rough*” means and in particular at what point a local authority should intervene in order to prevent possible rough sleeping.

22. In addition, the guidance omits one particularly vulnerable group of people: those seeking to leave accommodation as a result of violence, usually domestic violence. It is well established that, whilst domestic violence can be perpetrated against men, far more women than men experience domestic violence and so the group consists predominantly of women.⁶ For those suffering domestic abuse, the choice they make if not accommodated is not usually to sleep rough but to return to the accommodation where they are at risk of abuse. It would be helpful if the guidance specifically incorporated providing emergency accommodation, without any priority need test, to those leaving accommodation as a result of domestic abuse.

23. Finally, the guidance does not offer any explanation as to the division of responsibilities between different local housing authorities. For example, if someone is accommodated by Council A in the district of Council B, under homelessness duties at Part 7 Housing Act 1996, and those homelessness duties end, so that the accommodation ends and the person is at risk of rough sleeping, is he or she the responsibility of Council A (who originally provided the accommodation) or of Council B (in whose district

⁶ Crime Survey England and Wales, March 2019: an estimated 7.5% of women (1.6 million) and 3.8% of men (786,000) experienced domestic abuse in the last year, <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabusevictimcharacteristicsenglandandwales/yearendingmarch2019> [accessed 30 April 2019]

the accommodation was situated)? We have already experienced disputes between local authorities as to the division of responsibility in those circumstances.

Relationship with Part 7 Housing Act 1996 (“homelessness”)

24. In general, local housing authority homelessness functions are contained at Part 7 Housing Act 1996 which provides for:
- a) The right to a written decision as to whether any duty is owed;
 - b) The right to request a review of the decision if adverse to the applicant;
 - c) A statutory duty to secure accommodation where certain conditions are met;
 - d) That any accommodation secured, whether under of a duty or a power, must be suitable for the needs of the applicant.
25. Those provisions are all enforceable by the applicant, either through the mechanism of an internal review followed by an appeal to the County Court (in respect of decisions which the applicant disputes) or by a claim in judicial review where the local housing authority is in breach of its statutory duty (for example, where it fails to secure accommodation, where the accommodation is unsuitable or where it fails to notify the applicant of the relevant decision).
26. The guidance is not issued under s.182 Housing Act 1996. It is not statutory guidance. There is no explanation as to what, if any, relationship it has with the functions at Part 7 Housing Act 1996. We would recommend that the guidance is re-issued as statutory guidance, so that those assisted by the guidance have the benefit of duties owed to them, and the right to request reviews of decisions adverse to them.

Priority Need

27. The letter recognises the imperative need to bring **everyone in** during Covid-19. The requirement that a person be in a priority need category in order to obtain homelessness assistance under the Housing Act 1996 is incompatible with the necessities of the present public health emergency.

28. We urge the Secretary of State to exercise his power under section 189(2) of the Housing Act 1996 to make an order classifying all persons as having a priority need for accommodation. It is noted that the priority need requirement for homelessness support was abolished in Scotland in 2012.
29. An order deeming all people who are rough sleeping, at risk of rough sleeping or otherwise homeless to have a priority need would have the effect that:
- i. There would be a duty on local housing authorities to secure accommodation for everyone; and
 - ii. Such accommodation would be required to be suitable for each person's needs; and
 - iii. Any dispute as to whether or not a person should be secured with accommodation and/or the suitability of the accommodation could be resolved through the dispute mechanism at Part 7 Housing Act 1996 rather than the more cumbersome and expensive procedure of judicial review.

Extension of priority need in more limited circumstances

30. If there is no overall abolition of priority need for the period of the crisis, then the categories of priority need should at least be extended.
31. Those persons with specific Covid-19 risk factors as identified by Public Health England guidance should be recognised as being automatically in priority need. It is however noted that a lack of specific risk factors is no guarantee that a person will not suffer an acute, and even a fatal illness as a result of contractive Covid-19.
32. We note with concern the increased incidence of domestic violence which is resulting from Covid-19 lock-down measures.⁷ It is imperative that those seeking to escape dangerous domestic violence situations at this time are able to reliably obtain alternative accommodation.

⁷ See open letter to the Prime Minister, 3 April 2020, signed by Women's Aid and other domestic abuse organisations: <https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2020/04/An-open-letter-to-the-prime-minister.pdf> [accessed 29 April 2020]

33. Persons fleeing domestic violence are not automatically deemed to be in priority need for accommodation for the purposes of homelessness assistance under Part 7 Housing Act 1996, and are required to prove that they are vulnerable as a result of leaving accommodation due to violence in order to access housing support (Art 6 Homelessness (Priority Need for Accommodation) (England) Order 2002, SI 2002/2051). Establishing vulnerability in the context of homelessness priority need is notoriously challenging, and the law in relation to this concept has become extremely complex.⁸ We note that Crisis, and other homelessness campaigns, have been lobbying for the abolition of the additional hurdle of vulnerability in this context and for that amendment to be inserted into the current Domestic Abuse Bill 2020.⁹
34. We urge the Committee to recognise that all those who become homeless as a result of fleeing domestic violence are vulnerable, and should be treated as in priority need. We recommend an urgent amendment to article 6 of the Homelessness (Priority Need for Accommodation) (England) Order 2002 removing the additional vulnerability requirement in relation to persons having “*ceased to occupy accommodation by reason of violence from another person or threats of violence from another person which are likely to be carried out.*”

No Recourse to Public Funds

35. The letter states that local authorities should “*utilise alternative powers and funding to assist those with no recourse to public funds who require shelter and other forms of support due to the COVID-19 pandemic*”.
36. The law relating to this area is complex and, in normal circumstances, many people who have no recourse to public funds (“NRPF”) will not be accommodated by local

⁸⁸ The concept of “vulnerable” was most recently considered by the Court of Appeal in Panayiotou v Waltham Forest LBC [2017] EWCA Civ 1624, [2018] QB 1232. Lewison LJ said “*the question to be asked is whether, when compared to an ordinary person if made homeless, the applicant, in consequence of a characteristic within section 189(1)(c), would suffer or be at risk of suffering harm or detriment which the ordinary person would not suffer or be at risk of suffering such that the harm or detriment would make a noticeable difference to his ability to deal with the consequences of homelessness. To put it another way, what Lord Neuberger PSC must have meant was that an applicant would be vulnerable if he were at risk of more harm in a significant way.*”

⁹ See <https://www.crisis.org.uk/ending-homelessness/appg-for-ending-homelessness/appg-for-ending-homelessness-statement-on-draft-domestic-abuse-bill/> [accessed 30 April 2020]

authorities.¹⁰ However, during this crisis, there are sound legal reasons for providing accommodation to NRPF individuals: control of disease (Public Health (Control of Disease) Act 1984, Coronavirus Act 2020) and the duty on public authorities to protect individuals' right to life, and not to subject them to inhuman or degrading treatment (Articles 2 and 3, Schedule 1, Human Rights Act 1998).

37. We recommend that the Committee urges the Secretary of State to clarify to local authorities that the duties under **Everyone In** are to be undertaken regardless of any eligibility, immigration status, or recourse to public funds status. If necessary, the general power of competence at s.1 Localism Act 2011 should be amended to make it explicit that it extends to providing accommodation to anyone in order to prevent a breach of human rights, and the boundaries of that power at s.2 Localism Act 2011 do not apply during the period of the Covid-19 emergency.

38. Measures to address this issue are essential to achieving the stated aims of the **Everyone In** scheme. NRPF persons form a large proportion of the rough sleeping population – their inability to access public funds leaves them with no alternatives to street homelessness.

Gypsies and travellers

39. We note that on 16 April 2020 the Minister for Communities, Stephen Greenhalgh MP, wrote to English local authorities in a letter entitled **Covid-19: Mitigating the impacts on the gypsy and traveller community**. The letter contained this advice “*Provisions for rough sleepers were set out in a letter from my colleague, Luke Hall, Minister for Rough Sleeping and Housing, to Local Leaders on 26 March 2020. Local Authorities may conclude that some Gypsy and Traveller communities, especially those living on unauthorised sites and lacking basic amenities, require alternative places to stop where access to facilities such as water pipes and water bowsers and portable toilets is provided, or can be made temporarily available.*”

40. Despite the above guidance, we are aware that gypsy and traveller communities camped on unauthorised sites have been required to move on by police, see

¹⁰ In general, a person will have NRPF status either because he or she does not have leave to remain in the UK, or because he or she has leave, with a condition of NRPF attached.

<https://www.travellerstimes.org.uk/news/2020/04/minister-accused-egging-racist-witch-hunt-after-traveller-camp-eviction-during>.

41. We ask the Committee to emphasise to the Secretary of State that gypsies and travellers should not be moved on or evicted from their encampments, whether authorised or unauthorised, without the provision of alternative sites on which to camp.

The end of the crisis

42. The Prime Minister and the Secretary of State for Housing, Communities and Local Government has both committed themselves to ending rough sleeping in the lifetime of this Parliament.¹¹ This crisis has given the UK the opportunity to consider long-term measures strengthening the homelessness safety net in the UK to achieve the ultimate aim of ending rough sleeping and ensuring adequate housing for all. The Minister's letter **Everyone In** has shown that rough sleeping can be tackled, and there can be a safety-net of emergency accommodation for everyone. We believe that a commitment to provide emergency accommodation for all should not be restricted to public health emergencies but should be the norm in any civilised society.

Summary of Recommendations to the Committee

43. We recommend that the Committee undertakes the following:
 - i. Urge the Minister to reissue his letter as statutory guidance and clarify the terms "*rough sleepers*", "*those at risk of sleeping rough*", to clarify the requirement to provide accommodation to those leaving accommodation due to violence, and to clarify the division of responsibilities between local housing authorities;

¹¹ Press release Prime Minister sets out new measures to end rough sleeping, 27 February 2020, <https://www.gov.uk/government/news/prime-minister-sets-out-new-measures-to-end-rough-sleeping> [accessed 29 April 2020]

- ii. Urge the Minister to provide, by way of statutory guidance, that the accommodation secured as a result of the letter has been secured under the functions at Part 7 Housing Act 1996;
- iii. Urge the Secretary of State to exercise his power under 189(2) of the Housing Act 1996 to make an order classifying all persons as being in priority need for accommodation;
- iv. Alternatively:
 - i. Urge the Secretary of State to make an order classifying those people with specific Covid-19 risk factors as identified by Public Health England as in priority need; and
 - ii. Urge the Secretary of State to amend the Homelessness (Priority Need for Accommodation) (England) Order 2002 to remove the additional vulnerability requirement in relation to priority need for those fleeing violence.
- v. urges the Secretary of State to clarify to local authorities that the duties under **Everyone In** are to be undertaken regardless of any eligibility, immigration status, or recourse to public funds status, and/or the general power of competence at s.1 Localism Act 2011 should be amended to make it explicit that it extends to providing accommodation to anyone in order to prevent a breach of human rights, and the boundaries of that power at s.2 Localism Act 2011 do not apply during the period of the Covid-19 emergency;
- vi. emphasises to the Secretary of State that gypsies and travellers should not be moved on or evicted from their encampments, whether authorised or unauthorised, without the provision of alternative sites on which to camp;
- vii. Consider long-term measures to reinforce rather than deconstruct improvements made to homelessness provision during the Covid-19 pandemic.

PRIVATE RENTED SECTOR

Insufficient and unacceptably delayed measures to protect renters

44. We ask the Committee to acknowledge that the government response in relation to protecting renters during the Covid-19 crisis was insufficient, and unacceptably delayed.
45. On 18 March 2020 it was announced by the MHCLG that there would be “*complete ban on evictions and additional protection for renters*”.¹²
46. Unfortunately the measures enacting these proposed changes at section 81 and Schedule 29 of the Coronavirus Act 2020 (in force from 26 March 2020) are far more limited in scope than expected. The measures only extend the notice period for fresh possession claims to a period of 3 months, and prevent fresh claims except those in which a valid 3 month notice has expired. Given the time it takes for claims to be heard and to reach enforcement stage, these provisions would not of themselves have prevented evictions in existing possession claims from continuing to take place during the Covid-19 crisis.
47. Court possession hearings continued to be listed, and evictions took place until 27 March 2020 when measures were taken by the Master of the Rolls and the Lord Chancellor in the form of an urgent practice direction 51Z¹³ staying all current possession actions, including enforcement (evictions), for an initial period of 90 days.
48. We recommend that the measures set out in Practice Direction 51Z are placed on statutory footing. Given the paramount importance of preventing an increase in homelessness during the Covid-19 pandemic, it is desirable that the sensible measures taken by the Master of the Rolls and Lord Chief Justice are given the weight of primary legislation.

Rent Arrears

¹² “*Press release: Complete ban on evictions and additional protection for renters, government announces radical package of measures to protect renters and landlords affected by coronavirus*”; Ministry of Housing, Communities & Local Government and The Rt Hon Robert Jenrick MP, 18 March 2020, <https://www.gov.uk/government/news/complete-ban-on-evictions-and-additional-protection-for-renters>.

¹³ Amended on 22 April 2020.

49. We are disappointed by the failure of the government to implement a suspension of rental liability during the coronavirus crisis, or at least an option for renters to apply for the same. Property owners have been granted the right to claim a mortgage holiday, however renters who have lost income due to Covid-19 are not at present to be granted any corresponding relief. This will leave many with significant arrears, which unlike the mortgage interest continuing to accrue for borrowers during mortgage holidays, will give rise to grounds for possession in the future.
50. The continued availability of no fault eviction, under s.21 Housing Act 1988, means that once the moratorium on possession claims has expired, landlords are likely to seek to evict tenants who were unable to pay their rent and tenants will have no opportunity to raise the reasons for their default, or to ask the Court to consider their personal circumstances or any other considerations.
51. In addition, Ground 8, Schedule 2 Housing Act 1988 remains available to landlord as a mandatory ground for possession, requiring the Court to order possession where rent arrears were eight weeks' or more at the date of service of the notice and eight weeks' or more at the hearing date. If those conditions are fulfilled, again there will be no opportunity for the Court to consider the reason for the accrual for the arrears, the tenant's personal circumstances or even whether a repayment plan is acceptable. We expect many tenants to lose their homes in these circumstances.
52. Neither s.21 nor Ground 8 give the Court the flexibility to make an order for possession suspended upon terms that the tenant is able to continue in occupation provided that s/he pays current rent and is able to repay the arrears over a reasonable period. Such suspended orders are available where a landlord seeks possession on a discretionary ground, such as Grounds 10 or 11, Schedule 2, Housing Act 1988 (s.9 Housing Act 1988). They are frequently used by Courts in order to strike a balance between the interest of the landlord in recovering the arrears and that of the tenant in retaining his or her home. They can only be made where the Court is satisfied that the tenant will pay his or her future rent, and arrears will no longer accrue, and the tenant is able to repay the arrears over a realistic period. If there is no such realistic possibility, an outright possession order will be made and the landlord will recover possession.

53. Limiting possession on the grounds of rent arrears to Grounds 10 or 11, Schedule 2, Housing Act 1988 would allow the Court to consider whether it was reasonable to make an order for possession and, if it was reasonable, whether it was appropriate to make a suspended order upon terms that the tenant repays the arrears over a defined period. This flexibility would do much to reduce the numbers of tenants who are likely to be evicted because of rent arrears accrued during the Covid-19 crisis, and reduce the humanitarian crisis and the demands on public resources that will accrue as a result.
54. Although the updated Local Housing Allowance rates are welcome, the increase will not prevent the accumulation of significant rental arrears throughout the private sector in particular.
55. Certain groups are likely to face particular difficulties in meeting their rental obligations following loss of income due to Covid-19: those who are NRPF, EEA nationals who face difficulty in obtaining universal credit due to lack of understanding as to their eligibility for benefits, and those who face other difficulties in claiming universal credit on-line.

Omissions

56. Where an occupation arrangement (tenancy or licence) falls within the terms of s.3 Protection from Eviction Act 1977, the landlord or licensor will need a Court order in order to obtain possession and cannot obtain an order until after 30 June 2020 (at the earliest). Most occupiers are therefore protected. However, the moratorium does not prevent the eviction of occupiers who are not protected by Protection from Eviction Act 1977. The most obvious example are lodgers, who are in particular vulnerable positions in that they are sharing accommodation with their landlord. In addition, those occupying accommodation provided by local authorities under homelessness functions or indeed functions under Children Act 1989 or Care Act 2014 are not usually protected by Protection from Eviction Act 1977.¹⁴ Any of those people could be summarily evicted during this crisis.

¹⁴ R (N) v Lewisham LBC [2014] UKSC 62, [2015] AC 1259, SC

57. We also fear an increase in unlawful evictions, where landlords are required to obtain possession orders, but since they cannot in the current moratorium, resort instead to evicting the tenant. An eviction of a tenant is a criminal offence (s.1 Protection from Eviction Act 1977) and a breach of covenant of quiet enjoyment in the tenancy. However, in order for the tenant to obtain redress, s/he would have to find legal representation at a time. It is well-known that there is a shortage of legal aid housing providers in normal times.¹⁵ A tenant evicted unlawfully during this crisis will struggle to find representation.

58. We are also concerned that during this crisis, landlords may fail to honour their contractual obligations at ss.9A and 11 Landlord and Tenant Act 1985, ie to keep the property fit for human habitation and to keep the structure and exterior of the property, and the installations for the supply of water, sanitation and other utilities, in repair. We are concerned that tenants may be living in substandard conditions, without the ability to pay their rent in full, and unable to obtain legal assistance to require their landlord to fulfil legal obligations.

The end of the crisis

59. We are concerned about the situation of renters following the end of the Covid-19 pandemic, particularly those in the private market, who will have accrued rental arrears due to lost income. Following the easing of lockdown measures, there will be no quick solutions for individuals who have developed financial difficulties, likely including other debt beyond arrears of rent. The economic impacts of the Covid-19 pandemic are likely to be deep and broad. It is far from certain how many will be able to quickly return to gainful employment / self-employment with comparative earnings to their pre-Covid positions.

¹⁵ Law Society: “Provision of legal aid advice for housing is disappearing in large areas of England and Wales, creating legal aid deserts.” Parliamentary briefing 24 April 2019, <https://www.lawsociety.org.uk/policy-campaigns/public-affairs/parliamentary-briefing/legal-aid-deserts/> [accessed 29 April 2020].

60. We welcome the concept of a broadened possession pre-action protocol (as proposed in the government statement of 18 March 2020¹⁶) encouraging private landlords to reach out to tenants to understand their financial position. It must be noted however that unless this is supported by legislative measures it will not prevent private landlords from seeking possession and evicting their tenants in circumstances in which arrears have arisen as a result of lost income during and following Covid-19. Failure to comply with a pre-action protocol will not invalidate a claim or give rise to a defence.
61. However, our view is that fairness can only be achieved if the no fault ground at s.21 Housing Act 1988 is abolished, before the moratorium is lifted. We note that the previous Conservative Government consulted on the abolition of s.21 and that the current government committed to its abolition in the Renters' Reform Bill announced in the Queen's Speech. We believe that s.21 should be abolished before the moratorium is lifted.
62. Abolition of Ground 8 would provide tenants with a further opportunity to get their finances back in order. But it also would strike a balance; landlords would still be able to claim possession on Grounds 10 and 11, Schedule 2, Housing Act 1988, i.e. grounds which potentially entitle the landlord to possess where there has been non-payment of rent but only if it would be reasonable to grant possession.
63. The difference between Ground 8 and Grounds 10 and 11 is that under the latter possession is discretionary rather than mandatory, so a judge could delay granting possession if the tenants were good payers who were suffering from debt after the Coronavirus outbreak and had a credible offer to reduce their arrears, or if the family was very vulnerable, or would have no prospect of being housed elsewhere. If, on the other hand, the circumstances were such that it was reasonable to make an order for possession, the landlord would obtain a possession order. Finally, Grounds 10 and 11 provide the Court with a more flexible discretion than Ground 8. The Court can make a possession order, but suspend it upon terms requiring payment of the arrears over a period, along with payment of current rent. Where a repayment plan is a realistic possibility, this allows a tenant to retain his or her home, whilst paying back the rent owed to the landlord.

¹⁶ See footnote 14.

64. A large increase in the number of evictions will lead to increased strain on local authority housing options and homelessness services, which are already being stretched to breaking point by the Covid-19 crisis.

Summary of Recommendations to the Committee

65. To prevent a national crisis of homelessness following the end of the Covid-19 pandemic, we recommend:

- i. the extension of the eviction-delaying measures both under section 81 and schedule 29 of the Coronavirus Act 2020, and under Practice Direction 51Z, for a period of 3 months beyond the easing of restrictions. This will enable tenants a brief period to seek work and stabilise their finances in a highly uncertain economic environment;
- ii. the placing of the measures contained in Practice Direction 51Z onto statutory footing;
- iii. the abolition of section 21 claims for possession;
- iv. the abolition of ground 8 of schedule 2 Housing Act 1988, allowing the courts to consider the reasonableness of making possession orders in **all** rent arrears claims and giving the Courts the flexibility to make possession orders suspended upon terms that the tenant pays current rent and repays the arrears within a reasonable period, where appropriate.