Technical consultation on consequential changes to the homelessness legislation

Consultation response by the Garden Court Chambers Housing Team

About the Garden Court Chambers Housing Team

1. Garden Court Chambers is the largest barristers' chambers in London. Founded in 1974, it has a long-standing commitment to defending human rights, undertaking legal aid work, and upholding the rule of law.

2. The Housing Team at Garden Court Chambers is comprised of 29 barristers with expertise in all areas of housing law, from unlawful evictions and welfare benefits to homelessness and allocations. Books by members of the team include *Housing Allocation and Homelessness* (LexisNexis, 2022) and *The Housing Law Handbook* (Law Society, 2020). Members of the team frequently represent applicants for homelessness assistance in Housing Act appeals and judicial review claims, and regularly appear in possession cases on behalf of the tenant/occupier. More details about our work can be found here: Top ranked housing law barristers | Garden Court Chambers | London, UK.

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Response to consultation

General

3. Our general position is that we warmly welcome the government's intention to repeal s.21 Housing Act 1988 and look forward to the forthcoming Renters' Reform Bill. We also welcome increased resources for local housing authorities to assist applicants to prevent their homelessness as prevention of homelessness, so that an applicant does not have to experience actual homelessness and can either remain in their existing home or move from one home to another without intervening homelessness, is clearly both beneficial for the applicant and cost-effective for local housing authorities. We supported the extension of the definition of "*threatened with homelessness*" from 28 days to 56 days and the current deeming provision at s.175(5) Housing Act 1996 that an applicant served with a valid s.21 notice is threatened with homelessness. We consider that early help to prevent homelessness is vital and that local housing authorities should be both required, under Part 7 Housing Act 1996, and encouraged, through the provision of resources and guidance, to do that.

4. This response deals with questions (1) – (3) inclusive in general terms (rather than specifically responding to Questions 1a – e, 2a – e and 3a- 3) then questions (4) and (6).

Q1 - 3

5. We recommend Option 2. We consider that it is necessary to retain a "*deeming*" provision by which recipients of notices to seek possession are deemed to be threatened with homelessness and that deeming provision should not be limited to specific types of notices.

The importance of deeming that an applicant is threatened with homelessness when a valid notice of intention to seek possession is served

6. The modern approach to homelessness assistance is that early assistance by local housing authorities, in the form of their prevention duty at s.195(2), is both the most cost-effective means of helping an applicant find their own accommodation and the most appropriate, so that the applicant does not have to experience the effects of actual homelessness (whether that is rough sleeping, hidden homelessness ie staying with friends or relatives or being provided with interim accommodation).

7. The deeming provision at s.175(5) is an important part of ensuring that local housing authorities intervene early in cases of imminent homelessness and offer tenants practical assistance so as to prevent actual homelessness.

8. Prior to the insertion of s.175(5) into Housing Act 1996 (inserted by Homelessness Reduction Act 2017), local housing authorities were too often advising applicants who had been served with notices requiring possession (under s.21 Housing Act 1988 or under other provisions), that they were not yet threatened with homelessness, that they should return to the local housing authority when Court proceedings had been issued, a possession order made and/or they had received notice of execution of a warrant. This should not have been the norm. Prior to the insertion of s.175(5), the Code of Guidance advised that assured shorthold tenants who had received a proper s.21 notice should normally be treated as homeless as it was unreasonable for them to continue to occupy (para 8.32 Homelessness Code of Guidance for Local Authorities July 2006, ODPM). Similarly, in *R v Croydon LBC ex parte Jarvis* ((1994) 26 HLR 194, QBD), the Court had emphasised that it was undesirable for a tenant, or an ex-tenant, to be required to hang on "*till the bitter end and require a court order*" (Collins J). Despite that, all too often tenants who had received a s.21 notice were turned away and told to return (see *Homelessness: how councils can ensure justice for homeless people Focus Report*, Local

Government Ombudsman, 2011). This practice was one of those found to constitute "*gatekeeping*" by local housing authorities.

9. The practice meant that local housing authorities did not engage, at an early stage where preventative measures could still make a difference, in efforts to persuade the landlord to retain the tenant or provide assistance to the tenant to find alternative accommodation. It also meant that tenants were left to face inevitable possession proceedings, to which they did not have a defence, and where they were often ordered to pay their landlords' costs. They were also required to remain in their property until receiving notice of a warrant to be executed, or even to remain there until shortly before the warrant was due to be executed. This practice caused significant stresses for tenants. It meant that the relationship between landlord and tenant worsened, as the landlord was required to bring possession proceedings and spend money on legal costs, and so any possibility of persuading the landlord to retain the tenant (a key part of prevention work) diminished. It placed an unnecessary burden on the court system. It also meant that local housing authorities, having advised the tenant that he or she had to remain in possession until notice of a warrant had been received, then had a short period of time to try to prevent homelessness and find alternative accommodation. All too often, those attempts were not successful and interim accommodation then had to be secured.

10. The insertion of s.175(5) was intended to stop this practice, so that local housing authorities were deemed to owe a prevention duty to recipients of valid s.21 notices. This has the effect that local housing authorities should draw up an assessment of the applicant's housing needs (s.189A(1) – (3)) and a personal housing plan (s.189A(4) – (7)) and take reasonable steps to help the applicant secure accommodation (s.195(2)).

11. If there is no deeming provision, then the fear is that local housing authorities (particularly those with most pressures on their resources) will revert to the old practices of refusing to take an application for homelessness assistance and/or deciding that an applicant is

neither homeless nor threatened with homelessness unless a possession order has been made and is likely to be executed within 56 days. For that reason, we do not agree with Option 1 and favour Option 2.

Type of notice subject to the deeming provision

12. We agree with Option 2 rather than Option 3, although we consider that Option 2 could be expanded to include all notices requiring possession or terminating tenancies, including those served on tenants by social local housing authorities. See further [17] and below.

13. We do not see why the deeming provision should be restricted to notices served on the basis of mandatory grounds of possession, as proposed in Option 3. We imagine that the reasoning is that a Court is more likely to make a possession order under mandatory grounds than discretionary grounds.

14. We consider that the point of the deeming provision is to ensure that a local housing authority's inquiries into whether or not an applicant is threatened with homelessness are relatively simple, straightforward and not elaborate or costly. If the deeming provision is restricted to notices served indicating mandatory grounds only, the local housing authority will be required to scrutinise each notice, thus spending time and resources.

15. We reiterate that the intention behind the deeming provision is that the prevention duty should be accepted, so that local housing authorities intervene at an early stage to assist the applicant to prevent his or her homelessness. There is no obligation to secure interim accommodation at this stage. Indeed, if the prevention duty succeeds in preventing the applicant's homelessness, resources will have been saved because the applicant will not require interim accommodation, no further inquiries will have to be made, and no further duty will be owed to the applicant.

Extension of Option 2

16. We note that the current proposal at Option 2 is that the deeming provision should apply to all valid notices served under s.8 Housing Act 1988. It would therefore apply to private rented tenants and to assured tenants of private registered providers.

17. We recommend that Option 2 be amended to include all notices indicating an intention to seek possession, or terminating tenancies (notices to quit).

18. Firstly, we do not see why there should be a discrepancy between tenants of two different social housing providers (notices served by private registered providers would be subject to the deeming provision; those served by local housing authorities would not). We recommend that notices of intention to seek possession served by local housing authorities should be subject to the deeming provisions. Such notices would be served under s.83 Housing Act 1985 (secure or demoted tenants), s.128 Housing Act 1996 (introductory tenants), or s.298 Housing and Regeneration Act 2008 (family intervention tenants).

19. We also consider that notices to quit, served on non-secure tenants and licensees, should fall within the deeming provision. The benefits of early help, which the deeming provision promotes, apply irrespective of who the landlord is and what type of notice is served

20. We repeat that the purpose of the deeming provision is to ensure that there is early intervention so as to prevent homelessness. We do not see why this should not apply to tenants of local housing authorities or to those served with notices to quit. Indeed, it may be that local housing authorities (in their capacity as landlords) are more receptive to efforts to avoid the need to issue possession proceedings and thus prevent homelessness (such as assisting the tenant to maximise welfare benefits, arrange a repayment schedule etc).

21. If the deeming provision does not apply to tenants of local housing authorities, or to those served with notices to quit, we repeat the concern that they will be required to wait until a possession order is made or even until they have received notice of a warrant to be executed. This exposes them to an order for payment of legal costs being made against them and to uncertainty and stress. It also means that prevention activities will only be undertaken at a late stage, are less likely to be successful and the tenant is more likely to become homeless and to require interim accommodation and the relief and main housing duty. And it places an increased burden on the court system.

Q4 Proposal to remove the reapplication duty at s.195A from the homelessness legislation

22. We consider that s.195A should be retained, with the appropriate amendment so that it applies to applicants who accepted a private rented sector (s.193(7AB)) or a final accommodation offer (s.193A(4)) and make a new application for homelessness assistance within two years. The ability to make a fresh application, without any scrutiny of priority need, helps to alleviate concerns about offers of tenancies in the private rented sector creating a revolving door of homelessness. We note that private rented landlords will be entitled to serve notices and bring proceedings for possession in the first two years of tenancy. If that is the case, and particularly if mandatory grounds are relied upon, then a homeless applicant who accepted a private rented sector offer or final accommodation offer will become homeless again within a short period of time. We hope that such cases will be rare. However, that in the rare case that a notice is served within the first two years from acceptance of the offer, tenants should have the protection of s.195A.

Q6 Public sector equality duty assessment

23. It is our understanding that all changes to homelessness duties and to private rented sector tenancies have a disproportionate impact on black and ethnic minority households and individuals. We note that black and ethnic minority people experience

homelessness to a higher extent than others do (see Homelessness amongst Black and minoritised ethnic communities in the UK: a statistical report on the state of the nation — Heriot-Watt Research Portal (hw.ac.uk)). We also note that they are more likely to be living in the private rented sector, (see Renting from a Private Landlord by Ethnicity, at Renting from a private landlord - GOV.UK Ethnicity facts and figures (ethnicity-facts-figures.service.gov.uk)). We therefore consider that these proposals will have a particular impact on those from black and ethnic minority backgrounds and that the public sector equality duty should consider that impact. However, for the reasons set out above we hope that the impact will be a positive one, if the options we advocate are pursued.

24. If we can be of any further assistance, please do not hesitate to contact us.

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