

**JRF programme paper:
Housing Market Taskforce**



Tenure rights and responsibilities

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This paper:

- discusses the rights, responsibilities, risks and problems faced by landlords, lenders and tenants;
- examines the problems associated with current housing legislation, particularly on social housing; and
- outlines options for the reform of tenure.

The Joseph Rowntree Foundation (JRF) commissioned this paper to contribute ideas for its Housing Market Taskforce, a two-year programme of work aiming to achieve long-term stability in the housing market for vulnerable households.

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Introduction

The research team have been asked by the Joseph Rowntree Foundation's (JRF) Housing Market Taskforce to conduct a review of tenure rights and responsibilities. The overall aims of the review are to:

- highlight the key socio-legal characteristics or attributes of housing tenures in the UK, providing an understanding the differing balance of rights and risks between consumers, the state and lenders or landlords across all tenures;
- appreciate the extent to which these characteristics or attributes are intrinsic to the tenure itself or dependent on the context in which they are operating (e.g. legal, political, social, economic, environmental, financial); and
- outline options for tenure reform that are relevant to the JRF Housing Market Taskforce's aims, including an assessment of their likely impact on vulnerable groups and housing market volatility.

The housing system in the UK is largely organised around tenure. This reflects the legal differences between different tenures. Nonetheless our analysis here focuses on tenure as used in housing policy. That broadly equates to three – social housing (provided by local authorities and housing associations – now termed Registered Providers, 'RPs'); private renting; and owner-occupation. Other non-mainstream tenures, such as intermediate forms of ownership, are also considered as they have become a policy priority since the early 1980s as well as, more recently, the site of legal contestation. In law, by contrast, there are two main tenures only: freehold and leasehold. The difference between law and policy derives from the focus of the exercise – policy focuses on the provider; law on the nature of the relationship. This does have significance in relation to intermediate tenures, which must fit into that legal categorisation, as well as more general issues about agreements between occupiers and providers (of housing or loans).

We have structured our response around three key themes: regulation; access; rights and responsibilities. Regulation and rights and responsibilities take different forms of legal approach: regulation is primarily concerned with the state overseeing the operation of certain providers of housing and housing finance. Rights and responsibilities is concerned with the legal relationship between providers and occupiers (be that mortgagor and mortgagee or landlord and tenant). We include access as a distinct theme as it does not sit neatly within either regulation or rights and responsibilities. Access to different tenures may be regulated, and those seeking a home may have rights in relation to certain providers. However, those seeking to occupy a particular home sit outside the formal legal relationship until the provider enters into a mortgage or tenancy with them. The themes interrelate and interact. The access available to a particular tenure will ultimately govern the legal rights

and responsibilities that are entered into. Regulation may well apply a control on how providers use their rights.

An analysis of risk permeates this review, although risk is deployed differently in each theme. The regulation of providers is currently designed to minimise the risk of insolvency and impropriety; the regulation of access is deployed to minimise the individual and social risk of homelessness; the distribution of tenure-based rights and responsibilities is deployed differently dependent upon the primary focus of the statutory regimes. The dilemma for regulation and risk minimisation which the law finds difficult to resolve is whether the home is a consumer good, a social good or a vehicle for investment.

Our analysis is selective because of the nature of the brief as well as the status of the members of the Taskforce. We have included some differences from Scotland and Wales, because devolution provides a laboratory for legislative change. In Wales the legal structures have until now been essentially the same as in England, but with the new devolved powers on housing this is likely to change in the future (Hoffman, 2010).

Accountability gap

One further introductory point should be made, which is important when considering legal rights. As Genn (1999) found, there is an accountability gap between households which experience an injurious or damaging event and their response to that event – a large proportion of households ‘lump’ such experiences. It is one thing to give attention to balancing rights and responsibilities, but it is quite another to ensure that those rights and responsibilities are the subject of proper accountability processes. The gap is particularly significant at the low and no income end of the spectrum. Access to legal services for such households is subject to constant restraint through the legal aid budget, a by-product of the method of contracting between advice agency and the Legal Services Commission, and the shift away from face-to-face to telephone advice (see Lord Justice Jackson, 2009: Ch 26).

As an example, Cowan et al. (2006) have noted that, although it seems likely that more homeless applicants use the internal review process as opposed to judicial review under the old scheme and that the internal review process is likely to have a greater impact on initial decision-making, there remains a gap between the numbers of applicants who receive negative decisions and the numbers who seek an internal review. Various reasons can be postulated for that gap (Cowan et al., 2003), partly related to the homelessness process itself, but the key point here is that poor quality decision-making can be effectively affirmed by ‘lumping’.

Conversely, there are times when it appears that there is ‘over-enforcement’ of rights as a result of the involvement of ‘claims farmers’, although it is intended that certain such organisations be regulated out of the industry. Over-enforcement can lead to perverse consequences – so, for example, at one stage it was said that Birmingham City Council spent more in defending

claims brought as a result of disrepair than they did in actually conducting repairs.

There is a broader issue about the enforcement of rights and responsibilities by households. There are a range of potential dispute resolution mechanisms, from courts, tribunals, ombudsmen, internal reviews, external reviews; and styles, from adversarial, inquisitorial, investigatory, administrative checking. It is perfectly possible for a dispute to be open to more than one and, further, it is not always apparent which forum/style would be most appropriate for the particular dispute.

Structure of this paper

In this paper we first provide a scene-setting chapter which takes an overview of the three themes. We then take a more systemic approach to the themes by focusing on a number of key issues which both illustrate the interaction between our different themes and reflect key policy issues with which the JRF Housing Market Taskforce were concerned. These issues are:

- intermediate home-ownership;
- access to social housing;
- problems of tenancies (both social and private rented);
- repossession and arrears.

This analysis is followed by a conclusion where we set out some recommendations for reform

Setting the scene

In this section we take an overview of our three themes: regulation, access, and rights and responsibilities. We provide a brief overview before applying these themes to the particular issues.

Regulation

A range of techniques are available to those seeking to regulate housing providers. There is a spectrum of command and control; compliance; economic and self-regulation. The techniques available are rarely used singularly but in combination with each other, nor are they as 'pure' as might appear at first sight. An approach which gives primacy to the command and control technique is usually adopted as a last resort after consideration of alternatives in consultation with the interested parties.

The regulation of private sector landlords shows how governments have vacillated between different approaches to regulation and how they operate in combination. A range of regulatory techniques have been and are still used. Statutory forms of essentially command and control regulation such as selective licensing and tenancy deposit regulation seek to distinguish between 'good' and 'bad' landlords.

Accreditation schemes are essentially a form of economic and self-regulation run by landlord bodies, local authorities and universities that have supplemented statutory regulation and may be used to 'passport' landlords through the statutory regulation. The primary regulatory body is the local authority. It covers the arbitration of property quality; the designation and operation of licensing systems; the organisation and education of local private landlords; the adjudication on behaviour, broadly conceived, on the part of both landlord and tenant; the mediation of landlord-tenant disputes; and the prosecution of landlords in cases of harassment and unlawful eviction. There is, however, a tension in this developing role as local authorities have an increasing dependence upon the private rented sector to fulfil their statutory homelessness duties.

Most recently, the favoured regulatory techniques incorporate elements of a principles-based approach – such as that adopted by the Financial Services Authority (FSA) in relation to mortgage regulation and especially the 'Treating Customers Fairly' regime – and co-regulation – that is to say, a notion of a shared enterprise between regulator, the regulated and other groups, such as tenants: the Tenants Services Authority (TSA) approach fits this model. A particular challenge is mobilising occupier interest in regulation. The occupier is now labelled a consumer in regulatory terms (if not in law) and the consumer's interests are now balanced with private, public and community interests.

As one surveys the regulation of housing tenure, it is perhaps trite to note that the everyday reality is complex and messy. Partly, this is caused by the diversity of regulatory techniques, which have been developed in a haphazard way and indicate a seeming lack of coherence. Partly, this is because of the crowded 'regulatory space' (Hancher and Moran, 1989). In Appendix 1, we set out the different types and forms of regulation of the different tenures to capture the complexity of this across the different forms of tenure.

Access

We deal in Section 4 with the issue of access to social housing. Access to this tenure has the greatest level of legal intervention. In relation to owner-occupation and the private rented sector, access is primarily governed by price mechanisms, influenced as they are by a variety of external factors such as benefit entitlements and fairness in the terms of the agreement. The access point can also determine final outcomes of disputes between provider and occupier. It is at this point that the occupier can influence the contractual arrangements between themselves and the provider; thereafter, those arrangements are generally set in stone, subject to variations usually allowed by the provider alone. Whereas traditional contract law regards parties to the agreement as being free to negotiate terms equally with equal knowledge about the law, that assumption is hardly borne out by everyday experiences. It is for this reason that there is regulatory intervention, e.g. to regulate the information which must be given to borrowers by financial advisers and lenders when advertising and selling mortgages.

Rights and responsibilities

The conventional understanding of rights and responsibilities relating to tenure is that the unencumbered freeholder has the greatest autonomy and faces minimal risks. He or she has almost unchallengeable rights to use and deal with his or her property and limited responsibilities. The autonomy of occupiers declines dependent upon status, so that the long leaseholder is more vulnerable than the freeholder and the assured shorthold tenant faces the greatest risks to his or her occupation.

Whilst we would accept that this plan has validity and in particular exposes the vulnerability of the unprotected tenant to market forces, we would also suggest that it has some limits. In particular, occupiers' ability to manage risk is not identical but stratified according to the financial resources available to him or her.

For example, the owner-occupier unencumbered by a mortgage who does not have sufficient income to maintain his or her property, to adapt it to his or her physical need, or to move to an environment which may be more suitable for his or her needs, faces a decline in the financial value of his or her asset and in its use value to him or her. Nor is he able to use the value of the asset to raise income. On the other hand the assured shorthold tenant who is financially secure and mobile is in a position to negotiate favourable terms

and to exercise considerable control over his or her occupational location despite minimal legal protection.

We can organise the risks facing occupiers into four broad categories: responsibilities and risks relating to status and security; to affordability; to autonomy (in the sense of dealing with the property); and to physical condition and behaviour. We largely deal with status and security in Section 5 in relation to tenancies and, in Section 6, in relation to repossession for arrears. Here we make some preliminary points about these issues and deal more briefly with the other three categories we have identified.

Status and security

Status and security are primarily concerned with the rights of an occupier to remain in his or her home. In what circumstances can those rights be terminated? For owner-occupiers the greatest risk comes from repossession by a mortgagee (which we examine in Section 6). Nonetheless for owner-occupiers in flats there are also considerable risks posed by the nature of flat ownership. The vast majority of flats are bought on long leases. Such leases are a wasting asset which may become unmortgageable. There has been statutory intervention to permit enfranchisement and lease extensions and constrain forfeiture of the lease for breach of its terms (e.g. non-payment of service charges). There appears to be an undisputed view that the law on forfeiture is in urgent need of reform. As stated by the Law Commission (2004, para 1.1) 'it is complex, it lacks coherence, and it can lead to injustice'.

The Law Commission (2006b) put forward a comprehensive reform measure in 2006. Notwithstanding government agreement that the right to forfeit a lease should be abolished altogether (ODPM, 2002) the proposed legislation has not been enacted. Commonhold provides an alternative to long leasehold ownership by combining freehold ownership of a unit (for instance a flat) in a development with membership of a commonhold association, which owns the building and common parts. The commonhold has not proved a popular form of tenure (in 2008 it was reported that only some 17 schemes were in existence: Harpum et al., 2008, para 33–001; Smith, 2009).

The risk for tenants (whether of flats or houses) has always carried greater risk of loss of home. A complex set of statutory interventions overlay the common law relationship between landlords (both social and private) and tenants. These are summarised in Appendix 2.

We discuss some of the issues that arise from this in Section 5. The complexity of security has been added to over the last 15 years for occupiers of social housing by the creation of a number of new tenancy types, in particular the introductory/starter and demoted tenancy.

Early data suggested variable take-up of introductory/starter tenancies (Nixon et al., 1999), but estimates suggest that these now account for 72 per cent of all new lettings in England, and that starter tenancies account for 42 per cent of all new lettings by RPs (Pawson et al., 2010).

In the private rented sector, the Housing Act 1988 governs security. Tenancies protected under the Rent Act 1977 are in steep decline (comprising less than 5 per cent of all lettings; see CLG, 2010, table 731). Private landlords may offer fully assured tenancies, but in practice the assured shorthold tenancy (AST) is most frequently used, comprising 67 per cent of private rented tenancies in 2007–08 (CLG, 2010: table 731). The AST provides a minimum security of six months. While in practice many ASTs may offer longer security than six months, over 80 per cent are either periodic or for a period of less than 12 months (Reynolds, 2005). Possession proceedings are made simpler and cheaper by the availability of the accelerated possession procedure which enables the landlord to obtain a possession order by means of a paper-based procedure.

Affordability

Affordability is often a determinant of access to a housing tenure. Once access has been achieved there are very few controls over the payments which have to be made. For owner-occupiers the costs of their home comprise the price paid, and if they have had to take out a mortgage, the repayments they make under the mortgage. There are, of course no *legal* controls of house prices, and very few of mortgage costs. Where a mortgage is subject to the Consumer Credit Act 1974, the court does have power to intervene in 'unfair agreements' (see section 140A and 140B).

Since the Housing Act 1988, there have been very few legal controls of rents either. Although private tenants may challenge excessive rents or rent increases, such challenges are relatively rare: only 1,031 such cases going to the Rent Assessment Committee in 2008–09 (RPTS, 2009).

Rent setting by Registered Providers (RPs) and local authorities is controlled by administrative and financial measures from central government rather than any rights between the tenant and the landlord, and therefore a matter of regulatory rather than rights-based control.

A different set of rights may arise from government assistance with costs. The availability differs according to tenure. Up to 100 per cent of the costs of social rents is available, private rent costs are subject to some capping, and only interest payments are covered for mortgagors. Whilst assistance is available immediately with the costs of rents, mortgagors have to wait, currently, 13 weeks before entitlement to benefits arises. This has been further enhanced by the Homeowners Support Scheme introduced by the Brown Government in the wake of the credit crunch. It may be noted however, that there is no 'right' to participation in the scheme and take up has been negligible (Wilcox et al., 2010).

Autonomy

An important set of rights which relate to the home are those concerning the ability to transfer to new ownership (alienability) and other dealings with the home. While owner-occupiers may sell their home and indeed use it to raise

capital for other purposes, the legal constraints on tenants dealing with their home are considerable and, in general (except in limited cases such as the right to exchange for secure tenants), they are unable to do so. In this section we look at some particular issues which arise in relation to dealing: transfer of the home to others on death, and rights to permit some occupiers the right to change their tenure.

The right to pass on the home on death is significant. For owner-occupiers this can be achieved through the usual testamentary means through a will. Shorter tenancies whether secure, assured or assured shorthold are also property which can pass on death. In general, there can be only one succession to a limited group of persons, defined mostly by relationship to the deceased tenant, and subject to such a person occupying the property for a certain period.

A number of statutes allow occupiers an opportunity to change their tenure status, provided they meet certain conditions. For long leaseholders these rights are generally 'ill-drafted, complicated and confused' by the Vice Chancellor in *Denetower Ltd v Toop* (1991) 23 HLR 362. Indeed, in the case of any form of collective purchase the law is complex and difficult for leaseholders to navigate.

More straightforward, perhaps, are the right to buy of secure tenants and the right to acquire of assured tenants of RPs. The provisions are well enough known not to need setting out. In legal terms the main disputes arise from joint purchasers, often across generations, who subsequently fall out (Davis and Hunter, 1996).

The position of intermediate home-owners is usually provided for in the terms of their purchase. We discuss this further in Section 3 on intermediate home ownership.

The mortgage rescue scheme currently in operation provides for a move from owner-occupation into social renting or into intermediate home-ownership. Again it may be noted that these schemes do not provide for this as of right and the numbers assisted remain relatively small (Wilcox et al., 2010; CLG, 2010: table 1303). Further, tenants do not get any form of long-term tenancy security as the tenancy they are offered will be an assured shorthold tenancy. Mortgage rescue schemes are very different from private sale and lease back schemes being offered in the private market. These are now regulated by the FSA.

Physical conditions and behaviour

In this section we consider the rights and responsibilities for the condition of the home and the neighbourhood. In so doing we consider not only the physical condition of the home and neighbourhood, but also rights and responsibilities in relation to broader questions of conduct inside and outside the home.

The freehold owner of property bears the responsibility for maintaining the property and benefits from doing so. For long-leaseholders the lease sets out who is responsible for maintaining and/or improving different parts of the building. Statutory interventions through the Housing Act 1985 and subsequent legislation are designed to prevent exploitation of lessees, although there is little protection for the lessee who simply cannot afford reasonably proposed works. The position for residential tenants whose leases are for a period of seven years or less is that responsibility for repairs to the structures and exterior of the premises and for the services provided to it lies with the landlord.

The conduct of occupiers within the home is subject to the law of nuisance, whatever the tenure. Nuisance will cover any behaviour on a property which interferes with the use and comfort of the neighbouring land. In addition most long leases and tenancy agreements will have terms which control the use to which the premises may be used, and conduct which is permitted within the premises. Failure to comply with these terms may lead in the case of long leaseholders to forfeiture proceedings, and in the case of secure, assured or assured shorthold tenancies to possession proceedings.

There are no responsibilities on occupiers to maintain the environment of their neighbourhood, and owner-occupiers and long leaseholders face no property consequences as a result of their behaviour outside of the home. Private landlords too have resisted imposing any responsibility for the actions of their tenants outside the home (Carr et al., 2007). Here we can see a stark distinction with tenants of social landlords – there has been an extension of responsibility (by amendment in 1996 to the relevant grounds for possession in the Housing Acts 1985 and 1988 from behaviour towards ‘neighbours’ to behaviour in the ‘locality’). When this is combined with liability for other members of the household we can see the stark differences between the tenures. Hunter (2001: 234) concludes:

“It seems inconceivable that an owner-occupier whose teenage son is convicted of burglary in the surrounding area should be evicted from his home. Yet, this is what happens to tenants in social housing.”

Intermediate home-ownership (IHO)

Other papers which have been prepared for the Taskforce consider the role of IHO. Our purpose in this chapter is to identify a significant legal problem, together with other issues arising out of the nature of the model leases and practice in IHO transactions. There are obvious risks in the transaction as the very purpose of IHO is to extend home-ownership to lower income households which, by their nature, are more 'risky'.

In essence, IHO 'stretches' home-ownership to such households, because buyers purchase a share of a property, usually paying some sort of periodic fee to the provider on the remainder. It is intermediate both because it offers something between buying and renting, but also because it is assumed that buyers will move on to 'full' ownership at some stage in the future. The major providers of IHO are RPs, but private sector housebuilders have also developed schemes (particularly during economic downturns) and variants on them have been promoted, or at least considered, by private sector providers (see HM Treasury/CLG, 2006; CLG, 2008); indeed, there are issues over competition between RPs and private housebuilders, particularly during economic downturns (Burgess et al., 2009).

The problems

The legal problems have arisen because the stretching of home-ownership requires a rather crude 'bolting together' of existing legal frameworks in order to create a new legal framework for the product, now marketed as 'HomeBuy' (with different variants).

There is some weak evidence that IHO buyers perceive themselves to be 'owners', but, in the analogy of Bright and Hopkins (2010), IHO in law bears a similarity with the 'Emperor's New Clothes' tale. Although there are variations on the theme, generally IHO boils down to two particular types of legal arrangement. The buyer buys either (a) the freehold but a share in the equity of the property (HomeBuy direct), or (b) a long lease of the purchased share (most of the other scheme types) (Bright and Hopkins, 2009: 338). Although, in principle, complex legal issues can arise in relation to the former type, the main issues have arisen with type (b) on which this section focuses. It should, however, be stressed that these are the types which predominate within the social housing sector (including some profit-making organisations).

Under the long lease type, the provider retains the freehold title to the property. The buyer obtains a long lease representing their share, usually of 99 years; they pay a sub-market rent on the remainder, which should be set at no more than three per cent of the open market valuation of the provider's share. Although the lease is long, it will usually attract the protection of the Housing Act 1988 and is usually an assured tenancy (the exclusions to security of tenure in Schedule 1, Housing Act 1988 are unlikely to apply because of the high rental element).

The Homes and Communities Agency (and its predecessor, the Housing Corporation) promote model leases, which funded providers can either adopt or use their own provided they have the core terms of the model leases (see CML et al., 2010: para 14). Buyers usually purchase a minimum stake of 25 per cent, although different schemes have different minimum amounts, and they can subsequently purchase further shares – either en bloc or incrementally may increase the stake by a minimum 10 per cent until they own the property outright. (Unlike for other leasehold properties, enfranchisement is not permitted.) Subsequent purchases are referred to as ‘staircasing’ (and there are different rules about staircasing in certain protected rural areas). There is no provision for downward staircasing (only upwards), although some providers do have such provisions in their agreements (see CML et al., 2010: paras 6 and 62–74). That limitation is effectively to protect business planning and mortgagees. Most schemes have minimum periods of ownership and there may be other restrictions depending on, for example, if the development was built through a section 106 agreement or in certain protected rural areas.

There are three key provisions in the model leases of which note should be taken (although they have yet to be the subject of major litigation):

- the buyer takes *entire* responsibility for repairs and maintenance to the property, *irrespective of the size of share purchased*; they may have to pay a service charge in relation to common parts;
- there are restrictions on alienation (or transfer of ownership) of the whole or part of the property to protect public funds, and rights of pre-emption.
- a further key provision, often overlooked in the policy and evaluation literature, is a mortgagee protection clause, designed to give further comfort to the lender by entitling them to recover part of their loss where they take enforcement action on default by the buyer, provided that the loan had been approved in advance by the provider (clauses 6.1–6.6). This clause effectively removes at least part of any commercial disadvantage to the mortgagee because the provider underwrites part of the lender’s loss (giving an incentive to the provider to ensure that their financial checks are sufficiently robust at the outset) (see CML et al., 2010: para 15 and 18–23). Nevertheless, there is some evidence that the range of lending products which is available for a standard purchase is not available to those buying a share through IHO, so that loans are more expensive for IHO (CCHPR, 2008; McKee, 2010: 44–5).

The major legal problem concerns arrears of rent under the outstanding rented element. In such circumstances, it is open to the RP or other provider to bring possession on the usual grounds. These grounds include the mandatory possession ground – Ground 8 – where there are two months’ arrears at the date of the notice and at the date of the hearing. Possession should, in theory (as the ground is mandatory), follow as a matter of course. It is known that at least three RPs use Ground 8 in IHO cases (Pawson et al.,

2010). However, the consequences of such proceedings are also potentially disastrous:

- The buyer would lose their entire capital stake in the property;
- The mortgage lender, technically, would also lose their security interest, although there are other options available to them (such as staircasing or paying the arrears) to forestall the process.

The same consequences would follow if possession was sought on the discretionary grounds for rent arrears or other such grounds, including the behaviour of the occupier or their visitor (under which the RP must also show that it is reasonable for a possession order to be made). Indeed, on the behaviour ground, it is difficult to see what action a mortgage lender might take to avoid the consequences of a possession order.

Potential defences to possession on the mandatory ground (including human rights-type defences) have been raised, but dismissed. There appears, therefore, to be a significant risk to the buyer, of which they may be unaware at the time of purchase or, if aware, might not recognise its significance.

A reform agenda

It is recognised that IHO relationships involve a complex of interlocking policy and legal objectives, with the specific purpose of providing some degree of comfort for lenders. Nevertheless, there are elements of the relationship which have emerged as described above and which appear, on their face, to be disproportionate. In this section, we detail an agenda which seeks to balance the rights and responsibilities, with particular attention to the often forgotten key player: the buyer.

Protection of buyer's capital stake: At a minimum, the buyer's capital stake should be protected where the RP or other organisation seeks possession. In one case, *Midland Bank v Richardson*, the buyer was at risk of losing her capital stake which amounted to £29,500 at the time of purchase, rising to about £37,500 at the time of possession (as a result of market uplift), because she was more than two months in arrears of rent. The RP or other provider would take this stake. This cannot be a sensible, proportionate outcome, unless one considers that the 'profit' to the RP reflects their risk in engaging in the transaction in the first place.

Limitation of grounds for possession: The issue here is whether it is appropriate for an RP or other provider to seek possession of a property bought through an IHO arrangement by using a mandatory ground for possession based on rent arrears. Other options are, of course, available to the RP or other provider which, it is recognised, are less secure in that the order would be at the discretion of the district judge. However, that is entirely appropriate in cases where the occupier has a significant stake in the property itself. It is difficult to justify use of the mandatory ground. This reform option could, sensibly, be achieved through 'soft' forms of regulation (requiring

providers to desist from its use) as opposed to wholesale reform (although see below for discussion of the unregulated sector).

Responsibilities for repairs: if a buyer has a share in the property of less than 100 per cent, they are still responsible for the *full* cost of repairs on the terms of the model leases. This, again, seems disproportionate. Repairs increase the value of the property, in which the RP shares. There is, then, a disincentive on the buyer to repair the property as they will not see the full benefit. It is not known whether this has an effect on buyer behaviour (an empirical question), but, in any event, it seems disproportionate particularly when buyers, by their nature, are within the more marginal income groups. This reform option could be dealt with through alteration to the model leases.

Exchange professionals and transaction costs: IHO arrangements are complex and still relatively unusual (compared with the standard conveyance). Transaction costs are, therefore, likely to be commensurably greater. There are concerns, though, that exchange professionals are less clear about the relationships and the products themselves. This is not a reform option per se, but one which chimes with the underlying ethos of this paper – the consumer perspective – and this section, which suggests that the buyer is a forgotten key player in IHO.

Incorporating the unregulated sector: A variety of providers now offer IHO-type arrangements. RPs are regulated in the usual way, through the TSA, external audit, and, possibly, through human rights and other equalities obligations. However, there is a tranche of providers, predominantly within the construction industry, that is not subject to the same regulation and about which little is known. The reason for that regulatory silence is because RPs, as providers of social housing and recipients (or potential recipients) of public funding, are properly the subject of regulation. Commercial sector providers operate outside the ‘social’ sphere and are not in receipt of public funding (or, if they are, will be RPs). Nevertheless, they are offering similar products, in competition with RPs, to presumably similar households in terms of their economic position in the market. Those buyers do not have the same protections as IHO buyers from RPs, a fact which may not be known to them. Were one to bring commercial providers into the regulatory embrace of the TSA (or equivalent), there are likely to be commercial advantages to them, most particularly the external audit by the relevant agent of a buyer’s ability to meet repayments as well as the mortgagee protection clause.

Conclusions

The proposed agenda here is modest and proportionate, of the ‘sticking plaster’ type as opposed to full-blown reform. This recognises the significant profile of IHO in government housing policy, which was re-affirmed by the Coalition Government. However, what it also seeks to do is insert the buyer as a key actor, whose interests merit protection as much as lenders. It also recognises that, at least for some buyers, IHO is neither a sensible nor a rational product in which to invest as a ‘home’.

Access to social housing

It is clear that reforming access to social housing is 'on the radar' of the Coalition Government, although much of what has been reported is as yet unclear (indeed, the reported proposals reflect current law and practice).

Here we draw attention to six broad issues: the prevention of homelessness; legal scrutiny; the potential impact of the 'indigenous agenda'; mobility; exclusions; and tenure. We also address a possible reform agenda, which is limited to responses to perceived current defects in the present position and does not seek to speculate on other proposals. It is not our view that there is anything fundamentally wrong or misconceived in the allocation of social housing according to need – one may, of course, have different views on the needs which should be prioritised. However, the current statutory regime enables (requires, in fact) local authorities to develop local allocations schemes, with an exhortation towards regional and sub-regional schemes

Six issues

Prevention of homelessness

Prevention of homelessness currently animates much cross-cutting policy discussion, and rightly so. However, prevention must be balanced against the low threshold for the duty on local authorities to conduct an assessment of homelessness. If the local authority has reason to believe that a household may be homeless or threatened with homelessness, they come under a duty to make appropriate enquiries (s 184(1), Housing Act 1996). That duty may arise without the household making a formal application as homeless. This shift in policy from a reactive to proactive, preventative approach can lead to the denial of basic rights.

The current mechanism for delivery of housing advice prioritises the diversity of housing options available to households, a homelessness application being just one such option. There is concern that the housing options advice model operates as a 'gatekeeping' process, encouraging the use of alternative options (Pawson, 2007: 872). So, for example, most recently, concern has been expressed about Lambeth Council's policy of providing tenancy deposits for use in the private rented sector rather than taking homelessness applications may be an example of a blanket policy to avoid a statutory obligation (*R(Raw) v LB Lambeth* [2010] EWHC 507 (Admin)). Our (untested) assumption is that there are a greater number of emergency applications for judicial review in 'prevention' cases.

Legal scrutiny

At one extreme, it might be said that social housing allocations now operate in an increasingly legalised environment; that is, individual decision-making and policy decisions are both subject to legal scrutiny as well as being influenced by legal principles and priorities. This has been one of the stand-out

developments of the past 30 years. It infiltrates particularly into local authority processes and practices, but hardly at all, it seems, into those operated by RPs (see Cowan et al., 2008), although the shift to more ‘transparent’ techniques implied by choice-based lettings suggests that this might alter (Cowan, 2008). At the same time, the direction of legal scrutiny on allocations has now regressed as a result of the construction placed on the law by the House of Lords in *Ahmad v Newham LBC* [2009] UKHL 14 (see CLG 2009a) (and only to a point – see Cowan, 2009).

We might ask whether such direct challenges to local authority allocations through judicial review and/or a county court appeal (s 204, Housing Act 1996) offer appropriate techniques for improving local authority and RP practices. As Cowan et al. (2006) demonstrate, for a variety of reasons, a system of internal review which operates closer to the initial decision-making is more likely to have an ‘impact’ on subsequent decision-making by the organisation than challenges which take place in more remote locations. In any event, a substantial proportion of judicial review applications and county court appeals are settled at some stage before the formal hearing (Bridges et al., 1995), which does neither party any particular social good.

The ‘indigenous agenda’ and outstanding equalities issues

A recurrent theme in recent policy-making has been concerns over the balance between inward migration to a locality against the needs of the local community. This was expressed somewhat unfortunately by Margaret Hodge by reference to an undefined notion of indigeneity, but it has also been driven by the electoral success of the BNP (cf. Robinson, 2010). In their recent addition to the Code of Guidance on allocations (CLG, 2009a), the government has sought to develop its approach to this issue by calling for greater transparency in the development of the principles and policies on allocations locally (at paras 34–53). It has been, perhaps, slightly over-ambitious in this agenda of consultation, partly because it is unclear whether local authorities have sufficient resources to engage in the level of consultation suggested or expected; and, in carving out a role for local authorities, it has arguably left a vacuum centrally in defusing any tensions.

There is, in fact, a rather different story to tell about the exclusions of large numbers of households from the waiting list for social housing (see below).

How we respond to this agenda is important because that response can affect our response to a variety of other issues. For example, if the response is to increase the priority given to local connection, then this can have an impact on the equalities and mobility agendas, as well as the proportion and quality of properties allocated to homeless households.

On the broader issue of equalities duties, the evidence on the impact of choice-based lettings (CBL) appears more equivocal now than it has done so. Pawson et al. (2006:14–37) found evidence that CBL has led to deconcentrations of minority ethnic settlements in social housing (cf. Phillips and Harrison, 2010: 232–3), which runs counter to some assumed alternative perspectives that minority ethnic households choose to concentrate together

or are constrained by their needs. Van Ham and Manley (2009), in fact, found that choice-based lettings contribute to the segregation of ethnic minority groups. The difference from the Pawson et al. study can be accounted for in part by the difference in method and approach. Whereas Pawson et al. focused on a number of case studies (local authority and RPs), van Ham and Manley drew on CORE data of RPs. Further, as van Ham and Manley (2009: 42) note, 'if real choice is absent under choice-based lettings this may lead to selection into ethnic concentration neighbourhoods without applicants having a preference for such neighbourhoods' (see also Jeffers and Hoggett, 1995).

Mobility

Mobility has become a 'buzz-word' in social housing allocations policy-making, a policy prescription to which all social housing allocations schemes should aspire. The allocations framework does potentially facilitate such 'good' housing management practices (as suggested by *Ahmad*); at least, it does not hinder such practices. Indeed, the development of regional and sub-regional schemes has potential to deliver mobility within the confines of such schemes (CLG, 2009a: para 29), and there are national schemes particularly aimed at London social housing tenants seeking a move out of London (the 'housingmoves' scheme) as well as that currently being developed. But there are, of course, trade-offs. If the 'indigeneity agenda' proves to dominate, then this potentially militates against the promotion of mobility schemes generally, the focus being on local connection.

There is also the question about the desirability of the mobility agenda amongst potential aspirants. Other contextual factors, such as the significance of local family and neighbourhood ties, may reduce the pool of potential social tenants seeking a move (Fletcher, 2008). Even the CLG, whilst maintaining the desirability of mobility within housing allocations policy, acknowledges that the available research does not necessarily support pent-up demand for mobility (CLG, 2009b: 16-7).

Exclusions

Local authorities and RPs are entitled to exclude certain households from an allocation of property. Broadly, these encompass households with a past history of nuisance behaviour sufficient to justify an eviction (Housing Act 1996, s 160A(7)-(8)) and certain persons from abroad (s 160A(1)-(6)). These provisions are complex and unclear. In relation to the latter, for example, this affects persons subject to immigration control, EU residents with no ties in the UK, and those not habitually resident in the UK. It is particularly unfortunate, given that this is a growth area, that CLG did not update its Code of Guidance in respect of those persons when it had an opportunity to do so in 2009. Be that as it may, many of the preconceptions about allocations and immigration could easily be defused were these provisions to be made more widely available in plain English, and we would observe that this clear role for government could be better fulfilled.

It is to be observed that RPs have no similar statutory obligations regarding exclusions. Indeed, the ability of RPs to exclude is largely unregulated, a fact

which can cause particular issues in relation to nominations of individual households, to which we now turn.

Tenure

Although there is a tendency and temptation to view social housing allocations systems and processes as one-directional – that is, leading to a social housing allocation – that is not always the case. Indeed, in some areas, as Taskforce members will be aware, the construction of the ‘social housing’ tenure pulls a variety of other tenures into its embrace. The social housing settlement is complex, dynamic and spontaneous, with a variety of key and other actors engaged in the process.

While local authorities’ allocations processes are relatively circumscribed (through the Housing Act 1996, Pt 6), the same is less true, if at all, of RPs and private landlords. As a result, allocations processes and practices rely on negotiations and trust between the range of actors at their core (Cowan and Morgan, 2009). When such relationships break down, this can have significant consequences for the delivery of accommodation for households (Cowan *et al.*, 2009). The statutory requirement to co-operate in England and Wales is limited ‘...to such extent as is reasonable in the circumstances...’ (s 170, Housing Act 1996); in the Housing (Scotland) Act 2001, sections 5 and 6, the requirement to co-operate is mandatory unless the RP ‘...has a good reason for not doing so’.

A reform agenda

We have already noted our reform agenda for social housing allocation is limited. We raise four issues as part of our reform agenda.

Prevention: The prevention agenda is a laudable policy aim but it needs to be placed on a surer footing in tandem with making a homelessness application. There are good reasons for retaining [the low threshold \(that is, that the authority ‘has reason to believe’ that a person is homeless or threatened with homelessness\)](#) for making a homelessness application, principally based on both (lack of) knowledge of putative applicants of local authority obligations as well as the immediacy of the situations in which many applicants find themselves. A prevention approach may resolve impending homelessness, although the more likely outcome is a temporary reprieve or breathing space in which to assess one’s housing options. What our agenda on this point suggests is limited to requiring much clearer advice to local authorities on their obligations. There is nothing, of course, to prevent homelessness investigations and prevention of homelessness occurring simultaneously, as opposed to consecutively. The additional benefits of our suggestion are a cost reduction in the requirement for the involvement of legal professionals.

Clearer basis for RP involvement: RPs provide social housing, usually through nominations agreements with local authorities, but they do so as a matter of locally negotiated agreements combined with weak duties to co-operate as well as light-touch regulation by the TSA. This lack of legislative and regulatory oversight is unsustainable, given the role played by RPs,

particularly after a Large Scale Voluntary Transfer (LSVT) of housing stock, and Arms Length Management Organisations (ALMOs) in the delivery of social housing. It also produces problems where the RP, for whatever reason, seeks to reject a nominee. Much clearer duties on RPs would resolve many practical difficulties, whilst enabling them to retain their independence (as exist currently in relation to the role of the private rented sector). The Scottish solution appears to offer a sensible compromise.

Responding to public perceptions: This point has already been made strongly above. There is a clear duty on policy-makers not to peddle myths – indeed, to counter myths with the legal reality of the everyday working of homelessness and allocations. There is a role for local authorities and RPs, but the position at the moment appears to be a derogation from the policy-maker role, placing all the emphasis on local government.

Accountability for decision-making: In our introduction, we made the observation about the complex of accountability mechanisms and the occasionally perverse consequences of legal accountability. These points are particularly pertinent in relation to the regimes through which a person seeks access to social housing. Clear lines of regulatory and legal accountability would benefit all parties – local authorities, RPs, and applicants – and the research suggests that the closer these accountability mechanisms are to the decision-maker, the more likely they will have an impact on subsequent decision-making.

Problems of tenancies

The muted response to the Law Commission Report, *Renting Homes* (2006a), indicates that lawyers have faced considerable difficulties in communicating to politicians and policy-makers the substantial difficulties caused by the technical complexity and incoherence of the law relating to private sector tenancies. The current state of the law is out of date, cumbersome, wastes landlord, tenant and court resources and places unnecessary obstacles in the way of the achievement of appropriate policy outcomes.

In this section, rather than detailing particular legal problems, we summarise certain issues under the following headings: knowledge and complexity; irrationality: incremental and responsive; tenancy for life; management of multi-tenures estates; diversity of accountability fora. We then set out a reform agenda.

The issues

Knowledge and complexity

The private rented sector comprises more than two million occupiers yet knowledge of the legal framework is to a substantial extent limited to those with a professional expertise in housing law. The authors' experiences indicate that housing professionals struggle to understand the consequences of something as straightforward as granting tenancies as opposed to licences or the legal steps required to increase rents. In part, this ignorance reflects the different foci of housing law and housing policy set out above. It also reflects the frequently counter-intuitive operation of the law and its technical nature. It is not surprising that the majority of landlords and tenants who are unlikely to benefit from professional support are ignorant of the law and make ill-informed decisions with often damaging consequences.

The knowledge deficit is exacerbated by the complexity of the law. Complexity is caused in part by the proliferation of statutory regimes governing residential occupancy. In addition to the three main statutory schemes (as provided by the Rent Act 1977, the Housing Act 1985 and the Housing Act 1988) there are a number of other schemes covering for instance agricultural workers tenancies or park homes. Certain forms of residential occupancies, such as the residents of mutual cooperatives, or almshouses, are excluded from the main statutory schemes, although the exclusions are not consistent between the schemes and there is limited justification for many of the excluded categories. Excluded occupiers have to rely on the common law for protection which may lead to injustice.

Complexity in part is caused by the lack of integration of housing law into other areas of social welfare. Difficulties have been caused by the failure to reconcile the Disability Discrimination Act 1995 with housing provision. It is notable that the guidance to the Mental Capacity Act 2002 fails to advise on

tenure issues, although the incapacitated tenant poses particular problems for landlords. The Mental Capacity Act highlights another problem with housing law. Unlike the law on capacity, housing law has not been updated to take account of contemporary approaches to rights and responsibilities and is overly informed by outdated understandings of the roles of landlords and tenants which derive from property law. The Law Commission proposed updating the legal framework in a way that conceptualised tenants as consumers and landlords as providers. Such a re-imagination of the law would be more consistent with current policy drivers.

A further cause of complexity is the understandable reluctance of legislators to give retrospective effect to statutory schemes. This has resulted in an overlay of statutory provisions that requires any legal adviser to establish the date of commencement of the tenancy and the nature of the provider prior to giving any legal advice. The causes and consequences of non-retrospectivity require some elaboration.

Irrationality: incremental and responsive

Housing legislation has always been responsive to the perceived needs of landlords and tenants. Sometimes legislation has been enacted in response to crisis such as the Rent Acts passed during the First World War. Sometimes it has responded to ideological imperatives such as the Thatcherite commitment to the primacy of the market. The Law Commission's consultation paper (Law Commission, 2002) on the reform of tenure law explains it this way.

Legal complexity is in large part the result of political decisions taken at different stages in the development of housing law about which categories of agreement should or should not fall within the scope of any regulatory scheme. Legislators have in the past thought it right to make a large number of special provisions for particular situations (Law Commission, 2002).

Thus, the driver for the protections set out in the Rent Acts was the desire to protect tenants from exploitation by private landlords. The statutory provisions can be explained as designed to create the sort of security enjoyed by the owner-occupier. Prior to the amendments of the regime enacted by the Housing Act 1988, the Rent Act tenant was able to predict expenditure on rent, to enjoy security of tenure and be confident that their spouse and children would not be homeless when the tenant died. Such extensive protections required extensive exclusions.

The drivers for the statutory regime set out in the Housing Act 1988 are quite distinct. It is the contractual relationship between the parties and the market which have primacy. Market rents therefore replaced fair rents and rent increases can be agreed between parties. The policy objectives were to increase the supply of rented properties and to make access to the sector much easier. Social protections, such as succession rights and security of tenure were therefore reduced.

The Housing Act 1988 also marked a significant and ideological transformation of the nature of the RP landlord. Previously it had been treated as if it were located within the welfare sector. This statute aligned its tenants' rights with those of the private landlord.

The role of social housing has also been fluid over the last half-century or so, and this is reflected in the legal schema. Council housing was originally conceived as a paternalistic alternative to the private rented sector; the benign nature of the landlord was assumed and consequently there was no need for tenants to have legal protection. The rise of welfare rights movements in the 1970s led to pressures for legal security and rights, although it was not until the Housing Act 1980 that council tenants received a comprehensive package of legal protections. The statutory design was influenced by the then government's distrust of the local authority landlord and the scale of protections provided to the tenant was consequently high.

Tenancy for life

The argument about the 'tenancy for life' concerns the security of tenure of the local authority tenant (although it may also be extended to the RP tenant). The tenancy is allocated on the basis of need, but once granted, even if the need ceases, the tenant cannot be evicted except on specific grounds such as arrears of rent or breach of tenancy condition. A number of recent publications have argued that social landlords should be free to offer tenancies on what terms they like (Dwelly and Cowans, 2006; Centre for Social Justice, 2008). The argument goes that the high level of security is inappropriate when those who benefit from it are considerably better off than people on social housing waiting lists.

In our view, such an argument is misconceived. The secure tenancy granted by the local authority landlord was created simultaneously with the Right to Buy. It is a consequence of the effort to extend home-ownership and reduce the power of the local authority landlord. It is an important extension of citizenship offering stability and security for those who would otherwise be vulnerable in the housing market. It is difficult to see how the Right to Buy could work simultaneously with the eviction of those who no longer needed the security of local authority housing as those are the tenants who are most likely to exercise their Right to Buy. Moreover the justification for the discount depends upon the value placed upon the 'tenancy for life'.

It should also be noted that the security of tenure of the local authority tenant is not as absolute as the argument suggests. There can only be one succession. Where the tenancy is occupied by a couple that succession occurs when either an existing joint tenancy become sole or there is a succession on the death of one of the couple. The limited succession rights can cause difficulties, particularly for adult children who have lived with and cared for elderly parents. In the case of RPs the rights under the Housing Act 1988 are more limited with family members having no rights of statutory succession.

Proponents of reduced security also point to the under-occupation of local authority housing caused by security of tenure. Under-occupation is problematic when some families in local authority accommodation are living in overcrowded conditions and evicting under-occupiers, and rehousing them in smaller accommodation seems a sensible solution. However, there already exists a ground of possession where there is under-occupation following succession to a family member. In addition there would inevitably be political consequences arising from evicting grandmothers from their lifelong homes.

Over and above the practical problems which reducing security would cause, the argument seems to be based on misunderstandings of the consequences of granting security of tenure. When housing need is the basis for allocation then that housing need is eliminated by the grant of the secure tenancy. The tenant is inevitably going to be privileged compared with an applicant who is still in housing need. However the grant of the tenancy does not take away the tenant's vulnerability in the open market, which he or she shares with the person still on the waiting list. Evicting those no longer in housing need seems likely to create a 'revolving door' for local authority housing.

Management of multi-tenured estates

The combination of the Right to Buy, the deregulation of the private rented sector and the proliferation of tenancy types has led to estates becoming multi-tenured. This has generated management complexity for social landlords who may be required to manage their own stock, which is likely to consist of social tenancies and shared ownership, together with leasehold properties – some of which may have been let on the open market. In the private sector the problem of multi-tenure is not so acute because the range of tenure is more restricted. However, experience of cases coming before the Leasehold Valuation Tribunal indicates that serious management problems can arise where flats owned on long leases are sub-let on assured shorthold tenancies. The absent lessee is less likely to become involved in the management of the property. Mixed tenure in the private sector frequently leads to higher management fees so that individual lessees bear the financial burden.

Diversity of accountability fora

The proliferation of tenancy types combined with the variety of regulatory mechanisms has led to multiple and overlapping fora for the resolution of problems. So, for instance, a tenant of a housing association will use the county court to defend possession proceedings, the Rent Assessment Committee to challenge rent rises and the housing ombudsman service for administrative problems.

The complexity increases when the landlord is not necessarily the same organisation as the service provider. This is made apparent in the 40-page booklet produced by the Department of Communities and Local Government which sets out the variety of routes available to the residents of sheltered housing who want to complain about services. The correct route for complaining depends on who the landlord is or who provides the service complained about, as well as the substance of the complaint. This is not only

confusing for occupiers of rented property, but means that a crucial method of monitoring and improving provision is considerably weakened.

A reform agenda

We commend to the Taskforce the Law Commission (2006a) proposals to develop two types of landlord neutral regimes, designed to provide simplicity and transparency, as well as tidy up the mess that is the current law.

We also urge the Taskforce to recommend caution about any further proliferation of tenancy types. New forms of tenancy may have a superficial appeal, as apparently simple solutions to immediate problems, but legal consequences are rarely understood and accounted for in any proposals.

We also recommend that serious consideration be given to streamlining dispute resolution and accountability fora. Not only would this serve occupiers well, it would also create a more accessible knowledge base upon which policy-makers could draw.

Repossession and arrears

The greatest risk to the owner-occupier or tenant of a social landlord of losing his or her home arises where he or she is unable to make mortgage or rent repayment. For social tenants this is the largest cause of eviction, accounting for around 98 per cent of all actions entered and 93 per cent of all evictions implemented (Pawson et al., 2005).

The causes of arrears have been shown to be similar in both the owner-occupied and rented sectors (Hunter and Nixon, 1998; Blandy et al., 2002), although the proportion of mortgagors subject to eviction proceedings is much smaller than the proportion of social tenants, indicating a greater propensity for the latter to be caught up in the problems which cause arrears (low incomes, unemployment, reliance on benefits, family illness/breakdown, etc.). There is also some evidence of a higher propensity to arrears, than other home-owners, amongst intermediate home owners (Bramley et al., 2001). Turning to a comparison in the risk of eviction between different types of social tenants, the evidence here varies between different parts of Great Britain. A study in Scotland in 1997 (Mullen et al.) found that local authorities were much more likely to take legal action for possession than RPs, although the RPs were more likely to see these through to eviction. By contrast, in Wales, Evans and Smith (2002) found that RPs were more likely to take court action than councils. In England, the trends in eviction rates between both types of provider have been similar (Pawson et al., 2005). This most recent study indicates how over the last 10 years or so the management practices of local authorities and RPs have become much more aligned.

In this section we consider how both regulatory and legal rights interact to constrain possession in arrears cases and highlight particular problems and issues which arise.

Constraints on possession

Technically a lender is entitled to possession 'as soon as the ink is dry', although many mortgage agreements limit possession to the taking of possession proceedings to mortgage default. In these circumstances the key influences are restraints on lender behaviour imposed by regulatory or legal requirements.

The rights of lenders to regain possession in case of default are generally constrained by the Administration of Justice Act 1970, s 36 (as amended), which provides that on an application for possession of residential property by a mortgagee the court has a wide power to adjourn, suspend or postpone possession.

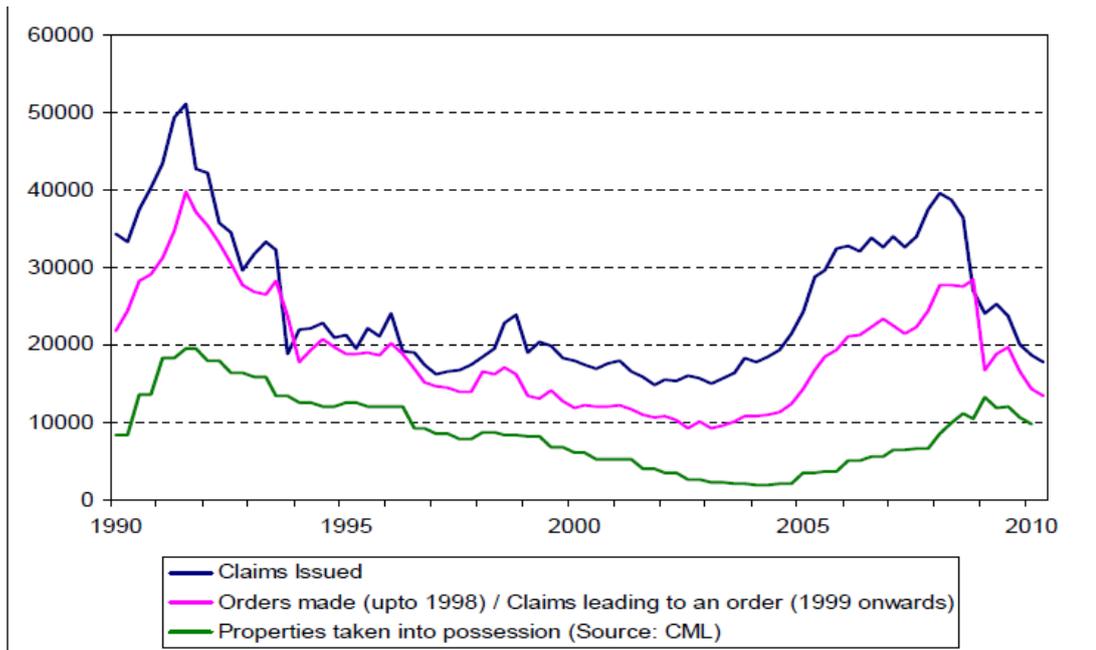
For secure and assured tenants the district judge is usually also confronted with a similar discretion to adjourn, suspend or postpone possession under the Housing Act 1985 or 1988.

For both social tenants and mortgagors the government has sought to ameliorate the risk of eviction through the imposition of pre-action protocols. In both cases these impose more stringent requirements on the landlord/mortgagee to try and reach an accommodation with the tenant/mortgagor prior to bringing the case to court. In Scotland an equivalent pre-action protocol for mortgagees has been given statutory force: see Home Owner and Debtor Protection (Scotland) Act 2010.

For owner-occupiers there are further regulatory constraints on possession. Mainstream mortgage lenders are regulated through the Financial Services and Markets Act 2000. This governs all 'regulated mortgage contracts' entered into after October 31, 2004. A regulated mortgage contract is a loan to an individual or trustees (not a company) secured by a first legal mortgage on land located in the UK. The regulator is the Financial Services Authority and all lenders must be authorised by FSA. A condition of their licence is compliance with standards of conduct: set out in 'Mortgages: Conduct of Business' (MCOB). Failure to comply can lead to complaint to the financial ombudsman. A key area of compliance is in MCOB13 on arrears and repossessions. The standards set out largely mirror those in the pre-action protocol. Secondary lenders are controlled under the Consumer Credit Act 1974 by the Office of Fair Trading. Where loans are made to individuals which do not fall within the 2000 Act, i.e. they are not first mortgages, they will come within this legislation.

It is very difficult to disentangle the effect of different measures on actions for possession. Since the start of the credit crunch in 2007–08 we have seen stronger guidance from the FSA, the introduction of the pre-action protocol and the introduction of various homeowners support scheme (see para. 2.19), which encourages lender forbearance. While mortgage possession actions did rise in both 2007 and 2008 since then they have been falling (MoJ, 2010).

Figure 1: Mortgage possession actions 1990–2010 Qtr 2



Notes:

1. The order counts include suspended and outright orders.
2. Figures for Claims Issued and Claims leading to an order both from 1999 onwards are seasonally adjusted.

Source: MoJ, 2010, p. 5.

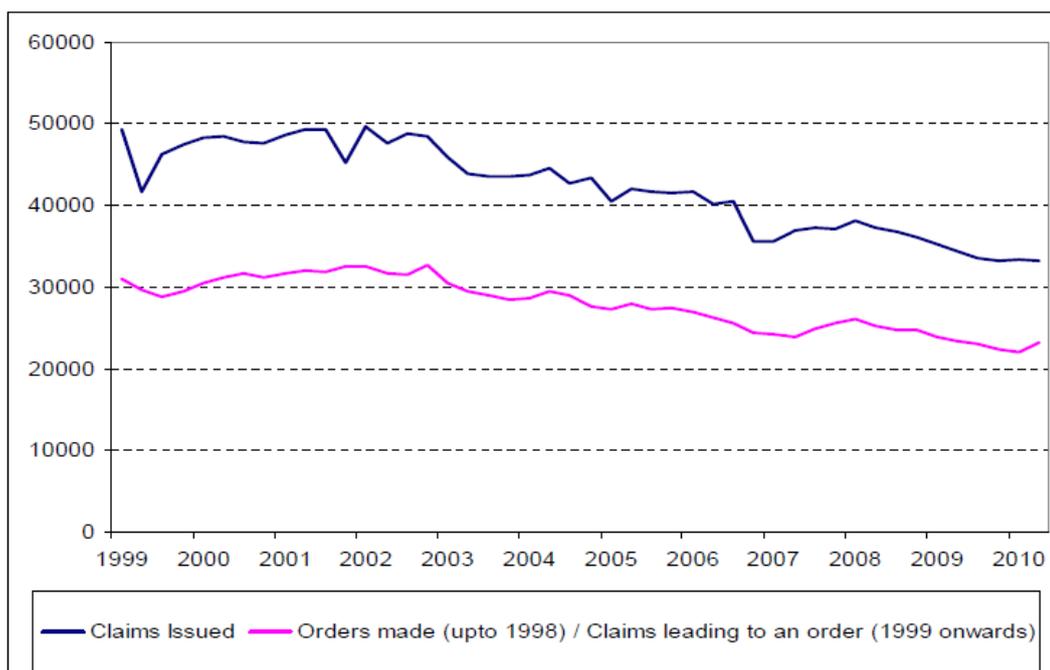
There is no definitive research which can account for this fall. Research on the home-owners support scheme suggests that this has encouraged lenders to introduce their own, similar schemes (Wilcox et al., 2010). The impact of the pre-action protocols must surely be another factor. The Ministry of Justice (MoJ, 2010, p.11) states:

”The introduction of the MPAP [Mortgage Pre-Action Protocol] coincided with a fall of around 50% in the daily and weekly numbers of new mortgage repossession claims being issued in the courts as evidenced from administrative records. As orders are typically made (when deemed necessary by a judge) around 8 weeks after claims are issued, the downward impact on the number of mortgage possession claims leading to an order being made was seen in the first quarter of 2009.”

A recent study (Advice UK et al., 2009) concludes that the mortgage protocol has played a part in reducing the number of cases brought to court. However, the MoJ (2010, p.12) cautions that: ‘it has not been possible to adequately quantify the long term impact of the MPAP.’

A similar pattern of possession actions falling since 2008 can be seen in relation to landlord possession actions.

Figure 2: Landlord Possession Actions – England and Wales, 1999–2010 Qtr2



Notes:
 1. The order counts include suspended and outright orders
 2. These figures are seasonally adjusted

Source: MoJ, 2010, p.8.

The study by Pawson et al. (2010) indicates that a large proportion of landlords did review their practices in the light of the introduction of the pre-action protocol. Again, this may account for some of the reduction in the claims issued.

Turning finally to a comparison in the risk of eviction between different types of social tenants, the evidence here varies between different parts of Great Britain. A study in Scotland in 1997 (Mullen et al.) found that local authorities were much more likely to take legal action for possession than RPs, although the RPs were more likely to see these through to eviction. By contrast, in Wales, Evans and Smith (2002) found that RPs were more likely to take court action than councils. In England, the trends in eviction rates between both types of provider have been similar (Pawson et al., 2005). This most recent study indicates how over the last 10 years or so the management practices of local authorities and RPs have become much more aligned.

Issues

In this section we consider a number of issues which arise from the current legal and regulatory framework governing loss of home in cases of mortgage or rent arrears. These are:

- lack of consistency in judicial decision-making;

- lack of teeth in the pre-action protocols;
- limitations of regulation;
- avoidance of Administration of Justice Act 1970.

Lack of consistency in judicial decision-making

For both mortgagors and tenants the judiciary has a large discretion in determining the order that is made. Once the matter is before the court, whether under the powers in the Administration of Justice Act 1970 or the Housing Acts, the evidence would suggest that the risk of losing the home is greater for home-owners than for social tenants (Hunter and Nixon, 1998). This stems both from the practices of landlords and mortgagees, the particular working and interpretation of the different Acts, but also the different attitudes of the judiciary towards private lenders and social landlords (Hunter and Nixon, 1998; Hunter et al., 2005, on attitudes of judiciary towards social renting). A number of studies have indicated that for both groups there is an advantage to the mortgagor/tenant attending the proceedings (Nixon et al., 1996, Mullen et al., 1997, Hunter et al., 2005). Attendance, however, has been higher for mortgagors than for social tenants (Nixon et al., 1996, Hunter et al., 2005).

There is nonetheless an ongoing concern with the operation of discretion across both tenures. A study of the exercise of discretion by district judges in rent arrears cases, however, concluded (Hunter et al., 2005, p. 107):

”there can be no ‘easy’ way to achieving consistency between judges. Even where factors are consistently taken into account, this will not necessarily lead to the same outcome. The weight and effect of a particular factor will depend on how the judge approaches cases more generally...”

Lack of teeth in the pre-action protocols

One form of control on both landlord/lenders and district judges is the possession pre-action protocol. There is, however, evidence that a significant proportion of mortgage possession cases that are brought show a failure to comply with the requirements and a failure by some judges to enforce the requirements (Advice UK et al., 2009). Here there does seem room for greater consistency of application.

The form of the protocol in England and Wales is such that there are only limited sanctions (essentially some form of costs penalty or an adjournment of the hearing pending fulfilment of the requirement) which can be applied for non-compliance by lenders or landlords. There is little evidence that district judges are using the sanctions that are available (Advice UK et al., 2009, Pawson et al., 2010) or that they provide any form of deterrent for landlords or lenders who flout them.

Limitations of regulation

Regulation does not provide individuals with a direct mechanism to challenge their eviction if they consider that e.g. a lender has failed to comply with the

FSA's Mortgage: Conditions of Business. These limits have been recognised by the FSA itself (FSA, 2009, para. 7.4):

'In response to worsening market conditions, we commissioned an urgent review of lenders' compliance with our arrears handling rules in December 2007. This work has been expanded and continues. It is clear from the outcomes of that work that our high-level approach has not sufficiently protected consumers and that this is another area where we need to take a much more robust and interventionist approach. Some of the outcomes for consumers highlighted through our thematic work have been sufficiently poor that we are taking enforcement action against a number of firms.'

In particular there have been problems with lenders moving too quickly to repossession action and failing to consider forbearance. These 'poor practices' were observed 'across the mortgage market, though it was more prevalent among specialist lenders and third-party administrators' (FSA, 2010a, para. 4.6). This has led to much closer alignment between the mortgage pre-action protocol and MCOB13, which has been converted from guidance into rules (see FSA 2010b). It is currently too early to say what impact this change has had and whether the tighter regulatory regime will improve the position of borrowers.

Avoiding the 1970 Act

Although the Administration of Justice Act 1970 provides a constraint on possession, it has been confirmed, however, in a number of cases (most recently *Horsham Properties Group Ltd v Clark* [2008] EWHC 2327 Ch), that a lender is not *obliged* to make an application under the 1970 Act, and may proceed to use other remedies (e.g. appointment of a receiver who may sell the property) which avoid the powers of the court. The decision in *Horsham* led to a private members bill (Home Repossession (Protection) Bill) which aimed to close this perceived 'loophole'. However, it was subsequently withdrawn and the position remains that mortgagors do not have the right to have the court consider the nature of the order appropriate order (cf. the stronger position in Scotland under the recently enacted Home Owner and Debtor Protection (Scotland) Act 2010). It has been suggested, however, that the regulatory pressures on lenders will mean that they do not readily resort to avoidance of the 1970 Act (see Greer, 2009).

A Reform Agenda

Given the conclusions reached above it seems unlikely that greater statutory control on discretion would effect a great deal of change on differences in judicial decision-making. Further, discretion is important in order that the individual circumstances of tenants and borrowers can be taken properly into account. There is always, however, room for further training of the judiciary to ensure more consistent approaches, particularly as to the application of the pre-action protocols.

The lack of teeth in the pre-action protocols is a concern given the (limited) evidence of non-compliance. It is not yet clear whether the statutory requirements in Scotland provide a model where avoidance is less easy. This is one potential route for reform. The statute could then impose greater penalties for non-compliance. As part of the Civil Procedure Rules the penalties which can currently be imposed are limited and perhaps provide insufficient deterrence to some lenders/landlords.

Although there is no evidence that a large number of lenders in England and Wales are taking advantage of the opportunity to avoid the protections of the Administration of Justice Act 1970, it is a concerning loophole. There seems no reason why reform should not be adopted on the same basis as in Scotland.

Conclusion

In this section we identify those reforms to tenure which we regard as both necessary and appropriate, as well as being in the most part limited. We then identify certain knowledge deficits, which may give rise to further suggestions for reform once those deficits are made good.

Suggestions for reform

Before making our suggestions for reform, however, there is one matter of overriding significance to which we draw the Taskforce's attention:

Taking tenure reform seriously: we have referred at a number of points to potential tenure reform – whether in relation to problems of forfeiture, difficulties in relation to evasion of the protection of the Administration of Justice Act 1970. Many of these types of reform are not highly political, they do not make headlines. Accordingly they may well not make it into legislative programmes. Nonetheless in terms of security in the home and of justice they can have significant impacts for individuals as well as adding to administrative costs for all parties (including the state) because of their complexity and the potential to increase homelessness. In our view, the problems should not be ignored and put on the back burner as not sufficiently important. A modern housing system should have modern legal framework. A half-hearted reform agenda creates more problems than it solves.

At least part of the current problems have been caused by a failure to deal with tenure reform holistically. Rather, the approach has been piecemeal, leaving intersecting or parallel regimes, which produce complexity and (understandable) lack of knowledge. Equally, it cannot be right to focus on tenure through the status of the provider because consumer rights are affected, often without understanding or, perhaps more mundanely, by the unified point of access to different tenures in the social sector.

We now set out our reform agenda based on our discussion in the preceding chapters:

- **Intermediate home-ownership:** We have suggested that this 'product' is currently not fit for purpose but a series of limited reforms, which put the consumer at the forefront, should secure its marketability, as opposed to the current position of disproportionate risks to the consumer. These reforms are as follows: protection of buyer's capital stake; limitation of grounds of possession; responsibility for repairs; exchange professionals and transaction costs; incorporating the unregulated sector. They are limited but significant reforms and are designed to give comfort not just to the consumer but also to the lender.
- **Access to social housing:** We recognise that the current law on access to social housing allocation may be criticised. We believe,

however, that much of this criticism is ill-placed and demonstrates considerable lack of understanding of the current system. The current system offers considerable flexibility to all social housing providers – rather than the inflexibility which is sometimes suggested – which can provide for local solutions to local issues – as opposed to the assertion which is regularly made in the media that locality is an irrelevant consideration. Our reform agenda is, therefore, limited to four specific issues which we regard as significant: balancing prevention with the low threshold for making a homelessness application; a clearer basis for RP involvement in social housing allocation; responding to public perceptions (and not peddling myths); and accountability for decision-making.

- **Problems of tenancies:** We appreciate that there are different views about the location of the problems with tenancies, but we have identified a number of issues, not least of which is the complexity of the current law, which call for a solution. There is a ready-made solution, provided by the work of the Law Commission, that takes a holistic approach to tenancies, is landlord-neutral, simple and transparent, and tidies up the current law. We have also recommended that dispute resolution and accountability fora be streamlined.
- **Repossession and arrears:** One of the central issues here is the balance between controls on judicial discretion and the need for judicial consistency. We believe that judicial discretion should be protected because it is always important to take account of the individual circumstances of tenants and borrowers, and those circumstances span a wide range of relevant factors which would be difficult to control for. However, we do recommend further training for the judiciary to ensure more consistency, particularly as to the application of the pre-action protocols. The lack of teeth in those protocols – enforcement for non-compliance – is a concern given the limited evidence of non-compliance. We have suggested that one potential route to reform is provided by the Scottish model, but there would need to be more research into the benefits of that approach. Finally, on a different matter, although there is no evidence that a large number of lenders in England and Wales are taking advantage of the opportunity to avoid the protections of the Administration of Justice Act 1970, it is a concerning loophole. There seems no reason why reform should not be adopted on the same basis as in Scotland.

There are two further issues which have been raised in our report, and which should also be considered as part of that reform agenda. That they have not been raised should not dim their significance as they are more than ‘tidying up’; rather, they affect a significant proportion of occupiers at different junctures of their housing pathways. The issues are:

- **The excluded:** a significant number of households are excluded from tenancy protection regimes, based on the status of their providers.

These include those fully mutual providers and non-registered housing associations, as well as buyers of intermediate products from private companies. There appears to be no (or limited) justifications for such exclusion, leading to a lack of enforceable rights. We also draw attention to those households excluded for one reason or another from an allocation of social housing, or whose priority has been reduced to such an extent that they are unlikely ever to be offered a property.

- **Dispute resolution:** the diversity of potential sites and techniques of dispute resolution are haphazard, confusing, and have potentially limited impact on subsequent decision-making. A cost-benefit analysis is unlikely to regard at least some of the current methods as clearly beneficial. Put another way, if we were to start afresh, it would be unlikely that we would develop the system currently in place.

Knowledge deficits

There are certain areas where, if we knew more about the providers/households engaged in the processes (as well as those processes), that greater knowledge might suggest a reform agenda. We commend to the Taskforce the following increasingly important areas:

- Intermediate home-ownership: in essence, little is known about what happens to those who buy a share through any such product (whether private or social provider), particularly at certain 'crisis' moments (facing a large repairs bill or loss of a household member's income). Given that such products are sold by their very nature to high-risk, low-income groups, this blindspot is significant particularly when one is considering how best to assist buyers at such moments.
- Fully mutual co-operatives: these fit *par excellence* into the category of the excluded, or, indeed, the unregulated. The provider is not subject to public regulation; the occupier has no security of tenure. There is no or limited evidence about how such organisations self-regulate but there is some concern that their operations given that they provide accommodation often to marginal households who would otherwise be protected.
- The 'impact' of pre-action protocols: we have drawn attention to what evidence there is on the impact of pre-action protocols, but, equally, we believe that more needs to be known about their reception by the courts and providers/lenders.
- The use of starter tenancies by RPs: starter tenancies used by RPs are of the assured shorthold variety, possibly with some additional protection for the occupier (such as a right of review). Little is known about the scale of use, management and operation of the starter tenancy regime, as well as the legal issues which may arise through them (such as under the Human Rights Act 1998).
- Managing multi-tenure estates: at indicated earlier, we have outlined certain issues around the management of multi-tenure estates. We

suggest that more needs to be known about how this can best be done and resolve issues which may not appear to be capable of a simple 'legal' solution.

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Appendix 1: The regulatory field in housing

Tenure		Type	Style	Statutory basis
Ownership	FSA – mortgages/credit	Principles-based, 'code of business' based on Statutory principles	Co-regulation	Financial Services and Markets Act 2000
	Financial Ombudsman Service (FOS)	Maladministration	Investigatory/ compliance	Financial Services and Markets Act 2000
	Council of Mortgage Lenders (CML)/Building Societies Association (BSA)	Codes	Industry self-regulation	n/a
	Office of Fair Trading (OFT)	Unfair terms	Self-regulation/ command and control	Consumer Credit Act 1974 Unfair Terms in Consumer Contracts Regulations 1999
Intermediate home ownership	TSA – model leases	Regulatory oversight based on Statutory principles, 'regulatory framework'	Co-regulation	Housing and Regeneration Act 2008
	CML/BSA	Codes	Industry self-regulation	n/a
	Housing Ombudsman Service	Maladministration	Investigatory	Housing and Regeneration Act 2008
Private renting	Local authorities	Compulsory and selective licensing	Compliance/ Command and Control	Housing Act 2004
		Harassment and unlawful eviction prosecutions	Compliance/ Command and control	Protection from Eviction Act 1977
		Voluntary accreditation	Self-regulation/co-regulation	n/a
		Housing health and safety enforcement	Compliance/ command and control	Housing Act 2004
	Universities	Voluntary accreditation		

	Industry associations Tenants OFT Housing Ombudsman Service	Codes of conduct Tenancy deposits / standards / harassment and unlawful eviction Unfair contract terms Maladministration	Self-regulation/ co-regulation Self-regulation Command and control Mandatory Voluntary only - Investigatory	n/a n/a Housing Act 2004 / Landlord and Tenant Act 1985 / Housing Act 1988 Unfair Terms in Consumer Contracts Regulations 1999 n/a
Registered Providers	TSA Audit Commission Housing Ombudsman Service OFT Central Government	Regulatory oversight based on Statutory principles, 'regulatory framework' Performance management Maladministration Unfair contract terms Rent targets	Co-regulation Regulatory oversight of systems/processes Investigatory Mandatory Economic/compliance	Housing and Regeneration Act 2008 Memorandum of understanding with TSA Housing and Regeneration Act 2008 Unfair Terms in Consumer Contracts Regulations 1999 n/a
Local authorities	Audit Commission TSA	Performance management (CAA) including Decent Homes Regulatory oversight based on Statutory principles, 'regulatory framework'	Regulatory oversight of systems/processes Co-regulation	Housing and Regeneration Act 2008 (not fully implemented yet)

	Local Government Ombudsman	Maladministration	Investigatory	
	OFT	Unfair Contract Terms	Mandatory	Unfair Terms in Consumer Contracts Regulations 1999
	Central government	Rent targets	Economic/ compliance	n/a

Appendix 2: Different tenancy types

Landlord	Type of tenancy	Relevant legislation	Type of security	Other comments
Councils and housing association if tenancy granted prior to 15-1-89	Secure	Housing Act 1985	Eviction only on grounds, most common grounds, e.g. rent arrears, anti-social behaviour, require the court to be satisfied it is reasonable to grant possession	The landlord must serve a notice of seeking possession prior to issuing proceedings
Council	Introductory	Housing Act 1996	Applies to all new tenants of council if the council have adopted an introductory tenancy scheme Possession must be granted by the court if necessary procedures have been complied with. At the completion of 12 months without possession the tenant will become secure	Prior to seeking possession the landlord must give a notice to the tenant and offer the tenant the opportunity of an internal review
Council	Demoted	Housing Act 1996, as amended by Anti-social behaviour Act 2003	Possession must be granted by the court if necessary procedures have been complied with	A demoted tenancy only arises on the making of an order by the court demoting a secure tenancy to a demoted tenancy because of anti-social behaviour Prior to seeking possession the landlord must give a notice to the tenant and offer the tenant the opportunity of an internal review
Housing association (registered provider) and private landlords	Assured	Housing Act 1988	Eviction only on grounds, most common grounds, e.g. rent arrears, anti-social behaviour, require the court to be satisfied it is reasonable to grant possession, although there is a mandatory order which may be sought for 2 months rent arrears (known as Ground 8)	The landlord must serve a notice of seeking possession prior to issuing proceedings
Housing association (registered)	Assured shorthold	Housing Act 1988	Possession must be granted if necessary 2 month notice has	The Housing Corporation and now the TSA discourages the use of assured shorthold

provider) and private landlords			been served	tenancies except in particular circumstances. These include using them as a form of 'introductory' or 'starter' tenancy for new tenants where there are problems of anti-social behaviour in a particular area. An assured tenancy granted by a housing association may be reduced by the court following proof of anti-social behaviour to a 'demoted assured shorthold tenancy'
Private landlord (granted prior to 15-1-89)	Protected/ statutory	Rent Act 1977	Eviction only on grounds,	Termination governed initially by common law – i.e. a notice to quit must be served to terminate a periodic contractual tenancy