



A Response to the Communities and Local Government Consultation Paper:

“Tolerated Trespassers: Successor Landlord Cases”

December 2008

Contact Details: Robert Latham (HLPA Executive Committee Member & Member of HLPAs Law Reform Working Group)

Address: Doughty Street Chambers, 53-54 Doughty Street, London, WC1N 2LS

Telephone No: 0207 404 1313

Email: r.latham@doughtystreet.co.uk

Web: www.hlpa.org.uk

About HLPAs

The Housing Law Practitioners Association (HLPAs) is an organisation of solicitors, barristers, advice workers, independent environmental health officers and others who work in the field of housing law.

Membership is open to all those who use housing law for the benefit of the homeless, tenants and other occupiers of housing. HLPAs has existed for over 10 years. Its main function is the holding of regular meetings for members on topics suggested by the membership and led by practitioners particularly experienced in that area, almost invariably members themselves. The Association is regularly consulted on proposed changes in housing law (by primary and subordinate legislation and also by other means such as relevant codes) by the relevant Departments, chiefly the DCLG.

The Chair, Vivien Gambling, is an experienced housing specialist and works for Lambeth Law Centre. Although the Association is London based, the membership is countrywide. The Association is also informally linked with similar Housing Law Practitioners Groups in the North-West, South Yorkshire and the West Midlands.

Membership of HLPAs is on the basis of a commitment to HLPAs's objectives. These objectives are:

- To promote, foster and develop equal access to the legal system.
- To promote, foster and develop the rights of homeless persons, tenants and others who receive housing services or are disadvantaged in the provision of housing.
- To foster the role of the legal process in the protection of tenants and other residential occupiers.
- To foster the role of the legal process in the promotion of higher standards of housing construction, improvement and repair, landlord services to tenants and local authority services to public and private sector tenants, homeless persons and others in need of advice and assistance in housing provision.
- To promote and develop expertise in the practice of housing law by education and the exchange of information and knowledge.

The HLPAs Law Reform Working Group has prepared this response. This group meets regularly to discuss law reform issues as they affect housing law practitioners. The Chair of the group reports back to the Executive Committee and to members at the main meetings which take place every two months. The main meetings are regularly attended by over one hundred practitioners.

1. Executive Summary

1. The development of the concept of the tolerated trespasser is an anachronism arising from a drafting flaw when security of tenure was extended to tenants of local housing authorities by the Housing Act 1980. On 10th December 2008, the House of Lords gave judgment in *Knowsley HT v White* (“*Knowsley*”); *Honeygan-Green v Islington LBC* (“*Honeygan-Green*”) and *Porter v Shepherds Bush HA* (“*Porter*”) [2008] UKHL 70. Lord Neuberger would have welcomed the opportunity to revisit whether *Thompson v Emlbridge* [1987] 1 WLR 1425 (“*Thompson*”) had been correctly decided (at [91]). It is a matter of deep regret to HLPa that none of the experienced counsel instructed in that case invited their Lordships to do so. In 1987, *Thomson* was subjected to sustained criticism (see “Rent Arrears, Suspended Possession order and the Rights of Secure Tenants”, Jim Driscoll (1988) MLR 371 and “Suspended Possession Orders”, HHJ John Platt and Nic Madge (191) NLJ 853).

2. There is now near unanimous support from lawyers working for both tenants and social landlords that the legislation must be amended at the earliest opportunity to prevent more tolerated trespassers from arising. The Housing and Regeneration Act 2008 (“the Act”) received the Royal Assent on 22nd July 2008. We are concerned that immediate action was not taken to bring Part 1 of Schedule 11 (save for para 14(2)(a)) into effect immediately. We would urge the CLG to do this at the earliest opportunity in 2009.

3. There is a similar consensus that the for both amending the legislation to reinstate the tenancies of existing tolerated trespassers. When HLPa responded to the original consultation, we urged the CLG to retrospectively revive the tenancies of all existing tolerated trespassers who remained in occupation of their dwellings. This would also have resolved the problem of the “successor landlords”.

4. We have considered the consequences the new replacement tenancies proposed in Part 2 of Schedule 11. We are satisfied that the course upon which the CLG has embarked is seriously flawed. The approach depends upon social landlords being able to distinguish between their “tenants” and their “tolerated trespassers”. It is apparent to HLPa that many are unable to do so. This is made the more difficult by the decision of the House of Lords in *Knowsley*. We discuss this in Section 2. We are satisfied that it now be wrong to implement Part 2 of Schedule 11 for reasons discussed in Section 3. The CLG should rather promote legislation to retrospectively revive the tenancies of all existing tolerated trespassers who remain in occupation of their dwellings.

5. If the CLG is minded to implement Part 2 of Schedule 11, it will need to “prune” those provisions which are now redundant as a result of *Knowsley*. If this is the chosen path, we can

see no reason why the tolerated trespassers of successor landlords should not be treated in exactly the same way as other tolerated trespassers. We discuss this in Section 4.

6. If Part 2 of Schedule 11 is implemented in its present form, the CLG must take the consequences of the future litigation that this will generate. In our response to the last consultation paper “Tolerated Trespassers” (November 2007), HLPAs estimated the cost of the unnecessary litigation caused by the CLG’s failure to take prompt and appropriate action to remedy the problem of the tolerated trespasser at £2.5 - £4m per annum. In 2008, four cases proceeded to the House of Lords. It is apparent that we underestimated the cost.

7. Most courts are now using Form N28A (July 2006) which postpones the date of possession rather than Form N28 (2008) which suspends the execution of the possession order. We are not aware of any statistics as to the extent to which Courts continue to use Form N28 (2001). Indeed, the CLG have failed to obtain any rigorous statistics as to the extent of the problem of tolerated trespassers. The absence of reliable data as to what is happening on the ground merely emphasises the need for Part 1 of Schedule 11 to be brought into effect immediately.

2. Who are currently “Tolerated Trespassers”?

8. Wilson LJ in *Jones v Merton LBC* [2008] EWCA Civ 660, observed (at [9]) that many social landlords were unable to distinguish between their tenants and their tolerated trespassers. Recent training events have confirmed that this observation applies to most social landlords. The decision in *Knowsley* makes their task of identifying their tolerated trespassers the more difficult. Yet, the statutory changes enacted in the Housing and Regeneration Act are premised upon social landlords being able to make this distinction. There has never been any foundation for the assumption that they would be able to do so.

9. As a result of the decision *Knowsley*, the regime of tolerated trespassers no longer has any relevance to “assured tenancies” under the Housing Act 1998. HLPAs now estimates that the number of tolerated trespassers has been reduced from some **500,000 – 750,000** to **400,000 – 500,000**.

10. A difficulty in identifying those who are currently tolerated trespassers, arises from Lord Neuberger’s decision in *Knowsley* at [97]. He held that a court, when making a suspended possession order under the 1985 Act, may proleptically direct that the order be discharged once the terms have been complied with. Such a direction can be made to work a discharge even where there has not been strict compliance with the terms of the suspension. Such a provision

had been added to the possession order in *Honeygan-Green* which provided “upon payment of the arrears in full, claim do stand dismissed”.

11. This form of order must be distinguished from orders which merely contain a “non-enforcement” clause, namely “when you have paid the total amounts mentioned, the plaintiff will not be able to take any steps to evict you as a result of this order”. This was the standard clause in Form N28 (1993) which led to Chadwick LJ’s creation of the “entrenched” tolerated trespasser in *Marshall v Bradford* [2001] EWCA Civ 594; [2002] HLR 2 (“*Marshall*”). Whilst the concept of the entrenched tolerated trespasser is no longer good law (see Lord Neuberger in *Knowsley* at [113]), it is still necessary for either the tolerated trespasser or the landlord to make an application to revive the tenancy. Hence in *Porter*, the case was remitted to the County Court for this discretion to be exercised.

12. The following tolerated trespassers remain:

(i) Those created by Form N28 (2001): **Some 150,000 – 200,000.**

13. This order was introduced in October 2001. As a consequence of the decision of the Court of Appeal in *Harlow BC v Hall* [2006] 1 WLR 2116, there is no question but that all tenants against whom such order were made are tolerated trespassers, regardless of whether they complied with the terms upon which the order was suspended. Since July 2006, most judges have opted for Form N28A.

14. These tolerated trespassers arise solely from an error in framing Form N28 (2001), the effect of which was to suspend the execution of the possession order (s.85(2)(a)) rather than postpone the date of possession (s.85(2)(b)). Some commentators have sought to distinguish between “blameless” tolerated trespassers who have strictly complied with the terms of the suspension from the other tolerated trespassers arising from the making of this order. HLPAs suggests that this distinction is not helpful. In many cases a breach may have arisen from a late credit of housing benefit.

15. On 13th June 2003, Garden Court Chambers wrote to the Court Service identifying the flaw in Form N 28 (2001). This letter was acknowledged on 5th May 2004. The Court Service declined to refer this back to the Rules Committee. This sub-class of tolerated trespasser continued to grow.

16. It would have been open to individual social landlords to make group applications under s.85(2) to revive all the tenancies affected by this error of government and substitute possession orders in the template of Form N28A. HLPAs is unaware of any social landlord having done so.

There has been no concerted action by either the CLG or Housing Corporation (in respect of successor landlords) to urge them to do this. In “New procedures for postponed possession orders – Avoiding unintended consequences of tolerated trespassers” (CLG, July 2006), the CLG suggested that such options were under consideration. It is of regret that nothing materialised.

(ii) Those created by Form N28 (1993): **Some 150,000 (possible none)**.

17. The Courts have not construed the effect of this order where the tenant has complied with the conditions for the initial period of postponement (normally 28 days). In all the cases which have come before the Court of Appeal, the tenant breached the order within the first 28 days. The one exception was *Southwark LBC v Onayomake* [2007] EWCA Civ 1426, which came before the Court of Appeal on a procedural issue. When *Onayomake* came back for trial on 23rd September 2008, Southwark compromised the case (writing off substantial arrears of rent), rather than have this important issue resolved.

18. As a result of the decision in *Knowsley*, there is a further unresolved issue as to whether it is open to a landlord to waive any breach thereby reviving the tenancy. This was the view of Millett LJ in *Greenwich LBC v Regan* (1996) 28 HLR 469 (see the p.478). In *Marshall*, Chadwick LJ (at [26] – [29]) held that *Regan* was inconsistent with the speech of Lord Brown-Wilkinson in *Burrows v Brent LBC* [1996] 1 WLR 1448 (“*Burrows*”). This approach was upheld in *Lambeth LBC v O’Kane* [2005] EWCA Civ 1010; [2006] HLR 2 (per Arden LJ at [58] – [59]). However, in *Knowsley*, Lord Walker (at [4]) was satisfied that *Regan* “was approved” by Lord Brown-Wilkinson in *Burrows*. Lord Neuberger did not expressly consider this and *Marshall* was only expressly overruled in respect of the interpretation of s.85(4) ([32] – [38] of Chadwick LJ’s judgment). There is a cogent argument that the issue of waiver is now back on the agenda. This would lead to the conclusion that most breaches by any tenant of the conditions specified in an order made using Form N28 (1983) or Form N28 (1993) will now have been waived. All such orders will have been made prior to October 2001.

(iii) Those created by Form N28 (1982): **Some 150,000 (possible none)**.

19. This was construed in *Thompson v Elmbridge* [1987] 1 WLR 1425. On 8th August 1997, the Local Government Association and HLPAs wrote to the DETR proposing the legislative changes that were required to s.82(2) Housing Act 1985. This approach was ignored by government.

20. In *Knowsley*, Lord Neuberger would have been willing to revisit the correctness of the decision in *Thompson* but for the approach adopted by counsel in the appeal. The status of

tolerated trespasser only arises where the tenant has breached the terms of the suspension. As discussed above, it is now arguable that it is open to a landlord to waive any such breach.

(iv) Those created by other templates: Numbers Unknown

21. Not all judges have used the recommended templates. Many have adapted them, as in *Islington v Honeygan-Green*. The effect of these orders, namely whether they postpone the date of possession or suspend the execution of the order, is often uncertain.

3. The Problems created by the Housing and Regeneration Act 2008

22. HLPAs welcome the changes enacted in Part 1 of Schedule 11. Although the amendments to the Housing Act 1988 are not strictly required, they will bring symmetry to the different statutory codes. HLPAs are concerned at the failure to implement this Part promptly upon the Act receiving the Royal Assent. We know not the extent to which possession orders based on Form N28 (2001) are still being made. We suspect that they are rare. However, any newly created tolerated trespassers will merely generate problems for the future.

23. The transitional provisions in Part 11 of Schedule 11 are not satisfactory. At training courses on the new Act, advice has been given that it is in the mutual interests of both social landlords and tolerated trespassers to make a s.85(2) Housing Act 1985 applications to reinstate any tenancies prior to the introduction of the Act. The reasons are as follows:

(a) The legislation is drafted in such a manner as to cause an administrative nightmare for landlords (see below).

(b) This is the only means whereby the tenant will secure their full basket of rights.

24. Many landlords do not know who their current tolerated trespassers are. In such circumstances, they will not know which tenants have acquired “new replacement tenancies”. This is a recipe for future litigation.

25. There is nothing in the Act to prevent a tenant from making a s.85(2) application to revive the original tenancy rather than rely upon the terms of the new tenancy. Indeed, rather than make an application under para 23 of Schedule 11 to have the “original” and “new” tenancies treated as the same and continuous for the purposes of a “relevant claim”, a tenant should be advised that their primary claim should be one under s.85(2).

26. Para 18(2) of Schedule 11 provides that “the terms and conditions of the new tenancy are to be treated as modified so as to reflect, so far as applicable, any changes made during the termination period to the level of payments for the ex-tenant’s occupation of the dwelling-house or to the other terms and conditions of the occupation.” It is clearly intended to deal with any changes in the conditions of tenancy which were made whilst the occupant was a tolerated trespasser. However, such changes could not have governed the conditions under which the tolerated trespasser occupied the premises. Had they done so, a new tenancy would have been created. Further, some landlord expressly excluded tolerated trespassers from the statutory consultation process in order to avoid the danger that new tenancies would otherwise be created. The new tenancy created by Part 2 of Schedule 11 will therefore be governed by the conditions of tenancy which applied when the occupier became a tolerated trespasser.

27. Landlords beware! We give the following example: A became a tolerated trespasser in 1986 (Form N28 (1983)), B in 1996 and C in 2000 (both Form N28 (1993) and D in 2004 (Form N28 (2001)). Once the Act implemented:

(i) A’s new tenancy will be on the terms applicable in 1986;

(ii) B’s the terms applicable in 1996;

(iii) C’s the terms applicable in 2000; and

(iv) D’s the terms applicable in 2004.

It will be necessary for the landlord in each case to go through the s.102/103 Housing Act 1985 consultation procedure to amend each of the relevant tenancy conditions applicable to A, B, C and D. If the landlord fails to do so and subsequently seeks to enforce the current conditions of tenancy against A, B, C or D (for example, conditions relating to behaviour), it will be open to A, B, C and D to contend that the conditions do not apply.

28. The logical approach would have been to retrospectively revive all tenancies where there had been no grant of a new tenancy and where the “home condition” is satisfied (i.e. the occupant has occupied the dwelling as his/her principal home at all material times). HLPAs proposed this in November 2007 in response to the previous consultation. This approach was also endorsed by the Social Housing Law Association. We urge the CLG to amend Part 2 of Schedule 11 to achieve this objective, rather than implement the Act as currently enacted. This approach would also resolve the problem of the “successor landlord” which is raised by the current consultation.

4. The Current Consultation

29. We turn to the specific questions raised in the current Consultation Paper. If the CLG is minded to implement Part 2 of Schedule 11, it will need to “prune” those provisions which are now redundant as a result of *Knowsley*. If this is the chosen path, we can see no reason why the tolerated trespassers of successor landlords should not be treated in exactly the same way as other tolerated trespassers.

Existing landlord practice relating to transferring tolerated trespassers

Q1. What is the usual practice of successor landlords when dealing with tolerated trespassers? Will tolerated trespassers generally be offered a new tenancy and, if so, what type of tenancy will they be offered? Does this differ from the type of tenancy offered to transferring tenants?

Q2. In what circumstances would tolerated trespassers not be offered a new tenancy?

Q3. Is it possible to identify occupants who have transferred as tolerated trespassers and who have not been offered a new tenancy (i.e., who continue as tolerated trespassers?) If so, is it considered that the numbers are likely to be significant or relatively small?

30. These questions are largely for the successor landlords who respond. In HLPAs experience:

(i) Many successor landlords are unable to distinguish between their tenants and their tolerated trespassers;

(ii) Some successor landlords have taken no steps in respect of their “suspected” tolerated trespassers because they are unsure as to what they should do.

(iii) We are far from satisfied that successor landlords have correctly identified which of their occupants are tolerated trespassers.

(iv) In the light of the decision in *Knowsley*, some occupants will have been wrongly identified as tolerated trespassers. In such circumstances, the original tenancy survives and any “new tenancy” would be subject to the subsisting interest in the land.

Q4. Are there any benefits to landlords in the existing situation and, if so, what are they?

Q5. Are the benefits to landlords sufficient to outweigh the disadvantages, particularly for tenants?

31. There are obvious advantages to successor landlords in retaining this sub-class of tolerated trespasser as they owe no contractual obligations to such occupants. It is questionable whether such advantages are consistent with their status as public authorities for the purposes of either judicial review, the Human Rights Act 1998 or their equality duties.

32. However, there are clear disadvantages to the landlord which were identified by Brooke LJ in *Bristol CC v Hassan* [2006] 1 WLR 2582 (“*Hassan*”) at [34]) and in the previous consultation paper. These disadvantages were revisited by Lord Neuberger in *Knowsley* at [82] – [84]. HLPAs highlights the following:

(i) The landlord is unable to enforce the any contractual conditions against the occupant;

(ii) The statutory framework for increasing rents does not apply to tolerated trespassers. It is questionable whether a landlord can lawfully increase the weekly sums payable by a tolerated trespasser in the absence of (a) an express agreement to increase the sum payable; or (b) an application to the County Court to vary the mesne profits payable.

33. This state of anarchy is wholly unsatisfactory for other tenants living in the neighbourhood. They have a legitimate expectation that the normal contractual obligations of both landlord and tenant should apply to all properties managed by the landlord. The landlord should keep all properties in repair. All occupants should behave in a tenant-like manner.

Legislating for successor landlord cases

Q6. Should the Government introduce secondary legislation to ensure that tolerated trespassers whose landlord has changed, but who have not been granted a tenancy by the new landlord, have their status as tenants restored?

34. This Government must introduce legislation to restore the rights of tolerated trespassers. The current situation is unacceptable for reasons which have been well rehearsed. The future status of a tolerated trespasser should not depend upon whether there was a stock transfer, a matter which has been entirely outside their control. The failure to take prompt action will lead to further expensive litigation. There are a range of unresolved issues which can only be settled by further appeals to the House of Lords unless the government now takes the urgent steps that are required. The Courts have become increasingly frustrated at the government’s failure to take the remedial measures which were identified and agreed as long ago as August 1997 (see para 19 above).

Change of RSL landlord due to merger or takeover

Q7. Should tolerated trespassers who transfer from one RSL to another RSL (and who are not granted a new tenancy by the successor landlord) be issued with the same sort of tenancy as the original one?

Q8. If this resulted in tolerated trespassers receiving an assured tenancy on starter tenancy terms (because the original tenancy was a starter tenancy), would this cause difficulties for landlords?

35. Since the regime of tolerated trespassers does not apply to assured tenancies, this should no longer be a problem.

Change of local authority landlord due to boundary adjustment

Q9. Should tolerated trespassers who transfer from one local authority to another local authority (and who are not granted a new tenancy by the successor landlord) be issued with the same sort of tenancy as the original one?

36. The tolerated trespasser should be issued with the same sort of tenancy as the original one.

Q10. Where the tolerated trespasser had originally held an introductory tenancy but the successor local authority landlord does not operate an introductory regime, should he or she be issued with a secure tenancy?

37. The tolerated trespasser should be issued with a secure tenancy.

Change of landlord from local authority to RSL following large scale voluntary transfer

Q11. Where no new tenancy has been signed, should transferring tolerated trespassers who originally held a demoted tenancy under the 1996 Act be offered a new demoted tenancy under the 1988 Act?

38. The tolerated trespasser should be issued with a demoted tenancy.

Q12. Where no new tenancy has been signed, should transferring tolerated trespassers who originally held an introductory tenancy be offered an assured shorthold tenancy or a full assured tenancy?

39. We are concerned that the successor landlord may not afford assured shorthold tenants with the same procedural safeguards which are provided by Part 5 of the Housing Act 1996. The simplest solution is therefore for them to be issued with an assured tenancy. In practice this situation is unlikely to arise because the former landlord would have obtained an outright possession order against an introductory tenant.

Q13. Where no new tenancy has been signed, should transferring tolerated trespassers who originally held a secure tenancy be offered an assured shorthold tenancy or a full assured tenancy?

40. The tolerated trespasser should be issued with a full assured tenancy.

41. HLPAs would be concerned were any successor landlord to have elected to offer a tolerated trespasser anything less than an assured tenancy. Our advice would be that the would be that the former tolerated trespasser should make an application under s.85(2) Housing Act 1985 to revive their original tenancy which would then revive as an assured tenancy (see *Helena HA v Pinder* [2005] EWCA Civ 1010; [2006] HLR 2, per Arden LJ at [44] and [62]). This would trump any tenancy that was subsequently granted. It would be quite wrong for a successor landlord to deprive a transferring occupant of their preserved rights merely because of defects in the drafting of the primary legislation and the templates used for possession orders. Government must accept their responsibility for this.

Q14. Are there any other options in relation to transferring tolerated trespassers (who have not signed a new tenancy) which might be considered? If so, please provide details on what these are and the advantages which they would bring.

42. The only feasible options are those discussed above.

Demoted and introductory tenancies

Q15. Where the proposals under consideration would result in a tolerated trespasser being granted a new demoted or introductory tenancy, should the trial period apply in full, or should they only last for the balance of time left over from the original tenancy?

43. Logic suggests that there should be consistency with what is offered to other tolerated trespassers under Part 2 of Schedule 11. The only feasible options are those discussed above.

Private landlords

Q16. Are there likely to be transferring tolerated trespassers in the private rented sector and, if so, what is likely to be the scale of the problem?

44. No – see the decision in *Knowsley*.

Applying the provisions in Part 2 of Schedule 11 to successor landlord cases

Q17. Should newly restored tenants who are already a successor under the original tenancy be entitled to succeed under the new one?

45. Logic suggests that there should be consistency with what is offered to other tolerated trespassers under Part 2 of Schedule 11.

Q18. Where newly restored tenants are not already a successor, should the succession rules which apply to them be those which are appropriate to the new tenancy, or the original tenancy?

46. Logic suggests that the tolerated trespasser should be in the same position as other tenants who transferred to the successor landlord.

Q19. Should the “termination period” count towards qualification for the preserved right to buy, as it does for tolerated trespassers issued with new tenancies under the 2008 Act whose landlord has not changed?

47. Yes – this is the effect of the House of Lords’ judgment in *Honeygan-Green* (see Lord Neuberger at [134]).

Q20. Under Part 2 of Schedule 11, where landlords have taken decisions regarding individuals’ voting rights based on their status as tolerated trespassers, these decisions cannot subsequently be challenged on the ground that the local authority failed to include people in the consultation process whom they should have included, or vice versa. Should this be extended to successor landlord cases so that similar provisions would apply to any consultation carried out by either the original or the new landlord during the termination period?

48. We can see no objection to this, but would question whether this is strictly required.

Q21. Part 2 of Schedule 11 gives the court discretion to treat the new tenancy as the same as the original tenancy so that they can allow claims relating to the period when the tenant was a tolerated trespasser. This applies to claims by both landlords and tenants for breach of tenancy agreement, or for the tenant to claim for breach of statutory duty. Should this be extended to successor landlord cases for the purpose of a claim involving the new landlord and the old landlord?

49. Logic suggests that there should be consistency with what applies to other tolerated trespassers under Part 2 of Schedule 11. In practice, it is unlikely that claims would be brought by or against the former landlord.

Q22. Part 2 of Schedule 11 provides that the possession order and other court orders made in respect of the possession proceedings will apply as far as practicable to the new tenancy. Should similar provision be made for successor landlord cases, so that any orders in the possession proceedings apply to the new tenancy, so far as practicable?

50. Logic suggests that there should be consistency with what applies to other tolerated trespassers under Part 2 of Schedule 11.

Q23. If so, should this depend on whether the new landlord has been made party to the proceedings?

51. This is a matter for the successor landlord. In our experience, successor landlords make generic applications to be joined as a party to all pending proceedings.

Q24. In seeking to apply the provisions in Part 2 of Schedule 11 to successor landlord cases, are there any other issues which we have not identified and which would need to be considered?

52. We are unaware of any.

Impact assessment

Q25. Does the impact assessment correctly identify the nature and extent of the costs and benefits associated with the four options which are considered?

53. The costs of Option A (Do Nothing) are likely to be greater than suggested. Further litigation is inevitable. There are still issues which it is likely that only the House of Lords will be able to resolve. There will also, inevitably, be litigation to the European Court of Human Rights at some stage in the future.

54. There is also a likelihood of significant future litigation costs if the CLG introduces Part 2 of Schedule 11 rather than retrospectively revive all tenancies as we advocate in Section 3 above.

Q26. Is it considered that any group is/groups are represented disproportionately amongst tolerated trespassers in successor landlord cases?

55. HLPAs believe that there are diversity issues to which the CLG should have regard:

(i) Regard should be had to “social exclusion”. HLPAs suggest that vulnerable tenants are more likely to be subjected to possession proceedings. They are less likely to attend possession hearings. They are more likely to have problems with housing benefits. They are more likely to be tolerated trespassers, and less likely to access legal advice to reinstate their tenancies.

(ii) The status of tolerated trespasser presents particular difficulties for victims of domestic violence:

(a) It is not clear whether a tolerated trespasser has a “right to occupy by virtue of any enactment” for the purposes of s.33 Family Law Act 1996 (see *Hassan* at [34]). This may restrict the orders that a County Court can make to protect victims of domestic violence. The importance that the government attaches to the protection of such victims is emphasised by the Domestic Violence, Crime and Victims Act 2004.

(b) An application to revive a former joint tenancy can only be made if both former joint tenants agree (see *Marshall*). Such an application cannot be made if a former tenant cannot be traced or refuses to cooperate. Cooperation may be refused after a relationship breakdown. It may have unfortunate consequences for a victim of domestic violence.

(iii) Disabled tenants (particularly those with mental health problems) are more likely to face eviction proceedings and become tolerated trespassers. Behavioural problems or housing benefit difficulties may be “related to a disability”.

(iv) HLPAs are unaware of any research as to whether there is any disparate use of possession proceedings against BME tenants. However, there is a wealth of such evidence in respect of defendants in the criminal justice system and in the employment situation.

Q27. Is there any evidence to suggest that the options under consideration would discriminate on the grounds of race and ethnicity; disability; age; gender and gender identity; sexual orientation; religion and/or belief?

56. HLPAs preferred approach is that the tenancies of all tolerated trespassers should be retrospectively revived. This is the best means of remedying the pernicious impact of the regime of tolerated trespassers on vulnerable tenants. It also restore to them the rights which they would not have lost had government taken the required action in 1997.

5. Conclusions

57. Lord Neuberger noted in *Knowsley* (at [84]) that there are still many outstanding issues to be resolved as to the rights and status of the tolerated trespasser: “Whilst these may be of interest to lawyers, they are simply not the sort of issues which legislation designed to protect residential tenants should require to be resolved”.

58. HLPAs believes that the best option is to retrospectively revive the tenancies of all tolerated trespassers who satisfy the “home condition” in paragraph 16(2) of Schedule 11. If the CLG is unwilling to revisit this issue, HLPAs can see no reason why the tolerated trespassers of successor landlords should not be treated in exactly the same way as other tolerated trespassers.

59. HLPAs is concerned at the delay in bringing Part 1 of Schedule 11 into effect. There is unanimity that this is required. This should have coincided with the Act receiving the Royal Assent on 22nd July 2008. It should now be introduced at the first opportunity in January 2009.

Robert Latham

Housing Law Practitioners Association

22nd December 2008