

Housing: Proportionate Dispute Resolution – The Role of Tribunals

Advice Services Alliance's response to the Law
Commission's consultation paper

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1 Advice Services Alliance

- 1.1 The Advice Services Alliance (ASA) is the umbrella organisation for independent advice networks in the U.K. Currently, our full members are:
- adviceUK
 - Age Concern England
 - Citizens Advice
 - DIAL UK (the disability information and advice service)
 - Law Centres Federation
 - Shelter
 - Shelter Cymru
 - Youth Access
- 1.2 Between them, our members represent over 2,000 organisations which provide a range of advice, legal and other services to members of the public. We estimate that about 125 of these organisations employ solicitors.
- 1.3 Most advice agencies and Law Centres offer services within a local catchment area, but some are regional or national. They are largely funded through public sector grants or contracts and charitable fundraising. With some limited exceptions, services are offered to users free of charge and are focused on areas of law which mainly affect poorer people e.g. welfare benefits, debt, housing, employment, immigration, education and community care (now commonly referred to as "social welfare law").
- 1.4 ASA welcomes the opportunity to comment on this Consultation Paper. The Paper asks many questions and we have not attempted to respond to all of them.
- 1.5 Our members have been given the opportunity to comment on a draft of this response. However, we anticipate that some of our members will respond separately. Further, we are aware that some of our members may hold differing views on some issues.

2 Introduction

- 2.1 We are not convinced that the Commission has made a sufficient case to justify the changes proposed. It is not clear what the real problems are that the Commission is trying to resolve in making these proposals. As far as possession proceedings are concerned, there is no evidence that the existing system run by district judges in the County Court is seriously deficient. It is not clear that the system proposed would produce a higher degree of specialisation than is presently to be found among most district judges.
- 2.2 The paper seems to assume that possession proceedings in the tribunal would be handled more efficiently than they are presently in the County Court, but this is far from self-evident. It is hard to imagine how such proceedings could be handled more quickly than they are at present. It is in fact a long-standing complaint that possession proceedings are handled too quickly in the County Court. The paper assumes that experienced district judges would transfer from the County Court to the tribunal in order to deal with housing cases, but it is not obvious that they would do so.

- 2.3 The paper seems to assume that a housing tribunal would be perceived to be more “user-friendly” and less intimidating for tenants, and that they would be more likely to take part in the proceedings. However, this is not self-evident. Many tenants do not attend court hearings because they have come to an agreement with their (usually social) landlord. It seems to us that this is likely to continue to be the case under a tribunal system.
- 2.4 There does not seem to be a great deal of support for the Commission’s proposals. The paper notes that those who responded to the previous Issues Paper did not come out strongly in favour of any major change to current arrangements. [Para 1.21] Moreover, those responding to the Issues Paper, almost without exception, stated that they thought that further resources needed to be put into the housing dispute resolution system, either into the courts, or into the provision of advice and representation, or both. [Para 1.35]
- 2.5 Furthermore, we consider that the proposals cannot be considered in isolation from the changes that are presently taking place in relation to legal aid. As others have commented, there would be serious dangers in introducing the proposed changes at a time when fundamental changes are being made to the legal aid system. Any reform to housing dispute resolution procedures requires a solid base of housing law practitioners to be available to advise those in need. At the moment there is considerable doubt as to the extent to which the existing base will survive the current changes being implemented to legal aid.
- 2.6 In what follows we will limit our response to consideration of those questions that appear to us to be essential to the proposals made and that fall within our knowledge and experience in relation to
- Dispute resolution generally
 - The role of tribunals
 - Legal aid
 - Alternative dispute resolution.

3 Part 1 - Introduction

Do consultees agree with the working assumptions on which this consultation paper is based? (Para 1.37)

- 3.1 The paper makes three key assumptions:
- That the Residential Property Tribunal Service will be brought into the Tribunals Service
 - That any reform of housing dispute resolution will be evolutionary
 - That there will be no significant increases in the public funds available for the resolution of housing disputes.
- 3.2 The first two assumptions appear to us to be reasonable.
- 3.3 We do not accept the third assumption however. It may well prove to be correct but we do not think that the Commission should work on this assumption.
- In our view, the Commission should consider what changes are necessary before considering whether funds are likely to be available.
 - As noted above, those responding to the Issues Paper, almost without exception, stated that they thought that further resources needed to be put into the housing

dispute resolution system, either into the courts, or into the provision of advice and representation, or both.

- The Legal Service Commission [LSC] claims that the implementation of the current reforms to legal aid will enable it to devote more resources to civil legal aid, and in particular to social welfare law, including housing. While we have doubts as to whether the LSC will achieve this, we do not think that their failure should be assumed.

4 Part 2 - The case for change

We would be interested in consultees' views on whether [...] a restriction on the use of expert witnesses would contribute to the proportionate resolution of disrepair cases, or, as the Law Society suggest, might it prevent the parties reaching an early settlement, and lead to more cases proceeding to a full tribunal hearing? (Para 2.126)

4.1 We do not believe that there needs to be any further restriction on the use of expert witnesses in addition to those already contained within the Disrepair Protocol and the CPR.

4.2 We would endorse the comments made by Michael O'Dwyer that:

"The use of experts in disrepair cases is absolutely vital in the pre action preparation and is integrated into the protocol process. There is no suggestion that this is in any way being abused or is in any way not helpful to the resolution of disputes. In addition, the protocol on the instruction of experts and the code set out in Rule 35 of the CPR, combine to ensure that the highest standards are adhered to. Expert evidence is already restricted unless ordered and the present system does not need further amendment."

Do consultees agree with our provisional proposals that the generalist and specialist elements of the current system for the resolution of housing should be re-balanced by shifting jurisdictions from the courts to an RPTS within the tribunals system to be established under the Tribunals, Courts and Enforcement Bill? If consultees do not agree, we would be interested to know the reasons why. (Para 2.133)

4.3 We are not convinced by the provisional proposals.

Justification

4.4 We note the view of Citizens Advice that, following the introduction of the rent arrears protocol, there is not a strong case for transferring rent arrears possession cases to a specialist tribunal. According to Citizens Advice, the experience of many of their advisers involved in court desks is that the current system works well, and that the protocol has made a real difference in providing a clear framework to help judges reach appropriate and consistent decisions.

Legal aid

4.5 There is a real risk that the implementation of these proposals will result in the loss of legal aid for housing cases. The general position is that legal aid is not available in first tier tribunals. The only significant current exceptions are in immigration and mental health, where people's liberty is at stake. If housing possession cases, in particular, are transferred to a first tier tribunal, we consider it very likely that the LSC will argue that legal aid should cease to be available as of right. This is even more

likely if the LSC considers that sufficient cover will be provided either by court duty schemes or by the presence in the relevant locality of what are now termed “integrated social welfare law services”.

- 4.6 The paper notes the fears of many respondents that a transfer of housing cases to a housing tribunal would involve the loss of legal aid. [Paras 6.5, 6.52] It notes that the future of legal aid, and especially the balance between funding for advice and assistance and funding for representation is currently very uncertain. [Para 6.2] It notes the expectation that applicants to the Scottish private rented housing panels will not require legal representation. [Para 2.131] It proposes that legal aid should continue to be available in those cases for which it is currently available, while noting that the principles on which legal aid is granted may change. [Para 6.61]
- 4.7 Although the paper claims at one point that the Commission would not support the transfer of jurisdictions proposed unless legal aid was available in the First-tier and Upper Tribunals [para 2.111], the paper fails to confront the real possibility that a transfer of jurisdictions could be followed by a reduction in legal aid availability, in the first tier in particular.

Do consultees think the benefits of the proposed changes will outweigh the potential costs that will be involved? In what respects do consultees think that the reformed system might be run more economically than the current one? (Para 2.141)

- 4.8 The paper does not contain any costings for these proposals, and they are impossible for us to estimate. We agree with the vast majority of previous consultees that further resources need to be put into the system if it is to function properly. In any event, consideration would have to be given not only to the costs of the new system but also to the effect on the County Courts of the loss of a major part of their business.
- 4.9 We do not agree with the premise of the second question. A reformed system should be considered firstly on its merits and only secondly in terms of its cost.

5 Part 3 - Housing Tribunal: proposed jurisdiction

Do consultees agree that jurisdiction should be transferred from the county court to the First-tier Tribunal in respect of rented housing possession claims? (Para 3.19)

Do consultees agree that jurisdiction should be transferred from the county court to the First-tier Tribunal in respect of rented housing disrepair claims? (Para 3.25)

- 5.1 As we have previously indicated, we do not believe that a strong enough case has been made out for the transfers proposed. As previously stated, we consider that the transfer of these cases to the first tier tribunal would however risk the withdrawal of legal aid for those who are eligible.
- 5.2 In relation to housing disrepair claims we note in particular the recent acceptance by the Government that the small claims limit should remain at £1,000, thus preserving entitlement to legal aid in relation to claims which fall above that amount. It would be extremely unfortunate if this significant recognition of the importance of such claims were to be undermined by the transfer of such claims to a first tier tribunal.

Do consultees agree that the tribunal should have jurisdiction to determine questions relating to succession rights, where these are incidental to possession proceedings? (Para 3.38)

- 5.3 We find the wording of this question somewhat confusing. Where possession proceedings are brought against occupants who claim to have the right to succeed to a tenancy, questions relating to succession rights are essential (rather than incidental) to the proceedings.

Do consultees agree that the housing chamber of the First-tier Tribunal should be able to determine housing benefit appeals? (Para 3.60)

- 5.4 We are not convinced that this is appropriate or necessary. If the Tribunal Service is aware that a possession claim is likely to be affected by a housing benefit appeal it should be able to arrange for the housing benefit appeal to be heard before the possession claim. We are not convinced that there is any particular advantage in having the two matters dealt with by the same tribunal, given the different jurisdictions involved and the need for different expertise.

- 5.5 We endorse the following comments on this question made by Shelter:

“We are not convinced that the housing chamber of the first tier tribunal could necessarily be expected to have the necessary expertise to be able to determine housing benefit appeals alongside mainstream housing issues. Housing benefit appeals are currently well dealt with by the Independent Appeal Tribunal. We do accept that it would be highly convenient and in many ways desirable for a possession case and an associated housing benefit appeal which has a bearing on rent arrears in that case to be dealt with together by the same body. However, housing benefit (HB) is a complex area of law in its own right and, depending on the composition of the tribunal, it would not necessarily have the expertise to deal with benefits issues. Additionally, the tribunal would have to call for all the appeal papers on the HB appeal and ensure that all the necessary evidence and argument was available to it.”

- 5.6 We also agree with Citizens Advice:

“In relation to hearing HB appeals we believe that there would also be problems in combining these with possession hearings. Firstly the time lines of a possession case and a housing benefit appeal are unlikely to coincide, thus building delays in the system. Secondly there must be a concern that the two appeals would not be treated as totally separate decisions if the same panel was dealing with both appeals. There would be a real danger that the first decision reached (and the evidence heard) would have an impact on the second decision.”

Do consultees agree that the housing chamber of the First-tier Tribunal should be able to step into the local authority’s shoes and determine a tenant’s initial housing benefit application if housing benefit is an unresolved issue in a rent arrears possession claim? (Para 3.62)

- 5.7 It seems to us that this proposal is wrong in principle. The determination of a housing benefit claim requires an exercise in administrative decision-making that is quite separate from the role of tribunals.

- 5.8 We endorse Shelter’s comment:

“We do not agree that original decisions on housing benefit applications should be made by the tribunal. We think that this would involve enquiries and investigations

which are more properly within the administrative sphere, and we would not wish to see tribunal resources taken up in this way.”

5.9 We endorse also the views expressed by Citizens Advice:

“We have significant concerns about the proposals to enable the tribunal to make HB decisions. Firstly such issues should not arise following the introduction of the pre-action protocol. If there is an outstanding HB issue then it follows that the landlord should not have initiated court action at this stage.

Secondly we cannot see how a tribunal could step into the shoes and make a “first instance” determination of an HB claim. Very often the reason a decision has not been made is that the local authority does not have all the information needed to determine the claim. In these instances the tribunal would be no more able than the local authority to make the decision. Where all the information is available, and the problem is that the case is sitting in a queue, then by the time the local authority has extracted the papers in order to make them available to the tribunal, it might as well make the decision itself.

There is also the issue that a negative decision on an HB claim taken by the tribunal may well increase the likelihood that the accompanying possession hearing results in an outright possession order. What would be missing would be the time and opportunity for the claimant to take advice and consider appealing the negative decision, as would currently happen. In this sense, such a conflation of the two decisions could seriously compromise the claimant’s access to justice. . .

In our view the fundamental issue is that disputes around the HB claim, including appeals, must be resolved before a possession claim is heard. That is the principle enshrined in the pre-action protocol. It follows that any strategy to improve the process should be focused on giving the tribunal or court additional powers to require the HB department to expedite a case where a possession claim has been made, rather than seek to conflate the two very different decisions required.”

5.10 It seems to us that there are a number of practical difficulties

- The tribunal would need to make a number of findings of fact in order to establish whether a tenant is or is not entitled to housing benefit. While some of these may be relatively straightforward, others may be quite complicated, and include consideration of the tenant’s circumstances at different periods of time. This may require production of a significant amount of evidence (e.g. as to the income of the tenant, her/his partner and/or adult children at different periods of time), without which the tribunal may feel unable to make a proper decision.
- The tribunal would also have to make findings as to the date on which the tenant’s application was made, or was to be treated as having been made, in order to decide the date from which the tenant was entitled to benefit, and/or whether the tenant was entitled to have their application backdated. This again may require evidence that is not easily available.
- To whom could the tenant or local authority appeal if they disagreed with the tribunal’s decision? Presumably this could only be a “sideways” appeal to the first tier tribunal dealing with benefit appeals. Would that tribunal have authority and/or find it easy to override the decision of the first-tier housing tribunal, particularly in relation to certain findings of fact?

Do consultees agree that jurisdiction should be transferred from the county court to the Upper Tribunal in relation to homelessness statutory appeals under sections 204 and 204A of the Housing Act 1996? (Para 3.71)

- 5.11 We are not convinced that a case has been made out for the transfer of such cases to the tribunal.
- 5.12 However, if jurisdiction for such appeals is to be transferred, we agree that it should be to the Upper Tribunal, and on the strict proviso that legal aid would continue to be available in such cases.

6 Part 5 - Procedural principles

Do consultees agree that an overriding objective, to which those deciding housing disputes must have regard, would assist in securing more proportionate dispute resolution? (Para 5.16)

- 6.1 As we stated in our response to the Commission's previous paper on these issues, we believe that key objectives of any system should be
- to ensure as far as possible that landlords and others understand and honour their legal obligations
 - to ensure that people with housing problems – tenants and homeless people in particular – understand their rights and obligations and have access to proper remedies where there is a failure to comply with legal obligations by others – especially landlords and local authorities
 - to ensure that the parties are on an equal footing
 - to provide a system that is accessible, fair and effective, and that produces decisions which are enforced.

Do consultees agree that, in addition to retaining an equivalent of the accelerated possession procedure for cases where possession is sought on notice-only grounds, the tribunals should be able to determine other rented housing possession and disrepair cases, caravan and mobile home possession cases, homelessness statutory appeal and housing and homelessness judicial review cases without an oral hearing, where the parties agree to dispense with an oral hearing? (Para 5.82)

- 6.2 We consider that any such provision should only be available where both parties are legally represented.
- 6.3 In our previous response we stated that we do not believe that housing (or any other serious) disputes can or should be adjudicated without the need for oral hearings.¹
- 6.4 There may of course be cases where both parties genuinely, and reasonably, agree to dispense with an oral hearing. This may include cases where the parties reach an agreement and ask the tribunal to put this agreement into effect by means of a consent order.
- 6.5 In most cases however there is likely to be a disparity in power and resources between the parties. There is a danger that the weaker and/or less advised or represented party may succumb to pressure to agree to dispense with an oral hearing to their own disadvantage.
- 6.6 We endorse the following comments by Citizens Advice:

¹ See our response to the Council on Tribunals consultation on oral hearings, which is available at http://www.asauk.org.uk/fileLibrary/pdf/Oral_Hearings_2.pdf

“We are therefore concerned at the proposal to dispense with an oral hearing where the parties agree. The tenant may well not appreciate the significance of insisting on a hearing, seeing it rather as an intimidating experience to be avoided, and also believing that it will make no difference to the outcome. Indeed in the past CABx have often reported cases where landlords have successfully sought to dissuade tenants from attending court on just such grounds. Similar pressure might well be applied to a tenant to agree to dispense with an oral hearing and agree to arrears repayments which may be unaffordable. . . .

There would also be a risk that local authorities might take a tenant’s decision to dispense with an oral hearing into consideration when deciding on intentional homelessness.”

- 6.7 To avoid the risks highlighted above, we consider that any such provision should only be available where both parties are legally represented.

7 Part 6 - Legal advice and representation

What types of advice or assistance do consultees think tribunal staff should offer to tribunal users? Do consultees agree that it is inappropriate for tribunal staff to offer any advice which touches on the substance of the dispute or its legal merits? (Para 6.21)

- 7.1 Tribunal staff should be able to provide advice on procedure, and advice on how to fill in certain forms, such as an application to suspend a warrant. They should also advise tribunal users of the advantage of getting independent legal advice. However we agree that they should not offer advice that touches on the substance of the dispute or its legal merits.

Do consultees agree that independent advice should be provided through a duty desk at every tribunal venue hearing housing cases (especially possession claims)? (Para 6.30)

- 7.2 We agree absolutely with this proposition. There is a wealth of evidence demonstrating the importance of advice and representation in housing cases, and especially possession claims.

Do consultees agree that there should be no formal bar on the use of legal representation before the tribunals? Are there ways in which use of nonlegal representation might be encouraged? What appropriate safeguards (for example in relation to quality, or adherence to professional standards or ethical codes) need to be in place if representation is to be other than by lawyers? (Para 6.50)

- 7.3 As we have stated previously, we do not believe that there should be any restrictions on the use of legal representation.
- 7.4 Representation by non-lawyers can, in our view, be safely provided by caseworkers employed by organisations that have a contract from the Legal Services Commission in housing, and therefore have the Specialist Quality Mark in housing.
- 7.5 We do not think that representation by anyone else should be encouraged.

Do consultees agree that legal aid should continue to be available in those housing cases for which it is currently available if they are heard by the tribunals in future instead of the courts? (Para 6.62)

7.6 Yes

Do consultees agree that greater use of conditional fee agreements is unlikely to contribute to the more proportionate resolution of housing disputes? Should there be any further restrictions on the use of CFAs in housing cases? (Para 6.77)

7.7 As we stated in our previous response:

“We are not convinced of the value of conditional fee agreements in housing cases. To date, they have been used primarily in housing disrepair cases, where it is unlikely that they have contributed to access to justice. Both the Law Society and the courts have emphasised that they should not be used when clients are entitled to legal aid – as is generally the case on local authority housing estates, which seem to have been the areas targeted by claims management companies active in this area. It appears that the use of CFAs in this context has declined significantly as a result of these warnings and the active defence of claims by local authority legal departments.”

8 Part 7 – Alternative dispute resolution

Do consultees agree that the tribunals which we propose should hear housing cases should offer mediation to the parties in every case? What steps short of compulsion do consultees think are justified to encourage use of mediation? Are there circumstances in which refusal to mediate should be penalised in adverse costs awards? (Para 7.35)

8.1 In principle, we agree that tribunals should consider offering mediation in every case, although we are not sure whether mediation would bring added value in many cases.

8.2 The paper implies that the tribunal would pay for mediation, which is likely to involve significant additional costs.

8.3 Where mediation is offered, it is essential that the recipients receive sufficient information about what is being offered and independent advice as to whether or not they should accept the offer.

8.4 In our previous response we stated:

“ASA’s view is that mediation may be appropriate in a limited number of types of housing disputes, in particular those where there is an ongoing relationship which both sides value, and/or which it would be advantageous to preserve rather than damage. Therefore mediation may well be suitable for . . . some kinds of landlord and tenant disputes. It is unlikely to be appropriate for . . . disputes where what is needed is enforcement of rights by a weaker party against a stronger one.”

8.5 It is possible that a routine process of offering mediation may lead to a change in the parties’ behaviour. Social landlords may, for example in rent arrears cases, place reduced importance on meeting with tenants before issuing proceedings, on the basis that a mediation meeting is likely to be arranged by the tribunal.

8.6 It seems to us that this proposal is one that should be piloted and properly researched. The second question can then be considered in the light of experience.

Do consultees agree that the tribunal should have the power to offer the parties early neutral evaluation? (Para 7.43)

- 8.7 We agree that the tribunal should have such a power. We agree with the Commission that this power is likely to be of most value in disrepair cases.

9 Part 8 - Fees and costs

- 9.1 Our general view in relation to costs is that the possibility of having to pay costs does focus the minds of the parties involved. Where a successful party is legally aided, obtaining a costs order against the opponent involves a concomitant saving in relation to the Legal Aid Fund.
- 9.2 The fear of costs can however act as a disincentive to parties considering bringing or defending proceedings. Costs are not generally awarded by tribunals, which presumably helps to make them seem more accessible.
- 9.3 There is therefore a difficult balance to be struck.

10 Part 9 - Enforcement

Are any further reforms (in addition to the removal of the requirement to register a tribunal judgment in the court before using the county court's enforcement powers) required to give a tribunal hearing rented housing possession and disrepair cases and caravan and mobile home possession cases effective enforcement powers, in relation to money judgments and warrants of possession? In particular, should there be any limit on the number of applications a tenant can make for suspension of a warrant of possession? (Para 9.38)

- 10.1 Enforcement powers need to be fair as well as effective. It is our view that no warrant should be issued without an application being made by the landlord on notice to the tenant.
- 10.2 We do not consider that there should be any limit on the number of applications a tenant can make for suspension of a warrant of possession. A tenant's circumstances can change for any number of reasons, and the court must consider these. Any such limit is in our view likely to be in breach of Article 6.
- 10.3 As Shelter says:

"We take the view that there should not be any limit on the number of applications a tenant may make to suspend a warrant of possession. Each application needs to be dealt with on its merits, and there cannot be any justification for an arbitrary numerical limit. The court or tribunal will not routinely accept that there are grounds for a fresh application to suspend, but will require to be satisfied on each occasion that there has been some change of circumstances, or that there are particular reasons why an earlier order has not been complied with. When what is at stake is the loss of a person's home, the court must be able to review the reasons why there has been non-compliance and consider whether there are mitigating factors that should relieve the defendant and his/her household of eviction."