

StepChange Debt Charity response to
Civil Procedure Rule Committee
enforcement of possession orders and
alignment of procedures in the County
Court and High Court consultation

May 2019



Introduction

StepChange Debt Charity welcomes the Civil Procedure Rule Committee's proposals to align the procedures that apply in the County Court and High Court in enforcing possession orders. However, we recommend there should remain a requirement to seek judicial permission for housing cases in the High Court.

We are the largest specialist debt advice charity operating across the UK. In 2018, over 650,000 people contacted our telephone helpline or online debt remedy tool for advice and information. Housing-related debt amongst our clients is significant: of the clients to whom we provided debt advice in 2018, 18% of those with a mortgage had mortgage arrears and 21% of tenants had rent arrears.

Data from our clients demonstrates that many are simply not able to afford life's essentials,¹ at the time of seeking debt advice. They need time to get advice and begin to stabilise the financial situation in order to address their debt problems. Our analysis of London clients, in particular, highlights how housing costs are increasingly at the heart of their financial difficulties.² Our 2018 survey of clients' housing issues reveal that 11% had been made homeless, at some point, as a result of rent or mortgage arrears.³

We have estimated the potential total external cost of unaddressed problem debt to government and the economy for a cohort of three million people facing severe financial difficulties to be around £8.3 billion. This is through the additional strain on health and local services, lost productivity, lost jobs and longer-term reliance on welfare and support services. It includes a potential £2.8 billion cost of losing a home or being evicted as a result of unresolved problem debt.⁴

It is important to ensure the proper protections for both landlords and people in debt and that these reach the right balance in terms of ensuring faith in the justice system by both parties. Recent Government policy has highlighted the importance of supporting people in financial difficulty to address and resolve their debt problems. The introduction of Breathing Space and statutory debt repayment plan schemes that could include protection from all collections and recovery action relating to a Section 8 eviction when people enter such a scheme would provide important support to help people in debt.⁵ The Pre-Action Protocol for Debt Claims,⁶ Pre-Action Protocol for Possession

¹ StepChange Debt Charity (2018) Locked Out

² StepChange Debt Charity (2018) London in the Red

³ StepChange Debt Charity (2018) Locked Out

⁴ StepChange Debt Charity (2014) Transforming Lives

⁵ HM Treasury (2018) Breathing Space scheme: consultation on a policy proposal

⁶ <https://www.justice.gov.uk/courts/procedure-rules/civil/pdf/protocols/debt-pap.pdf>

Claims by social landlords⁷ and Mortgage Pre-Action Protocol for Possession Claims⁸ also encourage landlords and lenders to provide forbearance to those who are struggling with their finances, and at risk of losing their home.

Our response reflects the increasing recognition in recent Government policy that evictions and homelessness should be a last resort for people who, because of a change in circumstances, simply cannot keep up with an essential cost such as rent or mortgage payment. The emphasis should be on providing them with an opportunity to stabilise their finances and, if the situation is appropriate, to be allowed time to repay their debts without fear of enforcement action or losing their home.

The recent announcement to end “no-fault” evictions by repealing section 21 of the Housing Act 1988, aims to strengthen tenants’ rights, so they can plan for the future, and feel more empowered to challenge their landlord about poor property standards where this occurs, without the threat of eviction.⁹ Any change in Civil Procedure Rules should align with the policy intention that tenants should have adequate protections to stay in their home.

Question 1: (a) Should there be a process in the County Court of providing a notice of the time and date of eviction prior to the retaking of possession? And if so then (b) should it be put on a statutory basis?

1a Yes

1b Yes

Please explain your response

All occupants of a premises should be given sufficient notice of the time and date of eviction to enable them to seek advice, apply to the court to challenge a decision, postpone or suspend an order or to make alternative arrangements for accommodation. This can only be ensured for all occupants, if this is placed on a statutory basis.

There were 23,630 possession orders and 31,658 possession claims made between July-September 2018.¹⁰ These cases have a significant impact on people’s lives. The leading cause of homelessness is the termination of a PRS tenancy. Shelter reports that 18,750 households were made homeless

⁷ <https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-possession-claims-by-social-landlords>

⁸ https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha

⁹ Ministry of Housing, Communities & Local Government (2019) Overcoming the Barriers to longer Tenancies in the Private Rented Sector: Government response.

¹⁰ Citizens Advice (2017) It’s broke let’s fix it

after being evicted from a privately rented home in 2016, an increase of 13,010 since 2011.¹¹ It is important for the wider economy and society that court processes work for tenants to allow them to challenge evictions that may be unlawful, to seek relief or on which the court may rule with consideration to hardship.

“It is important that so far as possible tenants should receive such notice in time to enable them to take advice and, if so advised, bring the matter back to court before the date fixed for eviction.”
Lord Justice Kennedy¹²

The statutory procedure should set out the notice period that is required and how and when the notice should be sent and delivered to ensure the court’s expectations are clear.

Question 2: Should the notice be based on the current Form N54?

Yes

Please explain your response

Form N54 should specify when the execution of the warrant will take place and tell the defendant that an application to court can be made to suspend the warrant. We would support the notice being based on current form N54 but this should be simplified into plain English¹³ to ensure that tenants understand the procedure to be followed, particularly if they wish to challenge the decision, as well as ensuring there has been procedural fairness. This would align with the current HMCTS reform programme with its emphasis on accessibility to court services, including the use of plain English.¹⁴

Question 3: What information should be included in the notice?

b) a new form

If so, please provide details and explain your answer

The form should be based on the current Form N54 specifying when the execution of the warrant will take place and telling the defendant that an application to court can be made to suspend the warrant. It should also include:

- more prominent and simpler instructions on the process the defendant needs to follow to challenge or suspend the warrant

¹¹ Shelter (2017), Eviction from a private tenancy accounts for 78% of the rise in homelessness since 2011

¹² <https://www.casemine.com/judgement/uk/5a8ff7a160d03e7f57eb082d> [2001] EWCA Civ 1138, at (26)

¹³ <http://www.plainenglish.co.uk/>

¹⁴ <https://www.gov.uk/guidance/the-hmcts-reform-programme>

- advice that the defendant should seek free debt and/or housing advice to address their housing situation as soon as possible and a list of sources of such free advice.

Lack of access to advice and assistance for tenants facing possession proceedings, as well as reduced provision of legal aid advice for housing,¹⁵ is already exacerbating delays to court procedures. Courts often adjourn cases involving arrears of rent for benefit problems to be resolved, but if the tenant is unable to obtain assistance to resolve the benefit issues the case may return weeks later with no progress having been made. Similarly, tenants who raise issues such as disrepair at the first hearing may be ordered to file and serve a fully pleaded Defence and Counterclaim but be unable to find a solicitor or adviser with the capacity to help and similarly return to court with no progress having been made.¹⁶ Including information in the notice encouraging people to access advice, with a list of free advice providers could reduce some of these delays.

Question 4: a) To whom should the notice be addressed and b) where should it be delivered? In particular should it always be addressed “to the occupiers” and delivered to the premises?

4a

Tenant

Other

Please explain your response

There have been examples where tenants of buy-to-let, and sometimes undeclared, landlords who have been subject to possession orders by lenders, have known nothing about the proceedings until the day bailiffs arrived at their doors. This was because they had ignored, or not received, letters addressed “to any other occupiers”.¹⁷ In this situation the current process favours the landlord in default, over their tenants. The Ministry of Justice should evaluate the mortgage process under The Dwelling Houses (Execution of Possession Orders by Mortgagees) Regulations 2010 for evidence of effectiveness.

One solution would be to require all landlords to have up-to-date records, shared with lenders, of all occupiers of their property and a requirement to specifically address letters to each of them by name in the event of a possession order being issued. At the least, such letters should be delivered in prominent way that ensures they are likely to be read by all occupiers.

4b

¹⁵ <https://www.lawsociety.org.uk/policy-campaigns/public-affairs/parliamentary-briefing/legal-aid-deserts/>

¹⁶ <https://www.judiciary.uk/wp-content/uploads/2019/01/cjc-dla-draft-response-on-housing-tribunal.pdf>

¹⁷ <https://www.landlordlawblog.co.uk/2017/10/12/mortgage-repossession-proceedings/>

The premises

Please explain your response

All occupants of a premises should be given sufficient notice of the time and date of eviction to enable them to challenge the order, seek relief or to make alternative arrangements for accommodation. Notice should always be given at the premises concerned to maximise the chances of all occupiers receiving this, as well as at any other contact addresses recorded.

Question 5: What should the standard length of notice be?

c) other (and what length)?

1 month

Please provide your justification for c)

In the recent Government consultation on longer term tenancies,¹⁸ 79% tenants who answered the question, wanted a minimum of three months' notice to find alternative accommodation. Official statistics published by the Ministry of Justice show that the median time for landlord claim to possession was, slightly longer, currently 16.3 weeks.¹⁹ If the landlord is required to provide two months' notice of a section 8 eviction claim and the possession order is granted, a one month notice of eviction date gives the tenant an additional month to get advice to challenge the decision, seek relief or provides them with a total of three months from the initial notice period to find alternative accommodation, before the possession order is enforced. Providing this additional one month notice should not significantly disadvantage landlords when the current median timeframe from a claim to possession is 16.3 weeks.

Question 6: Should the court have the power (i) to dispense with or (ii) to reduce or (iii) extend, the notice period?

6 iii)

The court should have the power to extend the notice period, depending on the circumstances, where the tenant wants to challenge the possession order, or suspend the order, but needs more time to seek and act on advice. The court should not have the power to dispense with or reduce the notice period as this would reduce the time the tenant has to challenge the possession order or to find alternative accommodation.

¹⁸ Ministry of Housing, Communities & Local Government (2019) Overcoming the Barriers to longer Tenancies in the Private Rented Sector: Government response.

¹⁹ *ibid*

Please explain your response

Tenants should be able to challenge a possession order, or seek relief and be given sufficient time to do so. The tenant is at risk of losing their home and the procedure must give the tenant the opportunity to obtain advice and, if appropriate, to defend a claim for possession.

and: - If yes: - a) at the time of the original judgment? - b) or later? - Please provide your justification for a) or b)

6b

Later, if this would ensure the defendants are not threatened with homelessness whilst looking to challenge a decision.

Question 9: Should procedures, (in terms of enforcement of possession orders in the High Court and in the County Court) be aligned by a similar requirement for HCEOs to provide a Notice to occupiers of the date and time of eviction delivered to the premises prior to the retaking of possession?

Yes

Please provide your justification

There should be a new requirement on the High Court to provide a Notice of the date and time of eviction delivered to the premises prior to the retaking of possession. For ease of understanding by the occupiers, this should be aligned to the procedures used in the County Court. This should adopt the fairest and clearest process for defendants across the board.

CPR 83.13(8) (a) requires sufficient notice to be given to all occupants of the premises to enable them to apply to the court for any relief to which they may be entitled.²⁰ There is no reason why High Court Enforcement Officers should be able to attend to evict without occupiers receiving any notice of the date or time of eviction and significantly reduces occupiers' rights which are upheld in the County Court process. With no notice occupants will have no time to seek advice or apply to the court for the warrant to be suspended. In fact, one High Court Enforcement Officers' firm states on their website that they are "*required to give the tenant seven days' notice*" when enforcing a writ of possession.²¹ This practice should be codified in the procedure rules to prevent abuse and put the practice on a firmer footing.

²⁰ Senior Master Practice Note (21 March 2016)

²¹ <https://thesheriffsoffice.com/articles/when-can-high-court-enforcement-agents-attend-for-residential-evictions-2>

Tenants given no notice of the eviction date will also have insufficient time to look for alternative accommodation and may end up as a result in local authority temporary accommodation. This puts more pressure on local government budgets at the same time as more and more families are currently being housed in temporary accommodation. This type of housing is often of particularly poor quality, not suitable for the families' needs and removes them from their established schools and health services.²²

Tenants applying for homelessness assistance from local housing authorities are often advised to wait until the day of the eviction, before assistance will be given. In some cases this can delay the time it takes for the landlord to gain possession. The Homelessness Reduction Act 2017 aimed to prevent this from happening by making provision for local housing authorities to provide early assistance to assured shorthold tenants facing possible homelessness, and so reduce the large costs faced by local authorities in finding housing for a homeless family.²³ However, if no notice is given of enforcement of a possession order, this may undermine the intentions of the Act in preventing homelessness.

In the future, in cases where the tenant has entered a Breathing Space or debt repayment plan scheme, the current intentions of the scheme would be undermined if there was no notice of a possession order given, so that the tenant could challenge the continuation of enforcement action.

At present, the High Court procedure also differs from County Court procedure in that the issue of the Writ requires a judicial act in terms of a judge being satisfied that all occupiers have sufficient notice of the proceedings. As stated above, this requirement involves a considerable case-load for Masters but where the burden on the claimant is very low and it is difficult to see how the court could reject the claimant's certificate that the occupiers have such notice. If the occupiers are to have advance notice of the date and time of eviction by way of a Form N54 type procedure, then that would give them notice and an opportunity to seek any relief or make arrangements.

Question 10: If it is accepted that provisions for enforcement of possession orders in the County Court and High Court be aligned, should there still be the need for judicial permission to enforce possession orders in the High Court?

Yes

Please explain your answer

In 2016 a senior Master Practice Note was issued stating:

²² House of Commons Library (2017) Use of temporary accommodation in England

²³ <https://www.judiciary.uk/wp-content/uploads/2019/01/cjc-dla-draft-response-on-housing-tribunal.pdf>

“I have received complaints that some High Court Enforcement Officers (“HCEOs”) have been using Form N293A to transfer County Court Possession Orders against tenants for enforcement to the High Court. This procedure is wrong because:

The Form is intended for enforcement of possession orders against trespassers only (as stated in the notes at the bottom of the form; and

CPR 83.13(2) requires the permission of the High Court before a High Court Writ of Possession can be issued; and

CPR 83.13(8) (a) requires sufficient notice to be given to all occupants of the premises to enable them to apply to the court for any relief to which they may be entitled.”²⁴

Removing the need for judicial permission to enforce possession orders in the High Court would undermine the intentions of this practice note, by reducing the rights of tenants to those currently applied to trespassers. In all housing cases, the risk of homelessness for the occupiers means that all should have the right to notice of eviction that provides them with sufficient time to challenge the decision, seek relief or to find alternative accommodation. It would also allow the High Court to decide if the tenant is vulnerable and should be given more support before the possession order is enforced.

“Applications seeking a transfer to the High Court should be backed up with evidence and not made as a matter of routine.”²⁵

District Judge Wendy Backhouse, the Law Society Gazette

Question 13: Should the current exception regarding the absence of need for judicial permission for a Writ to issue in mortgage cases continue?

No

Please explain your answer

The rationale for the exemption of mortgage cases is not clear and so we do not recommend that the absence of need for a judicial permission for a writ in mortgage cases should continue. Regulations regarding notice should be aligned with those in the County Court, where CPR55.10 sets out that notice of the possession claim hearing date in mortgage cases must have been delivered to the premises within five days of notification of the hearing date. It should also align with CPR55.10 (4) which requires a claimant to bring to a hearing a copy of notices and evidence they have been sent.

The courts have expressed different views as to what is meant by “sufficient notice of the proceedings” although the more recent authorities have limited to this to merely some notice

²⁴ Senior Master Practice Note (21 March 2016)

²⁵ The Law Society Gazette January 2014 [<https://www.lawgazette.co.uk/benchmarks/residential-possession-speedy-eviction/5039581.article>]

of an intention to implement an enforcement eviction procedure rather than a formal letter accompanied by a copy of the order for possession setting out that an application for a Writ is now being made. From a Claimant's perspective, it is for the defendant to initiate an application for relief. However, a, possibly vulnerable, defendant may require a notification of substance to push them into seeking advice and defending their rights.

Question 14: Should the requirement of occupiers having "sufficient notice of proceedings" be defined; and if so then how and in particular as to notice of:

- i) the proceedings seeking possession?
- ii) the original order for possession?
- iii) any order transferring enforcement to the High Court?
- iv) the last order or writ or warrant for possession or order staying or suspending such?
- v) an intent to enforce or
- vi) something else?

Any of the above – please specify which or All of the above

Yes

The "sufficient notice of proceedings" should be defined and should include "All of the above". The notification should also include encouragement to seek advice as soon as possible and a list of free advice providers.

Question 15: Should there be a need to justify transfer of enforcement of possession orders between the County Court and the High Court (i) if the procedures for possession are aligned and (ii) if they are not?

Yes

Please explain your answer; and give any particular considerations that should be taken into account as to whether or not transfer should take place

We would recommend that there should not usually be a need to transfer possession order enforcement from the County Court to the High Court. In exceptional cases, there should be a need to justify transfer, whether the procedures are aligned or not. We recommend, as argued above, that High Court procedures are aligned with those in the County Court.

A general assumption by landlords that High Court Enforcement Officers are more efficient at gaining possession of a property seems to have led to many landlords trying to transfer enforcement of possession orders from the County Court to the High Court. Such an assumption may explain the

increasing use of High Court enforcement action by other creditors, including landlords, in recent years.²⁶ However, we would question these assumptions as there is no available statistical evidence to compare the two.

*“Given that eviction by a county court bailiff, with notice, is the norm, cogent reasons for a transfer to the High Court should be given. Applications under section 42(2) of the [County Courts Act 1984] rarely give any evidence of delays in bailiff appointments in that particular court or of the hardship apparently being caused to the landlord, both of which are routinely cited in support of the request.”*²⁷

District Judge Wendy Backhouse, the Law Society Gazette

Ministry of Justice statistics showed that in 2018 the median time from claim to possession was 16.3 weeks. However, amongst landlords responding to a recent Government consultation the most frequent timeframe cited was 21 to 52 weeks.²⁸ This suggests that landlords are over-estimating the time it will take from claim to possession.

We also have concerns that private sector enforcement agents, including High Court Enforcement Officers, are frequently breaking regulations governing their conduct and putting people, especially those who are vulnerable, at increasing risk through aggressive enforcement activities. In contrast, County Court bailiffs are civil servants with clear systems of oversight and monitoring. Between December 2015 and December 2018 StepChange Det Charity advisers reported 340 incidents where clients had told them of incidences where private enforcement agents, including many High Court Enforcement Officers, have broken regulations or the Ministry of Justice National Standards. Over that time period there has not been a single report of such incidents regarding County Court bailiffs.

In addition, there may be a bailiff warrant to enforce a money judgement made with the possession order. In this case transferring the procedure to the High Court would result in much higher fees for the defendant, who is often vulnerable and in financial difficulty, rather than the claimant.

Finally, as Government policy on the use of civil courts has been to reserve complex, high value and public policy cases for the High Court, we would question whether it is an effective use of High Court judicial time to consider all but the most complex and exceptional possession orders.

*“When creditors use the High Court for enforcement, debtors who are individuals find themselves in an intimidating and complex procedural world which is inappropriate and a likely waste of all parties’ resources.”*²⁹

Citizens Advice

²⁶ Figures from the High Court Enforcement Officers Association

²⁷ The Law Society Gazette January 2014 [<https://www.lawgazette.co.uk/benchmarks/residential-possession-speedy-eviction/5039581.article>]

²⁸ Ministry of Housing, Communities & Local Government (2019) Overcoming the Barriers to longer Tenancies in the Private Rented Sector: Government response.

²⁹ Citizens Advice (Summer, 2010) Evidence: a Citizens Advice social policy publication

Question 16: What (if any) information should the court be provided with on application to transfer?

The court should require full information on the exceptional circumstances (defined in the procedures) that warranted a transfer to the High Court.

Question 17: Where a landlord wishes to transfer a case for the purposes of enforcement, should there be a specific provision that these applications are made on notice to the defendant using Form N244 or some other means?

Yes

If Yes: - Form N244 - Other – please specify

Other. A more simplified version of Form N244 would ensure that the defendant received clear information and notice of the application.

Question 18: Should such an application be capable of being determined on paper without a hearing?

No

Please explain your answer 20

An application should only be made in exceptional circumstances. The requirement to hold a hearing will ensure that the applicant has to put forward evidence of the suitability of the application and the exceptional circumstances that warrant it in front of the court. It would also give the defendant an opportunity to oppose this.

Question 19: Should there be any provision made regarding the higher costs of the HCEO over the County Court bailiff procedure?

Yes

If so, what provision should be made?

There is no clear justification for High Court Enforcement Officers being able to make higher charges and add greater costs than County Court bailiffs. We recommend that High Court Enforcement

Officers should only be able to charge the same as County Court bailiffs to enforce possession orders.

Question 20: Should there be any provision made regarding notice having to be given to occupiers in advance of eviction if a transfer order is made and a Writ obtained?

Yes

Please explain your answer

There should be exactly the same notice requirements on claimants to provide notice to occupants in the High Court and County Court. The alignment should use the higher levels of protection for the occupant that build on current County Court procedures.

Question 21: Should any applications for stays or suspensions of the possession order (made by the tenant) be made to the (home) County Court rather than the High Court?

Yes

Please explain your answer

There is no justification for applications for a stay or suspension of the possession order by the tenant to be made to the High Court. These should be made to the home County Court where the case originated as this would align with the overriding objective to ensure both parties are on an equal footing (CPR 1.1(2)(a)), as:

- Such applications are more expensive for all parties. Defendants in possession order cases are very unlikely to have the means to pay for such applications or the court costs. They will also be unable to bear the burden of the increased costs of High Court enforcement.
 - The use of the High Court is disproportionate in such cases where potentially vulnerable people are trying to keep their home.
 - The use of the High Court for enforcement of possession orders introduces an unmerited degree of complexity and formality into the enforcement process.
 - The language and procedures of the High Court are both arcane and intimidating. This has the effect of preventing potentially vulnerable people engaging in the process.
 - The process in the High Court as it stands is inaccessible to most of our clients who would require support to deal with the application process.
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- The case file may well be retained by the home County Court and not have been transferred to the High Court. This makes the process administratively burdensome and could lead to poor decision-making.
- In the absence of a specialist housing court³⁰, it seems most appropriate for such cases to stay in the County Court where it is most likely that there will be housing expertise.

Question 22: In cases where there is a request for a warrant or writ of possession, should the applicant have to certify that all occupants have had sufficient notice of proceedings to able to apply for relief

- (i) if advance notice does have to be given of the date and time of eviction and if such advance notice does not have to be given?**

Yes

Please explain your answer

All occupants should have sufficient notice to allow them to seek advice, apply for relief and/or find alternative accommodation.

Question 23: If there is to be a need for such certification; then should it be defined?

Yes

If yes, then should it be defined as all or any (and if so which) of notice of: (i) the proceedings seeking possession? (ii) the original order for possession? (iii) any order transferring enforcement to the High Court? (iv) the last order or writ or warrant for possession or order staying or suspending such? (v) an intent to enforce or (vi) something else?

All of the above. The certification should also include encouragement to seek advice as soon as possible and a list of free advice providers.

A full impact assessment has not been produced as these proposals do not fall under the definition of a regulatory provision and because we estimate the costs to be minimal. Our assessment is that there may be some administrative costs associated with these proposals but we expect them to be minimal and if that is the case, that they should be absorbed within MoJ's existing budget. We would welcome your views to help us assess and quantify any impacts, preferably with supportive evidence.

³⁰ Ministry for Housing, Local Government & Communities (2018) Considering the case for a Housing Court: Call for Evidence

Question 25: How will the proposed changes affect work in the enforcement sector?

The proposals should ensure that fewer possession orders are enforced by High Court Enforcement Officers with no notice given to the tenant or other occupiers. This should ensure that the expertise of County Court bailiffs in currently following better practice around possession orders is maximised and also reduce the costs of enforcement. More widely, they should reduce the risk of people being evicted with no notice of the date of eviction and so reduce the wider social costs of homelessness.

