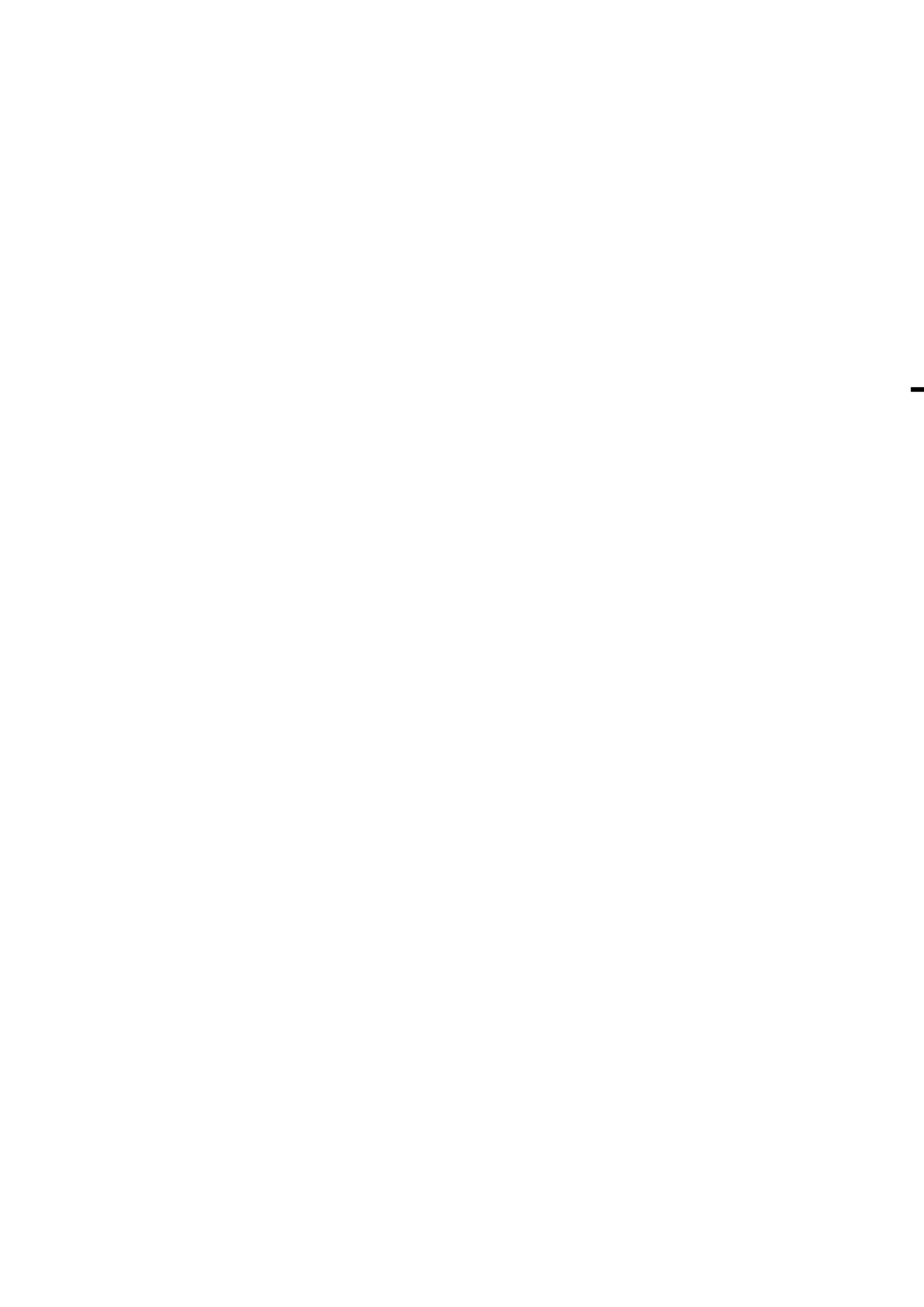




Tolerated trespassers

Consultation





Tolerated trespassers

Consultation

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Consultation

A summary of responses to this consultation will be published within 3 months of the close of the consultation period at the address below.

<http://www.communities.gov.uk/index.asp?id=1501893>

Paper copies will be available on request.

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

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The Department will process your personal data in accordance with the DPA and in the majority of circumstances; this will mean that your personal data will not be disclosed to third parties.

Responses

You are invited to respond by 2 November 2007. Please send your written response to:

Frances Walker
Social Housing Management Branch
Communities and Local Government
Floor 1, Eland House
Bressenden Place
London SW1E 5DU

Email responses are welcome to
frances.walker@communities.gsi.gov.uk

Telephone number for enquiries is: 020 7944 3666

The consultation criteria

The Government has adopted a code of practice on consultations. The criteria below apply to all UK national public consultations on the basis of a document in electronic or printed form. They will often be relevant to other sorts of consultation. Though they have no legal force, and cannot prevail over statutory or other mandatory external requirements (eg under European Community Law), they should otherwise generally be regarded as binding on UK departments and their agencies, unless ministers conclude that exceptional circumstances require a departure.

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

The full consultation code may be viewed at
www.cabinet-office.gov.uk/regulation/Consultation/Introduction.htm

Are you satisfied that this consultation has followed these criteria? If not, or you have any other observations about ways of improving the consultation process please contact:

Albert Joyce,
Communities and Local Government Consultation Co-ordinator
Zone 6/H10
Eland House
Bressenden Place
London SW1E 5DU
or by e-mail to:
albert.joyce@communities.gsi.gov.uk

Please note that responses to the consultation itself should be sent to the contact shown within the main body of the consultation.

Introduction

- 1 Many thousands of social tenants, both local authority and Registered Social Landlord (RSL) tenants, have become “tolerated trespassers”, seriously affecting their rights and causing practical difficulties for their landlords. Many tenants – and even landlords – may not even be aware of this.
- 2 This paper looks at options for remedying the situation both in the future and for existing tolerated trespassers.

What is a tolerated trespasser?

- 3 A tolerated trespasser is an occupant of a rented property under a secure or assured periodic tenancy who has lost the status of a tenant after the court has granted the landlord a possession order, but whom the landlord is allowing to remain in the property. This will usually be on terms such as payment of current rent and a weekly sum towards arrears of rent. These terms may be those imposed by the court as part of the court order, or subsequently agreed with the landlord (usually following breach of the terms in the order). Even if the occupant complies with the terms, this does not in itself alter the fact that he or she has become a tolerated trespasser.
- 4 A tolerated trespasser has no rights under the former tenancy agreement or the relevant Housing Acts¹ (although the Protection From Eviction Act 1977 continues to apply). He or she remains in the property for as long as the landlord permits. A landlord who is no longer willing to tolerate the continued occupation may apply to the court for a warrant to enforce the possession order, leading potentially to eviction by the court bailiff. (This is no different from what the landlord could do if the tenant were not a tolerated trespasser but had retained full tenancy status.). However, even where the landlord applies for such a warrant many tolerated trespassers will in practice continue to occupy properties following the suspension of the warrant by the court, where the court has discretion to do this. It is not uncommon for tolerated trespassers to continue living in their homes for years, frequently without realising that they are no longer technically tenants.
- 5 The continued occupation of social rented properties by former tenants who have become tolerated trespassers – frequently without their knowledge or understanding of the implications – has given rise to numerous practical problems.

How are tolerated trespassers created?

- 6 The concept of the tolerated trespasser was developed by the courts, in particular the House of Lords judgment in the 1996 case of *Burrows v Brent*. For many years it was applied only in cases involving secure tenants (ie mostly local authority tenants). The concept arises from the combination of the wording of section 82(2) of the Housing Act 1985 (which repeated wording in the Housing Act 1980) and the fact that, under the 1985 Act, courts have the power to postpone the date of possession or stay or suspend execution of the possession order. Section 82(2) states that where the landlord obtains

¹ The Housing Act 1985 in the case of secure tenants; the Housing Act 1988 in the case of assured periodic tenants.

an order for possession, the secure tenancy ends on the date specified in the order for the tenant to give up possession.

- 7 Most orders until recently were phrased to give the landlord entitlement to possession on a specified date (usually 28 days after the order was made), but with the landlord's right to request eviction suspended on condition that tenants obeyed the terms of the order (usually the payment of rent plus arrears). Until early 2006 it was thought that the tenant only became a tolerated trespasser upon breach of those terms after the possession date. However, in February 2006, the Court of Appeal held in *Harlow v Hall* that the standard wording for such orders meant that the secure tenancy would end on the date specified in the order as the date the landlord was entitled to possession, regardless of whether the tenant complied with the terms of the order or not. *Harlow v Hall* thus gave rise to a new category of (relatively) blameless occupiers – those who have fallen into rent arrears and whose landlord has been granted a suspended possession order, but who have lost security of tenure even where they have complied with the terms of the order.
- 8 The wording used for the possession order in *Harlow v Hall* was the standard wording recommended to the courts by Her Majesty's Court Service (HMCS) in form N28. Since the judgment in *Harlow v Hall* refers only to the version of N28 introduced in 2001, it is only tenants subject to an N28 order since 2001 who have been affected by this ruling and retrospectively been transformed into tolerated trespassers even where they obeyed the terms of orders. There are no court rulings at present on whether tolerated trespassers are created by earlier versions of form N28 where they have obeyed the terms of the order.
- 9 Until recently there had been no authoritative court decision on whether assured tenants of social landlords under the Housing Act 1988 become tolerated trespassers. The wording of that Act is different with regard to how tenancies end. However, a very recent decision of the Court of Appeal in the case of *Knowsley Housing Trust v White* (2 May 2007) has extended the tolerated trespasser doctrine to assured periodic tenants. The tenant in that case has requested leave to appeal to the House of Lords against the decision of the Court of Appeal.
- 10 Key provisions of the 1985 and 1988 Acts are set out in the annex to this document.

Problems created by tolerated trespassers

- 11 The problems caused by the creation of tolerated trespassers are largely confined to tenants of social landlords, since private landlords almost always use fixed term assured shorthold tenancies which the landlord can easily terminate and to which the tolerated trespasser issue is not relevant.
- 12 The existence of tolerated trespassers causes problems for both tenants and landlords. Neither landlord nor tenant can rely on the provisions in the relevant Housing Act or the terms of the tenancy agreement.
- 13 There are five main areas causing problems (note: these do not include effects on the right to buy or right to acquire, which are not available to tenants subject to possession orders):

- a) **Succession Rights** – tolerated trespassers are not tenants and so there are no succession rights (a fact which is frequently only realised on their death, when a family member is told they cannot succeed to the tenancy). On the other hand, if the landlord grants a new tenancy to resolve a tolerated trespasser situation, this may lead to the creation of additional succession rights (where a tenant had already been a successor in the original tenancy and there would, therefore, have been no further succession rights).
 - b) **Right to exchange** – tenants who become tolerated trespassers, lose their right to exchange with other secure or assured tenants of RSLs.
 - c) **Contractual right to repair and maintenance of property for secure tenants** – there is no statutory obligation upon local authorities to repair and maintain property for tolerated trespassers, although it is doubtful that landlords would allow their properties to fall into serious disrepair regardless of the status of their tenants. Tolerated trespassers have no entitlement to damages for disrepair due to neglect by the landlord. Where courts vary the original date for possession in order to restore full tenancy status, a frequent reason is to enable tenants to claim damages for disrepair.
 - d) **Unlawful increases in rent** – the relevant Housing Acts provide for increases in rent to secure and assured tenants, but these provisions do not apply to tolerated trespassers. Attempting to apply rent provisions to a tolerated trespasser may be a factor in the court finding that a new tenancy has been created, although in recent cases this has not by itself been held to be sufficient. In practice, it is likely that tolerated trespasser occupants, along with other tenants, are informed of rent rises and expected to pay the higher rates. It is not clear whether it is lawful for landlords to collect a higher level of charges from tolerated trespassers in excess of that specified in the possession order.
 - e) **Voting rights** – for landlords, there are difficult issues regarding whether tolerated trespassers should be able to vote in stock transfer and tenant management ballots, since the statutory rules on both refer to the votes of tenants. Practical issues also arise regarding whether tolerated trespassers should be included in *Best Value* statistics.
- 14 On the other hand, some landlords may consider that there are some benefits from having tolerated trespassers as occupants because of the loss of tenants' rights, for example, the loss of succession rights. There is also anecdotal evidence to suggest that some landlords may take the opportunity to increase the amount charged as rent – technically an occupation charge – to tolerated trespassers.
- 15 A particular problem associated with tenants who become tolerated trespassers is what happens if the tenant goes on to pay in full the judgment sum for arrears and costs. The effect of the recent court judgment in *London & Quadrant v. Ansell* (19 April 2007) is that, as soon as the judgment sum has been paid in full, the court loses any further discretion in relation to those proceedings. This means that the landlord can then start new possession proceedings against the occupant *as a trespasser* (which will usually leave the court no choice but to evict). It also means that the tenant cannot get his or her tenancy status restored retrospectively in order, for instance, to claim damages for disrepair. The law has therefore created a perverse incentive for the tenant to disobey the terms of the order.

- 16 The Court of Appeal decision in *Knowsley v White* that assured tenants also become tolerated trespassers gives rise to the concern that RSLs might react by using their power under the Housing Act 1988 to obtain mandatory possession orders where there are more than 8 weeks' arrears. Where this ground is used the court has virtually no discretion to give the tenant another chance. This would go against the Government's policy that eviction should only be used as a last resort.

The extent of the problem

- 17 The number of suspended possession orders granted to all social landlords between October 2001 (when the latest version of N28 was issued by HMCS) and July 2006 was approximately 250,000. Some tenants may subsequently have been evicted. However, with the law as it currently stands, all of these tenants remaining in occupation are likely to have become tolerated trespassers (though a small number may subsequently have had their tenancy status restored by the court as a result of individual applications). It is not known how many of these are 'compliant' tolerated trespassers, ie people who have fully obeyed the terms of the order.
- 18 There will also be an unknown number of people who became tolerated trespassers as a result of possession orders granted using one of the earlier N28 forms, dating back to before 2001. In these earlier cases, the tenants would only have become tolerated trespassers on breach of the terms of the order (according to current case law). It is not unusual for tolerated trespassers to remain in occupation for many years; the number of cases involving orders made before October 2001 may be a significant addition to the 250,000 since then. New tolerated trespassers are still being created, and every tenant of a social landlord who is evicted is a tolerated trespasser at the point of eviction.

Remedying the situation for future 'compliant' tolerated trespassers in the light of *Harlow v Hall*

- 19 Following *Harlow v Hall*, Her Majesty's Court Service recommended a new wording for a deferred possession order on rent arrears grounds, to be used where the court wishes to give the tenant another chance by deferring possession on terms. The new form N28A (entitled a 'postponed possession order') came into force in July 2006 and creates a new two-stage procedure. At the possession hearing the court declares the landlord to be entitled to possession but does not fix a date for possession. Terms are imposed – typically, in rent arrears cases, that the tenant should pay the current rent plus £x per week towards paying off the arrears – and the landlord cannot enforce the order so long as these terms are obeyed. If the terms are breached, the landlord can request the court to specify a date for possession, after which the landlord can also request a warrant of eviction.
- 20 Landlords who wish to proceed to eviction following breach of the terms must apply to the court (paying a £35 fee) for a possession date to be fixed. Initially the form and procedure were intended to apply only to secure tenancy cases. However, as a result of *Knowsley v White*, the Civil Procedure Rule Committee in conjunction with HMCS and the Ministry of Justice are considering steps to extend them to assured tenancy cases.

Existing tolerated trespassers post *Harlow v Hall*

- 21 The new-two stage procedure does not deal with the problem of existing tolerated trespassers. There are two main remedies already available but they involve action on a case by case basis. Firstly, for many tolerated trespassers the option exists of applying to the court to exercise its discretion to amend the original order by re-setting the date for possession in the future. The court is only likely to do this where the tenant has made a reasonable attempt to comply with the terms of the order. An order by the court in these terms removes the tolerated trespasser status as though it had never existed – the tenant is a tenant once again, with no break. This option is burdensome for both the parties concerned and the courts. In addition, case law has established that this option no longer exists where a secure tenant who has become a tolerated trespasser then goes on to pay off the full judgment sum in the order (usually the rent arrears sum at the date of the order plus costs). In such cases the court no longer has any discretion to vary the order.
- 22 Secondly, if the landlord is willing to do so, a new tenancy can be granted. However, where the problem, which led to the possession order in the first place, still exists – eg outstanding rent arrears – many landlords are reluctant to allow this. This approach may be burdensome for landlords, and does not completely solve the problem as it does not involve restoring the original tenancy with retrospective effect. This can be particularly problematic in relation to succession rights (see paragraph 13 (a) above).

The way forward

- 23 It is difficult to estimate the number of ‘compliant’ tolerated trespassers. There may not be many in this position. Nevertheless, Communities and Local Government recognises that many may consider, as a matter of principle, that it is unacceptable for any such tolerated trespassers to exist. It is very unlikely that either the parties or the judge at the possession hearing intended this result.
- 24 There is another class of tolerated trespassers – people who have unwittingly failed to comply with the terms of the order (usually because of housing benefit delays or the arrears direct process) – who, it could be argued, are not responsible for the lack of compliance. This may be larger in number.
- 25 The case law on tolerated trespassers has been developing since 1987. It is possible that, if there is an appeal to the House of Lords in *Knowsley v White*, this could result in still further changes to the law on tolerated trespassers as it currently stands.
- 26 Communities and Local Government, therefore, believes that it is time to consider what measures can be taken to remedy the tolerated trespasser situation, or at the very least, to ensure that there is some degree of certainty around the issues involved.
- 27 However, Communities and Local Government also recognises that there may be some potential benefits for landlords in the current situation.

Accordingly views are sought on:

- a) whether there are benefits to landlords in the existing situation, and if so what they are; and**
- b) whether any benefits to landlords are sufficient to outweigh the disadvantages, particularly for tenants.**

Future tolerated trespassers

- 28 The new form of wording of the court order (N28A) and the accompanying procedure introduced in July 2006 have gone a long way to prevent the creation of more ‘compliant’ tolerated trespassers – ie those who have obeyed the terms of a possession order but still lost their tenancy status.
- 29 The new postponed possession order does not, however, prevent the creation of tolerated trespassers where the landlord takes the next step towards eviction. Once the court specifies a date for the landlord to obtain possession the tenant will become a tolerated trespasser on the date specified for the landlord to obtain possession.
- 30 In addition, the new two-stage procedure introduces additional costs for landlords who wish to proceed to eviction following breach of the terms, since they must apply to the court (paying a £35 fee) for a possession date to be fixed.
- 31 Subject to consultees’ views, we would, therefore, propose to make the necessary changes to housing legislation, at the earliest opportunity, to prevent the creation of tolerated trespassers in the future.
- 32 One approach to resolving the problem would be to introduce into both Acts explicit provisions as to when tenancies end where the tenant is subject to a possession order. The recent Law Commission ‘Renting Homes’ draft bill provided a model clause to do this². The model clause is phrased in terms of the other provisions of the draft bill (eg referring to contract holders and occupation contracts rather than tenants and tenancies). However, we are of the opinion that a similar provision could be drafted to fit within the existing Acts.
- 33 In summary, the Law Commission’s model clause provides that where the court has granted the landlord a possession order which specifies a date on which the tenant is to give up possession, the tenancy will end:
 - a) on the specified date if the tenant has voluntarily left before it; or
 - b) on the date the tenant voluntarily leaves if this is after the specified date; or
 - c) if the tenant does not leave voluntarily, on the date when the tenant is evicted in accordance with the court order; or

² *Renting Homes: the final report*. Law Comm. No. 297. Vol. 2. Clause 154.

d) immediately before the effective date of a new tenancy agreement where some of the previous tenants remain in the property and it is a condition of the court order that the landlord must offer them a new tenancy on the same premises.

34 This would end the creation of any further tolerated trespassers; the tenancy would continue until tenants physically leave the building, or on the date for possession if they leave earlier.

Views are sought on whether to change the legislation to remedy the situation for all future tolerated trespassers. Views are also sought on the best way to change the legislation.

Existing tolerated trespassers

35 Amending the 1985 and 1988 Acts to prevent the creation of future tolerated trespassers will not solve the problem of those tolerated trespassers who have already been created.

36 We could take the opportunity to further amend the legislation to restore the tenancy status of existing tolerated trespassers. We believe that there are two options for consideration. The alternatives are:

a) to restrict retrospective restoration of tenancy status to 'compliant' tolerated trespassers, or

b) to restore tenancy status to all tolerated trespassers, ie include those who had failed to comply with the terms of the possession order (whether inadvertently or otherwise).

37 With regard to option (a), a distinction between 'compliant' and other tolerated trespassers could perhaps be justified on the grounds that the occupants, although having previously breached the tenancy agreement seriously enough to warrant a court order, have subsequently made the effort to improve by complying with its terms. Furthermore, because the creation of 'compliant' tolerated trespassers by the *Harlow v Hall* decision in 2006 is so recent, it could be argued that, for the vast majority of those subject to suspended possession orders, it was never intended that they should lose their tenancy status where they complied with the terms of the order.

38 However option (a) has the disadvantage that it would not pick up two categories of tolerated trespasser:-

1) Those who had inadvertently breached the terms of their possession order (usually because of the administration of arrears direct and housing benefit).

2) Those who comply as well as they can by paying instalments towards the sums owing under the order at more or less the right speed, but without strictly sticking exactly to the terms.

- 39 Furthermore, requiring landlords to separately identify ‘compliant’ tolerated trespassers would probably create considerable operational difficulties; it is likely to be difficult and time-consuming for landlords, requiring careful examination line by line of the rent record for each tenant subject to a possession order.
- 40 Option (b) would probably be easier for landlords to implement but could be more difficult to justify in principle, as it could be seen to be rewarding those occupants who had failed to comply with the conditions of their possession order. However, against this, it could be argued that it was not the intention of parliament that social tenants under the 1985 and 1988 Acts should become tolerated trespassers at all while still living in their homes; nor that landlords should suffer the problems which result. The Government recognises that, while the courts have developed the tolerated trespasser doctrine they have also consistently remarked on the need for legislation to remedy the situation.

Views are sought on whether to introduce legislation -

- **to restore the tenancy status of all existing tolerated trespassers (ie those still remaining in their homes), or**
- **to do so only for those ‘compliant’ tolerated trespassers who have continued to comply in all respects with the terms of the court order.**

- 41 Since 1996 landlords will have based decisions regarding individual tenants on their status as tolerated trespassers, for instance refusing succession or exchange rights. If the legislation were to be changed with retrospective effect so that tolerated trespassers (‘compliant’ or otherwise) are restored to their tenancy status, it would be necessary to consider all implications for landlords in relation to those decisions, and ensure protection from any legal consequences.

Accordingly, views are sought on whether provision should be made to protect landlords from liability for damages in these circumstances.

Guidance

- 42 Further consideration will be required to establish the best way to amend the legislation, and what problems would be generated in consequence. An alternative approach with regard to existing tolerated trespassers could be for Communities and Local Government to issue non-statutory guidance aimed at local authority and RSL landlords, reminding them that, in individual cases, occupants may have their tenancy status restored by the court, and encouraging landlords to adopt such an approach. Communities and Local Government might also provide information along similar lines for tenants and/or tenant groups.

- 43 This would avoid the pitfalls associated with retrospective legislation. However, if it was decided only to legislate in favour of future tenants, this might be perceived as treating existing tenants subject to a possession order unfairly when compared with future tenants. In addition, encouraging landlords and tolerated trespassers to apply to the court to restore the latter's tenancy status would increase the pressure on the court service.
- 44 Moreover, in the absence of new statutory provision, providing definitive guidance on the tolerated trespasser issue would remain subject to further changes in the law arising from individual cases. While the courts have clarified some of the issues, this is an area which is likely to continue to develop and it is difficult to predict how the courts will decide on any particular issue.

Introductory tenants

- 45 Finally, there is an issue as to whether the tolerated trespasser doctrine extends to local authority introductory tenants. Section 127(3) of the Housing Act 1996 provides that where the court makes a possession order the tenancy comes to an end on the date on which the tenant is to give up possession in pursuance of the order. The court has no discretion in relation to introductory tenancy possession orders to postpone, stay or suspend as it does under the 1985 and 1988 Acts. However, where a landlord obtains a possession order but then reaches agreement with the tenant and does not enforce it by eviction, letting them stay on instead, we believe it may be possible that the courts would hold that in these circumstances the former tenant became a tolerated trespasser once the possession date has passed.
- 46 The problems associated with erstwhile secure and assured tenants who have become tolerated trespassers, set out in paragraph [13] above, would apply equally to former introductory tenants, except that introductory tenants do not have the right to exchange.

Views are sought on:

- **whether introductory tenants should be treated on the same basis as secure and assured periodic tenants, that is to say whether the necessary legislative changes should be made to ensure that introductory tenants do not become tolerated trespassers in the future, or**
- **whether introductory tenants should be treated on a different basis and, if so, on what grounds.**

Impact Assessment

47 Attached to this consultation paper is a partial impact assessment of the options for dealing with the problems created by the tolerated trespasser doctrine. The final impact assessment will take into account the results of this consultation exercise.

Accordingly views are sought on the following:

- **Does the impact assessment correctly identify the nature and extent of the costs and benefits associated with the 4 options which are considered?**
- **Is it considered that any group is/groups are represented disproportionately amongst tolerated trespassers? In particular, is there any evidence to suggest that the tolerated trespasser doctrine discriminates on the grounds of race and ethnicity; gender or disability status?**
- **Is it possible to identify tolerated trespassers who continue to comply with the terms of the possession order (ie so-called 'compliant' tolerated trespassers)? If so, what proportion of tolerated trespassers fall into this category? If not, is it considered that the proportion is likely to be relatively small?**

Summary of options and questions :

Tolerated trespasser issues for landlords and tenants

- (1) Does the paper correctly identify the issues for landlords and tenants?**
- (2) Are there any other issues for tenants and/or landlords which are not identified in the paper?**
- (3) Are there any benefits to landlords in the existing situation, and if so what are they?**
- (4) Are any benefits to landlords sufficient to outweigh the disadvantages, particularly for tenants?**

Legislating for future tolerated trespassers

- (5) Should the legislation be changed to remedy the situation for all future tolerated trespassers?**
- (6) If so, how should the existing legislation be amended?**
- (7) In particular, is it considered that the Law Commission's draft clause should be adopted (appropriately modified)?**
- (8) Are there any other alternatives?**

Legislating to rescue existing tolerated trespassers

- (9) The issue of 'compliant' tolerated trespassers is likely to be more significant in principle than in practice (ie many tenants subject to a suspended possession order will go on to breach the terms, even if inadvertently or in insignificant ways). Is it considered that the issue of 'compliant' tolerated trespassers is different and serious enough to justify legislating only in respect of remedying their situation? This would apply only to those who have complied in all respects with the terms of the court order.**
- (10) Or should the legislation be amended to restore the tenancy status of all existing tolerated trespassers (ie those still remaining in their homes)?**
- (11) If the legislation is amended, should provision be made to protect landlords from liability for damages? If so, in what circumstances; and how might this be achieved?**

Guidance

- (12) If legislation is considered inappropriate, should Communities and Local Government issue non-statutory guidance to landlords? What issues should this cover?**
- (13) Should guidance also be provided separately for tenants and/or tenant groups?**

Introductory tenants

- (14) Should introductory tenants be treated on the same basis as secure and assured periodic tenants, that is to say, should the necessary legislative changes be made to ensure that introductory tenants do not become tolerated trespassers in the future.**
- (15) Or should introductory tenants be treated on a different basis? If so, what are the grounds for doing so?**

Impact assessment

- (16) Does the impact assessment correctly identify the nature and extent of the costs and benefits associated with the 4 options which are considered?**
- (17) Is it considered that any group is/groups are represented disproportionately amongst tolerated trespassers? In particular, is there any evidence to suggest that the tolerated trespasser doctrine discriminates on the grounds of race and ethnicity, gender or disability status?**
- (18) Is it possible to identify tolerated trespassers who continue to comply with the terms of the possession order (ie so-called 'compliant' tolerated trespassers)? If so, what proportion of tolerated trespassers fall into this category? If not, is it considered that the proportion is likely to be relatively small?**

Annex A

Key Provisions in the Housing Act 1985 and the Housing Act 1988 and wording of the court form N28

Secure tenants – the Housing Act 1985

Key provisions of the Housing Act 1985 in relation to the tolerated trespasser doctrine as it affects secure tenancies are section 82(2) and the court's discretionary powers in section 85.

For a secure tenant to be evicted, the landlord must request a possession order from the court after serving the tenant with a warning notice. Once a possession order has been made by the court, if the tenant does not leave voluntarily the landlord can request the court to issue a warrant of eviction – either immediately the date for possession passes, or, if there are terms in the order deferring possession, when those terms have been breached. Once the warrant has been issued the court bailiffs attend the property to carry out the eviction.

Section 85 of the Housing Act 1985, gives the court discretion, when making possession orders based on certain grounds (ie those alleging fault by the tenant), either to adjourn the possession proceedings or, when making an order, to use the following provisions in subsection (2):

“On the making of an order for possession of ... a dwelling-house ... or at any time before the execution of the order, the court may stay or suspend the execution of the order, or postpone the date of possession, for such period or periods as the court thinks fit.”

Subsection (3) then goes on to give the court power to impose conditions with respect to any adjournment, stay, suspension or postponement.

Until July 2006 it was standard practice, where the court wished to give the tenant a chance to retrieve the situation, to make an order giving the landlord the right to possession and specifying a possession date in 28 days, but deferring this right for so long as the tenant obeyed the terms of the order (in rent arrears cases, usually payment of current rent plus a specified weekly sum to reduce the outstanding arrears). Such orders were known as suspended possession orders.

This is due to the wording of section 82(2) of the Housing Act 1985, which states that:

“Where the landlord obtains an order for the possession of the dwelling-house, the tenancy ends on the date on which the tenant is to give up possession in pursuance of the order.”

This provision combined with the court's powers to postpone possession and stay or suspend warrants means that the tenancy may end while the tenant continues to live in the property. The development of the tolerated trespasser doctrine has been due to the courts' attempts to deal with such situations – originally with respect to secure tenancies.

Wordings for standard possession orders are recommended to county courts by Her Majesty's Court Service (HMCS). Judges are not obliged to use these forms of wording, but usually do. The usual form of order where possession on rent arrears grounds was to be deferred was, until summer 2006, form N28 (entitled a 'suspended possession order'). The particular wording of form N28 in current use was introduced in 2001.

The *Harlow DC v Hall* decision was based on that N28 wording, combined with the wording of section 82(2) of the 1985 Act. In that case the Court of Appeal decided that the *secure tenancy ends on the possession date regardless of whether the tenant complies with the terms upon which execution is suspended*. After that date the tenant becomes a tolerated trespasser.

Assured tenants – The Housing Act 1988

The provision in the Housing Act 1988 which creates security of tenure for assured tenants is section 5. It does not state when, in general, a possession order brings an assured tenancy to an end; instead it makes the obtaining of an order a necessary step before the landlord may bring the tenancy to an end. Sub-section (1) provides:

“An assured tenancy cannot be brought to an end by the landlord except by obtaining an order of the court in accordance with the following provisions of this Chapter or Chapter II below or, in the case of a fixed term tenancy which contains power for the landlord to determine the tenancy in certain circumstances, by the exercise of that power and, accordingly, the service by the landlord of a notice to quit shall be of no effect in relation to a periodic assured tenancy.”

The lack of any express provision in section 5 Housing Act 1988 for the date of termination contrasts with other provisions in the Act which do make such provision in certain particular respects such as demotion orders.

Annex B

Summary: Intervention & Options		
Department/Agency: Communities and Local Government	Title: Impact Assessment of Tolerated Trespasser	
Stage: Consultation	Version: 1	Date: 9 August 2007
Related Publications: Housing and Regeneration Bill and Consultation Document		

Available to view or download at:

<http://www.communities.gov.uk>

Contact for enquiries: Frances Walker

Telephone: 020 7944 3666

What is the problem under consideration? Why is government intervention necessary?

Creation by the courts of 'tolerated trespassers' -occupants of social rented housing who have lost tenancy status following a possession order- causes serious problems for tenants (eg loss of rights around succession, exchange and repair) and landlords (issues round entitlement to rent, including rent increases, voting rights in stock transfer/tenant management ballots). Remedies exist to restore tenancy status to existing/future tolerated trespassers, but are costly, time consuming, and not entirely effective. Amendment to primary legislation required to deal effectively with the issues.

What are the policy objectives and the intended effects?

The main policy objective is to abolish the tolerated trespasser doctrine and thereby remove the problems which this has caused for landlords and tenants by ensuring that tolerated trespassers are not created in future, and by restoring the tenancy status to existing tolerated trespassers.

What policy options have been considered? Please justify any preferred option.

The base case (status quo), and:

1. amending the 1985, 1988 and 1996 Housing Acts to deal with future tolerated trespassers
2. amending the 1985, 1988 and 1996 Housing Acts to restore tenancy status to all existing and future tolerated trespassers
3. amending the 1985, 1988 and 1996 Housing Acts to restore tenancy status to existing 'compliant' tolerated trespassers and future tolerated trespassers.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

Not yet fully considered, although three years following implementation is generally deemed good practice.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:



..... Date: 9 August 2007

Summary: Analysis & Evidence					
Policy Option: A		Description: Do nothing (retain status quo)			
COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' Costs of court action to restore tenancy : Local Authority (LA) costs: £300 – £500 per case Registered Social Landlord (RSL) costs: £300 – £500 per case Her Majesty's Court Service (HMCS) costs: (tbc) Tenants costs: £35 – £65 per case		
	One-off (Transition)	Yrs			
	£ None				
	Average Annual Cost (excluding one-off)				
	£				
Other key non-monetised costs by 'main affected groups' Tenants lose tenancy rights, landlords experience uncertainty over obligations to tenants ie voting rights and entitlement to rent. Also causes practical issues regarding whether tolerated trespassers should be included in Best Value statistics.					
BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' No benefits to tenants or courts Some benefits to landlords – costs are unknown but anecdotal evidence suggests that some are charging higher rents to tolerated trespassers		
	One-off	Yrs			
	£ None				
	Average Annual Benefit (excluding one-off)				
	£				
Other key non-monetised benefits by 'main affected groups' No benefits to tenants or courts					
Key Assumptions/Sensitivities/Risks Assumption that proportion of tenants will continue to apply for restoration of tenancy status once they become aware. Landlords experience uncertainty over entitlement to annual rent rises and associated obligations. Risk of challenge on stock transfer and Right to Manage ballots.					
Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £		
What is the geographic coverage of the policy/option?			England and Wales		
On what date will the policy be implemented?			N/A		
Which organisation(s) will enforce the policy?			N/A		
What is the total annual cost of enforcement for these organisations?			£ N/A		
Does enforcement comply with Hampton principles?			No		
Will implementation go beyond minimum EU requirements?			N/A		
What is the value of the proposed offsetting measure per year?			£ N/A		
What is the value of changes in greenhouse gas emissions?			£ N/A		
Will the proposal have a significant impact on competition?			No		
Annual cost (£-£) per organisation (excluding one-off)		Micro N/A	Small N/A	Medium N/A	Large N/A
Are any of these organisations exempt?		No	No	N/A	N/A
Impact on Admin Burdens Baseline (2005 Prices) (Increase – Decrease)					
Increase of	£ 0.00	Decrease of	£ 0.00	Net Impact	£ 0.00

Summary: Analysis & Evidence					
Policy Option: B		Description: Changing the 1985 and 1988 Housing Acts to deal with future tolerated trespassers			
COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' Court action: existing tolerated trespassers LA costs: £300 – £500 per case RSL costs: £300 – £500 per case HMCS: (tbc) Tenants costs: £35 – £65 per case		
	One-off (Transition)	Yrs			
	£ None				
	Average Annual Cost (excluding one-off)				
	£				Total Cost (PV)
Other key non-monetised costs by 'main affected groups' Existing tolerated trespassers not caught by the legislative change continue to suffer the disbenefits set out in Option A.					
BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' Savings from removal of need for court action to restore tenancy for future tenants subject to possession order. Social Landlords £300/500 per case HMCS: (tbc) Tenants: £35 – £65 per case		
	One-off	Yrs			
	£ N/A				
	Average Annual Benefit (excluding one-off)				
	£				Total Benefit (PV)
Other key non-monetised benefits by 'main affected groups' Prevention of future loss of tenancy status and associated problems. No benefits for existing tolerated trespassers.					
Key Assumptions/Sensitivities/Risks Potential increase in court cases from existing tolerated trespassers as amendment of legislation raises the profile of this issue. Risk of challenge on stock transfer and Right to Manage ballots. Landlords experience uncertainty over entitlement to annual rent rises and associated obligations.					
Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £		
What is the geographic coverage of the policy/option?			England and Wales		
On what date will the policy be implemented?			2008		
Which organisation(s) will enforce the policy?			N/A		
What is the total annual cost of enforcement for these organisations?			£ N/A		
Does enforcement comply with Hampton principles?			No		
Will implementation go beyond minimum EU requirements?			No		
What is the value of the proposed offsetting measure per year?			£ N/A		
What is the value of changes in greenhouse gas emissions?			£ N/A		
Will the proposal have a significant impact on competition?			No		
Annual cost (£-£) per organisation (excluding one-off)		Micro N/A	Small N/A	Medium N/A	Large N/A
Are any of these organisations exempt?		No	No	N/A	N/A
Impact on Admin Burdens Baseline (2005 Prices)			(Increase – Decrease)		
Increase of	£ tbd	Decrease of	£ tbd	Net Impact	£ tbd

Summary: Analysis & Evidence					
Policy Option: C		Description: Changing the 1985 and 1988 Housing Acts to restore tenancy status to all existing and future tolerated trespassers			
COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' Local Authority costs: £0.00 Registered Social Landlord costs: £0.00 Her Majesty's Courts costs: £0.00 Tenants costs: £0.00		
	One-off (Transition)	Yrs			
	£ None				
	Average Annual Cost (excluding one-off)				
	£				
Total Cost (PV) £					
Other key non-monetised costs by 'main affected groups' Some potential costs to landlords associated with restoration of tenancy status, eg duty to repair.					
BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' Savings from removal of need for court action to restore tenancy for future tenants subject to possession order and existing tolerated trespassers. Social Landlords £300/500 per case Tenants and HMCS (tbc)		
	One-off	Yrs			
	£ N/A				
	Average Annual Benefit (excluding one-off)				
	£				
Total Benefit (PV) £					
Other key non-monetised benefits by 'main affected groups' For all tolerated trespassers, restoration of tenancy rights. For landlords removal of risk of challenge in relation to voting rights of tolerated trespassers in stock transfer ballots.					
Key Assumptions/Sensitivities/Risks Key risk that landlords will face increase in compensation claims if provision isn't made to protect them from liability for decisions taken against tolerated trespasser tenants.					
Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £		
What is the geographic coverage of the policy/option?			England and Wales		
On what date will the policy be implemented?			2008		
Which organisation(s) will enforce the policy?			N/A		
What is the total annual cost of enforcement for these organisations?			£ N/A		
Does enforcement comply with Hampton principles?			No		
Will implementation go beyond minimum EU requirements?			No		
What is the value of the proposed offsetting measure per year?			£ N/A		
What is the value of changes in greenhouse gas emissions?			£ N/A		
Will the proposal have a significant impact on competition?			No		
Annual cost (£-£) per organisation (excluding one-off)		Micro	Small	Medium	Large
Are any of these organisations exempt?		No	No	N/A	N/A
Impact on Admin Burdens Baseline (2005 Prices) (Increase – Decrease)					
Increase of	£ tbd	Decrease of	£ tbd	Net Impact	£ tbd

Summary: Analysis & Evidence					
Policy Option: D		Description: Changing the 1985 and 1988 Housing Acts to restore tenancy status to existing 'compliant' and future tolerated trespassers			
COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' Court action: existing tolerated trespassers LA costs: £300 – £500 per case RSL costs: £300 – £500 per case HMCS: (tbc) Tenants costs: £35 – £65 per case		
	One-off (Transition)	Yrs			
	£ None				
	Average Annual Cost (excluding one-off)				
	£				Total Cost (PV)
Other key non-monetised costs by 'main affected groups' Prevention of loss of tenancy status and associated problems for future tenants subject to possession order, and for existing 'compliant' tolerated trespassers. For most existing tolerated trespassers there will be no benefits. For landlords admin. costs of identifying compliant tolerated trespassers.					
BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' Savings from removal of need for court action to restore tenancy for future tenants subject to possession order and existing compliant tolerated trespassers. Social Landlords £300/500 per case Tenants and HMCS (tbc)		
	One-off	Yrs			
	£ N/A				
	Average Annual Benefit (excluding one-off)				
	£				Total Benefit (PV)
Other key non-monetised benefits by 'main affected groups' Restoration of tenancy rights to those tenants who have attempted to comply with terms of possession order. For landlords removal of risk of challenge in relation to voting rights of tolerated trespassers in stock transfer ballots. Uncertainty over entitlement to annual rent rises and associated obligations remain.					
Key Assumptions/Sensitivities/Risks Risk that landlords will face increase in compensation claims if provision isn't made to protect them from liability for decisions taken against tolerated trespasser tenants- but lesser risk than Option C. Possibility of challenge to the Government over unequal treatment of tenants in similar position.					
Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £		
What is the geographic coverage of the policy/option?			England and Wales		
On what date will the policy be implemented?			2008		
Which organisation(s) will enforce the policy?			N/A		
What is the total annual cost of enforcement for these organisations?			£ N/A		
Does enforcement comply with Hampton principles?			No		
Will implementation go beyond minimum EU requirements?			No		
What is the value of the proposed offsetting measure per year?			£ N/A		
What is the value of changes in greenhouse gas emissions?			£ N/A		
Will the proposal have a significant impact on competition?			Yes/No		
Annual cost (£-£) per organisation (excluding one-off)		Micro N/A	Small N/A	Medium N/A	Large N/A
Are any of these organisations exempt?		No	No	N/A	N/A
Impact on Admin Burdens Baseline (2005 Prices)			(Increase – Decrease)		
Increase of	£ tbd	Decrease of	£ tbd	Net Impact	£ tbd

Evidence Base (for summary sheets)

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

Background

A tolerated trespasser is an occupant of a rented property under a secure or assured periodic tenancy who has lost the status of a social tenant after the court has granted the landlord a possession order, but who the landlord allows to remain in the property. This will usually be on terms such as payment of current rent and a weekly sum towards arrears of rent. Even if the occupant complies with the terms, this does not in itself alter the fact that he or she has become a tolerated trespasser. The problems caused by the creation of tolerated trespassers are largely confined to tenants of social landlords, ie local authorities and Registered Social Landlords (RSLs).

A tolerated trespasser has no rights under the former tenancy agreement or the relevant Housing Acts³ (although the Protection from Eviction Act 1977 continues to apply). He or she remains in the property for as long as the landlord permits. A landlord who is no longer willing to tolerate the continued occupation may apply to the court for a warrant to enforce the possession order, leading potentially to eviction by the court bailiff. However, even then many tolerated trespassers will in practice continue to occupy properties following the suspension of the warrant by the court, where the court had discretion to do this. It is not uncommon for tolerated trespassers to continue living in their homes for years, frequently without realising that they are no longer technically tenants.

Legislative Framework

The concept of the tolerated trespasser was developed by the courts, in particular the House of Lords judgment in the 1996 case of *Burrows v Brent*. For many years it was applied only in cases involving secure tenants (ie mostly local authority tenants). The concept arises from the combination of the wording of section 82(2) of the Housing Act 1985 (which repeated wording in the Housing Act 1980) and the fact that under the 1985 Act courts have the power to postpone the date of possession or stay or suspend execution of the possession order. Section 82(2) states that where the landlord obtains an order for possession, the secure tenancy ends on the date specified in the order for the tenant to give up possession.

Until early 2006 it was thought that the tenant only became a tolerated trespasser upon breach of those terms after the possession date. However, in February 2006, the Court of Appeal held in *Harlow v Hall* that the standard wording for such orders meant that the secure tenancy would end on the date specified in the order as the date the landlord was entitled to possession, regardless of whether the tenant complied with the terms of

³ The Housing Act 1985 in the case of secure tenants; the Housing Act 1988 in the case of assured periodic tenants.

the order or not. *Harlow v Hall* thus gave rise to a new category of (relatively) blameless occupiers – those who have fallen into rent arrears and whose landlord has been granted a suspended possession order, but who have lost security of tenure even where they have complied with the terms of the order. This group of tolerated trespassers is referred to here as ‘compliant’ tolerated trespassers.

The Court of Appeal decision in *Knowsley v White* (92 May 2007) extended the tolerated trespasser doctrine to assured periodic tenants of Registered Social Landlords.

At present there is no Court of Appeal judgement on whether the tolerated trespasser doctrine extends to local authority introductory tenants (s. 124 et seq. of the Housing Act 1996). We have made the assumption, therefore, that it does apply. Where a landlord obtains a possession order against an introductory tenant, but then reaches agreement with the tenant and does not enforce it by eviction, we believe it may be possible that the courts would hold that in these circumstances the former tenant became a tolerated trespasser once the possession date has passed. The problems associated with erstwhile secure and assured tenants who have become tolerated trespassers, set out below, would apply equally to former introductory tenants, except that introductory tenants do not have the right to exchange.

Options

1. This Impact Assessment sets out 4 options for changes to Part IV of the 1985 Housing Act and Part I of the 1988 Housing Act (new sections will need to be added) and section 127(3) of the Housing Act 1996. These options form the basis of the consultation:

Option A: Do nothing

2. This is the baseline against which the costs and benefits of Options B, C & D have been assessed. It represents a continuation of the existing ways of dealing with tolerated trespasser issues, which have cost implications for tenants, landlords, and the court service in relation to the restoration of tenancy status.
3. There are a number of reasons why we do not consider this to be a viable option. The existence of tolerated trespassers creates the problem of loss of tenancy status, usually without tenants’ knowledge. Problems arising from loss of tenancy status include:
 - i) **Succession Rights** – tolerated trespassers are not tenants and so there are no succession rights (a fact which is frequently only realised on their death, when a family member is told they cannot succeed to the tenancy).
 - ii) **Right to exchange** – tenants who become tolerated trespassers, lose their right to exchange with other secure or assured tenants of RSLs.
 - iii) **Contractual right to repair and maintenance of property for secure tenants** – there is no statutory obligation upon local authorities to repair and maintain property for tolerated trespassers. Tolerated trespassers do not have entitlement to damages for landlord’s breach of repairing obligations.

- iv) **Unlawful increases in Rent** – The relevant Housing Acts provide for increases in rent to secure and assured tenants, but these provisions do not apply to tolerated trespassers.
 - v) **Voting rights** – For landlords, there are difficult issues regarding whether tolerated trespassers should be able to vote in stock transfer and tenant management ballots, since the statutory rules on both refer to the votes of tenants.
4. Currently, for many tolerated trespassers, the option exists of applying to the court to exercise its discretion to restore tenancy status by amending the original order by resetting the date for possession in the future. However, this can only occur on a case by case basis. In July 2006 a new two stage process came into force whereby form N28A (a ‘postponed possession order’) could be used to omit a date for possession so that the provision about the tenancy ending no longer applies. Landlords who wish to proceed to eviction following breach of terms must apply to the court (paying a £35 fee) for a possession date to be fixed.
 5. This process is burdensome to both tenants and landlords. In many cases tenants make applications in person and without legal representation as Legal Aid costs are being curtailed, requiring a hearing in front of a judge – a further burden on the courts.
 6. Another option exists of granting a new tenancy. However, where the problem which led to the possession order in the first place still exists – eg outstanding rent arrears – many landlords are reluctant to allow this. This approach may be burdensome for landlords, and does not completely solve the problem as it does not involve restoring the original tenancy with retrospective effect. This can be particularly problematic in relation to succession rights. It will also potentially restore the right to buy which the tenant was not entitled to while subject to a possession order.

Option B: Amending the 1985 and 1988 Housing Acts to deal with tenants subject to future possession orders.

7. Option b) proposes the amendment of section 82(2) of the Housing Act 1985 (which repeated wording in the Housing Act 1980) and the inclusion of new sections to the 1988 Act.
8. This would remove the existing requirement for tenants who become subject to possession orders, to apply to the courts to restore tenancy status and the related additional costs. This step would also prevent the need to grant new tenancies and the associated problems as outlined in paragraph 6.
9. This option would only apply to tenants subject to future possession orders, ie to possession orders granted after the new legislation came into force.

Option C: Amending the 1985 and 1988 Housing Acts to deal with tenants subject to future possession orders and restore tenancy status to all existing tolerated trespassers

10. This option proposes the restoration of tenancy status for all existing tolerated trespassers and prevents this becoming an issue for any tenants subject to possession orders in the future.

Option D: Amending the 1985 and 1988 Housing Acts to restore tenancy status to existing 'compliant' tolerated trespassers and deal with future tolerated trespassers

11. A 'compliant' tolerated trespasser is a tenant who, although having previously breached the tenancy agreement seriously enough to warrant a court order, has subsequently made the effort to improve by complying with the terms of the possession order.
12. The creation of 'compliant' tolerated trespassers (ie those losing their tenancy status even if they comply with the terms of the order) by the Harlow v Hall decision in 2006 means that possession orders granted before that judgment (since 2001) now have an effect that would never have been intended by the parties or the courts at the time.

Costs and Benefits

Assumptions and unknowns

13. The preparation of this Impact Assessment is subject to a number of unknowns. The estimated figure of 250,000 tolerated trespassers is based on the number of suspended possession orders granted to all social landlords between October 2001 and July 2006 only. We are unsure of the numbers that have occurred since or even those who have subsequently been evicted. We have asked the Ministry of Justice to provide updated data as it is likely that all of those tenants who remain in their homes have become tolerated trespassers.
14. The 250,000 figure does not include those tenants who became tolerated trespassers prior to 2001.
15. We currently have only very limited statistics on the number of applications made to courts to postpone the date in possession orders.
16. It is not possible to disaggregate the number of 'compliant' tolerated trespassers from the estimated 250,000 that currently exist. We do not however consider there to be a significant number as most tenants in rent arrears do not keep up with instalments as per the terms of their possession order for various reasons, frequently as a result of the way in which Housing Benefit and Arrears Direct are paid.

Costs and Benefits

Option A

Costs

17. Currently once a tenant is made aware of his/her loss of tenancy status, an additional application to restore tenancy status will need to be made. This is where the main costs arise. If both tenant and landlord are in agreement it is likely that costs to the landlord will not exceed £300, including staff time. However, given that these applications arise following a dispute with a landlord, usually over damages for disrepair, it is probable that a series of hearings will be needed leading to an increase in costs for both landlord and tenant. Where this is the case, we estimate the costs to the landlord could be up to £500 per case. We estimate that the costs to tenants of such applications are likely to be in the region of £35 to £65 per case. We are currently unable to estimate the costs, if any, to the court service of such applications.
18. In addition, there are a number of other problems that arise from loss of tenancy status, although we are unable to quantify these costs.
19. For tenants the potential costs are as follows:
 - i) Loss of succession rights – family members who would have succeeded will likely incur expenses in finding new accommodation.
 - ii) Loss of right to exchange – tenants could potentially suffer loss of opportunity.
 - iii) Right to Repair and damages for disrepair – this could lead to costs for tenants but it is unlikely to be a significant amount as it is in landlords' interests to maintain their properties in an adequate state of repair
 - iv) Increases in rent – although costs are unknown, anecdotal evidence suggests that some landlords are charging higher rents to tolerated trespassers.
20. There could also be costs involved if landlords are challenged on tolerated trespasser rights to vote in stock transfer and tenant management ballots but to date we are unaware of such challenges taking place.

Benefits

21. We see no benefits for tenants in retaining the status quo. Landlords may possibly gain through a tenant's loss of succession rights as the freeing up of properties might enable them to make better use of their existing stock (although an under-occupation ground for possession already exists following succession) and meet the needs of those on waiting lists.

Option B

Costs

22. For existing tolerated trespassers the costs and benefits as outlined under Option A would continue to exist.
23. There is a risk that in raising the profile of this issue through legislative changes, it could lead to an increase in applications to the courts by existing tolerated trespassers to restore their tenancy status.
24. Future tenants subject to possession orders would no longer need to apply to the courts to restore tenancy status. The costs identified in Option A would be removed for tenants, landlords and the courts.

Benefits

25. This option would resolve the problem of tolerated trespasser status for all tenants subject to future possession orders. The threat of challenges to stock transfer and right to manage ballots would be removed for landlords in respect of these people.

Option C

Costs

26. Future and existing tenants subject to possession order would no longer need to apply to the courts to restore tenancy status. The costs associated with loss of tenancy status as identified under Option A would be removed for tenants, landlords and the courts.
27. Some potential costs to landlords associated with restoration of tenancy status, eg duty to repair. This would also apply to Options B and D.

Benefits

28. The benefits as identified under Option B would apply to tenants subject to future possession order and existing tolerated trespassers.

Option D

Costs

29. For existing tolerated trespassers, who have failed to comply with the terms of the order, the costs and benefits as outlined under Option A would continue to exist.
30. There is a risk that in raising the profile of this issue through legislative changes, it could lead to an increase in applications to the courts by existing tolerated trespassers to restore their tenancy status.
31. For landlords, there will be unquantified administrative costs associated with identifying those tolerated trespassers who have complied with the possession order.

32. There is a risk of the legislation being challenged by those who remain tolerated trespassers on grounds of unequal treatment – ie where ‘compliant’ tolerated trespassers who have had their tenancy restored by the legislation go on to breach the terms of the order at some future point but retain their tenancy status.
33. Future tenants subject to possession orders and existing tolerated trespassers who had complied with the terms of the order, would no longer need to apply to the courts to restore tenancy status. The costs identified in Option A would be removed for tenants, landlords and the courts.

Benefits

34. The benefits as identified under Option B would apply to tenants subject to future possession order and existing tolerated trespassers who had complied with the terms of the order.

Social Costs/Benefits

35. There may be social costs around the loss of succession rights and the right to repair but these costs are unquantifiable.

Environmental costs/benefits

36. There are no environmental costs that we are aware of.

Race Equality Assessment

To be completed following consultation.

Disability Impact Assessment

To be completed following consultation.

Gender impact Assessment

To be completed following consultation.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	Results in Evidence Base?	Results annexed?
Competition Assessment	No	No
Small Firms Impact Test	No	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	No
Disability Equality	No	No
Gender Equality	No	No
Human Rights	No	No
Rural Proofing	No	No