

Summary: Intervention & Options

Department /Agency: CLG	Title: Impact Assessment of Tolerated Trespasser provisions in Housing and Regeneration Act	
Stage: Final	Version: 3	Date: 1 July 2008
Related Publications: Consultation Paper on Tolerated Trespassers		

Available to view or download at:

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

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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 and repair) and landlords (issues around entitlement to rent, including rent increases, voting rights in stock transfer/tenant management ballots). Remedies exist to restore tenancy status individually to existing tolerated trespassers, but are costly and time consuming. 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 remove the problems which the tolerated trespasser doctrine has caused for landlords and tenants -
by ensuring that tolerated trespassers are not created in future; and
by restoring tenancy status to existing tolerated trespassers.
In addition, landlords should be protected from challenges arising from the change in the law.

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

(i) the base case (status quo);
(ii) amending legislation to prevent the creation of future tolerated trespassers;
(iii) as (ii) plus amending legislation to restore tenancy status to all existing tolerated trespassers;
(iv) as (ii) plus amending legislation to restore tenancy status only to compliant tolerated trespassers.
Following consultation, options (ii) and (iv) have been omitted from the final IA. The option to be implemented is (iii). Option (i) is referred to hereafter as option (A), and option (iii) as option (B).

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? Three years following implementation is deemed good practice.

Ministerial Sign-off For SELECT 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:

Summary: Analysis & Evidence

Policy Option: B

Description: Amend the 1985, 1988 and 1996 Housing Acts to remedy the situation in respect of future and existing tolerated trespassers

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups'
	One-off (Transition)	Yrs	
	£ 0.00		
	Average Annual Cost (excluding one-off)		
	£ 0.00		Total Cost (PV) £ 0.00
<p>Other key non-monetised costs by 'main affected groups' Disrepair cases continue with costs for landlord, tenant and courts - but not quantified. Loss of opportunity to charge higher rent where this has occurred. Training for landlord staff to operate new provisions, but already require training to deal with complexity of tolerated trespassers -so not additional cost.</p>			

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' Removal of need for court action to restore tenancy to those subject to possession order: social landlords £300 - £500 per case; HMCS £72 - £200 per case; tenants £35-£65 per case unrepresented and £500-£800 per case with representation. But court appearances remain necessary for disrepair cases (see above).
	One-off	Yrs	
	£ 0.00		
	Average Annual Benefit (excluding one-off)		
	£ 19,413 - £71,550		Total Benefit (PV) £ 97,065 - 357,750
<p>Other key non-monetised benefits by 'main affected groups' Restoration of tenancy status and rights to existing and future tolerated trespassers. Simplified management systems for landlords and removal of challenge relating to voting rights in tenant ballots.</p>			

Key Assumptions/Sensitivities/Risks Need to ensure that by granting a new tenancy, landlords are not disadvantaged (ie likely to be subject to challenge through the courts) or newly restored tenants put in a more favourable position than they would be if the courts restored tenancy status at the moment.

Price Base Year	Time Period Years 5	Net Benefit Range (NPV) £ 97,065 - 357,750	NET BENEFIT (NPV Best estimate) £ 227,408
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What is the geographic coverage of the policy/option?			England and Wales	
On what date will the policy be implemented?			April 2009	
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?			Yes	
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	£ 0.00	Decrease of	£ 0.00	Net Impact £ 0.00

Key: Annual costs and benefits: Constant Prices (Net) Present Value

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

1. A tolerated trespasser is an occupant of a rented property under a secure or assured periodic tenancy (probably also under an introductory or demoted tenancy) who has lost the status of a social tenant after the court has granted the landlord a possession order, but whom the landlord or the court 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. 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, i.e. local authorities and Registered Social Landlords (RSLs).

2. 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 or the court 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

3. 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 (i.e. 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.

4. Until early 2006 it was thought that the tenant only became a tolerated trespasser upon breach of the terms of the order 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.

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

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

6. At present there is no Court of Appeal judgement on whether the tolerated trespasser doctrine extends to local authority introductory tenants or demoted tenants. We have made the assumption therefore that it does apply. Where a landlord obtains a possession order against an introductory tenant or demoted tenant, but then reaches agreement with the tenant and does not enforce it by eviction, we believe it is likely 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 and demoted tenants, except that they do not have the right to exchange.

Options

7. Following consultation on a number of options to resolve the issues created by the tolerated trespasser doctrine, this Impact Assessment considers 2 options.

Option A: Do nothing

8. This is the baseline against which the costs and benefits of Option B has 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.

9. 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 request their landlord's agreement to exchange with other secured or assured tenants of LAs/RSLs. However, this is less significant as landlords already have the right to refuse agreement to a tenant subject to a possession order, regardless of whether they have become a tolerated trespasser. Introductory and demoted tenants do not have a right to exchange.
- iii) **Contractual right to repair and maintenance of property for secure tenants** - there is no statutory obligation upon landlords to repair and maintain property for tolerated trespassers. Tolerated trespassers have no 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.

10. 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, in section 82 (2) of the Housing Act 1985, 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 fee) for a possession date to be fixed.

11. This process of applying to vary the terms of the possession order 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.

12. Another option exists of granting a new tenancy. However where the problem which led to the possession order in the first place still exists - e.g. 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: Amend the 1985, 1988 and 1996 Housing Acts to prevent the creation of future tolerated trespassers and to restore tenancy status to all existing tolerated trespassers.

13. This is the option which was supported by the majority of responses to consultation. It proposes the amendment of the Housing Acts to spell out when tenancies come to an end, that is to say –

- following grant of a possession order, on the date the tenant is actually evicted, or
- on the date the tenant leaves voluntarily, if earlier than that.

14. This will remove the requirement for tenants, who become subject to possession orders after commencement of the new legislation, to apply to the courts to restore tenancy status and the related additional costs. It will also prevent the need to grant new tenancies and the associated problems as outlined in paragraph 12.

15. This option will also restore tenancy status for all existing tolerated trespassers by providing that a new tenancy is treated as arising on the commencement date, provided that the dwelling-house in which the tenant lives continues to be his/her principal home (though see paragraph [17] below in relation to tolerated trespassers where there has been a change of landlord). The new tenancy will be on the same terms and conditions as the original tenancy, but will be updated to reflect any changes in terms and conditions and amount of rent payable which have occurred during the termination period.

16. For some purposes, the new and original tenancies are to be treated as the same one continuing interrupted. The relevant purposes are :

- succession rights – to ensure that the newly restored tenant does not acquire new rights as a result of the new tenancy
- qualification for the right to buy and the right to acquire – so that, if the possession order is discharged, the time spent as a tolerated trespasser will count
- outstanding and new claims for breach of the terms of the tenancy agreement and/or breach of statutory duty (eg mainly disrepair claims) – subject to permission of the court
- decants – to ensure that the newly restored tenant may return to their original home as a secure tenant once the works have been carried out on it.

17. We will consult on whether the changes should extend to tolerated trespassers where there has been a change of landlord (eg following a large scale voluntary transfer). If changes are

made, following consultation, these will be introduced by secondary legislation and will be brought into force at the same time as the changes introduced by the primary legislation.

Costs and Benefits

Assumptions and 'unknowns'.

18. The preparation of this Impact Assessment is subject to a number of 'unknowns'. The estimated figures of between 250,000 – 300,000 tolerated trespassers in England 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. Postponed possession orders were introduced in July 2006, which are currently probably more widely used than suspended orders. These defer the point at which a tenant becomes a tolerated trespasser to later in the process.

19. The 250,000 – 300,000 figures do not include those tenants who became tolerated trespassers prior to 2001.

20. We have only very limited statistics on the number of applications made to courts to vary possession orders. Numbers are very low - during 2006 a total of 53 applications to vary were made and in the first six months of 2007 there were 49 – and reasons for the application are not specified. However we consider it likely that most applications to vary are for the purposes of restoring tenancy status. We are therefore basing estimates on these figures.

21. Estimated costs as summarised above have been calculated using the 250,000 – 300,000 suspended possession orders granted to social landlords between October 2001 and July 2006, assuming an annual average of 52,632 cases per year as an ongoing trend.

22. The death rate used to calculate succession rates is taken from the ONS website using 2006 projections. The ONS calculates death rates for England and Wales combined and so some deaths that occur will be in Wales and therefore not affect succession rates in England. Due to the small numbers involved this should not be a cause for concern. Assume 52,632 suspended possession orders per year (from consultation paper) and using ONS data 318 tolerated trespassers will die per year and if 50% are eligible to succeed then 159 will lose the right to succession. Using ONS population statistics on England and Wales, out of the 318 deaths 300 of these are likely to be in England, resulting in 150 people losing the right to succession. In England and Wales in 2006 there were 6,056 deaths per 1,000,000 people, average between men and women taken).

Source: http://www.statistics.gov.uk/downloads/theme_population/Table_1_Deaths_Rates_Summary.xls.

23. There are likely to be more applications to vary, in order to restore tenancy status, within other housing court actions such as disrepair claims rather than as free-standing actions. However these are not recorded separately.

Costs and Benefits

Option A

Costs

24. 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 hearing 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, if the tenant is unrepresented, or up to £800 if represented. The costs to the Court Service are estimated at between £72 and £200 per case.

25. In addition, there are a number of other problems that arise from loss of tenancy status, although we are unable to quantify these costs.

26. For tenants the potential costs are as follows:

- vi)** Loss of succession rights – family members who would have succeeded will be likely to incur expenses in finding new accommodation.
- vii)** Loss of right to exchange – tenants could potentially suffer loss of opportunity (although landlords can already refuse an exchange where the tenant is subject to a possession order).
- viii)** Right to Repair & damages for disrepair – this could lead to financial loss for tenants. Although necessary repairs are probably carried out (since it is in landlords' interests to maintain their properties in an adequate state of repair), landlords are unlikely to pay compensation for any disrepair suffered. However, this will not be the case where the courts restore tenancy status in order to allow a disrepair claim for compensation to go ahead.
- ix)** Increases in rent - although costs are unknown, anecdotal evidence suggests that some landlords are charging higher rents to tolerated trespassers.

27. 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. However, we have been informed that some landlords are balloting tolerated trespassers and tenants separately, which must involve extra costs.

Benefits

28. 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. However a family member who cannot succeed to the tenancy may apply to the landlord for housing assistance in any case. Landlords may also gain from charging higher rents but benefits are unknown and are likely to be small.

Option B

Costs

29. There may be minimal costs associated with the changes related to future tolerated trespassers, arising out of the loss of opportunity to charge higher rents or to ignore the disrepair duty. However, these are not considered to be significant, since there is very little evidence to suggest that most landlords charge higher rent, and the courts have the power to allow disrepair claims by tolerated trespassers anyway (though there are no figures on how frequently this is exercised).

30. The intention is to ensure as far as possible that landlords and tenants are not disadvantaged by the legislative changes relating to existing tolerated trespassers. There may be some costs attached to the provision that the time spent as a tolerated trespasser will count towards qualification for the right to buy. However, as newly restored tenants subject to a possession order will continue to be precluded from the right to buy, it is considered that these costs are likely to be minimal.

31. There may also be some disadvantages for landlords if the changes are extended to tolerated trespassers whose landlord has changed. The main circumstance in which a landlord changes is likely to be a stock transfer from a local authority to a Registered Social Landlord. We believe that most Registered Social Landlords grant a tenancy to all occupants who transfer (either a full assured or assured shorthold tenancy). However, we understand that some do not but are unable to estimate the numbers involved. (Other transfer circumstances will include where a Registered Social Landlord merges with or is taken over by another one, or where a local authority landlord changes following a boundary change but these are likely to happen only rarely.) RSLs may consider that losing their discretion not to grant a tenancy is a disadvantage. However, we believe that this is likely to be outweighed by the benefits: the savings from removing the costs associated with loss of tenancy status (see paragraph [33] below); and benefits more generally in terms of certainty and fairness.

Benefits

32. This option would resolve the problem of tolerated trespasser status for all tenants subject to future possession orders.

33. Existing tenants subject to possession orders would no longer need to apply to the courts to restore tenancy status. The costs associated with loss of tenancy status as identified in option A would be removed for tenants, landlords and the courts.

Race Equality Impact Assessment

34. Ministry of Justice (MoJ) data on the numbers of suspended possession orders granted to all social landlords cannot be further broken down by race or ethnicity. However CLG collects data on the numbers of social renters who are currently in rent arrears or had been in rent arrears at a previous time during the year of data collection.

35. Data is collected annually and is broken down into various sub groups, as part of the Survey of English Housing (SEH). It is likely that those surveyed would have included a proportion of tenants who are now tolerated trespassers; we are therefore using the SEH data as an indicator of likely numbers. The dataset comprise years 2001/2 to 2004/5, a similar timeline to that covered by the MoJ possession orders data. Please note that households are regarded as in arrears with rent if the payments are two weeks or more behind.

36. SEH data indicates that BME households are more likely to be in arrears (or to have been in arrears) than white households. As a result it is likely that any restoration of tenancy status will have a positive impact on BME tolerated trespassers.

Disability Equality Impact Assessment

37. As outlined above, MoJ data on the numbers of suspended possession orders granted to all social landlords cannot be further broken down into sub-groups. Using SEH data as an indicator of likely numbers, figures indicate that households with disabled or seriously ill members are much less likely to be in arrears than households without. It is therefore our view that amending the legislation as proposed will have minimal impact on disabled households.

Gender Equality Impact Assessment

38. Data taken from the SEH indicates that there is little difference in the likelihood of being in arrears by gender. Subsequently we do not anticipate that restoring tenancy status to existing tolerated trespassers will have any disproportionately negative impact across the sexes. In fact as there are a larger number of females as household reference person than males (SEH 2006) in social housing it is likely that females will gain from any changes we make.

39. A table summarising the SEH rent arrears data is attached at Annex A.

Competition Assessment

40. Competition will be unaffected by any amendments to legislation as proposed.

Small Firms Impact Assessment

41. Small Firms will be unaffected by any amendments to legislation as proposed.

Legal Aid

42. Data collected by MoJ does not enable us to determine the amounts of Legal Aid allocated to tenants who have sought to restore tenancy status. However, there is likely to be a saving made here if further cases are prevented in the future.

Sustainable Development

43. We do not anticipate any impact on sustainable development by amending legislation as proposed.

Carbon Assessment

44. Carbon emissions will be unaffected by any amendments to legislation as proposed.

Other Environment

45. We do not anticipate any other environmental impacts.

Health Impact Assessment

46. We do not anticipate any direct impact on health will arise as a result of amending legislation as proposed. However, it is likely that those family members affected by loss of succession rights will have experienced some degree of stress and instability as a consequence of being under threat of eviction and homelessness. Restoring tenancy status will remove any potential impact on health.

Human Rights

47. The right to respect for private and family life etc under Article 8, and the right to protection of property under Article 1 of the First Protocol, are both issues which have been examined in the context of possession proceedings. In general the position has been that human rights law cannot be used to challenge possession proceedings. The House of Lords recently in *Kay v Lambeth* reviewed the law and previous cases with regard to Article 8. Currently the position is that, with regard to secure and assured tenancies, a grant of possession in proceedings

properly instituted by the landlord in accordance with the statutory provisions will not constitute a breach of Article 8 rights.

48. Probably the most significant aspect of property rights is that at present where a tolerated trespasser dies there are no succession rights, whereas if an occupant were to remain a tenant until death the succession rules would apply. These differ slightly for secure and assured tenants, but for both regimes only one succession to a property is allowed; if the dead tenant was already a successor, no further succession to the tenancy is possible. Family members who would otherwise succeed to tenancies will continue to be deprived of the right to succeed so long as the current state of the law exists; but if the law is reformed landlords will lose the chance to make a fresh allocation to the property on a tolerated trespasser's death. However, it is not considered that this engages Article 1 of the First Protocol since that relates only to existing possessions not the chance of gaining a possession right. Overall, if any ECHR property issues do arise in respect of the proposed reform, the Government considers that its aims are in the public interest and proportional.

Rural Proofing

49. We do not have analysis on the geographical location of the estimated 250,000 tolerated trespassers, but by restoring tenancy status we are by and large improving tenant outcomes the impact of which will apply across all localities, both rural and urban.

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	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	Yes
Disability Equality	Yes	Yes
Gender Equality	Yes	Yes
Human Rights	Yes	No
Rural Proofing	Yes	No

Annexes

Summary of percentage of social renters currently in rent arrears or previously in rent arrears

Percent of social renters who were either currently in rent arrears or had been in rent arrears at some other time in the past year						
SEH survey yr	ethnicity of HRP		gender of HRP		Is someone in the h/hold seriously ill or disabled?	
	BME	white	male	female	yes	no
2001/2	25.4	13.6	14.2	15.3	11.0	17.9
2002/3	21.2	12.8	12.0	14.9	9.7	16.8
2003/4	18.4	11.5	10.5	13.8	7.1	16.2
2004/5	14.4	9.4	9.2	10.5	8.3	11.4