The Law Commission
Consultation Paper No 180

HOUSING: PROPORTIONATE DISPUTE RESOLUTION – THE ROLE OF TRIBUNALS

A Consultation Paper
The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This consultation paper, completed on 31 May 2007, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

The Law Commission would be grateful for comments on its proposals before 28 September 2007. Comments may be sent either –

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It would be helpful if, where possible, comments sent by post could also be sent on disk, or by email to the above address, in any commonly used format.

We will treat all responses as public documents in accordance with the Freedom of Information Act. Those who wish to submit a confidential response should contact the Commission before sending the response. We will disregard automatic confidentiality disclaimers generated by an IT system.

This consultation paper is available free of charge on our website at:
http://www.lawcom.gov.uk/housing_disputes.htm
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PART 1
INTRODUCTION

INTRODUCTION
1.1 The central question this consultation paper addresses is: should there be a specialist adjudicatory body to determine those housing disputes that require formal determination?

1.2 At present, the formal determination of housing disputes takes place within a structure that includes both a generalist element – the county court – and a specialist element – the various specialist tribunals that make up the Residential Property Tribunal Service (RPTS). The RPTS has in recent years seen its jurisdiction significantly extended with new jurisdictions added, notably by the Housing Act 2004. In addition, the context within which tribunals generally operate is being transformed with the creation of the new Tribunals Service and the anticipated enactment of the Tribunals, Courts and Enforcement Bill. Although the RPTS is not currently within the scope of the Tribunals Service, it is likely that once the first phase of implementation is complete, further tribunals will come within its scope. This paper is based on the assumption that, within the foreseeable future, the RPTS will join the Tribunals Service.

1.3 In this changing context we have considered three possible options:

(1) retain the status quo, with formal procedures for the resolution of housing disputes remaining divided as at present between the county court and the tribunals in the RPTS;

(2) propose the creation of a new specialist housing court either on a stand-alone basis or by creating a specialist housing court within the county court structure; or

(3) propose a rebalancing of the existing generalist and specialist elements.

Our provisional view is that it is the third of these options which should be further explored.

1.4 This consultation paper therefore makes four key provisional proposals:

(1) There should be a transfer of jurisdiction over claims for possession and disrepair in respect of rented dwellings from the county court to the RPTS.

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1 See Housing Act 2004 ss 22(9), 34, 45, 48, 49(7) 62(7), 73, 74, 86(7), 96(5), 97, 102, 103(2), 105(10), 110(7), 114(7), 120, 126(4), 130(9), 133, 134, 138, 143, 144(2), 181, 229, 230, 255(9), 256(4), sch 4 paras 10, 13, 15 to 18, sch 2 paras 7 and 9 to 13, sch 3 paras 11 and 14, sch 5 paras 31 to 34, sch 6 paras 24 to 26, 28 to 30 and 32 to 34, sch 7 paras 1(7), 2(3)(d), 5(7), 9(8), 10(3)(d), 14, 22, 26 to 28, 30 to 32 and 34 to 36, sch 13 and sch 15 paras 15 and 32.

2 We also suggest that jurisdiction over possession claims in relation to mobile homes and caravans may be another strong candidate for transfer to the tribunal.
(2) Appeals on a point of law from the First-tier Tribunal should go to the Upper Tribunal to be created by the Tribunals, Courts and Enforcement Bill, and would require the tribunal's permission.

(3) Homelessness statutory appeals currently heard by the county court, and housing and homelessness related judicial review applications, currently made to the Administrative Court, should be transferred to the Upper Tribunal.

(4) In relation to the position in Wales, we propose, not without some hesitation, that a reformed system should be a unified England and Wales one. (This would require the reversal of the devolution of the Welsh equivalent to the RPTS – RPT – Wales so that, jointly with the RPTS, it can be absorbed into the First-tier Tribunal.)

BACKGROUND

1.5 This project arises from two earlier Law Commission projects.

(1) During the consultations leading to publication of our report Renting Homes,³ we received many criticisms about current methods of resolving housing disputes and many suggestions for change, from a wide range of people and organisations.⁴

(2) In November 2002, following Sir Andrew Leggatt's review of tribunals,⁵ we were asked to consider a group of tribunals concerned with land, valuation and housing.⁶ The consultation which led to our report on that topic also revealed dissatisfaction with current ways of resolving housing disputes.⁷

1.6 The Law Commission was therefore asked by the Department for Constitutional Affairs:


⁶ The Adjudicator to HM Land Registry; the Agricultural Lands Tribunal; the Commons Commissioners; the Lands Tribunal; the Leasehold Valuation Tribunal, Rent Assessment Committees, the Rent Tribunal and Valuation Tribunals.

To review the law and procedure relating to the resolution of housing disputes, and how in practice they serve landlords, tenants and other users, and to make such recommendations for reform as are necessary to secure a simple, effective and fair system.8

Housing: Proportionate Dispute Resolution: An Issues Paper

1.7 In April 2006 the Commission’s Public Law Team published an Issues Paper,9 which asked how a more holistic approach for the proportionate resolution of housing problems and disputes could be developed.

1.8 This discussed how problems are transformed into disputes, and looked at barriers to effective resolution. It examined the use of non-court dispute resolution mechanisms such as mediation, ombudsmen and managerial techniques (for example internal complaints procedures).

1.9 It suggested that the elements of a system for proportionate dispute resolution would be: an enhanced scheme for the provision of advice and assistance (which we provisionally labelled "triage plus"); more use of managerial techniques, such as complaints procedures, and greater use of ombudsmen; use of different forms of alternative dispute resolution, including mediation and early neutral evaluation; and a system of formal adjudication for disputes that could not be resolved in other ways.

Consultation responses

1.10 We received sixty two responses.10 We also spoke at a number of conferences, workshops and other events,11 and conducted meetings with various organisations. We received responses from a variety of individuals and bodies: lawyers, advice agencies, judges, landlords, tenants, ombudsmen and others. Responses varied in length and style: not all respondents answered all the questions. An analysis of the consultation responses can be seen on our website.12

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8 We were asked to explore the extent to which the idea of proportionate dispute resolution could be applied in the housing context: see the DCA White Paper: Transforming Public Services: Complaints, Redress and Tribunals (July 2004) available at http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf (last visited 23 May 2007).


10 The consultation period ran from 20 March to 11 July 2006.

11 For example, the Law Society organised a well attended seminar on the Issues Paper on 30 June 2006.

Outcomes

Ombudsmen and managerial techniques

1.11 We are not proposing to consult again on the role of ombudsmen and managerial techniques in housing disputes as part of this project. In our forthcoming Encouraging Responsible Letting consultation paper, we are considering some of these issues in the context of self-regulatory organisations in the private rented sector. For example, complaints procedures operated by landlord associations or landlord accreditation schemes are a managerial technique applicable to the private rented sector. Accreditation schemes or landlord associations could require private landlords to become members of the Independent Housing Ombudsman scheme as a condition of membership. We will return to these matters in our final report to be published at the end of 2007.

Triage plus and the Legal Services Commission strategy

1.12 The development and implementation of the Legal Services Commission strategy for the Community Legal Service, have coincided with our developing thinking on triage plus. The draft strategy included proposals to set up “Community Legal Advice Centres” (CLACs) and “Community Legal Advice Networks” (CLANs).

1.13 The Legal Services Commission’s proposals appear to embody many of the elements of triage plus, relating to holistic advice provision; feedback to decision makers; information gathering and sharing, so that parts of the system learn from experience, and prevent similar problems arising in future.

1.14 In a recent speech, Vera Baird (Parliamentary Under-Secretary of State for Constitutional Affairs) emphasised the importance of holistic advice provision.

Complex and interlinked problems require integrated and holistic solutions. …To achieve this providers will need to change the way they work (for example through linking together to deliver legal services via the CLAC/N models) to ensure that clients are offered a more holistic service. … The key, intrinsic, point about CLACs is that they will offer integrated advice services across a range of social welfare law categories … Community Care, Housing, Debt, Employment and Welfare Benefits.

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14 The first CLACs are proposed for Gateshead and Leicester. The first CLAN will be set up in Cornwall: see the LSC press release dated 13 March 2007 at http://www.legalservices.gov.uk/press/press_release20.asp (last visited 23 May 2007).


The Legal Services Commission’s strategy also referred to the feedback and learning elements of triage plus.\textsuperscript{17} 

Rather than have a further round of formal consultation, we will be engaging directly with the Legal Services Commission to determine what the triage plus concept has to offer in the context of the implementation of the Legal Services Commission strategy, particularly in the operation of CLACs and CLANs. Similarly, we plan further consultation with advice providers. Many advice providers who responded to the Issues Paper consultation argued strongly that their services already provide triage plus. We need to understand better how this currently operates, and how such services could be developed further in the future.

\textit{Formal adjudication of housing disputes}

This paper focuses exclusively on the issue of which body or bodies should formally adjudicate those housing disputes that cannot be resolved by other means, while remaining proportionate to the issues to be determined.

\textbf{COURTS OR TRIBUNALS – THE CHANGING CONTEXT}

In Part 8 of the Issues Paper, we argued that such a formal adjudicatory body or bodies was needed to:

\begin{enumerate}
\item enable governments to meet their obligations under Article 6 of the European Convention on Human Rights and Fundamental Freedoms;
\item be an independent forum in which authoritative interpretations of the law can be handed down, which determine the extent of housing rights and obligations;
\item hear evidence and find facts which determine the extent of individual's housing rights and obligations;
\item determine appeals from other courts or tribunals …;
\item hear challenges by way of judicial review to the legality of dispute resolution outcomes and procedures that fall outside the formal court structure;
\item provide the authority for actions imposed by the state, including both criminal sanctions for breach of the criminal law, or remedies for breaches of private or public law;
\item authorise enforcement of the remedies provided by the court.
\end{enumerate}

We argued that any system of formal adjudication should meet these requirements.

1.19 We also considered the values which we thought should underpin a proportionate dispute resolution system. We identified these as:

(1) accuracy;
(2) impartiality and independence;
(3) fairness;
(4) equality of arms;
(5) transparency;
(6) confidentiality;
(7) participation;
(8) effectiveness;
(9) promptness;
(10) efficiency/cost and
(11) impact.

Most respondents to the Issues Paper thought that we had identified the correct set of values, so we continue to use them to evaluate our reform proposals.

1.20 We then went on to ask a series of questions about the jurisdictions, procedures and operation of courts and tribunals in housing cases. Of the sixty two respondents to the Issues Paper, forty answered one or more of the questions relating to courts and tribunals. The key questions were whether formal adjudication of housing disputes should be carried out by a specialist or generalist body, and by a court or tribunal. (We also asked for respondents' thoughts on a number of more detailed issues, such as whether the same body should have civil and criminal jurisdiction, procedures (formality, oral hearings, adversarial/inquisitorial procedure), costs, fees, location, legal aid and hearings.)

1.21 Those who responded to the Issues Paper did not come out strongly in favour of any major change to current arrangements. However, of the nineteen respondents who answered the specific question as to whether the body formally adjudicating housing disputes should be a specialist or generalist one, all but one favoured a specialist body.

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1.22 We cannot now ignore the existence of the Tribunals, Courts and Enforcement Bill, and the fact that we can reasonably expect that it will shortly be on the statute book.\textsuperscript{20} Although, when we wrote the Issues Paper, we knew that a Tribunals Service was to be created, we could only speculate on the precise nature of any underpinning legislation. In the light of the significant reforms foreshadowed by the Bill, together with the responses to the Issues Paper, we think it right that we should engage in a further round of consultation on the question: should formal adjudication of housing disputes be left largely unreformed, or should it be reformed? Would reform lead to more proportionate dispute resolution? As we said at the outset, we provisionally propose that there should be reform.

The Tribunals, Courts and Enforcement Bill

1.23 A draft Bill was published for pre-legislative scrutiny in July 2006 – shortly after the end of our consultation on the Issues Paper.\textsuperscript{21} The Bill itself was introduced into the House of Lords last November. When enacted, it will implement key recommendations from the Department for Constitutional Affairs White Paper on the Tribunals Service.\textsuperscript{22}

1.24 The Bill creates a new statutory framework for tribunals in England, and those with a remit covering the whole of the England and Wales jurisdiction. It unifies the tribunals’ judiciary under a Senior President.\textsuperscript{23} The Bill provides for the creation of a “First-tier Tribunal” and “Upper Tribunal” to which the Lord Chancellor, by order, can transfer functions from existing tribunals listed in the Bill.\textsuperscript{24} Each of those tribunals can be organised into a number of chambers, to which particular functions or jurisdictions can be allocated.\textsuperscript{25}

1.25 The provisional view of the Department for Constitutional Affairs in December 2006 was that the First-tier Tribunal might consist of a minimum of 3 chambers: social security; tax and regulation; mental health and other welfare appeals. It had not yet reached a view on whether the Upper Tribunal needed to be divided into chambers.

\textsuperscript{20} At the time of writing, the Bill had completed the Committee stage in the House of Commons, and was awaiting a date for Report and Third Reading. Royal Assent is anticipated before the 2007 summer recess.


\textsuperscript{23} Tribunals, Courts and Enforcement Bill, cl 2 refers to the Senior President. Clause numbers in the Bill referred to in this consultation paper are in the Bill as brought from the Lords and ordered to be printed in the Commons, Bill 65 06-07.

\textsuperscript{24} See cl 3 for the establishment of the First-tier and Upper Tribunals; cls 30 to 38 for transfer of tribunal functions; and sch 6 for the list of tribunals from whom functions can be transferred.

\textsuperscript{25} Tribunals, Courts and Enforcement Bill, cl 7 provides for chambers.
1.26 The Tribunals, Courts and Enforcement Bill therefore provides an excellent opportunity to review the jurisdictions of tribunals in England in relation to housing cases.

1.27 The Bill allows for the flexible deployment of tribunal judiciary and other tribunal members with appropriate expertise. A specialist housing chamber could be created in the First Tier Tribunal. The First-tier Tribunal could also determine other issues, for example relating to eligibility for housing benefit (a matter which frequently arises in the course of possession proceedings brought on the grounds of rent arrears), as it will have jurisdiction over social security appeals. An Upper Tribunal chamber based on the Lands Tribunal (which currently exercises appellate functions in some housing matters) could hear appeals from First-tier Tribunal decisions in housing cases.

1.28 Although the Bill does not list the RPTS tribunals as tribunals whose functions could be transferred to the First-tier or Upper Tribunals, there is a power in the Bill to amend the Schedule 6 list.

1.29 While there is no power in that Bill to transfer functions from courts to the First-tier or Upper Tribunals, the Secretary of State and National Assembly for Wales have power to make orders conferring additional jurisdiction on the Residential Property Tribunal, along with power to make consequential amendments including to primary legislation.

1.30 Taken together, these two powers could be used to transfer jurisdictions from the county courts to the new tribunal structure via the Residential Property Tribunal.

1.31 The establishment of the Tribunals Service, an Executive Agency of the Ministry of Justice, is not dependent on the Bill. The Service is responsible for providing

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27 Such an approach was suggested by one of the respondents to the Issues Paper, Lancelot Robson, a legal academic and RPTS chairman, who told us that “It might however be possible to have a new upper chamber “grown” out of the RPTS with the status of a court which dealt with appeals, and cases with non-housing content. There will be some overlap with the jurisdiction of the Lands Tribunal, but perhaps the Lands Tribunal could be brought in as part of the new upper chamber.”

28 Tribunals, Courts and Enforcement Bill, cl 37.

29 Housing Act 2004, s 229(3).
administrative support to the tribunals in the service. The Tribunals Service Framework document refers to the tribunals currently within the Tribunals Service, and states that “It is the intention that further tribunals will join the Service in future years and that new tribunals will be created within the Tribunals Service.” These could include the RPTS tribunals. A consultation paper on the future development of the Tribunals Service is anticipated in Autumn 2007.

WORKING ASSUMPTIONS

1.32 Having noted that our provisional proposals are based on the assumption that the RPTS will be brought within the new Tribunals Service, this paper is based on two further working assumptions.

Evolution not revolution

1.33 First, any reform will be evolutionary rather than revolutionary in nature. In response to the Issues Paper, a number of respondents warned against the likely negative consequences of establishing a completely new specialist housing tribunal or court – in particular the expense, and potential for disruption to services. We agree with these views. This is why we are not pursuing the idea of a completely new housing court, and have instead assumed that any reform will take place within the framework created by the Tribunals, Courts and Enforcement Bill.

Resources for dispute resolution

1.34 Second, our Issues Paper was based on the assumption that there would be no significant increase in the level of public funds available, in particular for the provision of advice and representation.

1.35 Those responding to our Issues Paper, almost without exception, stated that they thought that further resources needed to be put into the housing dispute resolution system, either into the courts, or into the provision of advice and representation for parties to housing disputes, or both. While we do not doubt that additional resources for dispute resolution would be beneficial, we do not believe that any proposals for reform should be dependent on significant additional funding being made available.

30 The tribunals currently included in the Tribunals Service are the Employment Tribunal Service, the Adjudicator to HM Land Registry, the Asylum and Immigration Tribunal, the Commissioners Office, the Appeals Service, the Mental Health Review Tribunal, the Special Educational Needs and Disability Tribunal, the Criminal Injuries Compensation Panel, the Financial Services and Markets Tribunal, the Gender Recognition Panel, the General Commissioners of Income Tax, the Information Tribunal, the Immigration Services Tribunal, the Lands Tribunal, the Pathogen Access Appeals Commission, the Pensions Appeal Tribunal, the Pensions Regulator Tribunal, the Proscribed Organisations Appeals Committee, the Special Commissioners of Income Tax, the Transport Tribunal and the VAT and Duties Tribunals.

31 See in particular the responses of the Housing and Land Committee of the Civil Justice Council, Shelter, the British Property Federation, and Victor Sullivan (a private landlord).

1.36 We have therefore based this consultation paper on the assumption that levels of public funding will remain broadly the same. We are clear, however, that should our provisional proposals for the transfer of cases from courts to tribunals be taken forward, this should only be done on the basis that legal aid remains available for tribunal hearings.

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

STRUCTURE OF THIS PAPER

1.38 In Part 2 we examine the case for change. We also describe the nature of the tribunals on which we propose to confer new functions. In Part 3 we discuss the jurisdictions we are proposing to transfer, or in some cases, to confer concurrently on tribunals. In Part 4 we consider appeal rights against tribunal decisions, and the role of precedent. In Part 5 we discuss tribunal procedures. Part 6 concerns legal advice and representation. Part 7 looks at the scope for mediation and early neutral evaluation to be offered in the tribunal system. In Part 8 we discuss fees and costs. Part 9 refers to powers to enforce the tribunal decisions. Part 10 summarises our conclusions and lists the questions to which we would like consultees to respond. The Appendix sets out the jurisdictions we propose to confer on tribunals.
PART 2
THE CASE FOR CHANGE

INTRODUCTION

2.1 In Part 1 we set out our four basic provisional proposals for reform.\(^1\) If accepted, they will bring much change to the ways in which housing disputes are formally adjudicated. This Part considers the case for change.

2.2 It starts by reflecting on the current position, in particular perceived weaknesses with the county court, and perceived advantages of tribunals. It then considers the issue that is central to our provisional proposals, namely that the adjudicatory body should be a more specialised one. We then consider some of the other issues that arise in the context of current discussion about whether there should be reform of the system of housing adjudication, in particular delay and inconsistency, the need for participation, and access to justice. On the assumption that greater specialisation is desirable, we consider whether this should be done by increasing specialisation in the courts, or through a tribunal. We note that there will be costs, both human and financial, associated with making the changes proposed, and ask whether the benefits of our proposed reforms will outweigh those benefits. Finally we consider the particular position of housing adjudication in Wales.

THE CURRENT POSITION

Perceived problems with the county court

2.3 In our earlier projects\(^2\) we have heard a number of complaints about how the county court currently deals with housing matters. They include:

(1) delay in getting cases to court;
(2) the length of time taken to get orders, particularly possession orders;\(^3\)
(3) the frequency of adjournments;
(4) the granting of multiple applications by tenants to suspend the execution of warrants of possession;
(5) an over technical approach where applications for possession\(^4\) were rejected for what landlords saw as minor deficiencies of drafting;

\(^1\) See above para 1.4.
\(^2\) See above para 1.5.
\(^3\) The Social Housing Law Association told us that “It can take 6 to 8 weeks just for an initial hearing date, during which time rent arrears are building up, which cannot assist either the landlord or the tenant who is faced with an even larger debt at final determination.”
\(^4\) For example when using the accelerated procedure for properties let under assured shorthold tenancies where possession is sought on the notice only grounds: Civil Procedure Rules, rr 55.11 to 55.19.
(6) cost;

(7) the very limited time given for possession claims to be heard, which could be characterised as “conveyor belt justice”;¹⁵

(8) inconsistent decision making;⁶ and

(9) concern about county court judges’ lack of specialist housing law knowledge.

2.4 Shelter referred to a number of problems in its response:

it is a glaring weakness of the present law that many actual day-to-day issues remain uncertain. For example, is there a duty on a landlord to mitigate his/her loss if a tenant leaves in a middle of a fixed term tenancy? … It is equally a weakness of the present legal system that such issues may never be resolved, or are resolved only at the local level of the county court small claims jurisdiction. This is because the costs associated with taking such issues to the higher courts are out of all proportion to the sums involved.

Despite the improvements in court procedure brought about by the Civil Procedure Rules 1998, the combination of legal complexities and procedural formalities is sufficient to deter all but the most determined litigant in person; while the fear of a costs order to be made against an unsuccessful party deters the remainder.

Perceived advantages of tribunals

2.5 The literature on tribunals suggests that, as compared with courts, they may have a number of advantages. Most notable is that tribunals are more specialised, not only in terms of their jurisdictions but also in the skills and knowledge which tribunals’ judiciary and members bring to the tribunal. It is also argued that tribunals are cheaper than courts, are more informal than courts, are more procedurally flexible than courts, may reach decisions more quickly than courts, offer their judiciary and staff more focussed training than courts, and generally offer a more user-focussed service than the courts.⁷ One of the obvious disadvantages of tribunals is that they do not have all the powers available to courts, although the Tribunals, Courts and Enforcement Bill gives more powers to tribunals than they have had hitherto.


2.6 While we think that some of these perceived advantages may be more apparent than real, there is no doubting that, as between courts and tribunals, the latter are (for the most part) more specialist than courts. We therefore turn first to consider the issue of specialisation.

SPECIALISATION

2.7 Of those responding to the specific question as to whether the formal adjudicatory body should be specialist or generalist, eighteen favoured a specialist body: only the Association of District Judges thought that it should be generalist.

2.8 District Judge Russell Campbell regarded a specialist body to determine housing disputes as “long overdue” and thought that it would produce more effective case management. The Brent Private Tenants Rights Group “strongly supported” the need for a specialist housing jurisdiction. The Law Society argued that housing law has a “special nature” as most housing disputes are not about compensation. The unique nature of housing law suggested to them that different processes are required. Consequently, they favour “local specialist courts”. Citizens Advice favoured a “Specialist Tribunal able to make binding decisions on points of law and fact”.

2.9 Tessa Shepperson, a solicitor who advises landlords, favoured a specialist body, commenting that

There are sometimes problems today with Judges making incorrect or inconsistent decisions due to lack of knowledge in housing law.

On the tenant side, the Law Centres Federation also thought that

Housing justice requires a trained and informed judiciary. Judges need to be knowledgeable about housing and housing law as well as legislation relating to discrimination and equality rights.

2.10 The Advice Services Alliance thought that the minimum requirements for a housing court or tribunal would include judges knowledgeable about housing and housing law. Shelter and the Bar Council noted that non-specialists in housing are required to make judgments about technical issues, without specialist training on those issues, and this has in the past caused some major difficulties.8

2.11 We think that there is a strong case for a more specialist adjudicatory body. However, there are some potential disadvantages. The Bar Council commented in its consultation response that:

As the Commission correctly says, many county court judges have an excellent knowledge of housing law and are best placed to determine housing disputes; others have little knowledge of the area.

8 Shelter, for example, suggested that the troublesome line of authority on the tolerated trespasser could have been avoided had the original judges been housing law specialists.
2.12 We would be anxious not to lose the expertise and interest of those county court judges with a good knowledge of housing law, were responsibility for possession and disrepair cases to be transferred from the county court to the tribunals. The provisions in the Tribunals, Courts and Enforcement Bill mean that we do not have to. It allows individuals to be judges both of the county court and of the First-tier or Upper Tribunal hearing housing cases. The same principle extends to members of the Lands Tribunal.

2.13 The Senior President of Tribunals, with the agreement of the Lord Chief Justice, will control deployment of district and circuit judges in the First-tier and Upper Tribunals. Thus the Senior President of Tribunals could request those district and circuit judges with a demonstrated interest and expertise in housing cases to sit in rented housing possession and disrepair cases in the tribunals.

2.14 We are not proposing to transfer to tribunals every jurisdiction conferred by statute on the county court in what might be thought of as a housing case. By allowing individuals to be judges in both the county court and the new tribunals system, the Bill would provide the flexibility for individuals with an interest in and knowledge of housing law to continue to hear housing cases in both court and tribunal systems.

2.15 This would help to address the concerns of some of those respondents who strongly favoured a court, rather than a tribunal, hearing housing cases. The Bar Council repeated its response to Renting Homes, stating that:

> There have long been calls for the creation of a court with jurisdiction to deal with all housing cases. Given the Commission's aim to simplify housing law, we take this opportunity to voice our support for the establishment of a housing court. By this, however, we do mean a court, not a tribunal, even if – which we would consider desirable – it included lay members. We believe that, for some years to come, the complexity of housing law, the need for uniformity and the importance to the parties, combine to demand the higher standard of dispute resolution that can only be under-written by the judiciary.

By allowing the judiciary from the court system, to sit in tribunals alongside lay members (including other experts) the Tribunals, Courts and Enforcement Bill may provide the best of both worlds.

The nature of specialist expertise

2.16 It is important to stress that, in considering the specialist nature of tribunals, it is not only the legally qualified members of the tribunal that bring specialist expertise to the tribunal. Where tribunals are composed of two or three members it is typically the case that the other members will also have specialist knowledge,

9 See Tribunals, Courts and Enforcement Bill cls 4 to 6.
10 Tribunals, Courts and Enforcement Bill, sch 6, Part 3.
11 See Tribunals, Courts and Enforcement Bill, sch 2, para 6 for the First-tier Tribunal and sch 3, para 6 for the Upper Tribunal.
12 The court or tribunal point is discussed further below at paras 2.105 to 2.125.
albeit not specialist legal knowledge. The Residential Property Tribunal Service (RPTS) currently uses lawyer chairmen, surveyors with expertise in valuation, housing conditions or management, and a lay member, with knowledge of the local area.

2.17 In our Issues Paper we asked respondents whether the body adjudicating housing disputes should include not just lawyers but those with a wider range of professional expertise. Respondents were strongly of the view that it should. Indeed this would add to the specialist capability of the tribunal.\(^{13}\) Many respondents suggested that greater involvement of experts would lead to cost reductions.

2.18 The Law Society disagreed, cautioning that:

> Potentially the use of a surveyor sitting with a judge in the place of expert witnesses may militate against early resolution as there would be no expert opinion until the court surveyor had reported, which would be after the proceedings had been issued. The present position in disrepair cases is that the protocol requires early joint expert witness evidence. The expert evidence is therefore available at an early stage which aids early resolution. If it were not available the parties would issue and await the court surveyor’s report.

2.19 The Department for Constitutional Affairs, in reviewing the role of non-legal tribunal members, has commented that:

> The aim of the policy will be to ensure that panels offer appropriate levels of experience and expertise; facilitate a cost-effective and efficient use of the judiciary; and fully meet the needs of tribunal users. It will also allow the flexibility to cater for the particular needs of individual jurisdictions and of particular kinds of case. We therefore envisage that rules that are laid down in the Order will be subject to an overriding discretion for the Senior President or his delegate to decide that the panel in a particular case is to be composed in a different way, but in accordance with paragraph 15 of Schedule 4.\(^{14}\)

**Assessors – an alternative to a tribunal with non-lawyer members?**

2.20 There are powers for the county court and High Court to appoint an assessor “to take such part in the proceedings as the court may direct”\(^{15}\) We are not aware of these powers being used in county court housing cases. Although Lord Woolf in his reports on access to justice had recommended that the courts should make

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\(^{13}\) This was advocated by Anthony Essien of the Leasehold Advisory Service (LEASE), and the National Landlords Association.


\(^{15}\) County Courts Act 1984, s 63; Supreme Court Act 1981, s 70; and Civil Procedure Rules, r 35.15.
wider use of their powers to appoint expert assessors to assist the judge in complex litigation,\textsuperscript{16} most housing cases will not meet this criterion. In a recent article, Deirdre Dwyer noted that the use of assessors has not expanded significantly since the Civil Procedure Rules were introduced, being primarily limited to use in the Admiralty Court.\textsuperscript{17} We have doubts whether use of court assessors could be regarded as proportionate, certainly not by comparison with use of expert tribunal members.

**Expertise in other areas of law**

2.21 Some respondents argued that the creation of a specialist tribunal could cause problems given research showing that people's problems are clustered (that is, a housing problem may not arise in isolation, but alongside for example a relationship breakdown, welfare benefits or wider debt problem). The Housing Law Practitioners Association argued that:

the establishment of a court/tribunal confined to one jurisdiction appears to be contrary to the “one stop shop” holistic approach which in other similar contexts, government policy is promoting eg the Legal Services Commission’s Strategy for the Community Legal Service 2006-11 particularly at pages 7-8. Moreover housing law does not exist in a vacuum. Indeed the trend has been for housing issues and companion areas of law to become more enmeshed. Contractual issues arise in housing cases, of course. More significantly so do disputes between husbands and wives and former partners and other family members as to the possession or division of the value of the former shared home in matrimonial or similar proceedings. In the immigration field issues relating to the accommodation of asylum seekers by the National Asylum Seekers Support Service (NASS) or local authorities has proliferated statute and case law which has involved housing and immigration practitioners. The prospect that whatever jurisdiction the specific court/tribunal is given some “housing” issues will still remain outside, is going to defeat the purpose of the proposal.

2.22 Similarly, the Legal Services Commission opposed a specialist housing adjudicatory body because “the evidence from research is that people’s legal problems cluster and are usually not just housing related.” SITRA told us that they believe that there is a role for judges who are specialist in housing matters [but] “we do not think that a specialist court or tribunal is the way forward.”

2.23 We accept that there will always be “boundary issues” where jurisdictions are conferred on different bodies. We discuss some of these in Part 3. However, as our provisional proposal is to transfer only rented housing possession, disrepair


and homelessness statutory appeals, and housing and homelessness judicial reviews to the tribunals, this may mean that some of the concerns expressed by respondents (for example about other contract or family law issues arising in housing cases) will be less of a problem in practice than transferring a wider range of housing jurisdictions out of the county court.

HOUSING BENEFIT

2.24 With respect to one crucial issue which frequently arises in rent arrears possession cases, we believe that the new tribunal structure would have a considerable advantage over the current system. This is in relation to housing benefit. We propose that the tribunal hearing rent arrears possession cases should also have jurisdiction to determine any housing benefit appeals, and further, to make first instance decisions on housing benefit applications.

2.25 The RPTS in its consultation response commented that:

Perhaps one of the best illustrations of the fragmentation of housing dispute resolution lies in the jurisdiction of the Appeals Service to deal with housing benefit appeals. The Appeals Service (TAS) adjudicates in a wide range of disputes relating to benefits administered by central government. The jurisdiction to deal with housing benefits was conferred on TAS to tackle the perceived lack of independence of the Housing Benefit Review Boards constituted by local authorities to hear appeals from their own housing benefit decisions. However, TAS has no special expertise in housing which would make it the obvious candidate to deal with disputes of this kind.

2.26 The Appeals Service is already part of the Tribunals Service administration. Appeals Service tribunals are listed in Schedule 6 to the Tribunals, Courts and Enforcement Bill. The Department for Constitutional Affairs proposes that there will be a social security chamber of the First-tier Tribunal.

2.27 It would therefore appear to us logical that in rent arrears possession cases in which housing benefit is an issue, the same tribunal should be able to combine housing expertise (through members drawn from the current RPTS tribunals) and social security expertise (through members drawn from the current Appeals Service). This would provide the injection of housing expertise which the RPTS believes to be lacking in the current Appeals Service, and allow the housing benefit issues (which are frequently a reason for adjournment in rent arrears possession cases) to be dealt with.

2.28 The Bill provides for chambers of the First-tier and Upper Tribunal to be created by order of the Lord Chancellor. Either the Lord Chancellor or the Senior President of Tribunals can allocate the functions between the chambers. The

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18 The Tribunals, Courts and Enforcement Bill, sch 6 lists the Social Security Act 1998, by which the Appeals Service tribunals were constituted. The Child Support, Pensions and Social Security Act 2000, sch 7, which provides for housing benefit appeals states in para 23 that housing benefit appeals are to be heard by tribunals constituted by that 1998 Act.

19 Tribunals, Courts and Enforcement Bill, cl 7.
Tribunals Service wants to encourage the flexible use of judiciary under the provisions in the Bill. They expect that the chambers will evolve and change over time. Judiciary could sit outside their home chamber so that a judge with experience of housing benefit could sit in a chamber hearing rent arrears possession cases.

2.29 While it may be appropriate for a tribunal drawing together both housing and social security expertise to sit where it is apparent in advance that a difficult housing benefit issue is at stake, the standard housing chamber of the First-Tier Tribunal could, we think, appropriately deal with the determination of routine housing benefit matters that come up in the course of a possession action. The institutional proximity of the social security jurisdictions in the Tribunal Service should facilitate appropriate support for such determinations.

2.30 Housing benefit eligibility is not formally dependent on the payment of other benefits. The Housing Law Practitioners Association cautioned, however, that “In practice a tenant may have to resolve their problems of income support/incapacity benefit or jobseekers allowance before housing benefit will be paid.” We do not currently propose to confer on the housing chamber of the First-tier Tribunal jurisdiction over appeals against other benefit decisions (for example in relation to income support) nor to confer on it first instance jurisdiction to determine such other benefit claims. If practical experience showed that housing benefit decisions could not be made without determinations of eligibility for other benefits, the boundaries of the chambers could be adjusted. If in due course it was thought necessary to create a “housing and social security chamber” this would be possible under the Bill.20

HOMELESSNESS AND OTHER JUDICIAL REVIEW CHALLENGES

2.31 Similarly, we propose to transfer from the county court to the Upper Tribunal jurisdiction over certain statutory appeals in relation to homelessness decisions.21 The Upper Tribunal will be given jurisdiction under clause 15 of the Tribunals, Courts and Enforcement Bill to make the orders which the Administrative Court can make on an application for judicial review. In some cases a holistic solution to an individual’s problems may also require a judicial review application to the High Court. In future, we think that instead the Upper Tribunal should be able to hear the homelessness statutory appeal and the judicial review. The Lord Chief Justice and Lord Chancellor could make an order allowing for housing or homelessness related judicial review applications in future to be determined by the Upper Tribunal.

IMMIGRATION AND ASYLUM ISSUES

2.32 Again, as the work of Asylum Support Adjudicators is brought into the new tribunal system,22 if in homelessness or other housing cases issues arose as to responsibility for supporting an asylum seeker, it would appear possible for a

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20 Tribunals, Courts and Enforcement Bill, cl 7.
21 Under ss 204 and 204A of the Housing Act 1996.
22 Tribunals, Courts and Enforcement Bill, sch 6, Part 4.
tribunal member with the appropriate knowledge to sit and hear the case. Likewise, members of the Asylum and Immigration Tribunal will also be members of the First-tier and Upper Tribunals; their expertise could be called on as required.

2.33 Do consultees agree that increased specialisation would offer significant advantages for the formal adjudication of housing disputes?

OTHER ISSUES

Delay

2.34 Although we had received evidence that delay was a problem, responses to the Issues Paper revealed that delay was an issue on which respondents were divided, both in perceptions of current problems, and the possibility for solutions.

2.35 Lawyers and advice organisations tended to argue that delays were not as significant as is often made out, had reduced in recent times, and that they were important in ensuring that due process was maintained. There was an acceptance that a certain amount of delay was unavoidable, and to an extent desirable.

2.36 Anthony Essien of the Leasehold Advisory Service (LEASE) commented that:

Delay is a problem, if nothing else because the parties want the case dealt with faster than it is probably practical to do so. Whilst the delay or at least the perception of undue delay may be unavoidable, what is avoidable is the lack of explanation at the outset for these delays. Communication between the forum addressing the dispute and [the parties] could be better and the language used in correspondence to explain delays must be intelligible for the lay party.

Some delay is inevitable, if nothing else simply for the necessary administration of the case. One also has to give each side sufficient time to address the case put against it. Quite what the right balance is will also depend on the nature of the dispute and its complexity.

2.37 Experience in other jurisdictions supports the suggestion that a certain amount of delay provides necessary procedural protections. The Ontario Rented Housing Tribunal, created under the Tenant Protection Act 1998, determines applications for eviction. Under that Act, a default order will be issued terminating the tenancy and requiring the tenant to leave the rented property if the tenant does not file a written dispute within five calendar days of receiving the landlord’s eviction notice.

23 Tribunals, Courts and Enforcement Bill, cls 4(1)(d), 5(1)(d) and 5(2)(d).
Researchers who had reviewed the literature on housing dispute resolution commented that:

In 58% of eviction applications since 1998, an eviction order was issued on a default basis, without the tenant having presented their position at a mediation or hearing...

A certain minimum period between an application for possession being made and a decision being taken is necessary to give the defendant a chance to respond.

A number of lawyer respondents, including the Housing Law Practitioners’ Association, pointed out that the accelerated possession procedure offers one of the swiftest examples of civil justice available.

Landlords, however, were more likely to regard delay as a real problem, especially in court procedures for evictions. At one end of this spectrum, the National Landlords Association recognised that some delay in the system is unavoidable, but “small measures”, such as overlooking small errors in notices would assist. Martin Bayntun, a lawyer and residential lettings landlord, made a similar point. Angus Bearn, a residential lettings landlord, went further, arguing that the local county court is pitifully slow and inefficient at handling claims … [and] waste everyone’s time with frivolous and pedantic procedural matters.

Tessa Shepperson, a solicitor who advises landlords noted that:

It can take a landlord up to five months (sometimes longer) to recover possession in standard cases (including the notice period). This is unacceptable if there are rent arrears accruing.

The National Landlords’ Association has previously surveyed members about the delay involved in making possession claims.

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24 Tenancy Protection Act 1998, s 192(1), referred to in K Laird (Director of Legal Services-ACTO) (2002) Submission to the Ombudsman Ontario: Concerning the failure of the Tenant Protection Act and the Rules and Procedures of the ORHT to meet Ombudsman Fairness Standards, prepared on behalf of the Advocacy Centre for Tenants Ontario and the Legal Clinics Housing Issues Committee. We were referred to this publication in C Lightowler, J Davidson, K Hudson, Review of the Evidence Relating to Housing Problems and Disputes in the Private Rented and Social Rented Sectors and Approaches to Resolving Such Disputes (2006).

25 C Lightowler, J Davidson, K Hudson, Review of the Evidence Relating to Housing Problems and Disputes in the Private Rented and Social Rented Sectors and Approaches to Resolving Such Disputes (2006) p 27. This review was produced for the Scottish Executive.

The legal process to remove tenants tends to be long, onerous and expensive. Landlords report that it takes an average of just over 6 months to secure an eviction through the court. 47% said it took between 3 and 6 months, 21% between 6 and 9 months. A small but significant minority of 8% reported that on average it took more than a year to get troublesome tenants out of the property.27

2.41 Delay was perceived to be not just a problem for courts: concerns were also expressed about delays in the tribunal system. For example the Chartered Institute of Housing saw several advantages to the use of tribunals, but noted that:

tribunals are not without their problems, in particular speed of decision making (mainly waiting for a hearing date) is a problem. If the Commission recommends greater use of tribunals then we would like to ensure measures are taken to speed up the process. Tribunals should have the power to divert cases to more appropriate dispute resolution mechanisms as appropriate. A twin track approach may help which separates cases which are wholly disputes about facts and those which involve arguments about the interpretation of the law.

Provided concerns about speed could be dealt with we would favour tribunals taking over more of court work with the courts being used only for the most complex cases where there is little chance of agreement.

2.42 The respondents to a study in 2001 of the Leasehold Valuation Tribunal (LVT) suggested that a transfer to the tribunal would not necessarily reduce delays:

stakeholder interests with experience of county court procedures and the new jurisdiction of LVTs generally felt that transferring jurisdiction to the LVT had not led to speedier case processing, cost savings or a simplified path to dispute resolution, although some further reform of the LVT process was perceived as potentially securing such gains.28

The authors of that report commented that “the comments of some interviewees, and particular professional representatives, over the (in)efficiencies of the LVT process were often based on comparisons with county court procedures introduced following the Woolf reforms.”29

2.43 At present, in possession cases, other than those brought against trespassers, rule 55.5 of the Civil Procedure Rules states that the hearing date (which the court will fix when it issues the claim form) will be not less than 28 days from the date of issue of the claim form. Rule 55.5(3)(b) states that the standard period between the issue of the claim form and the hearing will be not more than eight weeks, and that the defendant must be served with the claim form and particulars of claim not less than 21 days before the hearing date. Rule 3.1(2)(a) provides that the court may extend or shorten the time for compliance with any rule. Neither the Civil Procedure Rules nor the Practice Direction relating to possession claims refer to shorter time periods where the accelerated possession procedure for assured shorthold tenancy possession claims is used.

2.44 The RPTS has the following performance targets for 2007-08 and subsequent years.

1. In 75% of Rent Assessment Committee cases the first hearing date is booked within ten weeks of receipt, and any rearranged hearing dates are within six weeks of the original hearing date or the request for deferral, whichever is later. 90% of summary reasons are issued within four weeks of the hearing.

2. In 75% of Leasehold Valuation Tribunal cases the first hearing date is booked within 20 weeks of receipt, and any rearranged hearing dates are within six weeks of the original hearing date or the request for deferral, whichever is later. 90% of summary reasons are issued within six weeks of the hearing.

3. In 75% of Right to Buy cases the hearing is booked within nine weeks of receipt, and any rearranged hearing dates are within six weeks of the original hearing date or the request for deferral, whichever is later. 90% of reasoned decisions are issued within four weeks of the hearing.

4. 75% of Housing Act 2004 cases (excluding right to buy) are determined within fifteen weeks of receipt of the application. 90% of reasoned decisions are issued within four weeks of the hearing.

2.45 The Tribunals Service in its Business Plan for 2006-07 includes “Key Performance Indicators” for different tribunals. For example in the Appeals Service (which hears appeals against social security decisions) there is a target for the average time from the receipt of an appeal from the original decision-making agency to the first tribunal hearing of 11 weeks.

Advantages and disadvantages of targets

2.46 Respondents had differing views on the value of target deadlines: some were positive. SITRA, a voluntary agency and registered charity offering training, consultancy and advice on issues connected with the provision of supported housing and care, thought that “Targets are useful if they are used to analyse

30 Information provided by Mike Ross of the RPTS on 12 April 2007.
delays and look to removing obstacles to a more responsive service by redirecting resources.” Bromsgrove Citizens Advice Bureau told us that “Deadlines need to be tight to ensure focus of all parties, continuity and good service for clients”. Lancelot Robson, a RPTS chairman, also referred to the power of targets to concentrate the minds of decision makers, but observed:

Nevertheless governments must realise that there has to be sufficient slack in the system to achieve those targets. For example, the Residential Property Tribunal Service Annual Reports consistently show that the London area panel fails to meet the hearing and disposal targets in about 25% of cases, in contrast with a much better performance elsewhere. However cases in London are often more complex, and Tribunal members (who are ad hoc part-timers) are often dealing with several cases at any particular time. Elsewhere this is rare.

2.47 Anthony Collins solicitors argued that there:

Should be standard deadlines nationwide. Will hopefully focus resources to prioritising certain housing cases that affect whether a person has a roof over their head and means that there is less differentiation from Court to Court on waiting times. For example, it takes 6 weeks at least in Birmingham County Court from issue to eviction date when you apply for a warrant of possession. When a decision has already been made eg that a tenant's arrears are so high they should be evicted, the landlord has to see the debt owed to them increase significantly simply due to a delay at Court.

2.48 Tessa Shepperson suggested that:

for possession proceedings where there is a mandatory ground for possession, in particular proceedings based on section 21, the order should be made within 28 days. Or indeed, if the Judge looking at the paperwork does not see any problem, a 14 day order could be made immediately on the basis that it will stand unless the defendant puts in a defence within that 14 days.

2.49 Other respondents were sceptical. The Advice Services Alliance stated that “We suspect that target deadlines do indeed shift delays to other parts of the system.” Similarly, the Civil Justice Council commented that:

We do not feel that target deadlines are of significant assistance in this respect. Too often, the target becomes the objective, which may well simply lead to delays being relocated elsewhere in the system. The objective is to create systems that function well and flexibly. But administrative processes can be assisted by good and timely advice.

The Law Centres Federation told us that:

There is a tendency with target setting that the bodies trying to reach them, look to ways of achieving the target at the expense of all round service provision. For example, the enforcement of target setting by
the Legal Services Commission has meant that more creative work to solve the underlying root causes of problems is threatened.

Shelter had similar concerns.

2.50 A third group of respondents saw both advantages and disadvantages of targets. The Law Society acknowledged that targets encourage compliance with objectives but an over reliance on targets can have adverse effects in other areas by diverting resources.

2.51 Pat Reddin, responding on behalf of the Association of Building Engineers, thought that “strict time limits should be imposed as they are in protocols” but that the framework must prevent delays from being shifted to other parts of the system: “Times must be adhered to but KPIs [Key Performance Indicators] will be required to ensure that there are not “soft” areas used for dumping the time.”

**Delay – our conclusions**

2.52 Delay was one of the principal issues addressed by Lord Woolf in proposing his reforms of the Civil Justice system. The emphasis on case management was one of the principal reforms he proposed to address the problem. In the light of the evidence we have received to date, delay may be less of a problem, at least in some courts, than is sometimes thought to be the case.

2.53 We understand that that the Tribunals Service is seeking a more transparent approach to the setting of service standards (including dealing with questions of delay).

2.54 We think it unlikely that the transfer of jurisdiction over rented housing possession and disrepair, homelessness statutory appeal and housing and homelessness judicial review cases from the county court and Administrative Court to the First-tier and Upper Tribunals would lead to an overnight reduction in delays. Indeed, delays might increase in the early days until processes have bedded in. Were our provisional proposals to be adopted, the RPTS would have to move from a case load of around 8,000 cases a year,\(^{31}\) to something around 150,000 cases a year.\(^{32}\) Even though we do not think that every possession case currently dealt with by the courts would equate to one case in the RPTS, such a transfer would still represent a step change in the work load of the RPTS, perhaps by five or six times its current level.

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\(^{31}\) The projected caseload of the RPTS in England for 2007 is 7,914 cases, a 3% decrease compared with 2006. These comprised 1,836 fair rent and 732 Housing Act 1988 cases (Rent Assessment Committee cases); 5,160 Leasehold Valuation Tribunal cases, 174 Housing Act 2004 cases (Residential Property Tribunal cases) and 12 other cases (Rent Tribunal and recognition of tenants association cases): data supplied by Mike Ross of the RPTS on 12 April 2007.

\(^{32}\) In 2006, 134,429 possession actions were entered by landlords in the county courts in England and Wales: see DCA, Statistics on Mortgage and Landlord Possession Actions in the County Courts – Fourth Quarter 2006 (February 2007).
There will be experience of tribunals with large case loads in the Tribunals Service, in particular in social security appeals, employment cases, and immigration appeals. As it is not envisaged that transfer of housing jurisdictions should take place until after the RPTS has been brought into the Tribunals Service, the Service will by then have experience of dealing with jurisdictions with large caseloads. Lessons from that experience should be transferable to the housing jurisdiction.

We also expect that overall proposals for proportionate dispute resolution will offer some scope for a reduction in the number of cases which require formal adjudication. This could in turn reduce the delays before those cases which do require such a process are heard. Similarly if more matters were dealt with without the need for an oral hearing, this might also enable speedier case processing, in particular through a more sophisticated use of information technology. We discuss oral hearings in more detail in Part 5.

Do consultees agree that delay may be less of a problem, at least in some courts, than is sometimes thought to be the case? Do consultees think delay might increase, at least initially, if cases were transferred to a more specialised adjudicatory body?

Consistency

A second issue that we have been told is a problem with the courts is consistency. We consider two issues under this head: consistency in decision-making and consistency in administration.

Consistency in decision-making

Inconsistent decision making by judges currently hearing housing cases has been recognised as a problem. We acknowledge that, particularly where judges are required to exercise wide discretion, similar cases may be determined in dissimilar ways. Nevertheless, inconsistent decision making offends against values of accuracy and fairness if the answer produced is either not the legally right one, or the parties feel they have not been treated fairly (through like cases being treated differently).

District Judge Russell Campbell commented that

It became apparent to me … some years ago that housing cases may be dealt with in rather different ways in county courts around the country.

Shelter considered that specialised housing judges could bring greater consistency of decision making particularly in relation to discretion in possession proceedings. The London and National Disrepair Forum also commented that

Experience has shown that there is inconsistency in the way in which District Judges deal with housing disputes. ... The use of specialist housing judges would go some way to address this and to restore landlord faith in the legislative framework that prescribes a route for dealing with housing problems.

2.61 It should not be thought that inconsistency is exclusively a problem for courts. Tribunals have also been criticised for inconsistent decision making. Macclesfield, Wilmslow and District Citizens Advice Bureau was sceptical about any proposal to transfer jurisdiction to a tribunal:

Tribunals have been suggested as an alternative to the County Court. Our considerable experience of Welfare Benefit, Medical and Employment Tribunals does not suggest that this would be a helpful change. ... There has been criticism of inconsistencies between District Judges, and their decisions. Our specialist staff who represent clients at Tribunals make the same criticisms of Chairmen.

The research on the extension of the Leasehold Valuation Tribunal's jurisdiction made a similar point.34

2.62 Inconsistency is a difficult issue to address in practice. The study into the exercise of discretion in county court rent arrears possession cases concluded that:

A wide and diverse range of factors was reported by judges as being influential in how they exercised their discretion in individual cases with less consistency noted on the weight given to different factors. There was no evidence of judges having regard to self-evidently inappropriate factors, simply that they approached the task in the different ways set out above.

What this suggests is that there can be no “easy” way to achieving consistency between judges. Even where factors are consistently taken into account, this will not necessarily lead to the same outcome.35

2.63 While recognising the difficulties, steps may be taken to increase consistency of decision making. These include: structuring of discretion; training; appraisal and precedent.


2.64 In our Renting Homes Final Report, we recommended that discretion should be structured where the decision whether to grant possession of a rented house depends on a test of reasonableness.\(^{36}\) In deciding whether it is reasonable to make a possession order, adjourn proceedings or postpone the giving up of possession, we recommended that the court must have regard to “the relevant circumstances”,\(^{37}\) which include not only the circumstances of the tenant but circumstances affecting the landlord and other persons. Similarly, the Law Commission’s draft Bill on the termination of tenancies also provided for a “layered discretion”.\(^{38}\) The authors of the study looking at discretion in rent arrears cases noted, however, that given the factors which lead to different judges taking different approaches:

it is likely that even the introduction of some form of structured discretion which states that certain factors must be taken into account, eg level of arrears, personal circumstances of tenant, the impact on the landlord, will still lead to different outcomes for similar cases.\(^{39}\)

2.65 Better training will also help. The research on the exercise of discretion in rent arrears cases looked at the training of district judges in housing cases. The Judicial Studies Board provides induction training for new deputy district judges, which aims to equip them with the necessary knowledge for determining housing possession cases. It also provides triennial continuation training, seminars on particular topics and an annual district judge seminar. District judges also have a “Civil Bench Book” which includes a section on practical tips in possession cases, summarising the relevant law and procedure, and a discussion website hosted by the Judicial Studies Board, known as Felix.

2.66 The attitudes of the judges interviewed to the training they were given varied: most felt that the training was useful, but limited.\(^{40}\) In terms of developing consistency in how they handled possession cases, judges considered that discussion with colleagues, either at the same court or on training courses, was valuable, as was sitting in more than one court in the same area.

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2.67 The Bar Council referred to problems with the training of county court judges:

... the Housing Act 1996 introduced a right of appeal in homelessness decisions for the first time. As is now widely appreciated, a judge sitting on such an appeal is effectively conducting a judicial review of the authority’s decision. We understand from many of the judges charged with this new (and often most unfamiliar) jurisdiction that they received little training in the area. Likewise, following the extension of the jurisdiction of the leasehold valuation tribunal by the Commonhold and Leasehold Reform Act 2002, we have heard complaints from judges that they received little training on the extension of that jurisdiction with the consequence that they were uncertain as to when they should transfer cases to the tribunal.

2.68 The tribunal system offers greater scope than the courts for more specialised training and the dissemination of best practice. Paragraph 8 of Schedule 2 to the Tribunals Courts and Enforcement Bill makes the Senior President responsible for the maintenance of appropriate arrangements for the training, guidance and welfare of judges and other members of the First-tier Tribunal. Paragraph 9 of Schedule 3 makes similar provision for the Upper Tribunal.

2.69 Much training is already provided within the tribunal system. For example, in the RPTS Corporate Plan 2005-06, one of the stated targets was:

We will review and roll forward our training strategies for panel members and staff, including developing training courses for the new Housing Act jurisdictions.

Target: For panel members, to run induction, continuing development, specialist and panel-based training consistent with the strategy target of members receiving a minimum 18 hours training over a rolling three-year period.

Target: For panel staff, to run induction, continuing development and other training identified at national, panel and individual level consistent with the strategy target of each staff member receiving a minimum three days off the job training a year.41

APPRAISAL

2.70 Other management techniques may be used in tribunals that might be regarded with hostility by some court judges, but which might help secure greater consistency in decision making. Deputy district judges in the county courts are subject to a form of appraisal. Discussion at training events may offer judges the opportunity to compare their knowledge of particular areas as against their peers. There is, however, no formal appraisal of full time salaried judges in the court system. We believe that the culture within the county court system is less receptive to more formal appraisal methods than the tribunal system, where tribunal members have become used to appraisal.

2.71 The RPTS 2005-06 Corporate Plan states that:

We will continue to operate appraisal systems for Presidents, Vice-Presidents, the Director of Training and Development, chairmen and members, incorporating the results of the review of the member appraisal system at the end of the first cycle which ended in October 2003. We will also continue running our mentoring scheme for newly-appointed members.

Target: Complete appraisals consistent with achieving the target of all Presidents, Vice-Presidents, the Director of Training and Development, chairmen and members being appraised by December 2006.

Target: Provide mentors for new members for the first twelve months following their appointment.42

2.72 While some judges might perceive appraisal as a threat to judicial independence, if sensibly designed, appraisal could assist in the promotion of greater consistency. Mentors, for example, might be of real benefit by making tribunal members more aware of how their colleagues approach particular issues. It is likely to be easier to introduce such schemes in the newly evolving tribunal system than in the courts.

PRECEDENT

2.73 Consistency of decision making would be assisted by clear substantive housing law rules. In Part 4 of this paper we set out proposals for the system of appeals from First-tier Tribunal decisions in housing cases, the role of the Upper Tribunal, and the development of precedent.

Consistency in administrative practice

2.74 There can also be inconsistency in practice. The Association of District Judges consultation response referred to good practice in some courts, for example the response pack sent to defendants including a list of all firms with Community Legal Service housing contracts; procedures set out for dealing with cases including housing possession, housing disrepair and anti-social behaviour claims to ensure an early determination of them; having a duty solicitor or citizens advice bureau advisor scheme at court; and discouraging local authorities from taking possession proceedings if there are outstanding housing benefit issues.

2.75 Similarly, the authors of the study on discretion in rent arrears cases commented that “It might be thought that pro forma records could provide an aid to consistency; however, we found that these forms were not standard for every county court”.43

2.76 Bringing housing cases into the new tribunals system could achieve more consistent administrative practice. This is a key objective of the new service.\textsuperscript{44} For example, all tribunals would send out information about local advice agencies when sending the response pack to defendants.

2.77 If the RPTS tribunals were to be absorbed into the First-tier Tribunal, and brought within the Tribunals Service administration, good practice developed elsewhere in the Tribunals Service could be extended to the tribunal hearing housing cases.

2.78 The Service would need to ensure that staff were adequately trained in the particular issues relating to housing cases. The RPTS in its consultation response commented that:

We consider that access to adjudication and good adjudication depends to a very large extent not only on parties’ knowledge that the system exists but on their ability to use a system which is proportionate and enabling. This, in turn, depends on the good practice of court or tribunal staff.

The administrative staff have the initial and a continuing dialogue with parties and their representatives. They need to have a familiarity with the jurisdictions they are dealing with and a good knowledge of case management powers and purpose and be given the opportunity to contribute to the development of practice and procedure. In a court system this is difficult to organise where the range of disputes is wide and procedure confined. In a specialist tribunal, this can be attained more easily and effectively maintained.

2.79 \textbf{Do consultees agree that consistency both of decision-making and administration may be achieved more easily by a specialist tribunal?}

\textbf{Other considerations}

2.80 We set out below a number of other points\textsuperscript{45} which we think add support to the case for our provisional proposals.

\textit{Participation – Access to Justice}

\textbf{LOCATION AND LOCAL KNOWLEDGE}

2.81 In order to participate in a system, potential parties must be able to access it. If a system is physically remote, that may deter participation.

2.82 The Housing Law Practitioners Association commented that

the narrower the jurisdiction, the wider geographical area a tribunal tends to cover, leading to reduced accessibility for those less physically able or with fewer financial resources. HLPA also considers


\textsuperscript{45} These arise from the values set out above at para 1.19.
that housing cases raise local issues which require local machinery to deal with them.

2.83 We accept that local knowledge can allow for the more efficient, and potentially more accurate, processing of housing cases. For example, local knowledge of the performance of different local authority housing benefit offices and the practices of different social landlords can help judges get through an extensive list of possession cases quickly.46

2.84 We think that tribunals could equally acquire local knowledge. There is nothing inherent in the nature of a tribunal that prevents this. At present, the RPTS is organised on a regional basis;47 members sit within particular areas and are able to develop local knowledge.48 The new tribunal structure will be organised on a regional basis (even if it does not retain the same regional organisation as the current RPTS). Individual tribunal members will still repeatedly hear cases in the same or similar locations thus developing a knowledge of local housing conditions. This would be reinforced by making home visits, currently part of the normal practice of Rent Assessment Committees.49

ACCESSIBILITY OF VENUE

2.85 Although some matters may be able to be dealt with electronically, or on the papers (without an oral hearing – an issue we discuss in Part 5) or by telephone conferencing (for example case management hearings), there will still be a need for hearing venues accessible by the parties. As the Law Society noted:

If there is to be a specialist housing court or tribunal then it is essential that it is geographically accessible to users. Many users will be for example on low incomes, disabled or having caring responsibilities. This can be a particular problem in rural areas.

2.86 At present both the Tribunals Service, with some 170 buildings,50 and Her Majesty’s Court Service with, currently, 178 county courts are looking to rationalise their estates. But the reduction in the number of permanent buildings run by either service does not mean that local accessibility will inevitably be reduced. More sharing of accommodation, or short-term renting of appropriate

47 There are five regional panels in England: Southern, London, Midland, Northern and Eastern, as well as a separate panel for Wales.
48 A member of the Welsh rent assessment panel referred, in a presentation at the Cardiff Landlords Open Evening organised by Cardiff City Council in January 2007, to panel members' knowledge of particular features of the housing market in parts of Cardiff (for example a large number of properties on 99 year leases, giving rise to many applications for lease extensions to the Leasehold Valuation Tribunal).
49 Rent Assessment Committees are one of the tribunals which make up the RPTS and determine fair rents for dwellings let under the Rent Act 1977.
accommodation are obvious ways to ensure, even increase, accessibility. Inevitably a balance has to be struck between the tribunal sitting close to the parties, and the provision of suitable facilities.

2.87 While we agree with some respondents who suggested that renting of hotel rooms or community halls (often shared with other activities) may not always be appropriate, it will be one of the tests of the Tribunals Service that it continues to deliver locally accessible justice. We see no reason why it cannot.

2.88 In the Issues Paper, we asked respondents specifically whether they thought that it should be easier for hearings to be held in the premises the subject of the dispute. Only ten answered, of whom seven were opposed to the suggestion. We can see that while home visits are a good idea, and a domiciliary hearing may be appropriate where a party cannot get out of the house, generally speaking domestic distractions may divert attention from the hearing.

2.89 We had also asked whether other experiments such as a travelling court (for example in a converted bus) should be tried, to take the court or tribunal to the parties, particularly in rural areas. Respondents’ views were more evenly split (seven in favour and six against), although practical problems were highlighted. The Legal Services Commission noted that although other experiments such as a travelling court should be tried, they urged:

not a bus – we have research from outreach projects that show clients do not want to be seen going on a bus for legal advice in rural areas. Video conferencing has been successful in some of the Partnership Initiative Budget projects. In [New South Wales] Tribunal members will hear cases at caravan sites, or in community halls or local council offices – wherever is a suitable local space.

2.90 We conclude that domiciliary hearings and a court on a bus may not be a suitable solution for most housing cases. On balance, we think that a neutral venue, accessible by the parties would be more appropriate.

AN ACCESS TO JUSTICE SUCCESS STORY FROM AUSTRALIA

2.91 Brendan Edgeworth, an Australian academic, in his consultation response referred to a dramatic increase in access to justice for both landlords and tenants after jurisdiction in public and private sector rented housing matters was transferred from local courts to a tribunal in New South Wales. The number of claims heard by the Residential Tenancies Tribunal (subsequently incorporated into the Consumer, Trader and Tenancy Tribunal) by 2001 was six times the annual mean heard by the court between 1971 and 1986. Edgeworth commented that:

This explosion of disputes can only be explained by the introduction of the new forum, and the growing willingness of parties to make use of it.

2.92 In particular the creation of the tribunal led to an increase in the number of tenants bringing claims (for example in respect of repairs or for the return of tenancy bonds (deposits)) – strikingly, in the area studied by Edgeworth, tenants
had never previously initiated actions before the court. Landlords were also bringing more claims – not just for repossession but also for compensation for damage to premises and unpaid rent.

Overall, one can conclude that the tribunal has ushered in a much tighter compliance regime for landlords and tenants than was the case under the court.

Even former opponents within the legal profession, and property owners’ associations, are now reasonably satisfied with the way the tribunal operates.

2.93 Aspects of the New South Wales system, for example the way that it is financed, (with 50% of the cost coming from interest on tenancy deposits) the low fees (Aus $29 or around £12), and the absence of delay between making a claim and the hearing (with 74% of tenancy matters being heard within 21 days of lodgement\(^51\)) may not easily be replicated in England and Wales. However, the New South Wales experience does provide an example of a greater willingness to bring proceedings before a tribunal than before a court.

2.94 It will be interesting to see whether a similar increase in access to justice is secured when (as we discuss below) private rented housing disrepair claims in Scotland are heard by the Private Rented Housing Panels, instead of the Sheriff Court, as a result of the Housing (Scotland) Act 2006.

2.95 **How best can any formal adjudicatory body develop local knowledge of housing?**

**Impact**

2.96 In Part 4 we consider the role of precedent, which is one way in which the decisions of a formal adjudicatory body can have a wider impact than on the parties to the case before it. In Part 9 we look at enforcement of tribunal decisions – if there are no satisfactory mechanisms for requiring compliance with a court or tribunal decision, this clearly lessens its impact. Below we discuss other mechanisms suggested by respondents to the Issues Paper, which may increase the impact of a tribunal or court on the wider housing decision making and dispute resolution systems.

**COURT/TRIBUNAL USER GROUPS**

2.97 Clarke Willmott solicitors gave us a good example of how courts and users could work together towards more holistic advice provision. The Housing Helpdesk at Portsmouth County court, referred to below, offers advice and sometimes representation to anyone involved in housing disputes. In practice the vast majority of the persons they deal with are tenants of social landlords. …

We believe that there is too much “them and us” with landlords and their advisers on one side and tenants and their advisers on the other. We see no reason why there cannot be much more liaison between the two, preferably on a regular basis.

By way of example, the author of this note, together with two others, some years ago founded a discussion group for users of Portsmouth County Court. Although, initially, those attending this group were members of social landlords and/or their legal representatives, over time representatives of the “Housing Helpdesk” (as referred to above) have attended. This has enabled an exchange of views and opinions to take place which we believe has been of significant help in identifying the options available, to all those involved in any housing dispute.

2.98 The Residential Property Tribunal Service in England has a national users' group. Such user groups have a useful role to play, in disseminating information about the work of the tribunal, in addition to bringing parties or their representatives together to better understand each others’ concerns.

OTHER FEEDBACK MECHANISMS

2.99 Shelter noted that sometimes cases are brought on a representative basis (for example in relation to defectively built council housing). Shelter suggested that

There should be mechanisms for the court to communicate, and the landlord/local authority to receive, the court’s view about how performance has been defective, with a view to recognising and eradicating bad practices. There is no reason in principle why a court or tribunal should not regard it as part of its function to relay criticism and/or constructive comment to a responsible person or corporate body, and in some cases to publicise those findings. At the least, the court should concern itself with future practice.

2.100 The Brent Private Tenants Rights Group referred to the licensing of landlords of houses in multiple occupation\(^\text{52}\) and noted that:

There should certainly be a mechanism to record what other actions have been taken to address a particular problem, and, if the landlord or tenant has not tried to make amends, a mechanism for exemplary damages or something similar to be awarded. There must also be an automatic link with the list of licensed landlords, so that a tendency to certain relevant types of behaviour is on public record. This would be a corollary to the help and information role suggested at [paragraph] 8.53 of the paper, which would ensure that such behaviour was not a result of ignorance.

2.101 Brendan Edgeworth argues that even if a tribunal provides an informal method of dispute resolution, it can still have a wider impact.

\(^{52}\) Licensing of houses in multiple occupation is required under the Housing Act 2004, Part 2.
far from reducing the impact of law on the resolution of conflict, it can actually increase it. But in contrast to some who are critical of the increasing “juridification” of social relations, and who might see this as an undesirable development, the reality suggests that it might be operating in beneficial ways. Under formal, costly court-based processes, only the tip of the pyramid of disputes is subjected to the scrutiny of law; and access to the courts is often dependent on economic power. This was certainly the case prior to 1989 for tenancy disputes.

But if a tribunal can bring a whole array of disputes under the spotlight of the law, this suggests that the rule of law is extended in society, in contrast to the much less regulated system of courts for the reason that so many matters were never the subject of formal adjudication. That appears to be the case in this study. The fact that both landlords and tenants in general, and their representative bodies, despite their many and varied (and often incompatible) criticisms of the legislation have not called for a return to the old court system suggests that a far more effective system of procedural justice is presently in place.

2.102 How best do consultees think that the decisions of any adjudicatory body could have a wider impact?

Fairness – procedures

2.103 A traditional argument for the creation of tribunals, as opposed to courts, has been that tribunals can provide a more user-friendly system, easier for litigants to navigate without legal assistance. In Part 5 we discuss procedural issues, including the degree of formality appropriate in housing proceedings, which do affect the ease of participation in the tribunal process.

Equality of arms – advice and representation

2.104 Part 6 relates to advice and representation in the tribunals.

SPECIALIST TRIBUNAL OR SPECIALIST COURT?

2.105 The principal argument that underlies our provisional proposal that there should be a rebalancing of the current distribution of housing adjudication, by moving cases from the generalist county court to the specialist tribunal, is that the formal adjudication of housing disputes would benefit from a greater degree of specialisation.

2.106 Although specialisation has traditionally been perceived as a virtue of, or reason for creating, tribunals,\(^{55}\) we accept that making the argument for specialisation does not, by itself, answer the question: court or tribunal? Indeed, respondents were evenly divided as to whether the formal adjudicatory body should be a court, a tribunal, or combination of both.

2.107 In a separate paper published on our website,\(^{56}\) we discussed in more detail the distinction between courts and tribunals. In practice the distinction between the two is by no means clear cut, and is arguably becoming less clear and less important. We noted academics’ views that some of the traditional distinctions drawn between courts and tribunals can be called into question.\(^{57}\) The National Union of Students in its response to the Issues Paper commented that:

> We find it difficult to accept the rigid distinction drawn between courts and tribunals. In our experience, courts (particularly in chambers) can be informal and we are aware that, although their rules may be less prescriptive, employment tribunals, for example, can be very formal in their approach.

2.108 In the same vein, the Council on Tribunals observed:

> What an adjudicative body does is usually more important than what it is called. The Council has suggested that an effective adjudicative body in the field of housing should have the following characteristics: independence and impartiality; a sufficient degree of specialism (including non-legal members) to deal with the issues; appropriate powers; flexibility of process; an “enabling” approach focused on the user; more integration than at present with other parts of the “system” (initial decision-making, feedback, proportionate dispute resolution); no financial deterrent (fees, costs orders etc).

2.109 In some cases, it was the issue of representation, rather than specialisation, which led a respondent to favour a court over a tribunal: the Law Society commented:

> It is essential that there is a final arbiter in housing disputes. It is also essential that representation is provided. Legal aid is not available in tribunals; because representation is so important we favour local specialist courts.

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55 Participation, special expertise, and expertise in administrative law were identified by the Leggatt Report in 2001 as the tests for whether a matter should be decided by a court or tribunal: Sir Andrew Leggatt, *Tribunals for Users – One System, One Service: Report of the Review of Tribunals* (August 2001) para 1.10. The Franks committee in 1957 had stated that the advantages of tribunals were “cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject”: *Report of the Committee on Administrative Tribunals and Enquiries* (Cmnd 218) para 38.


2.110 This might suggest that if legal aid were available in a specialist tribunal, objections to tribunal rather than court status would be reduced.

2.111 We should make clear at this point that, although we have assumed no general increase in cash resources, we certainly do not accept the inevitability that legal aid will not be available for tribunal proceedings. We would not support the transfer of jurisdictions from the county court and Administrative Court to the First-tier and Upper Tribunals unless legal aid was available in those tribunals. In Part 6 we discuss representation and legal aid in more detail.

2.112 In reaching our provisional proposal, we considered three possible options for the establishment of a more specialist housing jurisdiction:

(1) the establishment of a “stand-alone” housing court;

(2) adaptation of the current county court to create a specialist housing jurisdiction;

(3) making greater use of the RPTS.

2.113 In relation to the first option, we (and some respondents) recognise that there is little appetite in government for the creation of a new stand alone specialist court. Apart from any other consideration, we think this would require a wholly disproportionate expenditure of resource that would not be forthcoming in the present financial climate.

2.114 In relation to the second, we note that there have been one or two examples of a specialist jurisdiction being carved out of the county court. The creation of the specialist Patents County Court is one example. But these do not offer a service throughout the country.

2.115 We thought it extremely unlikely that, given the generalist ethos of the county court system, it would be possible for county court procedures and training to be amended to the extent needed to provide the kind of specialist housing adjudication our provisional proposal envisages.

2.116 We have therefore concluded that the only way to achieve a more specialist forum would be by moving cases into the tribunal system, as we provisionally propose.

2.117 The flexibility provided by the Tribunals, Courts and Enforcement Bill will enable any tribunal hearing housing cases to acquire most of the court-like powers that are necessary (for example in relation to enforcement of awards, discussed in Part 9 below), while retaining those tribunal features (such as non-lawyer expert members) which are also considered desirable. Indeed, where there is specialist

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58 In para 8.18 of the Issues Paper we had noted that successive Lord Chancellors had opposed the creation of specialist courts and that “Current moves towards a single civil court, albeit with the possibility of specialist streams, are further indications that proposals for a specialist housing court will not find favour.” See http://www.lawcom.gov.uk/docs/issues_paper.pdf.
judicial expertise currently in the courts, this will not be lost, given the powers to enable judges to sit in tribunals.59

2.118 With these considerations in mind, the option of transferring more jurisdictions to the RPTS – as we provisionally propose – seems to be the only practical way forward. The RPTS described the composition of the various tribunals within the service in its consultation response:

27. RPTS Tribunals are usually constituted by a lawyer chairman, a surveyor with expertise in valuation, housing conditions or management and a lay member. Chairmen are appointed by the Lord Chancellor and other members by the Secretary of State for Communities and Local Government. Members undergo extensive training in our jurisdictions and share a commitment to the application of good case management and an enabling approach at hearings. Expertise is held and developed in areas relevant to the jurisdictions. Expert opinion is tested and applied.

28. The presence of the lay members serves to ground the service in the community and to facilitate and reassure parties whether represented or not.

29. The constitution of the Tribunal is flexible. For example in cases where difficult issues of valuation principle are involved, Tribunals may include two valuers. In procedural hearings a chairman will sit alone. Subject to legislative requirements, this flexibility could be extended to other cases.

2.119 A study carried out for the then Department of the Environment, Transport and the Regions in 1999 and 2000 looked at a previous transfer of jurisdiction from the county court to an RPTS tribunal: in this case appointment of a manager cases, insurance disputes and service charge cases before the Leasehold Valuation Tribunal.60 The authors found that there was a general consensus among respondents to the research that Leasehold Valuation Tribunals were a better forum than the county court for the settlement of these cases. The majority of applicants interviewed were satisfied that the tribunal panel had the necessary expertise to handle the case.

2.120 The research (carried out only just after major changes had been introduced) revealed some concerns. First, several respondents suggested that the challenge of determining reasonableness (which was central to the resolution of many LVT cases) was beyond the ability of many judges, who were often considered to be unfamiliar with both the jurisdiction and technicalities of leasehold cases. Second, while most applicants (generally leaseholders) were satisfied with the tribunal’s expertise, most respondents to tribunal applications (generally freeholders) were not convinced that the panel had the necessary expertise to manage the case, or

59 See Tribunals, Courts and Enforcement Bill, cl 6, sch 2, para 6 and sch 3, para 6.
the professional experience and specialist knowledge to sit in judgment. Local authority or housing association freeholders were particularly critical, suggesting that the Leasehold Valuation Tribunals lacked knowledge about social housing management and failed to appreciate the distinctive issues involved in managing a large number of properties on mixed tenure estates.61

2.121 Over the last seven years, the Leasehold Valuation Tribunal has had the opportunity to develop greater expertise in relation to these jurisdictions. Indeed, some of the problems reported arose from the legislation itself, remedied by Commonhold and Leasehold Reform Act 2002.62

2.122 We think that an expansion of the role of tribunals, in particular a chamber of the First-tier Tribunal based on the RPTS, in housing cases would provide a more obvious mechanism for greater involvement of non-lawyer experts such as surveyors, in determining housing cases, than trying to introduce them into the county court, for example as assessors.

2.123 We also consider that allowing rented housing possession cases to be heard by a chamber of the First-tier Tribunal based on the RPTS would be a natural development, given the changing roles of the RPTS tribunals over time. From an original concern with rent and valuation matters, the RPTS has developed, and will continue to develop, a wider expertise in relation to housing matters. The RPTS in its consultation response to our Issues Paper recognised that

the sum of the RPTS jurisdictions now far more closely echo those of the Courts and require the application of property law, the exercise of judicial discretion and appeals against the decisions of public bodies.

2.124 District Judge Russell Campbell commented that

Given the lack of appetite in government for the creation of specialist courts, it would appear relatively straightforward to encourage the rapid evolution of such a body by transferring to the RPTS many – if not all – of the housing cases heard by the county courts. I can see no objection to disrepair cases being heard by the RPTS. The presence of surveyors sitting as members of a panel may discourage the use of experts by the parties, although I do not think such use should be prohibited.

Many possession claims are dealt with in boxwork in county courts, accelerated claims being listed for hearing only if a particular issue requires determination. It is difficult to see why a specialist tribunal judge should not deal with these cases in the RPTS. Where hearings are required, it has often been said that block listing in county courts


leads to too little time being available to hear individual cases properly. In some courts, the same might be said in relation to warrant suspensions. Transfer of these cases might enable them to be allocated more time.

2.125 We recognise that in many cases before the Leasehold Valuation Tribunal expert witnesses such as surveyors and valuers give evidence. We query whether in private rented housing disrepair cases, if the tribunal had an expert surveyor or building engineer member, and carried out an inspection of the premises, it would also be necessary for the parties to engage their own experts to give evidence in relation to the property condition. One possibility would be for the instruction of expert witnesses only to be possible with the tribunal’s consent.

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

A Scottish precedent – private rented housing panels

2.127 We have referred to the creation of a specialist tribunal in New South Wales to hear tenancy disputes. Closer to home, the Housing (Scotland) Act 2006 provides a precedent for the transfer of jurisdiction in housing disrepair cases to a tribunal. The Scottish Executive has explained that:

The Act’s provisions both extend the statutory repairing obligations of a landlord and allow a tenant a cheaper, quicker, more accessible and less formal method of enforcing them. At the moment a tenant would have to have recourse to the sheriff court to enforce the repairing obligations under Schedule 10 to the Housing (Scotland) Act 1987. The intention is to bring about improved standards of repair and maintenance in the private rented sector.63

2.128 The Act imposes a new repairing standard on private landlords, requiring them to ensure that “any fixtures, fittings and appliances provided under the tenancy are in reasonable repair and working order”; “any furnishings provided under the tenancy can be used safely” and “there is a satisfactory provision for detecting and giving warning of fires.” 64

2.129 In seeking to improve the state of repair in the private rented sector, the Act provides that the Scottish equivalent to the RPTS, Rent Assessment Panels, be renamed “Private Rented Housing Panels” and be given jurisdiction to consider whether private landlords have complied with their statutory repairing duties. The tenant must notify the landlord that he must carry out work to comply with the


64 Housing (Scotland) Act 2006, s 13(1).
landlord’s repairing duty before applying to the Panel to enforce that duty. The Panel will be able to order the landlord to carry out repairs,  and make “rent relief” orders (reducing the rent payable by up to 90%) in the event of the landlord’s non compliance. Failure to comply with a repairing standard enforcement order is made a criminal offence.

2.130 Of particular interest for our examination of proportionate dispute resolution is the fact that having received an application, the Panel Secretary must inform the parties that mediation is available as an alternative means of resolving the dispute and explain the use of the procedure. If both parties agree to mediation, the Panel Secretary must facilitate it. It is envisaged that the mediation would be conducted by Panel members: if unsuccessful, a Panel member who acted as a mediator would not go on to hear the case and formally determine it.

2.131 While the regulations governing applications to the panel state that a party may act in person or be represented, the expectation appears to be that applicants will not require legal representation. The Legal Aid Impact Test included in the Regulatory Impact Assessment for the Regulations noted that:

It is expected that those tenants who seek to enforce the current repairing obligations in the sheriff court will instead apply to the Private Rented Housing Panel, thus leading to potential savings in legal aid. The Regulations will assist in this, by allowing the Panel and Committees to operate effectively.

The regulations go on to provide that “Where a party attends a hearing and is not represented by another person, the Committee may assist that party to make the best of his or case, without advocating the course that party should take.”

2.132 Officials at the Scottish Executive told us that they are unable to provide an estimate of how many housing disrepair cases the Private Rented Housing Panel will hear each year. Statistics on the numbers of disrepair cases heard by the Sheriff courts were not available. The old Rent Assessment Panel dealt with 202 cases in 2005-06, with 37 carrying over to the next year.

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65 Housing (Scotland) Act 2006, s 22(3).
66 Housing (Scotland) Act 2006, s 26.
67 Housing (Scotland) Act 2006, s 27.
68 Housing (Scotland) Act 2006, s 28.
2.133 Do consultees agree with our provisional proposals that the generalist and specialist elements of the current system for the resolution of housing disputes should be re-balanced by shifting jurisdictions from the courts to an RPTS within the tribunals system to be established under the Tribunals, Courts and Enforcement Bill? If consultees do not agree, we would be interested to know the reasons why. We deal with the detail of the jurisdictions to be moved in the next Part.

2.134 Are there other benefits which consultees think might flow from such a re-balancing?

THE COSTS AND BENEFITS OF OUR PROVISIONAL PROPOSALS

2.135 We think our provisional proposals could, if adopted, lead to significant improvements in the formal determination of housing disputes. The principal advantages we anticipate are those which flow from increased adjudicative specialisation, combined with the flexibility created by the creation of the new tribunal structures.

2.136 We recognise, however, that making the changes we have provisionally proposed will have a cost, both human and financial. It may also allow for some economies, for example in relation to the use of accommodation or administrative costs.

2.137 A wide range of factors must to be considered in evaluating the question of the costs of our proposals. Without purporting to be comprehensive, they include: the different salaries/fees paid to different adjudicators; the relative costs of premises; the relative costs of training; the relative costs of administration. Our recommendations will have implications for legal aid (see Part 6). In Part 8 of this Paper we consider costs rules and fees, which will clearly affect the direct costs to parties of bringing claims in the future.

2.138 We do not have the detailed data that enable us to conclude whether the “average” cost of a case determined in a court will be more or less than the cost of a case determined by a tribunal. We would welcome information and views on these issues from respondents.

2.139 Two particular points need to be borne in mind. First, whatever the costs, it may be argued that the benefits that would arise from the proposed re-balancing from the generalist court to the specialist tribunal would outweigh those costs. For example, if the tribunal was more efficient, or more consistent, or more user friendly, then it could be argued that these are benefits in improving the quality of adjudication which should be sought.

2.140 Secondly, it cannot be assumed that the types of issue that currently require formal adjudication will remain the same. In our wider work on proportionate housing dispute resolution, we are exploring ways in which those potentially in dispute can be assisted to solve problems themselves, or can be encouraged to use alternative forms of dispute resolution. Furthermore, if as a result of changes that may emerge from our work on Encouraging Responsible Letting, there are improvements in management practice, especially on issues such as repair, this can also reduce the demand for formal dispute adjudication.
Do consultees think that the benefits of the proposed changes will outweigh the potential costs that will be involved? In what respects do consultees think that the reformed system might be run more economically than the current one?

WALES

Responsibility for the RPTS tribunals in Wales (RPT Wales, as they are known) has been devolved initially to the National Assembly for Wales, but under the Government of Wales Act 2006, after 3 May 2007, to the Welsh Ministers. Devolved tribunals will fall outside the new structures to be established by the Tribunals, Courts and Enforcement Bill. The Tribunals Service Executive Agency does not administer devolved tribunals in Wales. The Welsh Ministers’ consent would be required to transfer tribunal functions to the First-tier and Upper Tribunals, and to add any devolved tribunals to the list in the Bill from which functions can be transferred to the new tribunals.

Appeals, however, provide a complicating factor. The appeal routes from the tribunals are not unified. Some appeals lie to the High Court,74 but appeals from the Residential Property Tribunal and the Leasehold Valuation Tribunal both go to the Lands Tribunal.75 It appears likely that the Lands Tribunal will be merged into the Upper Tribunal. So although there will be no integration at first instance, appeals from Wales will still go to the Upper Tribunal.

The differential coverage of the Tribunal Service creates, potentially, a crucial distinction between the position in England and that in Wales. As is apparent, both from this Part and from those that follow, we see the existence of the Tribunal Service as a very important factor in justifying the expanded jurisdiction of the RPTS/First-tier Tribunal. The absence of the First-tier Tribunal in Wales significantly undercuts the desirability of extending the jurisdiction. The existence of a (partial) appeal to the Upper Tribunal would, it is true, ameliorate these effects, but they remain an important consideration. Our understanding is that there is no prospect at present of the establishment of anything resembling a Welsh version of the Tribunal Service. It would certainly be beyond our remit in this project to recommend such a departure.

There seem to us, therefore, to be broadly three options in relation to Wales. We consider each in turn.

Un-devolve the RPT Wales

The first option is to transfer responsibility for policy, administration and secondary legislation in relation to the RPT Wales from the Welsh Ministers back to the UK Government in Westminster. In other words, devolution of responsibility for these tribunals would be reversed. The RPT Wales could then be incorporated within the new First-tier Tribunal, along with the RPTS in England,

74 See, for example, *Park Lane Properties Ltd v Northern Rent Assessment Committee* (2003), an unreported decision of Davis J on 27 July 2003 available on Lawtel (case reference AC9400144); *R (Katie Lester) v London Rent Assessment Committee* [2002] EWHC 2790, (2002) 46 EG 199.

75 Housing Act 2004, s 231, Commonhold and Leasehold Reform Act, s 175.
and the tribunals in both England and Wales would be administered through the Tribunal Service.

2.147 There is some historical and administrative logic to this. When the Communities and Local Government Department (or its predecessors in title) were the sponsoring department for the RPTS, then it clearly made sense, in the context of the so-called “executive devolution” which inspired the Government of Wales Act 1998, for the National Assembly for Wales to take over that sponsorship role when housing policy was devolved.

2.148 However, the theory behind the development of the Tribunal Service weakens that logic. An important element in the original case for the Tribunal Service was dissatisfaction with the departmental sponsorship role. It is difficult to see how that concern could apply with any less force to (now) Welsh Assembly Government sponsorship of RPT Wales than to Communities and Local Government departmental sponsorship of the RPTS tribunals.

2.149 On the other hand, it must be noted that there is likely to be very understandable political resistance to any attempt to remove functions from Cardiff Bay, at a time when, with the implementation of the Government of Wales Act 2006, the emphasis is on extending the powers of the Welsh political institutions.

Expand the jurisdiction of RPT Wales

2.150 The second option would be effectively to ignore the difference in context provided by the Tribunals Service and transfer the same set of jurisdictions to RPT Wales. This would only be justified if we were to conclude that the advantages of a stand-alone first instance tribunal over the county court remained sufficient to justify the move. Our provisional proposals in this Part, and in the rest of the paper, rely on the argument that the advantages of tribunals generally are significantly enhanced, in prospect, by administration through the Tribunals Service, and the provisions of the Tribunals, Courts and Enforcement Bill, and their disadvantages similarly reduced. The balance of advantage in transferring cases from the courts to a stand-alone departmentally sponsored tribunal is much less clear.

2.151 A particular problem with this option lies in the transfer of the homelessness statutory appeal and the housing related judicial review jurisdiction. It may be more a matter of perception than reality. But locating these jurisdictions with the Upper Tribunal in relation to cases in Wales, where there was no First-tier Tribunal, does not seem conducive to increasing access to justice, particularly where the former jurisdiction is being moved from the (local) county court. But if this option were to be modified to exclude such a transfer, then the result would be that there would be different jurisdictions for the county court in England and in Wales. This could be seen as problematic.

No change to the current system

2.152 If reform is too difficult or undesirable, then the default must be no change. But the argument of this paper, and of the Issues Paper before it, is that the current system is not serving the public well.
Our provisional proposal

2.153 Not without some hesitation, our provisional view is that the first option is in principle that to be preferred. If, as we suggest, an enhanced role for the RPTS/First-tier Tribunal will deliver a better service to the English public, then we should advocate a system that delivers those benefits equally to the Welsh public. That to do so goes against the trend of moving responsibilities to Wales under devolution clearly creates practical and political obstacles. But a mature approach to the division of responsibilities between the UK institutions surely should allow for some developments counter to the general trend.

2.154 Is transferring responsibility for the RPT Wales back from the Welsh Ministers to the UK Government so that a single England and Wales system can be introduced the right option for Wales? If not, which of the other options should be preferred?
PART 3
HOUSING TRIBUNAL: PROPOSED JURISDICTIONS

INTRODUCTION

3.1 Our first provisional proposal is that, on the assumption that the Residential Property Tribunal Service (RPTS) tribunals are taken into the new Tribunals Service, and become a specialist housing chamber of the First-tier Tribunal, the First-tier Tribunal should exercise all those jurisdictions currently conferred on the RPTS tribunals in England and RPT Wales in Wales.¹ In addition, we provisionally propose that the tribunal should have transferred to it jurisdiction over rented housing possession and disrepair claims. We also suggest that mobile home and caravan possession claims might be transferred to the new tribunal.²

3.2 Given responses to the Issues Paper, we do not propose to confer on the First-tier or Upper Tribunals any jurisdiction over criminal matters. Nor are we making proposals which might provide for the determination of homelessness applications alongside claims for possession.

3.3 We also provisionally propose that the Upper Tribunal hear appeals from the First-tier tribunal. In addition we provisionally propose the transfer of homelessness statutory appeals and housing judicial review cases to the Upper Tribunal, which will have a judicial review jurisdiction. We discuss the appellate role of the Upper Tribunal in Part 4.

Lists of jurisdictions prepared for the Issues Paper

3.4 As background to the Issues Paper, we identified a large number of statutory provisions conferring jurisdiction on the county, Crown, magistrates’ and High courts relating to matters which could involve housing issues.

3.5 We also identified the provisions conferring jurisdiction on tribunals which have a role in determining housing disputes (the Lands Tribunal, Rent Tribunal, Rent Assessment Committees, Leasehold Valuation Tribunal, Residential Property Tribunal, Valuation Tribunals, Appeal Tribunals (under social security legislation) and the Agricultural Lands Tribunal). Some of the issues might relate more generally to property matters, rather than housing.

¹ We do not list these existing tribunal jurisdictions in this consultation paper: they are included in Law Commission, Public Law Team, Housing Disputes – Tribunal Jurisdictions (December 2005), which was published on the Law Commission website at the same time as the Issues Paper, at http://www.lawcom.gov.uk/docs/tribunal_jurisdictions.pdf. Provisions in the Housing Act 2004 conferring jurisdiction on the Residential Property Tribunal are now in force.

² Our overall provisional proposals are summarised in para 1.4 above.
3.6 These lists were published, along with a paper explaining how they had been produced, on the Law Commission website along with the Issues Paper.3

Housing tribunal model discussed in the Issues Paper

3.7 In paragraphs 8.28 to 8.33 of the Issues Paper, we put forward the following possible model for a housing tribunal.

(1) It would have jurisdiction to hear all disputes arising under the statutory provisions listed in those tables currently heard by a county court, High Court, magistrates’ court, Crown Court, or one of the RPTS tribunals.

(2) It should also be able to determine disputes relating to housing benefit connected with other disputes within its jurisdiction, while the Appeals Service would retain its jurisdiction to hear housing benefit appeals.

(3) It would not take any jurisdiction from the Lands Tribunal, Agricultural Land Tribunal, Adjudicator to HM Land Registry or Valuation Tribunals.

(4) The county court, High Court and magistrates’ court would cease to have jurisdiction over all housing disputes other than those arising under the Family Law Act 1996 or the Matrimonial and Family Proceedings Act 1984, for which they would have concurrent jurisdiction with the housing tribunal.

(5) The housing tribunal would have jurisdiction not only over civil matters, but also over housing related criminal offences such as statutory nuisance cases or breaches of anti-social behaviour orders obtained by social landlords.

3.8 In the light of responses received to the Issues Paper tribunal model, we no longer propose to create a specialist housing court or tribunal to hear every matter which might arguably be described as a housing dispute. Our emphasis has become more limited.

Categorising housing disputes and jurisdictions

3.9 A number of respondents considered that we should have done more to categorise the types of dispute that might be regarded as a housing dispute. The Housing Law Practitioners’ Association commented that:

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One difficulty with the approach is that there is no detailed discussion of different types of cases – eg homelessness cases, possession based on rent arrears, possession on other grounds, mortgage possession, succession, disrepair, anti-social behaviour etc. Different approaches may be appropriate for different types of housing cases.

3.10 We had decided not to do that at the Issues Paper stage as we felt it would lead to a lot of argument on the detail, whereas we were anxious to know what people thought about the principles we had developed. Two respondents, however, offered a categorisation of housing disputes which have been of considerable assistance.

3.11 The Law Society provided the following list:

1. allocation cases, comprising homelessness, temporary accommodation allocation, disability discrimination and ombudsman cases;
2. housing standards cases, comprising contractual disrepair, tortious disrepair, statutory nuisance, environmental health regulation and the Health and Safety Executive;
3. possession cases, comprising rent arrears, mortgage possession, nuisance and tenancy/licence disputes;
4. anti-social behaviour cases, comprising possession, anti-social behaviour injunction, anti-social behaviour order and breach of anti-social behaviour order cases;
5. unlawful eviction cases, which are either contract or tort, or Protection from Eviction Act 1977 criminal cases;
6. relationship breakdown cases, comprising occupation orders or transfer of tenancy cases;
7. benefits cases – housing benefit; and
8. Residential Property Tribunal Service cases, comprising rent cases and leasehold cases.

3.12 Shelter thought that housing disputes included:

1. possession proceedings: rent arrears;
2. possession proceedings: mortgage arrears;
3. possession proceedings: anti-social behaviour;
4. possession proceedings: non-secure tenancies;
5. claims for disrepair (with and without order for works);
6. environmental problems, eg, statutory nuisance;
7. harassment / illegal eviction;
(8) neighbour problems;
(9) claims for breach of contract;
(10) homelessness (including community care issues);
(11) allocations;
(12) succession (and other “tenants” charter’) cases;
(13) travellers’ cases;
(14) asylum support cases;
(15) agricultural worker cases. 4

3.13 In the light of other responses and our own thinking, we do not go as far as either of these lists might suggest. For the purposes of this paper we propose that the following classes of case should be transferred:

(1) all possession cases in respect of rented accommodation, including those arising from rent arrears and from anti-social behaviour;5
(2) all claims for disrepair (by tenants against landlords and by landlords against tenants);
(3) homelessness statutory appeals;
(4) housing and homelessness judicial reviews; and
(5) possession cases involving mobile homes and caravans.

Jurisdiction in the remaining categories of case would remain with those bodies which currently exercise it.

3.14 Although this is not as comprehensive a list as we originally suggested in the Issues Paper, it will still mean a very substantial shift from the use of courts to the use of tribunals. It may be that other categories of housing related disputes, in particular mortgage possession proceedings, might be transferred at a later date.

DETAILED PROPOSALS

3.15 The rest of the Part sets out the implications of our provisional proposals in more detail. We ask consultees to consider the other legal issues which may arise in disrepair and possession proceedings. We have identified some, including housing benefit. Consultees may be aware of others. We seek consultees views

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4 Shelter, Housing: Proportionate Dispute Resolution Response to the Law Commission’s Issue Paper, p 17.

5 We do, however, propose that the county court should retain jurisdiction in respect of possession cases where the landlord also seeks an anti-social behaviour remedy such as an injunction or anti-social behaviour order.
on these connected issues. In particular we seek views on our provisional proposal that the tribunal be able to determine housing benefit matters which arise in possession claims.

**Rented housing possession claims**

3.16 We propose the transfer to the First-tier Tribunal of jurisdiction over claims for the possession of rented housing, brought on any ground (including rent arrears, anti-social behaviour, or in the case of dwellings let on assured shorthold tenancies, the “notice-only” ground provided by section 21 of the Housing Act 1988). We propose that the county court should retain jurisdiction to hear possession claims where at the same time the landlord seeks another remedy for anti-social behaviour, such as an injunction – an issue we discuss further below.

3.17 Rented housing possession claims are the most numerically significant class of housing cases in the county court system. It is this area where considerable dissatisfaction has been expressed with the operation of the current system. Possession claims by social landlords (councils and housing associations) form the bulk of the county court’s possession caseload. The vast majority of rented housing possession claims by social landlords are brought on the grounds of rent arrears: in 2002/03, 97.75% of possession actions entered in court were on the grounds of rent arrears, while only 1.41% were on grounds of anti-social behaviour.

3.18 Respondents’ views were divided on the idea. Some, for example Martin Bayntun, a landlord said that there should be “A relatively informal but nevertheless a legally powered tribunal that can make rulings, make money and repair orders and issue possession orders.” Others, including the National Union of Students and Independent Housing Ombudsman thought that “courts are the proper forum for dealing with dispossession of tenants”.

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

**Rented housing disrepair claims**

3.20 Disrepair claims are not as numerically significant as rented housing possession claims. The Association of District Judges noted that:

> The paper refers on numerous occasions to disputes over disrepair. In practice, such disputes rarely come before the courts. Some 3 or 4

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6 In 2004, for example, there were 17,210 possession actions entered by private landlords as compared with 137,191 entered by social landlords.


8 In our consultation paper Encouraging Responsible Letting we discuss the disparity between the evidence on the poor physical condition of private sector rented properties in England and Wales, and the relatively limited action taken to enforce the relevant standards.
years ago, courts were inundated with housing disrepair claims following vigorous canvassing on council estates by “claims farmers”. When allegations of disrepair were brought to their attention, most local authorities inspected the properties and carried out such repairs as were their responsibility. In that sense, the awareness of items of disrepair was heightened, but solicitors pursuing claims were unable to do so economically, and the flow of such claims dried up.

3.21 Notwithstanding these views, we propose the transfer from the county court to the First-tier Tribunal of jurisdiction over claims by landlords against tenants, and by tenants against landlords in relation to housing disrepair, that is alleging the breach of any repairing obligations. These include obligations imposed by the tenancy, whether express, or implied, for example under section 11 of the Landlord and Tenant Act 1985. We do not propose the transfer of jurisdiction from the magistrates’ courts (in relation to statutory nuisances). As we propose that the housing chamber of the First-tier Tribunal be based on the current Residential Property Tribunal Service, it will also have jurisdiction in relation to appeals against enforcement action taken by local authorities under the Housing Health and Safety Rating System introduced by Part 1 of the Housing Act 2004.⁹

3.22 We propose the transfer of jurisdiction over rented housing disrepair claims to the First-tier Tribunal for three main reasons.

(1) A tribunal that draws on the expertise of the surveyor members of the RPTS could better determine disputes related to property conditions.

(2) As it is normal practice for the tribunal to inspect and assess the property condition, this could assist parties who cannot afford to instruct expert witnesses.

(3) The body which determines possession cases ought to be able to determine disrepair cases as the two issues may arise in the same dispute.

3.23 In respect of the third issue, a tenant might argue in defence to a rent arrears possession claim that he was withholding rent as the landlord had failed to comply with his repairing obligations and thus owed damages for breach of contract. Another example of how possession and disrepair issues may interact was discussed by the Law Centres Federation in its response:

Many Law Centres are based in areas where there are older properties. A Law Centre reports, “Redevelopment by landlords is often a way of removing regulated tenants, many of whom are elderly. What can start as a problem with repairs can develop into a full blown battle to save a tenant’s home. The council serves notices on the landlord to carry out repairs. A number of consequences may follow: the landlord may serve a Notice to Quit. If the work cannot be done

with the tenant in occupation, a stalemate can arise. The landlord may persuade the council to hold off saying that s/he will do the repairs, or the property may be sold. Pressure is then put on the tenants, including threats and proposed buy-outs for derisory amounts of money.

3.24 In Scotland, the Private Rented Housing Panel will only be able to determine disrepair cases where an application is made by the tenant. If disrepair arose in the course of eviction or other proceedings before the Sheriff court, it would be for the Sheriff court to determine: it could not refer the case to the Private Rented Housing Panel. In England and Wales we think that disrepair when raised as a counterclaim or otherwise in connection with possession claims should be determined by the tribunal.

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

OTHER LEGAL MATTERS ARISING IN POSSESSION AND DISREPAIR CLAIMS

3.26 It is generally easy to identify provisions which confer jurisdiction on a court to hear possession,\(^{10}\) or disrepair, claims. These powers can readily be transferred to the tribunal by the Secretary of State and Welsh Ministers exercising their powers to transfer additional jurisdictions to the Residential Property Tribunal under section 229(3) of the Housing Act 2004.

3.27 There are some incidental matters where the issue is also straightforward. For example section 15 of the Landlord and Tenant Act 1985 provides that

the county court has jurisdiction to make a declaration that section 11 (repairing obligations) applies or does not apply to a lease …

The Secretary of State, or in Wales, the Welsh Ministers, could use the power to order the transfer of these matters to the Residential Property Tribunal so that the tribunal instead of the county court should exercise this function of determining the landlord’s repairing obligations.

3.28 We have made a preliminary attempt to identify other legal issues that might arise incidentally in the context of a possession or disrepair claim. We hope consultees will tell us of others which arise in practice. Our general approach is to ensure as far as possible that where it is clear that the principal issue is one relating to possession or disrepair, the tribunal should also have the power to determine other matters that may arise which are incidental to the main issue, but which need determination if the main issue is also to be determined. Conversely if there are issues which are not principally related to possession or to disrepair, the court should have power to determine the incidental issues as part of its power to determine the primary issue.

\(^{10}\) For example, ss 7 and 40(1) of the Housing Act 1988 confer jurisdiction on the county court to order possession of houses let on assured tenancies on specified grounds.
3.29 We offer some examples to illustrate the point.

**Tenancy status issues**

3.30 In some cases, before the possession issue can be dealt with, there may be a need to decide what the precise legal status is. For example, if possession is sought on the notice-only ground in section 21 of the Housing Act 1988, the tribunal may have to decide the logically prior question whether the tenancy in question is an assured shorthold tenancy.

3.31 In some cases, the statute specifically confers jurisdiction on a court to deal with what are essentially preliminary matters determinative of the existence of a substantive jurisdiction. In such cases, these powers could be given to the tribunal.

3.32 As a matter of logic, it seems to us, a court or tribunal should be assumed to have the power to satisfy itself that the factual/legal preconditions to the exercise of its jurisdiction exist before it can exercise that substantive jurisdiction. It does not seem necessary to single out some of those preliminary matters as the subject matter of particular jurisdiction-bestowing legislative provisions.

3.33 If some specific legislative acknowledgement of the tribunal’s ability to determine these preliminary matters is necessary at all, then we think a general provision establishing that a tribunal has jurisdiction to determine any issue necessary to found its substantive jurisdiction might be helpful.

3.34 Do consultees agree that there should be a general provision to ensure that tribunals have jurisdiction to determine those preliminary matters that need deciding before they can deal with the principal substantive issue?

3.35 A contrasting example may arise in the context of a dispute about whether premises are let subject to a business tenancy under Part 2 of the Landlord and Tenant Act 1954, or whether they are subject to a form of residential tenancy, such as a protected or statutory tenancy under the Rent Act 1977 (for which we would propose to confer jurisdiction on the First-tier Tribunal).

3.36 If the party seeking possession is pursuing the claim on the basis that the premises were subject to a business tenancy, and had thus issued a claim in the county court using the mechanisms appropriate for business tenancies, our approach would suggest that the matter should remain with the court. Even if the court determines that the tenancy was in fact a form of residential tenancy for which jurisdiction would normally be exercised by the tribunal, we think that it would be appropriate for the court to continue to hear the claim, rather than require the claimant to start proceedings again in the tribunal.

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11 For example, s 141(1)(a) of the Rent Act 1977 gives the county court jurisdiction to determine whether a tenancy is a protected tenancy, or the tenant of a dwelling a statutory tenant.

12 See, for example, *Tan v Sitkowski* [2007] EWCA Civ 30, The Times, 15 February 2007, in which the landlord sought possession of premises using the procedure appropriate for business premises, and the tenant argued unsuccessfully that having ceased to use the ground floor for business purposes, while remaining living in the flat above, the premises were subject to the Rent Act 1977.
Succession rights
3.37 A person against whom possession is sought may argue that they have a right to remain in the premises as a successor to the original tenant. In order to determine the possession claim, the tribunal would therefore need jurisdiction to consider who is qualified to succeed to the tenancy. We think this is a clear example of a situation where the tribunal should have power to determine the logically prior issue, without requiring the institution of separate court proceedings.

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

Anti-social behaviour remedies
3.39 Currently, where a local authority landlord is seeking a possession order against a secure tenant on the grounds of anti-social behaviour, it might also consider seeking a demotion order under section 82A of the Housing Act 1985. Registered social landlords have similar powers under the Housing Act 1988 to seek an order to demote assured tenants to assured shorthold tenancies. In the draft Rented Homes Bill published with our final Renting Homes Report, we included provision enabling proceedings for possession to be combined with proceedings for an order to impose a “prohibited conduct standard contract” (the equivalent of a demoted tenancy). Similarly, we think that social landlords who currently have the power to seek an order to demote a tenant, should be able to do so in the same proceedings, and same forum, as any possession claim. In these cases, we think that the tribunal should similarly have power to make a demotion order.

3.40 In other situations, social landlords might seek an injunction prohibiting anti-social behaviour, or an order under section 1B of the Crime and Disorder Act 1998 (an anti-social behaviour order in all but name) at the same time as bringing possession proceedings. This gives rise to some difficult issues.

3.41 While we would not want the landlord to have to apply to both the tribunal and the court if it wished to bring a possession claim and seek other remedies against a tenant responsible for anti-social behaviour, we remain to be convinced, given some of the concerns expressed by respondents, that it would be appropriate to

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15 In the infamous case of Moat Housing Group – South Ltd v (1) Harris; (2) Hartless [2005] EWCA Civ 287, (2006) QB 606, a possession order, anti-social behaviour order and injunction were obtained in proceedings without notice to the tenants, although the Court of Appeal subsequently held that the injunction granted was too wide, it was not appropriate to make anti-social behaviour orders, and that the possession order should be suspended on terms and not take immediate effect.
give the tribunal some of the more draconian anti-social behaviour powers (for example to grant a warrant of arrest or attach a power of arrest to an injunction).\textsuperscript{16} It would follow that in this situation it would be in the court rather than the tribunal that the case should be heard.

3.42 Do consultees agree that, in possession cases involving allegations of anti-social behaviour, the tribunal should be able to order the demotion of a tenant, but not have power to grant a warrant of arrest or attach a power of arrest to an injunction?

Concurrent jurisdiction for the court and tribunal

3.43 If the tribunal did not have jurisdiction to determine these matters, the parties would be forced to start parallel proceedings, for example in the county court, to obtain a ruling, before the tribunal could determine the matter originally referred to it.

3.44 This used to happen in some Leasehold Valuation Tribunal cases where the tribunal had jurisdiction under s 19(2A) of the Landlord and Tenant Act 1985 to determine whether the amount of a service charge was reasonable, but not (until that Act was amended by the Commonhold and Leasehold Reform Act 2002) to determine whether the service charge in question was due and payable by a tenant. The tenant had to go to the county court for a ruling on the liability to pay the service charge, and then to the tribunal for a determination as to the amount payable.\textsuperscript{17}

3.45 We are very keen to avoid this type of problem, which puts parties to unnecessary expense, and may unduly prolong proceedings. This would not advance the objective of proportionate dispute resolution.

3.46 We would not, however, wish to encourage free-standing applications to be brought to the tribunal in respect of these secondary matters (for example succession), or for parties to have a free choice as to whether to bring disrepair or possession proceedings in the county court or tribunal. We do not wish to encourage “forum shopping” as between the courts and tribunals.

3.47 We therefore provisionally propose in relation to a number of the statutory provisions conferring jurisdiction in these “secondary” matters that the tribunal be given concurrent jurisdiction over such matters where they arise in the course of proceedings for which the tribunal does have jurisdiction (that is, in the course of possession and disrepair proceedings) but not otherwise.

3.48 There are precedents for such an approach. For example, section 52(3) of the Landlord and Tenant Act 1987 provides that where a county court hears a proceeding in exercise of the jurisdiction conferred on it, it may also assume jurisdiction to hear matters that are joined with those proceedings but which it

\textsuperscript{16} Housing Act 1996, ss 153C(3) and 155(4).

\textsuperscript{17} \textit{Gilje v Charlegrove Securities Ltd} [2000] 44 EG 148 is an example of such a case.
would not otherwise have jurisdiction to hear. County courts may therefore in such circumstances exercise the jurisdiction conferred on Leasehold Valuation Tribunals that would otherwise be exclusive to Leasehold Valuation Tribunals.

3.49 In table 1 in the Appendix we seek to identify the provisions relating to possession and disrepair claims in the county court in respect of residential tenancies, which we think should be exercisable by the First-tier Tribunal. We also state whether we propose that jurisdiction should be transferred from the county court, so the county court could no longer hear these cases (“Transfer”); whether the tribunal should have concurrent jurisdiction to hear these matters only when they are raised in the course of disrepair or possession proceedings over which the tribunal has jurisdiction (“Concurrent if raised”); or whether the tribunal and county court will have concurrent jurisdiction (“Concurrent”).

3.50 Does table 1 in the Appendix identify all the relevant statutory provisions conferring jurisdiction on the county courts in rented housing possession and disrepair cases which should be exercisable by the First-tier Tribunal?

3.51 Do any other connected issues arise in claims for possession or disrepair in relation to rented housing, other than the jurisdictions identified in table 1 in the Appendix, which the tribunal would also need to be able to determine?

3.52 Are there any other cases where applications might have to be made both to an RPTS/RPT Wales tribunal and to the county court to resolve an individual housing dispute (in which the opportunity presented by this project should be taken to reform jurisdictional boundaries)?

Housing benefit issues

3.53 Respondents to the Issues Paper expressed frustration about housing benefit. Clarke Willmott solicitors gave us a very clear example of what can go wrong in relation to housing benefit in possession cases.

We are struck, when representing social landlords, by the number of occasions when tenants attend court claiming that they have fully co-operated with the local housing benefit department but yet have been unable to obtain payments which are due to them. Often social landlords disbelieve this and assert that the tenant has failed or refused to co-operate with themselves and/or the local HB department. Often social landlords’ views are based on information provided to them by the local HB department.

We have been involved in at least one case where our client, a social landlord, produced a letter from the local HB department stating to the effect that it had repeatedly requested information from the tenant concerned but without success. The tenant disputed the accuracy of this letter, stating that she had supplied information as required. On the case being adjourned for 48 hours, the tenant was able to return to court to produce a letter from a different officer in the same HB department confirming that she had fully co-operated when requested to do so and thus entirely disputing the contents of the first letter referred to above!
3.54 The Chartered Institute of Housing also referred to a possible perverse incentive on social landlords to bring more rent arrears possession claims even where there are housing benefit problems: “the key performance indicator (KPI) for rent arrears includes tenants whose rent arrears arise solely from housing benefit delays creating an incentive to use the courts.”

3.55 Research studies have also reported the influence of housing benefit on rent arrears possession claims. The authors of the study of the exercise of judicial discretion in rent arrears possession cases concluded that:

These findings confirm the common perception amongst the practitioners who took part in the focus groups, and indeed of the district judges themselves, that housing benefit issues are distorting the work of county courts in dealing with rent arrears cases.

3.56 Respondents also put forward a variety of solutions to the housing benefit issue. Clarke Willmott suggested:

requiring the active participation in disputes of the appropriate housing benefit department. For example, a “certificate” to be issued by the HB department, to be sent to the landlord and tenant (and court/tribunal etc) setting out the position. This could comprise either (a) a “certification” that the HB claim has been investigated in accordance with the regulations and refused – and the time for appeal has expired; or (b) setting out a full “history” of the tenant’s dealings with the HB department.

3.57 Alan Tunkel, a barrister, thought that:

In the case of Social Landlords, the key to proportionate dispute resolution is on-line access to information. Whether the facilitator is a District Judge, a Mediator, an Ombudsman or another, if that facilitator has authorised on-line access to (i) the Social Landlord’s computerised records for the tenanted property and (ii) the DSS’s computerised records for the tenant’s Housing Benefits payments, then he will be well on the way to conducting an effective triage and resolving many of the problems that arise.

3.58 We do not think that the housing benefit problems in possession cases can be solved by one single measure.

(1) The Pre-Action Protocol for Possession Claims Based on Rent Arrears, about which many respondents made positive comments, should divert

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from the formal adjudication process many rent arrears possession claims where there are outstanding housing benefit issues.\(^{20}\)

(2) Similarly, it is hoped that triage plus will enable tenants to obtain advice earlier, thereby reducing the number of cases in which tenants first seek assistance at the court/tribunal duty possession advice desk. This would reduce the need to consider adjourning the possession claim for investigation of housing benefit issues.

3.59 If rent arrears possession cases involving live housing benefit issues did make it to the tribunal, as we discussed in Part 2,\(^{21}\) we think that the tribunal hearing the rent arrears possession claim should also have jurisdiction to hear any housing benefit appeals. A tribunal member with social security experience (who normally sits in the social security chamber) could sit as a member of the housing tribunal.

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

3.61 In some, perhaps a majority of, cases in which housing benefit issues are outstanding, it appears that the local authority has not determined the tenant’s initial eligibility for housing benefit (rather than a determination having been made, and the tenant appealing). We therefore provisionally propose that the tribunal should be able to step into the shoes of the local authority and make that “first instance” determination, in other words, act as a “relevant authority” exercising the powers and duties under section 134 of the Social Security Administration Act 1992 and the Housing Benefit Regulations 2006.\(^{22}\)

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

3.63 **Are there any other measures (apart from the Rent Arrears Possession Pre-action Protocol) which would reduce the number of rent arrears possession claims coming before the tribunal in which housing benefit is an unresolved issue?**

**HOMELESSNESS STATUTORY APPEALS**

3.64 Sections 204 and 204A of the Housing Act 1996 give the county court jurisdiction to hear appeals on points of law against decisions of local authorities in relation to homelessness applications, and in relation to the provision or non-provision of accommodation pending the hearing of a homelessness statutory appeal.

\(^{20}\) This can be found on the DCA website at www.dca.gov.uk/civil/procrules_fin/contents/protocols/prot_rent.htm (last visited 23 May 2007).

\(^{21}\) See paras 2.24 to 2.30 above.

\(^{22}\) SI 2006 No 213, regulation 89 of which provides that “Unless provided otherwise by these Regulations, any matter required to be determined by these Regulations shall be determined in the first instance by the relevant authority”. 
3.65 Jurisdiction was conferred on the county court in these cases in response to concerns about the numbers of judicial review applications which were being made to the Administrative Court in homelessness cases, and the lengthy, expensive and inaccessible process involved.

3.66 The Law Commission had recommended that judicial review in homelessness cases should be replaced by a right of appeal to the county court or an independent tribunal. Lord Woolf, in his final access to justice report also recommended that “there should be a new route of appeal to the county courts on judicial review principles, against local authorities’ decisions on homelessness.”

3.67 Shelter in its consultation response to the Issues Paper noted that:

Within the law of homelessness itself, there are incongruities. For example, appeals on a point of law against homelessness decisions go to the county court, and that court also has jurisdiction to deal with an appeal against the refusal to extend temporary accommodation pending the outcome of the main appeal (s 204A, Housing Act 1996). On the other hand, the county court has no jurisdiction in those situations where an emergency local remedy is most immediately required – i.e., the refusal of a local authority to accept an application, or to provide interim accommodation pending a decision or to extend temporary accommodation pending a decision on review. These discrepancies make no sense at all, and lead to homeless applicants being routinely deprived of a remedy. Of course, if the county court were to have jurisdiction over the whole range of homelessness issues, it would need to operate a duty judge system on a round-the-clock basis: this could no doubt be established on a regional basis.

Where improvements are desperately needed is in the absence of an accessible emergency remedy in homelessness cases, and also in cases of illegal eviction …

The only satisfactory solution is to give jurisdiction to the county court to grant injunctions and to deal with public law points of challenge, if necessary on an out of hours basis. There is of course already a precedent for such jurisdiction, in that the county court now deals with appeals on a point of law against homelessness decisions under s.204 of the Housing Act 1996.

3.68 Simon Rahilly of the Merseyside Housing Law Group commented that:

Changes could be made to make the present arrangements more comprehensive. For example, now that the county court has been given what is effectively a judicial review role for homelessness appeals, this should extend to the whole range of homelessness and

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allocation issues. Some decisions (eg on the provision of interim accommodation) still have to be taken by way of Judicial Review.

3.69 Clause 15 of the Tribunals, Courts and Enforcement Bill gives the Upper Tribunal a judicial review jurisdiction, to grant mandatory, prohibiting and quashing orders, declarations and injunctions, on an application which falls within a class specified in a direction given by the Lord Chief Justice.

3.70 We provisionally propose the transfer to the Upper Tribunal of jurisdiction over homelessness appeals where the county court currently exercises a statutory appeal role. We consider that these appeals should be heard by a body with specialist knowledge of administrative law principles, housing law and local housing conditions. We consider that a specialist housing tribunal, or housing and land chamber of the Upper Tribunal, would have appropriate expertise.

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

3.72 In the light of respondents’ comments about the other issues which arise in relation to homelessness cases, we provisionally propose that the Upper Tribunal should also be able to hear housing and homelessness related judicial review applications. Indeed, the ability of the Upper Tribunal to hear judicial review cases is the principal reason for our suggesting that homelessness statutory reviews should also be transferred to it (since it is possible that the Upper Tribunal may not be as convenient and accessible as a county court, depending on where it sits). In some cases this might involve the High Court transferring proceedings to the tribunal, which had been started in the High Court.25

3.73 We recognise, however, that there may be some difficult drafting issues in attempting to define precisely which housing and homelessness judicial review applications could be heard by the Upper Tribunal. Too broad a definition may lead to the tribunal being deluged with applications in respect of which it has neither the expertise nor the capacity to handle, leading to delays. Too narrow a definition risks the type of difficult boundary issues as have arisen out of the statutory limitation preventing judicial review of Crown Court decisions in “matters relating to trial on indictment”.26 However, these possible border issues have to be seen in context. Unlike the situation with matters relating to trial on indictment, jurisdiction between the Upper Tier and the High Court would be concurrent – an applicant who went to the High Court would not be shut out of a remedy.

3.74 If jurisdiction is transferred to the Upper Tribunal in relation to homelessness statutory appeals under sections 204 and 204A of the Housing Act 1996, which homelessness and housing related judicial review applications should the Upper Tribunal be given power to determine?

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25 Tribunals, Courts and Enforcement Bill, cl 19 allows for this.

CARAVANS AND MOBILE HOMES

3.75 We also provisionally propose the transfer to the tribunal of jurisdiction over possession cases relating to caravans and mobile and park homes.\(^{27}\) The law relating to mobile and park homes has recently been amended.\(^{28}\) Although, generally speaking, the law on caravans and mobile homes represents a discrete body of law, separate from the law relating to rented (bricks and mortar) dwellings, the issues are so similar to those relating to housing that we think the housing chamber of the First-tier Tribunal would rapidly acquire the necessary expertise. Possession claims in relation to caravans and mobile homes are brought under Part 55 of the Civil Procedure Rules, which also governs rented housing possession claims.\(^{29}\) There has also been judicial criticism of current methods of resolving disputes in relation to mobile homes.\(^{30}\)

3.76 Do consultees agree that jurisdiction should be transferred from the county court to the First-tier Tribunal in respect of caravan and mobile home possession claims?

JURISDICTIONS WE ARE NOT PROPOSING TO TRANSFER TO A TRIBUNAL

Long lease possession and forfeiture claims

3.77 We are proposing the transfer of jurisdiction in claims for possession of ordinary rented housing cases, for example secure, assured, assured shorthold, introductory and demoted tenancies, to the First-tier Tribunal. Our original lists of jurisdictions also included provisions relating to possession claims in respect of other types of lease, for example long (over 21 year) tenancies at a low rent under Part 1 of the Landlord and Tenant Act 1954.\(^{31}\) Other statutory provisions governing the circumstances in which a freeholder can regain possession of premises held on a long lease where the leaseholder is seeking to exercise their statutory rights to enfranchise, or secure an extended lease, where the freeholder wishes to redevelop the premises.\(^{32}\) There are more general provisions relating to the forfeiture of leases, for example section 146 of the Law of Property Act 1925 which allows the court to grant relief against forfeiture or exercise of a right of re-entry for breach of a covenant in a lease. Although there have been recent

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\(^{27}\) See, for example, paras 4, 5 and 6 of sch 1 to the Mobile Homes Act 1983.

\(^{28}\) See chapter 3 of Part 6 of the Housing Act 2004.

\(^{29}\) Para 1.8 of Civil Procedure Rules, Practice Direction 55 which relates to possession claims states that "... a claim under paragraphs 4, 5 or 6 of Part I of Schedule 1 to the Mobile Homes Act 1983 may be brought using the procedure set out in Section I of Part 55 if the claim is started in the same claim form as a claim enforcing the rights referred to in section 3(1)(b) of the Caravan Sites Act 1968 (which, by virtue of rule 55.2(1) must be brought under Section I of Part 55)."

\(^{30}\) See, for example, the comments of Carnwath LJ in Warfield Park Homes Ltd v Warfield Park Residents’ Association [2006] EWCA CIV 283, para 39.

\(^{31}\) Landlord and Tenant Act 1954, s 13.

\(^{32}\) Leasehold Reform Act 1967, s 17; Leasehold Reform, Housing and Urban Development Act 1993, s 61.
legislative interventions, for example in the Commonhold and Leasehold Reform Act 2002, other aspects of long lease forfeiture and possession claims are still dependent on the operation of common law principles.

3.78 We do not propose the transfer of jurisdiction to the tribunal in respect residential long leasehold property possession or forfeiture claims. The Law Commission has recently reported on termination of tenancies for tenant default (proposals to reform the law of forfeiture of leases). We do not consider it appropriate to propose further changes to the law relating to the forfeiture of long leases. We think that it would be useful to see how the tribunal performs in relation to the possession claims for ordinary rented housing first, before considering giving it additional leasehold possession jurisdictions.

Mortgage possession claims

3.79 We also considered whether mortgage possession claims should be heard by the First-tier Tribunal instead of the county court. Respondents expressed concerns about aspects of the way mortgage possession claims are currently dealt with.

3.80 There had also been concerns in the past in respect of the inconsistent treatment of mortgage and rent arrears possession defendants, when mortgage possession cases were dealt with in the judge’s room (chambers), and rent arrears possession cases in open court (potentially more embarrassing and intimidating for the defendant). It might therefore be argued that rent arrears possession and mortgage possession cases should be dealt with by the same body with similar procedures.

3.81 We do not propose the transfer of responsibility for mortgage possession cases from the county court to the First-tier Tribunal at this stage, for two main reasons.

3.82 First, numerically, mortgage possession cases are as significant a part of the county court workload as rented housing possession claims, and have been increasing over the last couple of years. We think that it would significantly increase the potential for “teething problems” (for example delays and other inefficiency, while new procedures bedded in) if the First-tier Tribunal housing chamber were given both the rented property and mortgage possession jurisdictions at the same time. If the tribunal proves better at handling the rented property possession cases than the county court, a transfer of jurisdiction in mortgage cases might be considered at a later date.

35 In 2006 131,681 mortgage possession claims were issued in England and Wales, 91,195 orders made and 17,000 properties taken into possession, as compared with 134,429 landlord possession actions issued in the county courts and 96,689 orders made: DCA, Statistics on Mortgage and Landlord Possession Actions in the County Courts – Fourth Quarter 2006 (February 2007).
Second, we are not convinced that a transfer of jurisdiction to a tribunal would tackle some of the underlying problems with mortgage possession claims to which respondents drew our attention. The Association of District Judges expressed particular concern about mortgage possession claims where the court generally has no opportunity to control costs (because the terms of the mortgage deed often allow them to be added on to the debt). They believe this may well lead to disproportionate costs being charged, with no sanction that the court can impose. Similarly, Macclesfield Wilmslow and District Citizens Advice Bureau stated that:

Lenders can include a clause in the agreement which gives them total freedom to impose substantial charges at will if a payment is defaulted. The agreement is so long and complex that few reasonable people would read it, and even fewer understand it.

Costs in mortgage possession cases are normally charged automatically to the account as provided for in the agreement, but are not shown as part of the arrears in Court proceedings. Once costs have been awarded in rent possession cases they are often shown as part of the arrears, giving a distorted picture of the tenant’s behaviour, and prejudicing the tenant in a Ground 8 claim.

They gave a case study example:

Mr and Mrs Haddon had a secured loan from a non-prime lender in addition to a first mortgage with a high street bank. Redundancy and illness led to them making irregular payments on the secured loan, and a Possession Claim was made. The Statement of Account provided with the Claim documents showed that the stated “arrears” of £1,114.96 consisted of true payment arrears of £514.96, and penalties totalling £600. The Court commented unfavourably, but had no choice other than to make an Order.

Where the problem relates to the terms of the mortgage agreement itself, any solution is more likely to be provided by, for example, the Unfair Terms in Consumer Contracts Regulations than by a transfer of jurisdiction over mortgage possession cases to a tribunal.

**Criminal jurisdiction**

In the Issues Paper we asked whether civil and criminal jurisdictions should be amalgamated, and whether a proportionate housing dispute resolution system required closer integration of criminal and civil courts. Respondents were generally very strongly opposed to giving a single tribunal or court both criminal and civil jurisdiction. Brent Private Tenants’ Rights Group answered “No, in fact NO!” to the first of those questions.

The Law Society was equally firm:

36 SI 1999 No 2083.
No. We strongly disagree. The criminal code is a public standard of behaviour breach of which creates a conviction for a criminal offence and punishment of the offender. If charged with a criminal offence a defendant is entitled to the full procedural protections contained in the whole of Article 6. The purpose of the civil code is to provide remedies for individuals in respect of civil wrongs. In civil cases only Article 6 (1) applies. Unlawful eviction legislation provides for a public authority (usually the local authority) to prosecute landlords where they are alleged to have committed criminal offences, and civil remedies for an occupier who has been harassed or evicted unlawfully such as damages or readmittance to the home. To amalgamate the two jurisdictions would mean that both the local authority and the occupier being claimants with proceedings which would have to consider evidence under two standards of proof. The effect of such hybrid proceedings would be to increase complexity to such an extent that an individual occupier would find it extremely difficult to pursue an individual civil remedy whilst at the same time a landlord defending criminal charges might be denied the proper procedural protections. It is a fundamental constitutional value that criminal and civil jurisdictions remain separate.

We share the Law Society’s concerns. We do not therefore propose the transfer to the tribunal of any criminal jurisdiction.

Family law property issues

3.86 In the Issues Paper model for a housing court or tribunal we had suggested that it be given concurrent jurisdiction with existing courts which deal with applications relating to rented properties arising under the Family Law Act 1996 or the Matrimonial and Family Proceedings Act 1984. Respondents did not support the classification of such family law property matters as housing disputes. The Association of District Judges commented that “applications for occupation orders are not “housing disputes” as such, but arise out of relationship disputes.” We do not therefore propose to give the tribunal jurisdiction in these matters.

Determination of homelessness applications at the same time as possession claims

3.87 In the Issues Paper we asked whether a proportionate dispute resolution system should allow possession and homelessness applications to be decided in a single process. Only three respondents thought it should: eleven disagreed. The Advice Services Alliance commented that:

We do not agree that possession and homelessness applications should be provided in a single process. It is the duty of the local authority to decide on whether an applicant is homeless, in priority need, and whether or not an applicant is homeless “intentionally”. At present, where a decision is adverse to the applicant, there is a right of internal review, followed by a right of appeal to the county court. These procedural rights would disappear if possession and homelessness applications were decided in a single process. A large
number of possession applications would be complicated considerably by the consideration of the homelessness position. Such a process would also require that all defendants in possession applications have access to quality advice and representation.

3.88 The Law Society commented that:

There are over 100,000 homelessness applications each year. Local authorities have been given the duty to determine such applications as they have the power to allocate accommodation and are best placed and qualified to determine such applications. If jurisdiction for determining such applications was transferred to the court then it would have to be transferred in all cases. In addition a court does not have the relevant expertise or resources to assess homelessness applications.

3.89 We do not therefore propose to confer on the First-tier Tribunal jurisdiction to determine homelessness applications at the same time as determining rented housing possession claims.

3.90 Do consultees agree that these issues should not be transferred to a tribunal?
PART 4
THE UPPER TIER: AUTHORITY AND PRECEDENT

INTRODUCTION

4.1 Lord Woolf, in his final access to justice report, stated that:

Appeals serve two purposes: the private purpose, which is to do justice in particular cases by correcting wrong decisions, and the public purpose, which is to ensure public confidence in the administration of justice by making such corrections and to clarify and develop the law and to set precedents.¹

4.2 Put another way:

Appeals and appeal systems are usually understood in terms of the supervision of inferior decision-makers by superior ones, with a view to providing the values of accuracy, fairness, consistency, and a mechanism for the generation of rules.²

4.3 In this Part we look at existing appeal rights against county court and Residential Property Tribunal Service (RPTS) tribunal decisions; we discuss provision for appeals and review of decisions in the Tribunals, Courts and Enforcement Bill. Finally, we consider the ability of the tribunals to develop an authoritative and coherent body of housing law.

4.4 We ask consultees whether they agree with our provisional proposal that there should be an appeal on a point of law from the First-tier Tribunal to Upper Tribunal, which would require the permission of the tribunal.³ We ask whether those tribunals' powers to review their decisions should be limited in housing cases. We also ask consultees if they agree that housing cases determined by the Upper Tribunal should set precedents which would bind the First-tier Tribunal.

CURRENT APPEAL RIGHTS: (1) AGAINST COUNTY COURT DECISIONS

4.5 At present:

(1) appeals against decisions of county court district judges lie to the county court circuit judge;


³ Our package of provisional proposals is summarised in para 1.4 above.
(2) appeals from county court circuit judge final decisions in multi-track cases,\(^4\) lie to the Court of Appeal;

(3) appeals against county court circuit judge decisions on appeal from a county court district judge's decision lie to the Court of Appeal;

(4) appeals against other decisions of county court circuit judges (case management decisions in multi-track claims, orders in Part 8 or fast track claims) lie to a High Court judge.\(^5\)

4.6 Rules of court can provide that any right of appeal to a county court, the High Court and the Court of Appeal may be exercised only with permission.\(^6\) Permission to appeal is required for almost all appeals from the decision of a judge in the county court or High Court.\(^7\) Permission to appeal will only be given where:

(1) the court considers that the appeal would have a real prospect of success; or

(2) there is some other compelling reason why the appeal should be heard.\(^8\)

4.7 Permission to appeal may be sought from the lower court at the hearing at which the decision to be appealed was made, or from the appeal court.\(^9\) Where the lower court refuses permission, a further application for permission may be made to the appeal court. Only the Court of Appeal (not the court appealed from) can grant permission for an appeal from a county court or High Court appeal decision.\(^10\)

4.8 Where an appeal is a second appeal within section 55 of the Access to Justice Act 1999, the Court of Appeal will not give permission unless:

(1) the Court of Appeal considers that the appeal raises an important point of principle or practice; or

\(^4\) Other than Part 8 cases in the multi-track under the Civil Procedure rules 8.9(c) and specialist claims (admiralty, arbitration, commercial and mercantile, patents court, technology and construction court, Companies Acts 1985 and 1989 and contentious probate proceedings).

\(^5\) Ss 54 to 65 of the Access to Justice Act 1999 provide the statutory framework for appeals (other than to the House of Lords). Part 52 of the Civil Procedure Rules (“CPR”), supported by Practice Direction 52, governs appeals to the Court of Appeal (civil division); the High Court and a county court. The Access to Justice Act 1999 (Destination of Appeals) Order 2000,\(^5\) Practice Direction 52 para 2A.1 and the Appellate Jurisdiction Acts 1876 and 1887 prescribe where appeals against different court decisions lie.

\(^6\) Access to Justice Act 1999, s 54.

\(^7\) Civil Procedure Rules, r 52.3(1). Permission is not required an appeal against a committal order, a refusal to grant habeas corpus or a secure accommodation order made under s 25 of the Children Act 1989.

\(^8\) Civil Procedure Rules, r 52.3(6).

\(^9\) Civil Procedure Rules, r 52.3(2).

\(^10\) Civil Procedure Rules, r 52.13(1).
(2) there is some other compelling reason for it to hear the appeal.¹¹

4.9 The Court of Appeal has decided that the following appeals are to be treated as appeals to a county court or the High Court within the meaning of section 55, so that any appeal to the Court of Appeal would be a “second appeal” to which the stringent test for permission in rule 52.13(2) applies:

(1) an appeal from a tribunal on a point of law under section 11 of the Tribunals and Inquiries Act 1992,¹²

(2) any application to the High Court which can be categorised as an appeal by way of case stated;¹³

(3) an appeal to a county court on a point of law from a decision of a local housing authority under section 204(1) or 204A of the Housing Act 1996;¹⁴

(4) any other appeal to the High Court or the county court from any tribunal or other body or person.¹⁵

Powers of the court on appeal

4.10 The appeal court will allow an appeal where the decision of the lower court was:

(1) wrong; or

(2) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.¹⁶

Case law indicates that the application and interpretation of rule 52.11(3) cannot be divorced from consideration of the nature of the decision under challenge, and the question of whether the appeal proceeds as a review or a re-hearing.¹⁷

4.11 The appeal court, on an appeal, has all the powers of the lower court, and can also:

(1) affirm, set aside or vary any order or judgment made or given by the lower court;

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¹¹ Civil Procedure Rules, r 52.13(2).
¹³ Clark v Perks [2001] 1 WLR 17.
¹⁵ Brooke LJ in para 14 of the judgment in Clark v Perks [2000] 4 All ER 1, [2001] 1 WLR 17 said this was the logical conclusion of the Vice-Chancellor’s judgment in Azimi v Newham London Borough Council 2000) 33 HLR 569.
¹⁶ Civil Procedure Rules, r 52.11(3).
(2) refer any claim or issue for determination by the lower court;
(3) order a new trial or hearing;
(4) make orders for the payment of interest;
(5) make a costs order.  

4.12 Those powers are subject to any enactment setting out special provisions for particular categories of appeal, for example where the statute gives the power to a particular person, body or tribunal where the appeal court cannot exercise it. Tony Harrop-Griffiths has argued that rule 52.1(4) means that on a homelessness appeal under section 204 of the Housing Act 1996, the appeal court could not take the decision itself, and would be limited by section 204(3) of that Act to quashing, confirming or varying the decision as it thinks fit.

CURRENT APPEAL RIGHTS: (2) AGAINST RPTS TRIBUNAL DECISIONS

4.13 There is no single route of appeal from the decisions of the different tribunals which form part of the Residential Property Tribunal Service.

(1) From decisions of the Rent Assessment Committee, the possibilities are:
   (a) an appeal to the High Court under the Tribunals and Inquiries Act 1992, s 11, on the grounds of an error of law; or
   (b) an application to the High Court for judicial review of the Rent Assessment Committee’s decision.

18 Civil Procedure Rules, rr 52.10(1) and (2).
19 Civil Procedure Rules, r 52.1(4).
21 See, for example, Park Lane Properties Ltd v Northern Rent Assessment Committee (2003), an unreported decision of Davis J on 27 July 2003 available on Lawtel (case reference AC9400144).
22 For example in R (Katie Lester) v London Rent Assessment Committee [2002] EWHC 2790 (Admin), (2002) 46 EG 199.
From decisions of the Residential Property Tribunals, an appeal lies to the Lands Tribunal. This requires the permission of either the Residential Property Tribunal or (if that tribunal has refused permission), the Lands Tribunal. Such an appeal must be made within the time specified in the Lands Tribunal Rules. The Lands Tribunal can exercise any power which was available to the Residential Property Tribunal.

There is a similar general right of appeal (not expressly limited to points of law) from a decision of a Leasehold Valuation Tribunal to the Lands Tribunal.

The Lands Tribunal Rules 1996, Part IIA govern applications for permission to appeal against Leasehold Valuation Tribunal and Residential Property Tribunal decisions. Interestingly, those rules have been amended so that in some provisions, references to the Leasehold Valuation Tribunal and the Residential Property Tribunal have been replaced with references to “the First-tier Tribunal”.

APPEALS AND REVIEW UNDER THE TRIBUNALS, COURTS AND ENFORCEMENT BILL

Appeals against tribunal decisions

It is important to stress at the outset that the Bill provides that the Upper Tribunal will have the status of a superior court of record (as has the High Court and Employment Appeal Tribunal).

Parties will have a right of appeal to the Upper Tribunal on a point of law from decisions of the First-tier Tribunal, other than excluded decisions. Appeals against First-tier Tribunal decisions will require the permission of either the First-tier or Upper Tribunal.

Do consultees agree that there should be a right of appeal only on a point of law against decisions of the First-tier Tribunal in housing cases? Should the same rule apply to all of its housing jurisdictions?

Housing Act 2004, s 231.

The RPTS website states that an appeal against a Residential Property Tribunal decision can be made to the High Court under the Tribunals and Inquiries Act 1992, or on an application for judicial review. However, s 231(4) of the Housing Act 2004 states that s 11(1) of the Tribunals and Inquiries Act 1992 does not apply to any decision of a Residential Property Tribunal.

Housing Act 2004, s 231(3).

Commonhold and Leasehold Reform Act 2002, s 175.

SI 1996 No 1022.

See the Lands Tribunal (Amendment) Rules 2006 (SI 2006 No. 880), rule 3, for example.

Tribunals, Courts and Enforcement Bill, cl 3(5).

Tribunals, Courts and Enforcement Bill, cl 11.

Tribunals, Courts and Enforcement Bill, cls 11(3) and (4).
4.18 Do consultees agree that permission of the First-tier Tribunal or Upper Tribunal should be required for any appeal against the First-tier Tribunal's decisions in housing cases?

4.19 Excluded decisions include decisions of the First-tier Tribunal to review or not review its own decisions, and decisions of a description specified in an order made by the Lord Chancellor. The Explanatory Notes to the Bill state that:

the power can be used for two purposes only. The first purpose is the preservation of existing appeal rights where those rights are, or include, something other than a right to appeal on a point of law. The second purpose is the preservation, in cases where there is currently no appeal right, of the existing position.

4.20 On an appeal, the Upper Tribunal may set aside the decision of the First-tier Tribunal if it finds that the making of the decision involved an error of law. If it sets aside the decision, it must either remit the case to the First-tier Tribunal with directions for its reconsideration, or remake the decision. If it remakes the decision it may make any decision the First-tier Tribunal could have made, and may make such findings of fact as it considers appropriate.

4.21 The Bill also provides for a right of appeal on a point of law from the Upper Tribunal's decisions (other than excluded decisions) to the Court of Appeal. Appeals from Upper Tribunal decisions require the permission of the Upper Tribunal or Court of Appeal. Clause 13(7) provides that the Lord Chancellor can make an order providing for permission for such an appeal not to be granted unless the Upper Tribunal or Court of Appeal considers that the proposed appeal would raise some important point of principle or practice, or that there is some other compelling reason for the relevant appellate court to hear the appeal (the test for permission for second appeals under the Civil Procedure Rules, rule 52.13(2)). The powers to prescribe “excluded appeals” in an order would allow for the preservation of existing appeal rights where these differ from the standard pattern provided by clause 13.

4.22 The powers of the Court of Appeal on appeal from the Upper Tribunal are similar to those of the Upper Tribunal on appeal from the First-tier Tribunal (although the

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32 See paras 4.25 to 4.31 below.
33 Tribunals, Courts and Enforcement Bill, cl 11(5).
35 Tribunals, Courts and Enforcement Bill, cl 12.
36 Tribunals, Courts and Enforcement Bill, cl 13.
37 Tribunals, Courts and Enforcement Bill, cl 13(3) and (4).
Court of Appeal can remit the decision to be remade not just to the Upper Tribunal, but to the tribunal from which the Upper Tribunal’s decision was an appeal 38).

4.23 The Tribunals, Courts and Enforcement Bill may (but does not necessarily) lead to Lands Tribunal jurisdictions being transferred to the First-tier or Upper Tribunal. We have provisionally proposed that the Upper Tribunal should have a housing and land chamber. If this were agreed, this could absorb the current Lands Tribunal, and, in addition to its existing jurisdictions, would hear appeals from the First-tier Tribunal in housing cases.

4.24 Do consultees agree that the Tribunals, Courts and Enforcement Bill provides the opportunity for a much more straightforward structure for appeals; and ensures that authoritative precedents will be dealt with by judges who have expertise in housing law?

Review powers

4.25 In addition to appeals, the Bill also gives the First-tier Tribunal an explicit power to review its own decisions (other than “excluded decisions”), either of its own initiative, or on an application by a party who has an appeal right. 39 The Tribunal Procedure Rules can provide for types of decision which cannot be reviewed, or can only be reviewed on specified grounds, or on the tribunal's own initiative. 40

4.26 On such a review, the First-tier Tribunal can correct accidental errors in the decision or in a record of the decision, amend reasons given for the decision, or set the decision aside. 41 If it sets a decision aside, it must either re-decide the matter concerned or refer the matter to the Upper Tribunal for the Upper Tribunal to re-decide the matter. 42 On a redecision, the tribunal can “make such findings of fact as it considers appropriate.” 43 A tribunal cannot review its decision more than once. 44

4.27 The Upper Tribunal is given similar powers to review its decisions under clause 10 of the Bill, although the Upper Tribunal, on setting aside a decision, must re-decide it (it has no power to refer it to the Court of Appeal for decision).

4.28 The ability of a decision maker, whether a first instance decision maker (such as the local authority) or the tribunal hearing any legal claim, to review its own decisions is an important contribution to proportionate dispute resolution. As Michael Adler wrote, in a recent article:

38 Tribunals, Courts and Enforcement Bill, cl 14(2)(b).
39 Tribunals, Courts and Enforcement Bill, cl 9(1) and (2).
40 Tribunals, Courts and Enforcement Bill, cl 9(3).
41 Tribunals, Courts and Enforcement Bill, cl 9(4).
42 Tribunals, Courts and Enforcement Bill, cl 9(5).
43 Tribunals, Courts and Enforcement Bill, cl 9(8).
44 Tribunals, Courts and Enforcement Bill, cl 9(9).
if, as soon as someone submits a complaint or an appeal, the decision was reviewed as a matter of routine, either by the line manager of the first-instance decision maker or by a specialist reviewing officer, it is probable that, in many cases, it would be possible to resolve the matter at that stage in light of the additional information submitted by the complainant or appellant. Thus, as long as the review does not stand in the way of the individual accessing a complaints procedure or an appeal tribunal, the case for reviewing the initial decision when someone makes a complaint or submits an appeal would seem to be very strong. Although it would add to administrative costs, there would be administrative savings because, in the case of tribunals, there would be a reduction in the number of cases proceeding to a tribunal hearing.

4.29 In the specific housing context, decisions of the First-tier Tribunal in relation to rented housing possession and disrepair and caravan and mobile home possession cases should be susceptible to review by the First-tier Tribunal. Similarly, the Upper Tribunal should be able to review its own decisions in relation to appeals against First-tier Tribunal decisions, homelessness statutory reviews under the Housing Act 1996, and in housing judicial review applications.

4.30 Should the First-tier Tribunal’s power to review its own decisions be subject to any limitations?

4.31 Should the Upper Tribunal’s power to review its own decisions be subject to any limitations?

THE ROLE OF THE TRIBUNALS IN DEVELOPING HOUSING LAW

4.32 The Bar Council, in responding to the Issues Paper, told us that

If a tribunal is used, our concerns are twofold: (a) maintenance of a consistent body of housing law that leads to predictable results in litigation; and, (b) the availability of proper representation in the difficult area of housing law.

4.33 We discuss the second of these issues, relating to representation, in Part 6. Here we consider the capacity of the tribunals system to enhance, rather than prevent,
the coherent development of housing law. An effective system of precedent would contribute to the accuracy, transparency and impact of decisions in housing disputes.

4.34 While the Tribunals, Courts and Enforcement Bill provides for appeals from the Upper Tribunal to the Court of Appeal, whose decisions would be binding just as they are now, we anticipate that very few cases would end up in the Court of Appeal. Thus we need to look at precedent in the tribunals themselves.

Precedent in the Tribunals, Courts and Enforcement Bill

4.35 The Leggatt report recommended express statutory provisions that would make a limited selection of decisions of appellate tribunals binding.48 However Lord Justice Brooke, who had been in charge of the tribunal modernisation programme since 2001, warned against applying a “one size fits all” approach to different tribunal groups who have developed different traditions.49 Instead he thought that the President of each appellate tribunal should be given powers to issue Practice Directions, perhaps with the concurrence of the Senior President, setting out the tribunal’s practice.50

4.36 Clause 23 of the Bill provides for the giving of practice directions, which may consist of guidance about the application or interpretation of the law, or the making of decisions by members of the First-tier or Upper Tribunals.51 The Senior President of Tribunals may give directions as to the practice and procedure of the First-tier and Upper Tribunals.52 Chamber presidents may, with the approval of the Senior President, give directions as to the practice and procedure of the chambers over which they preside.53 The Explanatory Notes to the Bill state that “These directions may take the form of guidance, interpretation of the law, matters of precedent or the delegation of judicial functions to senior members.”54

4.37 We need to consider what practice directions as to precedent would be appropriate in respect of the First-tier and Upper Tribunals hearing rented housing possession and disrepair claims, caravan and mobile home possession claims and homelessness statutory appeals and housing and homelessness judicial reviews, as well as when exercising the current RPTS and Lands Tribunal jurisdictions.

51 Tribunals, Courts and Enforcement Bill, cl 23(6).
52 Tribunals, Courts and Enforcement Bill, cl 23(1).
53 Tribunals, Courts and Enforcement Bill, cl 23(2).
The role of precedent in other senior tribunals

4.38 Although a leading text on administrative law states that "in the use of its own precedents a tribunal is ... in a radically different position from a court of law"\(^{55}\), most academics doubt that there remains a difference in practice between the systems of precedent in courts and tribunals. Trevor Buck, in a recent article looking specifically at the role of precedent in tribunals considers that, if this were ever true, it certainly is not now.\(^{56}\) On the contrary, he says tribunal work is mainly directed at exercising narrow, textual "interpretational" discretion of statutory provisions rather than the exercise of wider, unstructured discretionary powers.\(^{57}\)

4.39 The Social Security and Child Support Commissioners, and the Asylum and Immigration Tribunal (AIT), in common with courts, produce a doctrine of precedent that "imposes obligations having effect both vertically and laterally".\(^{58}\) All tribunals reflect the general (vertical) obligation on courts to follow superior courts, as well as a weaker and more controversial (lateral) obligation on courts to follow their own decisions or those of a court of co-ordinate jurisdiction.\(^{59}\)

Precedent in the Asylum and Immigration Tribunal

4.40 District Judge Russell Campbell drew our attention to the approach in the Immigration Appeal Tribunal and Asylum and Immigration Tribunal.

The experience of the Asylum and Immigration Tribunal might be useful in the context of identifying important decided cases which ought to be followed and as a means of ensuring consistency. Immigration law and housing law share some things in common. There is a great deal of each and the law develops rapidly. Judges are required to make findings of fact from "dense" and often hotly disputed accounts. Key decisions of the Immigration Appeal Tribunal and now the Asylum and Immigration Tribunal, are "starred" and binding in subsequent cases. In 2002, the Court of Appeal approved (in S [2002] EWCA Civ 539) as "benign and practical" the notion of an authoritative determination of some general question of fact with the intention that it should be binding as to conditions then existing in a particular country: a "Country Guidance" determination. The adoption of these or similar techniques might accelerate the development of expertise amongst housing judges and ensure consistency. Triage plus providers and others would be made aware of the important decisions that they and their clients should be familiar with. Although

housing practitioners are at present able to follow developments through the Housing Law Reports and the practice pages of Legal Action, most – if not nearly all – county court decisions fall well below the radar.

**Social Security Commissioners**

4.41 The Social Security and Child Support Commissioners select decisions for “reported” status by means of a “consensus test”: for a decision to attain such added status it should “command the broad assent of at least a majority of Commissioners”.60 There are currently forty to fifty recorded status cases a year, around two per cent of the 2,260 Commissioners appeals in 2004-05.61

4.42 A single Commissioner must generally follow “Tribunal of Commissioners”62 decisions.63 Single Commissioners will adhere to decisions by other single Commissioners except where “slavish adherence to this could lead to the perpetuation of error”.64 All Commissioners’ decisions are, in principle, binding on the first-tier Appeals Service tribunals and the original decision-makers. Where first-tier Appeal Service tribunals are faced with conflicting Commissioners’ decisions, they will decide which one applies and there is no obligation to follow earlier decisions.

4.43 “Reported” decisions of the Social Security Commissioners hold more authority than “unreported” decisions. However, if the unreported case was a later case and the Commissioner expressly stated that he or she was not following an earlier reported decision it will be open to a subsequent Commissioner to follow the later unreported decision. Where there are two conflicting “reported” decisions and the earlier decision has been carefully considered in the later one but not followed then the later decision should be applied.

**First instance tribunal decisions as precedents?**

4.44 Sir Andrew Leggatt, in his report, noted that

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62 A “Tribunal of Commissioners” is a panel of three or more Social Security Commissioners, convened by the Chief Commissioner: see T Buck, “Precedent in Tribunals and The Development of Principles” (2006) 25 Civil Justice Quarterly 458, 471.


There are obvious practical difficulties in expecting many tribunals sitting across the country, with wide differences in experience and constitution, and a remit to consider each individual case on its merits to develop a consistent view of the law.65

4.45 Decisions of the RPTS tribunals are not binding precedents. Siobhan McGrath, the President of the RPTS, explained at an RPTS user group meeting in June 2006 that in cases of importance, an RPTS tribunal might say that “this line of thinking is recommended”, if the answer to a particular legal question was clear, but that where two different lines of approach were possible, the court must clarify the approach. The RPTS will make tribunal chairmen aware of any individual decisions which a chairman considers important.

4.46 While in practice the Lands Tribunal follows its own previous decisions, they are not binding, especially where the decision was given by a single member. 66 In West Midland Baptist (Trust) Association (Inc) v Birmingham Corporation, the Court of Appeal stated that the Lands Tribunal’s practice of treating its own decisions on points of law as binding should be discontinued.67 However, the Court of Appeal’s objections were aimed at the judicial level at which precedent-setting ought to occur.68

Upper Tribunal decisions as precedents

4.47 If there is to be a specialist Upper Tier, we do not think that First-tier Tribunal decisions should be binding precedents in relation to housing cases. Such an approach is supported by a number of respondents to the Issues Paper. The Bar Council commented that:

The Paper recognises the difficulties created by the fact that tribunals do not have the authority to provide rulings on points of law. The Commission has, however, made it clear that the creation of a dedicated housing court is most unlikely and, despite our support for such a court, we understand the difficulties involved in its establishment. It may be that employment law can provide a model for how a consistent body of housing law can be maintained. If housing cases are initially to be dealt with by tribunals, a specialist housing appeal court could ensure the maintenance of a consistent body of housing law informed by all the various aspects of the subject. We would envisage such a court as having the status of the High Court with appeal to the Court of Appeal.

4.48 Do consultees agree that decisions in housing cases of the First-tier Tribunal should not be laterally binding precedents in other cases before the First-tier Tribunal?


66 West Midland Baptist (Trust) Association Inc v Birmingham Corporation [1968] 2 QB 188.

67 [1968] 2 Q.B. 188, at 210, Sellers LJ and 225, Sachs LJ.

68 In this case the Court felt that the Lands Tribunal had been incorrect in believing that they were bound by a decision by a single surveyor member of the Tribunal on a point of law.
Andrew Arden QC recommended the creation of a housing appeals tribunal equivalent to the Employment Appeal Tribunal, which he thought would help the coherent development and consistent application of housing law. He thought that unless all housing disputes were put through a central and common channel at some point in the process, “it is axiomatic that as soon as any new laws come up for consideration, different views will start to emerge” and “old laws will continue to be developed piecemeal, exacerbating the problems of complexity and cost instead of contributing to their diminution.”

We agree with the suggestion that all housing cases that raise issues beyond the purely factual should potentially be subject to consideration by the Upper Tribunal. We also think that there needs to be a mechanism for selecting those case with precedent value; to regard every Upper Tribunal decision as binding would be to encourage highly undesirable legalism in a forum where this was neither appropriate nor proportionate.

**Status and authority of the tribunals**

Some respondents to the Issues Paper thought that tribunals would be seen as inferior to courts, and not sufficiently authoritative. The London and National Disrepair Forum told us that:

If the responsibility for adjudicating housing disputes was to be transferred to the Residential Property Tribunal Service, wholesale re-education would be needed of the public and the profession to ensure that the jurisdiction of the Residential Property Tribunal Service was seen as on a par with that of the courts. It would need to have the jurisdiction to impose sanctions in order to be effective and unless its jurisdiction is extended in this way, it is difficult to see how it would be an effective mechanism as it will continue to be seen as a tribunal of inferior status to the civil court system.

The Tribunals, Courts and Enforcement Bill essentially deals with these fears. Michael Adler in his Modern Law Review article commented that:

To the extent that the establishment of the TS raises the standing of tribunals, tribunal decisions should be more authoritative and, to the extent that it takes seriously the commitment in the White Paper to stimulating improvements in administrative decision making, it should be in a better position to ensure that government departments and public bodies are made aware of leading (second-tier) decisions.

The fact that under our proposals some Upper Tribunal decisions are binding precedents (as Employment Appeal Tribunal decisions are) will enhance the status of the tribunal system in the eyes of potential users.


4.54 Do consultees agree that some if not all housing decisions of the Upper Tribunal should be vertically binding precedents on the First-tier Tribunal?

4.55 If consultees agree that only some decisions of the Upper Tribunal should be binding, how and by whom should the precedential value of decisions be determined?
PART 5
PROCEDURAL PRINCIPLES

INTRODUCTION

5.1 The ability of a formal adjudicatory body to deliver proportionate dispute resolution depends to a large extent on its procedures. As the Tribunals Service is currently considering the rules of procedure it will need, we do not intend to make here detailed proposals for procedure rules. Rather, we consider the principles which should underpin those rules. Getting the procedural principles right is a key element in ensuring that the formal resolution of housing disputes is done in a proportionate way. Thus after a brief review of the existing procedural systems, we consider: overriding objectives, pre-action protocols, formality, case management, and oral hearings. These affect how far the proposed tribunals embody the core values, such as fairness, equality of arms, accuracy, promptness, efficiency and cost, and impact.

5.2 We ask consultees whether there are current procedural rules in housing cases which should be retained or changed. We ask whether an overriding objective would be helpful, and whether pre-action protocols in housing cases should be amended, or new ones introduced. We seek views on how procedure rules can help to create the appropriate level of (in)formality, and on whether parties should be given the option of determination without an oral hearing. Finally we ask if consultees agree that more claims, defences or applications should be made electronically, and whether other information technology tools could contribute to proportionate dispute resolution in housing cases.

CURRENT PROCEDURE RULES

5.3 Proceedings in the county court in England and Wales are governed by the Civil Procedure Rules. Part 55 and Practice Directions 55 and 55B relate specifically to proceedings for possession. There are also a Pre-action Protocol for Housing Disrepair Cases,1 and (since October 2006) a Pre-action Protocol for Housing Possession Cases based on Rent Arrears.2

5.4 Residential Property Tribunal Service (RPTS) tribunals operate under a number of sets of procedural regulations, including:

(1) for Rent Assessment Committees, the Rent Assessment Committees (England and Wales) Regulations 1971,3 and the Long Residential Tenancies (Principal Forms) Regulations 1997;4

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3 SI 1971 No 1065.
4 SI 1997 No 3008.
(2) for Rent Tribunals, the Rent Assessment Committees (England and Wales) (Rent Tribunal) Regulations 1980;\(^5\)

(3) for Leasehold Valuation Tribunals, the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003;\(^6\) and the Leasehold Valuation Tribunals (Procedure) Wales Regulations 2004;\(^7\)

(4) for Residential Property Tribunals, the Residential Property Tribunal (Right to Buy Determinations) Procedure (England) Regulations 2005;\(^8\) the Residential Property Tribunal Procedure (England) Regulations 2006;\(^9\) and the Residential Property Tribunal Procedure (Wales) Regulations 2006.\(^10\)

5.5 The RPTS in its consultation response referred to the flexibility of its procedures allowed for by these regulations:

Court procedure is governed by CPR and although this provides flexibility, it is not wholly possible to tailor procedures to fit each jurisdiction. The RPTS tribunal rules also provide some flexibility but in some cases are not adequate to deal with recalcitrant parties or cases of urgency.

The main difference however lies in approach and the ability of the Tribunal to model its procedures to deal with the type of dispute before it. The following illustrates how this is put into practice:

(a) Rent cases – these are effectively party-party cases but are usually single issue. Cases are set down for hearing or paper determination on receipt. Parties are invited to make written submissions and to appear. The committee inspects the property, considers the submissions and issues a decision. The process takes up to 10 weeks.

(b) LVT cases – these are party-party cases. In enfranchisement, the representation level (either by surveyors or lawyers) is high and accordingly standard directions for hearing are given. In other LVT cases tenants are usually not represented and also landlords often conduct cases on their own behalf. The cases are often factually complex and multi-issue. A pre-trial review is held and tailored directions for hearing are given. This is an opportunity to explain procedure, narrow issues and initiate mediation. The process to hearing takes up to 20 weeks.

\(^5\) SI 1980 No 1700.
\(^6\) SI 2003 No 2099.
\(^7\) SI 2004 No 681 (W 69).
\(^8\) SI 2005 No 1509.
\(^9\) SI 2006 No 831.
\(^10\) SI 2006 No 1641 (W 156).
(c) RPT cases – these are citizen and state in that they involve appeals against local authority decisions. The model system is a hybrid of the above. Standard directions require the participation of parties and are relatively simple. It is intended that the process to hearing will take up to 15 weeks.

5.6 Procedures in the Lands Tribunal are governed by the Lands Tribunal Rules 1996,11 made under the Lands Tribunal Act 1949, s 3(6). The Lands Tribunal President’s practice direction allows for different procedures in different cases.

5.7 These are:

1. Special procedure for cases requiring case management by a Member in view of their complexity, the amount in issue or its wider importance. The procedure involves a pre-trial review by the Member to ensure that all appropriate directions are given for the fair, expeditious and economical conduct of the proceedings, and generally the case will proceed much as in a court.

2. Simplified procedure for the speedy and economical determination of cases in which no substantial issue of law or valuation practice, or substantial conflict of fact, is likely to arise. The objective is to move to a hearing as quickly as possible and with the minimum of formality and cost. The hearing is informal and strict rules of evidence do not apply. It will almost always be completed in a single day. Except in compensation cases, to which particular statutory provisions on costs apply, an award of costs is made only in exceptional circumstances.

3. Written representation procedure which requires the consent of the parties, and will only be used if the Tribunal, having regard to the issues in the case and the desirability of minimising costs, is of the view that oral evidence and argument can properly be dispensed with. The Member allocated to the case will if necessary carry out a site inspection before giving his written decision.

4. The standard procedure applies in all other cases. Under this procedure case management will be in the hands of the Registrar. He will look to hold a pre trial review at the earliest time that it appears appropriate to do so, and he will give directions tailored to the requirements of the particular case. These directions may, as appropriate, use elements of the special procedure (for example, timetabling through to the hearing date) or the simplified procedure.12

11 SI 1996 No 1022.
TRIBUNALS, COURTS AND ENFORCEMENT BILL: PROVISION FOR PROCEDURE RULES

5.8 Clause 22 of the Tribunals, Courts and Enforcement Bill provides for a Tribunal Procedure Committee to make Tribunal Procedure Rules governing the practice and procedure to be followed in the First-tier and Upper Tribunals. Schedule 5 to the Bill makes further provision about the Committee and the rules.

5.9 The Tribunals Service plan that tribunals will transfer in to the new structures with their existing procedure rules. In the long run:

The intention is for the Tribunal Procedure Committee to develop sets of rules which are harmonised where possible but also to cater for the needs of individual jurisdictions. Harmonised rules will aim to:

- Provide simplified appeal routes, and a common terminology for processes
- Provide a common pathway through processes where feasible
- Facilitate proportional dispute resolution.13

5.10 Which current court and tribunal procedure rules and regulations applicable to the resolution of housing disputes work well and should be retained if rented housing disrepair and possession claims and caravan and mobile home possession claims were to be determined by the First-tier Tribunal?

5.11 Which current procedure rules and regulations applicable to the resolution by courts and tribunals of housing disputes do not work well and require reform?

5.12 What, if any, changes to court and tribunal procedure rules would assist in securing proportionate dispute resolution in housing cases?

OVERRIDING OBJECTIVES

5.13 These have become a common means of seeking to underpin a dispute resolution system with a set of values. For example, any power to make Civil Procedure Rules is to be exercised with a view to securing that:

(a) the system of civil justice is accessible, fair and efficient, and
(b) the rules are both simple and simply expressed.14

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14 Civil Procedure Act 1997, s 1(3).
The Civil Procedure Rules themselves refer to an overriding objective of dealing with cases justly.\(^{15}\)

5.14 The Tribunals, Courts and Enforcement Bill sets out the overriding objective to be followed by the Tribunal Procedure Committee when making rules:

- Power to make Tribunal Procedure Rules is to be exercised with a view to securing—
  1. that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done,
  2. that the tribunal system is accessible and fair,
  3. that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently,
  4. that the rules are both simple and simply expressed, and
  5. that the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.\(^{16}\)

5.15 Overriding objectives have also been included in the Residential Property Tribunal procedure regulations, which provide that:\(^{17}\)

1. When a tribunal—
   1. exercises any power under these Regulations; or
   2. interprets any regulation,

   it [must] [shall] seek to give effect to the overriding objective of dealing fairly and justly with applications which it is to determine.

2. Dealing with an application fairly and justly includes—
   1. dealing with it in ways which are proportionate to the complexity of the issues and to the resources of the parties;

\(^{15}\) This includes as far as practicable: (a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate – (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party; (d) ensuring that it is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.

\(^{16}\) Tribunals, Courts and Enforcement Bill, cl 22(4).

(b) ensuring, so far as practicable, that the parties are on an equal footing procedurally and are able to participate fully in the proceedings;

(c) assisting any party in the presentation of his case without advocating the course he should take;

(d) using the tribunal's special expertise effectively; and

(e) avoiding delay, so far as is compatible with proper consideration of the issues.

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

PRE-ACTION PROTOCOLS

5.17 Following the introduction of the Woolf reforms of the civil justice system, a number of pre-action Protocols have been approved by the Head of Civil Justice. These are designed to encourage the exchange of early and full information about the prospective legal claim, to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings, and to support the efficient management of proceedings where litigation cannot be avoided.\(^{18}\) In relation to housing, two specific protocols have been introduced: for housing disrepair cases; and for housing possession cases.

Pre-action Protocol for Housing Disrepair Cases

5.18 The Pre-action Protocol for Housing Disrepair cases applies to civil claims arising from the condition of residential premises,\(^{19}\) including related personal injury claims.\(^{20}\) It does not apply to counterclaims.

5.19 It prescribes the steps which tenants should take before bringing a claim, for example sending an “early notification letter”, setting out specified information (details of the tenant, the defects, previous notification of the landlord, any expert the tenant proposes to instruct, relevant documents) and asking the landlord for relevant documents and information. It provides what the tenant should then put in a “letter of claim”, and suggests the information which the landlord should provide in their response. It gives guidance on the instruction of experts. Specimen letters are appended to the protocol.

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\(^{18}\) Civil Procedure Rules, Practice Direction – Protocols, para 1.4.

\(^{19}\) For example claims under s 11 of the Landlord and Tenant Act 1985, s 4 of the Defective Premises Act 1972, common law nuisance and negligence, and claims under the express terms of a tenancy agreement or lease, but not claims brought under s 82 of the Environmental Protection Act 1990, which are heard in the magistrates’ court: see para 3 of the protocol.

\(^{20}\) The housing disrepair pre-action protocol can be found on the DCA website at http://www.dca.gov.uk/civil/procrules_fin/contents/protocols/prot_hou.htm (last visited 23 May 2007).
Pre-action Protocol for Possession Claims Based on Rent Arrears

5.20 The Pre-action Protocol for Possession Claims Based on Rent Arrears applies to residential possession claims by social landlords based solely on rent arrears.\(^{21}\) It does not apply to claims in respect of long leases or where the tenant has no security of tenure (such as assured shorthold tenancies), or claims by private landlords.\(^{22}\) It reflects good practice guidance given to social landlords in the collection of rent arrears.

5.21 The Rent Arrears Protocol emphasises early and frequent contact with tenants, when arrears arise, and after service of any statutory notices. Landlords should advise tenants to seek help from citizens advice bureaux, debt advice agencies or other appropriate agencies. Landlords are advised to take specific steps where the tenant is vulnerable. The protocol encourages landlords to try to agree affordable sums for the tenant to pay towards arrears, and to postpone any court proceedings if the tenant complies with such an agreement. If proceedings are brought, the landlord should tell the tenant when the hearing is and advise them to attend.

5.22 The protocol requires landlords to assist tenants with housing benefit claims, to make contact with the housing benefit department, and to work with the tenant to resolve housing benefit problems. It provides that rent arrears possession proceedings should not be started against a tenant who can demonstrate that he has (a) provided the local authority with all the evidence required to process a housing benefit claim; (b) a reasonable expectation of eligibility for housing benefit; and (c) paid other sums due not covered by housing benefit. A landlord who brings proceedings should tell the tenant what is known of the tenant’s housing benefit position.

Alternative dispute resolution in the protocols

5.23 Both protocols provide that the parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation. They warn that both parties may be required by the court to provide evidence that alternative means of resolving their dispute were considered, and that “Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still actively being explored.” The Disrepair Protocol gives as examples of alternative dispute resolution the following: discussion and negotiation; early neutral evaluation by an experienced third party; mediation; for council tenants, local authority repairs, complaints and or arbitration procedures and the right to repair scheme for small urgent repairs of less than £250 in value; complaints to the appropriate ombudsmen; and for private tenants, local authority environmental health officers. In Part 7, we discuss in a little more detail possible links between the tribunal and other forms of dispute resolution such as mediation.

\(^{21}\) The rented housing possession pre-action protocol can be found on the DCA website at http://www.dca.gov.uk/civil/procrules_fin/contents/protocols/prot_rent.htm (last visited 23 May 2007).

\(^{22}\) The British Property Federation in their response to the Issues Paper were strongly opposed to the protocol applying to private landlords.
Respondents’ views on pre-action protocols

5.24 Respondents to the Issues Paper strongly supported the pre-action protocols. Indeed some, for example Paddington Law Centre, thought we had failed fully to appreciate their value. Many, including the Bar Council and Shelter, argued that these protocols were either already proving effective (in reducing the number of disrepair cases coming to court) or that they should be given more time to bed in, before more substantial changes to the housing dispute resolution system were proposed.

5.25 Although these arguments have not persuaded us to refrain from making the provisional proposals made in this paper\(^{23}\) – since however successful the protocols, they do not deliver the advantages we think arise from moving more housing cases from the court into the new tribunals system – nevertheless the support from respondents for the protocols leads us to propose that pre-action protocols for rent arrears possession and housing disrepair cases should be retained, even if these cases are heard by the tribunal instead of by the county court.

5.26 Some respondents also suggested that the pre-action protocols contain weaknesses. The Disrepair Protocol states that:

> Should a claim proceed to litigation, the court will expect all parties to have complied with the Protocol as far as possible. The court has the power to order parties who have unreasonably failed to comply with the Protocol to pay costs or be subject to other sanctions.\(^{24}\)

Similarly, paragraph 14 of the Rent Arrears Protocol states that if the landlord unreasonably fails to comply with the terms of the protocol, the court may impose an order for costs, and in cases, other than those brought solely on mandatory grounds, adjourn, strike out or dismiss claims. Tenants are warned that if they unreasonably fail to comply with the terms of the protocol this may be taken into account when the court is considering whether it is reasonable to make possession orders.

5.27 Both the Social Housing Law Association and the Housing Committee of the Civil Justice Council gave examples of what they saw as the limitations of the protocols.

5.28 Are any amendments required to the Pre-action Protocols on Housing Disrepair and Possession Claims for Rent Arrears to better secure proportionate dispute resolution in housing cases?

5.29 Should any further pre-action protocols be developed to help secure proportionate dispute resolution in other housing cases?

\(^{23}\) Summarised in para 1.4 above.

\(^{24}\) See also Civil Procedure Rules, Practice Direction – Protocols, paras 2.1 to 2.4.
INFORMALITY

5.30 Informality has traditionally been presented as a characteristic and advantage of tribunals, when compared with courts.25

5.31 Academic research looking at tribunals and users’ perceptions of them suggests that such statements about the informality of tribunal procedures should not be taken at face value. Studies of different tribunals have shown that:

(1) there are problems defining what is meant by informality;

(2) in any event, not all tribunal procedures are informal;

(3) informality may not assist litigants, particularly unrepresented litigants, in bringing a case before a tribunal.26

5.32 It has also been argued that the implicit assumption that courts are more formal than tribunals should not be overstated. Thus Bradley and Ewing noted that procedures in a tribunal are not always less formal than in a comparable court, such as the county court’s informal small claims track.27

5.33 We accept that the mere fact that lawyers may regard a tribunal as less formal than a court does not make the tribunal any less daunting to those who participate in its procedures.

5.34 We also accept that informality must not imply that proceedings should have no structure at all; indeed lack of structure can be a significant cause of injustice if parties are not enabled to put their case fully or if time is spent considering issues that are irrelevant to the resolution of the dispute.28

5.35 In our Issues Paper we asked what degree of formality was appropriate in adjudicating housing disputes, and whether this should vary depending on the nature of the proceedings. We did not get a large response to this question. Comments were made that some cases needed to be dealt with greater formality than others. There seemed to be support for the proposition that there should be procedural flexibility.

5.36 We conclude that if rented housing possession and disrepair claims are determined by a First-tier Tribunal, the formality of its proceedings should vary according to the type of dispute. While the skill of the individual tribunal in managing hearings is crucial, the procedural rules also need to allow appropriate sanctions to be imposed in the event of non compliance.


28 See, for example, S Blandy, I Cole, C Hunter, D Robinson with R Inniss and S Kane, Leasehold Valuation Tribunals: Extending the Remit (2001), pp 50 to 52. The majority of leaseholders who had had a hearing before the Leasehold Valuation Tribunal thought that the procedure was too informal.
How can the procedure rules governing tribunals in housing cases secure the appropriate level of formality/informality for their proceedings?

CASE MANAGEMENT, DIRECTIONS AND PRE-TRIAL REVIEWS

The Civil Procedure Rules placed a great emphasis on active case management by judges. Effective case management powers are an important means for any court or tribunal to ensure the progress of a case and prevent delay. They contribute to securing more prompt and effective dispute resolution, and may reduce costs and increase efficiency. In our Issues Paper, we asked respondents what case management powers should be available in the context of housing adjudication, and what sanctions should apply where procedural rulings were ignored. The Civil Justice Council, in its response stated that “the importance of case management as a means of resolving disputes cannot be over-stated.”

Current powers to make directions and hold pre-trial reviews

The Civil Procedure Rules allow a court hearing a possession claim to decide the claim or give case management directions. Other provision for directions in the Civil Procedure Rules depends on the track to which the claim is allocated, and in relation to counterclaims.

Procedure regulations for Leasehold Valuation Tribunals may include provision for the holding of a pre-trial review (on the application of a party to proceedings or on the motion of a leasehold valuation tribunal). A Leasehold Valuation Tribunal can hold a pre-trial review in respect of an application to it, either on its own initiative or at the request of a party. The parties must be given at least fourteen days notice of the date, time and place. At the pre-trial review, the tribunal shall give any direction that appears to it necessary or desirable for securing the just, expeditious and economical disposal of proceedings; endeavour to secure that the parties make all such admissions and agreements as ought reasonably to be made by them in relation to the proceedings; and record in any order made at the review any such admission or agreement or any refusal to make such admission or agreement. The functions of the tribunal at or in relation to the pre-trial review can be exercised by a single tribunal member.

29 Civil Procedure Rules, r 55.8(1)(b).
30 Civil Procedure Rules, Part 27 and Practice Direction – Small Claims Track govern small claims: r 27.4 makes certain standard directions and r 27.6(1) refers to preliminary hearings; Part 28 and Practice Direction 28 – the Fast Track refer to directions in fast-track cases, and Part 29 and Practice Direction 29 – The Multi-track refers to directions in multi-track cases.
31 Civil Procedure Rules, Part 20, and Practice Direction – Counterclaims and Other Additional Claims, para 5.3.
5.41 The Residential Property Tribunal can give such directions as it considers necessary or desirable for securing the just, expeditious and economical disposal of the proceedings or any issue raised in or in connection with them. ProcEDURE regulations can include provision for evidence, supply of information and disclosure and witnesses. Although the enabling powers refer to pre-trial reviews, the regulations use the term “case management conference” (defined as meaning a pre-trial review or any other meeting held by a tribunal for the purpose of managing the proceedings in respect of an application). A Residential Property Tribunal (or a single qualified member) may hold a case management conference. At the case management conference the tribunal may order the parties to take such steps or do such things as appear to it to be necessary or desirable for securing the just, expeditious and economical determination of the application. The regulations specifically provide that the case management conference may be postponed or adjourned, and that a party may be represented at it. The tribunal has other case management powers, for example to extend or, where the parties agree, reduce time limits. The regulations also provide for parties to ask the tribunal to make directions.

Case management under the Tribunals, Courts and Enforcement Bill

5.42 The Tribunals, Courts and Enforcement Bill does not contain a specific reference to directions, other than practice directions to be made by the Senior President or Chamber Presidents. There are powers to make Tribunal Procedure Regulations relating to evidence, witnesses and attendance, and to confer on each of the First-tier and Upper Tribunals “such ancillary powers as are necessary for the proper discharge of its functions.” We assume these embrace the provision of case management powers.

33 Housing Act 2004, s 230(2).
34 Housing Act 2004, sch 13, para 5.
40 Tribunals, Courts and Enforcement Bill, cl 23.
41 Tribunals, Courts and Enforcement Bill, sch 5, para 10.
42 Tribunals, Courts and Enforcement Bill, sch 5, para 16.
Respondents’ comments

5.43 Respondents in some cases recommended fairly traditional case management powers. For example Shelter told us that:

In many cases, the formal rules of evidence, and ancillary directions such as those for witness statements and disclosure of documents, are a necessary pre-requisite of a fair hearing. But it should also be recognised that the somewhat ossified framework of the Civil Procedure Rules is not ideally suited to problem solving, and judges may need the freedom to make a wider range of orders if they are to concern themselves with any underlying problems.

5.44 Lancelot Robson, an RPTS chairman, commented that:

The most effective case management tool is to fix a hearing date and a timetable for the production of evidence. The second most effective tool is to refuse all but the most compelling requests for adjournment, and let it be known in advance that that is the policy. The parties will then turn up with a reasonable amount of the evidence, although maybe slightly disgruntled.

5.45 District Judge Russell Campbell suggested a model for pre-trial reviews drawing on family law litigation.

In county court ancillary relief cases, the parties are required to narrow the issues in dispute and focus on resolution by means of First Appointments and Financial Dispute Resolution (FDR) hearings. The aim is to achieve at least “heads of agreement” which will promote settlement and a proportionate use of court time if a contested hearing cannot be avoided. A judge who hears an FDR hearing is not involved in a subsequent substantive hearing in the same case. A similar approach might be useful in housing cases, where there may be great scope for the parties to narrow the issues in, for example, disrepair cases (how extensive is the disrepair? What steps are required to remedy a defect? What will the practical arrangements be to minimise loss, disruption and expense?) A specialist body adjudicating in housing cases could integrate such an approach into its rules of procedure.

5.46 As we have noted above, the RPTS tribunals can hold pre-trial reviews (case management conferences). Blandy and her colleagues in their study of the Leasehold Valuation Tribunal noted that practice as to when a pre-trial review would be held varied from one region to another.43 Views of those surveyed were fairly evenly split as to whether the pre-trial review had been helpful, with applicants generally more positive than respondents. Pre-trial reviews could provide a useful opportunity for the parties to meet, clarify the details of the dispute, and inform themselves about tribunal procedures. This did not happen in

every case, and there were criticisms about the time taken by pre-trial reviews and their failure to clarify the issues.

5.47 Some of those surveyed shared the concerns of our Issues Paper respondents about the failure by the tribunal to take firmer steps where directions had not been complied with. Where one or other party failed to attend the pre-trial review, this limited the potential benefits.44

5.48 Pre-trial reviews are unlikely to be appropriate in all cases. There is a balance to be struck between saving money and time by narrowing the issues in dispute at an earlier stage, and danger that a preliminary hearing might prolong, or increase the cost of litigation. We think that the tribunal determining housing possession and disrepair cases ought nevertheless have power to hold pre-trial reviews (although whether a full oral hearing requiring the attendance of the parties at the hearing venue is necessary in every case is a separate question).

5.49 Some respondents thought that case management powers going beyond the traditional pattern of directions were needed. The Civil Justice Council suggested allowing the court or tribunal:

(1) to incorporate into its deliberations, cogent representations based on the client’s instructions, and made “on behalf of a party by solicitors or advisers who are aware of the evidential and legal issues, together with (where applicable) factors which may affect the court’s exercise of its discretion”;

(2) actively seeking evidence such as medical reports, which for whatever reason the parties have been unable to obtain;

(3) requiring third parties such as the chief housing benefit officer or the Department of Work and Pensions to provide information directly to the court; or

(4) referring specific questions to another person or agency such as the monitoring officer of a public body or the Ombudsman service, with a requirement that they report back to the court.

5.50 What case management powers do consultees think are needed for the proportionate resolution of housing cases? In particular, do consultees agree with the suggestions of the Civil Justice Council? Do consultees have views on how case management powers can be exercised effectively? Are other powers needed to secure the proportionate resolution of housing disputes?

5.51 Several respondents suggested that there should be greater scope at the pre-trial stage for the tribunal or court to suggest, recommend or require the parties to consider or use a means of alternative dispute resolution, such as mediation or early neutral evaluation. We discuss links between the tribunal and other forms of dispute resolution such as mediation in Part 7 of this paper.

Sanctions for non-compliance

5.52 A number of respondents commented that case management decisions and directions were not effectively enforced. For example, the Association of Residential Managing Agents told us that “The LVT should be given power to dismiss cases and award costs if parties do not comply with directions.” The availability of costs and case dismissal penalties for non-compliance with procedural directions was also considered appropriate for other housing cases. Anthony Collins Solicitors thought that there should be “cost penalties for publicly funded litigants – tougher penalties for non compliance as currently exist but specially stated in directions order.” Anthony Essien of the Leasehold Advisory Service (LEASE) thought that if procedural rulings are ignored the sanction should be “potentially, dismissal of claim/defence, but this must be used as and when the case merits and by no means as an automatic sanction.”

5.53 Leasehold Valuation Tribunals and Residential Property Tribunals do have power to dismiss, or allow, the whole or part of an appeal or application in a case where a party to the proceedings has failed to comply with a requirement imposed by regulations, or an order of the tribunal, relating to the supply of information and documents, disclosure or inspection of documents, requiring persons to attend or give evidence and produce documents. They may also dismiss applications, appeals or transferred proceedings, in whole or in part, on the ground that they are (a) frivolous or vexatious or (b) otherwise an abuse of process. As some respondents appeared unaware of these powers, it suggests that they may be used infrequently.

5.54 Respondents recognised that the use of these discretionary powers to enforce case management directions raised difficult issues. Lancelot Robson commented that:

Should we apply draconian procedural sanctions, or determine the case on its merits?

Most courts and tribunals already have powers to exclude evidence and strike out cases for procedural default, but the sanction has to be proportionate. In cases of serious default the innocent party always has the right to make an application to strike out the other side’s case, but rarely do so.

… [A]dopting a policy of “zero tolerance” is likely to breach Article 6, unless the party concerned has a history of default.


Similarly, Tessa Shepperson told us:

This is a difficult one as it is very unfair on parties who obey procedural rulings if the other party is seen to flout them with impunity. On the other hand it can be unfair for someone to lose an otherwise good case simply on a procedural basis. I think that some sort of sanction should be imposed however, as otherwise there is little incentive for parties to comply. These could include costs orders, earlier dates for possession, heavier interest rates for payments.

We agree that there should not be an automatic dismissal of claims or defences in the event that case management directions are not complied with. However, tribunals should be more willing than at present to exercise their discretion to dismiss cases or appeals in the event of non-compliance. Costs penalties may also be appropriate, but may depend on the general costs rules for the tribunal. In Part 8 of this paper we discuss the costs rules which should apply to housing cases before the tribunal.

Do consultees agree that automatic dismissal of claims or defences should not be permitted where case management directions are not complied with? Do consultees agree that tribunals should be more willing to exercise their discretion to dismiss cases on this ground?

ORAL HEARINGS AND DETERMINATIONS ON THE PAPER

In the Issues Paper, we asked to what extent can housing disputes be adjudicated without the need for oral hearings.

Current provision for matters to be dealt with without a hearing

Where a case in the county court is proceeding on the small claims track, the court may, if all parties agree, deal with the claim without a hearing.47 Housing disrepair claims for up to £1,000 can be dealt with in the small claims track.

Accelerated possession proceedings for assured shorthold tenancies

Claims for possession for dwellings let on assured shorthold tenancies, where the landlord relies on the ground for possession in section 21 of the Housing Act 1988 (giving the tenant at least two months written notice that the landlord requires possession), can be brought using the accelerated possession procedure.48 Only a claim for possession can be brought using this procedure.49

47 Civil Procedure Rules, r 27.10.
48 Civil Procedure Rules, r r 55.11 to 55.19, and Practice Direction 55, s II.
49 Civil Procedure Rules, r 55.2(1)(b).
5.61 If the judge is satisfied that the claim form was served and the claimant has established an entitlement to recover possession, the judge will make an order for possession, without holding a hearing.\(^{50}\) A judge who is not satisfied as to those matters, will either strike out the claim (if the claim form discloses no reasonable grounds for bringing it),\(^ {51}\) or direct that a date be fixed for a hearing and give any appropriate case management directions.\(^ {52}\)

5.62 If the defendant seeks postponement of possession on the ground of exceptional hardship under section 89 of the Housing Act 1980, the judge may direct a hearing of that issue.\(^ {53}\) In our report Renting Homes, we recommended retention of the accelerated possession procedure.\(^ {54}\)

**Tribunals**

5.63 A Leasehold Valuation Tribunal can determine applications without an oral hearing, if it has given the parties at least 28 days notice that it plans to proceed without one, and neither the applicant or respondent has made a request to the tribunal to be heard. The tribunal shall then invite written representations, set time limits and tell the parties how it intends to determine the matter without an oral hearing. At any time before the application is determined, the applicant or respondent can ask to be heard, or the tribunal can decide to hold a hearing.\(^ {55}\)

5.64 A Residential Property Tribunal has slightly broader powers.\(^ {56}\) It may determine an application (other than an application for an urgent interim management order\(^ {57}\)) without an oral hearing if it has given the parties not less than fourteen days written notice that it plans to do so. Unlike a Leasehold Valuation Tribunal, the Residential Property Tribunal is not required by the regulations specifically to invite written representations. At any time before the application is determined, the applicant or respondent can ask to be heard, or the tribunal can decide to hold a hearing. If one of the parties requests an oral hearing, the tribunal must give notice of one. A determination without an oral hearing may be made in the absence of any representations by the respondent. A single panel member may decide whether an oral hearing is or is not appropriate.

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\(^{50}\) Civil Procedure Rules, rr 55.16(1) and (2) and 55.17.

\(^{51}\) Civil Procedure Rules, r 55.16(1)(c).

\(^{52}\) Civil Procedure Rules, r 55.16(1) (b).

\(^{53}\) Civil Procedure Rules, r 55.18.


\(^{57}\) See the Housing Act 2004, s 102 for applications for interim management orders.
Tribunals, Courts and Enforcement Bill

5.65 Tribunal Procedure Rules to be made under the Tribunals, Courts and Enforcement Bill may also make provision for dealing with matters without a hearing, or as respects allowing or requiring a hearing to be in private or in public.58

Oral hearings and paper determinations – research evidence

5.66 A number of studies suggest that where appellants are given a choice of an oral hearing as opposed to a determination on the papers, their chances of succeeding in their appeal are higher at an oral hearing.59 Higher success rates have been explained by a number of factors.

1. The ability to give credible oral evidence at the hearing.
2. Legal (or other) representation at the oral hearing.
3. Longer to prepare the case.

The authors of one study noted, however, that it was not possible to assess whether appellants who opted for an oral hearing had stronger cases than those who selected determination on the papers.60

5.67 Paddington Law Centre, in its response to our Issues Paper, cited more recent research.

It is salutary to consider the experience of the statistics in Disability Rights Bulletin Spring 2006 which demonstrate the importance of appellants choosing an oral hearing as against paper representations in SSATs and DATs. For Attendance Allowance 45.8% succeeded in oral hearing as against only 27.2% who made paper representations.

58 Tribunals, Courts and Enforcement Bill, sch 5, para 7.

With Disability Living Allowance the figures were 57.4% (oral) as against 29.5% (paper). With Incapacity Benefit (personal capability assessment) the disparity was still wider 57.8% (oral) as against only 17.8% (paper). (Based on statistics for the quarter ending June 2005).

5.68 Not long after the introduction of the accelerated possession procedure in 1993, the Government commissioned research into its use and effectiveness. The research, carried out in late 1995 and early 1996, showed that eight out of ten applications under the procedure were eventually granted an order for possession, two thirds without a hearing. Possession orders under the accelerated procedure were nearly always obtained more quickly than they would have been under the ordinary procedure and consequently, at less cost to landlords, tenants and the judicial system. Where there was no need for a hearing, 80% of cases reached a conclusion in six weeks. Six out of ten cases granted an order for possession following a hearing, took less than ten weeks from start to finish. Many landlords experienced subsequent delays and incurred further costs because tenants did not leave by the date specified in the possession order.61

Council on Tribunals consultation on oral hearings

5.69 In 2005 the Council on Tribunals published a consultation paper “The Use and Value of Oral Hearings in the Administrative Justice System”. The Council has also published a summary of consultation responses on its website.62 Most respondents thought that oral hearings were more user-friendly than other dispute resolution processes, and that users find it easier to express themselves through speaking. However, most respondents who answered thought that oral hearings inhibit at least some users, and that they create difficulties in securing attendance and appropriate venue and have resource implications. A majority of respondents also found, however, that oral hearings were more legalistic and daunting than other dispute resolution processes.

5.70 Most respondents thought oral hearings increased the cost of determining a dispute. There was no consensus as to whether oral hearings are more or less time consuming than other dispute resolution processes. Most respondents who answered also thought that an oral hearing could lengthen the overall resolution process from initiation to decision. Oral hearings were believed to increase the potential for delay and adjournment.

5.71 Most respondents thought that oral hearings are more effective than other processes in (a) dealing with complex matters; (b) dealing with matters where evidence and credibility are in question; and (c) uncovering evidence not otherwise disclosed. They were asked about the features of a dispute which should indicate the need for an oral component or oral hearing – responses included where the relevant facts are not agreed, where there are complex facts


or complex legal issues, where there are issues at stake of high importance to the participants, where medical issues indicate the need for an oral hearing or where it is necessary to expose the dispute to public gaze.

5.72 Respondents to the Council’s consultation paper thought that an oral hearing should not be held where all parties choose a paper hearing; where the cost is disproportionate to the dispute; or to determine legal issues better suited to a paper hearing.

5.73 A large minority of consultees thought that the opportunity to have a day in court was important to users. Consultees were divided as to whether the “day in court” desire could be satisfied only through an oral hearing. Most respondents who answered also thought that oral hearings were the best way in which to ensure that justice is perceived to be done by the participants themselves and the public at large.

The Issues Paper – respondents’ views on the need for an oral hearing

5.74 The value and necessity of an oral hearing divided the respondents to our Issues Paper: those from the advice sector on the tenant side were more likely than landlords and their advisors to emphasise the importance of oral hearings, particularly in possession cases. Paddington Law Centre stated that “any systematic withdrawal of certain classes of case to paper only hearings will result in significant injustice.” Similarly the Advice Services Alliance did not believe that housing (or any other serious) disputes can or should be adjudicated without the need for oral hearings.

5.75 Those who favoured oral hearings for housing cases gave a variety of reasons:

(1) Where defendants to possession proceedings face a number of problems, it may be more difficult for them to get their case across on paper. (National Union of Students).

(2) Attendance at court can provide an opportunity for a person in need of assistance to get legal advice on their situation for the first time. In addition, where appropriate, referral into the system of advice provision may follow. (National Union of Students).

(3) An oral hearing may be necessary to check on the opponent’s claims or challenge inaccurate statements or omissions from the claim form. (Paddington Law Centre).

(4) A fuller picture of the facts may be gained at an oral hearing. Lancelot Robson noted that “It is also the experience of most RPTS members that their view of the case gained from the papers often changes during the hearing. I suggest that most housing law disputes need an oral element, particularly when factual issues are in dispute.”

(5) Oral hearings are invaluable to secure the attendance of tenants and thereby deal with the problems the tenant is facing. Dealing with the matter on paper is likely to result in the full facts not being before the court or tribunal, and consequently an injustice might result. (The Association of District Judges).
Where a matter is defended, an oral hearing benefits witnesses who can see that action has been taken. (Anthony Collins solicitors).

Where a civil right or obligation is being determined it is a requirement of Article 6 of the European Convention on Human Rights that there must be a hearing, although this can be waived where both parties agree that the case can be determined without an oral hearing. (The Law Society and the Law Centres Federation referring to the Advice Services Alliance’s response to the Council on Tribunals consultation).

However, some respondents questioned the need for an oral hearing in all possession cases. These included the Association of District Judges who noted that “housing disputes are already adjudicated without an oral hearing under the accelerated possession procedure”; Tessa Shepperson, who suggested that “in cases where it looks as if it is inevitable that an order for possession will be made (eg on s 21 grounds) the papers could be passed straight to the Judge to make an order which could be subject to being set aside if the defendant puts in a defence within 14 days”; and Clarke Willmott solicitors, who asked

Is there really a need for claims for possession based on rent arrears to be dealt with by way of an oral hearing? Many applications to suspend warrants for possession can, in our opinion, be dealt with on paper.

We accept that in many cases an oral hearing may be better than a determination on the papers, in terms of securing greater accuracy (if the decision is taken on the basis of more evidence which has been subject to greater scrutiny); participation and equality of arms; and transparency. However, we share the concerns of those responding to our Issues Paper, and to the Council on Tribunals Consultation Paper, about the scope for an oral hearing contributing to greater delay and higher costs.

We remain to be convinced that an oral hearing would necessarily be justified in every single possession, disrepair or homelessness statutory appeal or housing or homelessness judicial review case. The idea that oral hearings should not be necessary in all cases, save where the defendant evinces serious opposition, is carried forward in the draft Bill published with the Law Commission’s recent report on Termination of Tenancies for Tenant Default.

We recognise that article 6 of the European Convention on Human Rights may limit the extent to which the parties can be prevented from having an oral hearing where their civil rights, including the article 8 right to respect for home, are at stake.

Ideally a party’s chances of success should not depend on whether they choose an oral or paper determination. However, research shows that this may not be the case. We nevertheless think that individuals should have the choice of a process that would take longer, but which might give them a higher chance of success (an oral determination), or a quicker process, where their chances of success might be lower (a determination on the papers). It would be important for parties to be informed about differential success rates. Consent to determination on the papers should be informed consent.

We conclude that the practical way forward is for each tribunal to have the option of a paper-only track, with the parties able to choose. The Tribunals Service should have considerable scope both to pilot and evaluate different options for different types of case.

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

USE OF INFORMATION TECHNOLOGY

In the Issues Paper, we asked whether greater use of information technology would afford users greater choice in the ways hearings are conducted.

The regulations governing Residential Property Tribunals specifically allow the tribunal to permit the use of telephone, video link, or any other method of communication to make representations to the tribunal, or for the purposes of a case management conference or hearing.

Although the procedure regulations governing the Leasehold Valuation Tribunal do not specifically provide for the use of telephone or video link, the RPTS has operated a pilot scheme in London for telephone conference pre-trial reviews in service charge cases where the parties are legally represented. Although not extensively used, where they had been the RPTS thought that these cases had been very successful and that there was greater scope for use of this procedure. The RPTS believed that telephone hearings would save both the tribunal and the parties’ time, but that they may not be suitable where parties were not legally represented, or in larger cases where the technology would not allow more than six phone calls to be connected in a phone conference. (Telephone conference proceedings raise an issue relating to the recording of the hearing (which might undermine an informal atmosphere), and the possible problems for any appeals if there was not an adequate transcript).


Discussion at an RPTS User Group meeting on 22 June 2006.
**Video technology**

5.86 A few respondents referred to the use of video technology. The RPTS mentioned providing videos to show parties what the tribunal hearing would involve. Pat Reddin, a building engineer suggested video virtual visits of premises (someone going round first and video recording the condition of the property, with the recording shown at the tribunal hearing).

5.87 Another possibility is to use video links to connect parties with adjudicators remotely, so that they can experience the advantages of personal hearings but without the expense and inconvenience of travel. Moreover, video links could also provide an opportunity for local authorities to participate more actively in hearings. It would balance up the process in personal appeals if, through video links, local authorities had the opportunity to answer or refute points made in person by appellants.66

5.88 At the same time, concerns about the use of video technology were expressed in a response to our Issues Paper.

5.89 As with oral hearings, the creation of the Tribunals Service will create the opportunity for new procedures to be piloted and evaluated.

5.90 Do consultees think that there is greater scope for the use of video conferencing, for hearings, or “virtual visits” to premises the subject of a dispute?

**Online filing of claim forms and other pleadings**

5.91 Information technology could also be used to allow parties to complete forms and file pleadings online. Her Majesty’s Court Service already offers “Money Claims Online” and “Possession Claims Online” services.67 These allow claim forms and defences to be completed on a website, and submitted electronically, with relevant court fees paid online by debit or credit card.

5.92 The Possession Claims Online service was introduced nationally on 30 October 2006, after a pilot scheme in Wales.

(1) Possession claims can be brought electronically in respect of rent arrears and mortgage arrears, where there is an address for service in England and Wales, and where the claimant can provide a postcode for the property to be recovered, and has an e-mail address.68

(2) The particulars of claim must include a history of the rent or mortgage account with the dates and amounts of payments due and payments made, and a running total of the arrears.


68 Civil Procedure Rules Practice Direction – Possession Claims Online, para 5.1
(3) An acknowledgement of receipt is sent to the claimant when an online claim form is received. When the court issues the form, it will serve a printed version and a defence form on the defendant.

(4) A defendant can choose to complete an online defence form, and pay the appropriate fee for any counterclaim electronically, instead of completing a paper form.

(5) There is an electronic messaging service on the Possession Claims Online website which the parties can use to communicate with the court (but not to send court forms or attachments).

(6) Parties can make online applications in relation to possession claims. Where the court has made an order for possession in a claim started online, and the claimant is entitled to the issue of a warrant of possession without requiring the court’s permission, the claimant can complete an online request form for a warrant of possession and pay the fee on line.

(7) Where the court has issued a warrant of possession, the defendant can apply electronically for its suspension, provided that the application is made at least five clear days before the appointment for possession and the defendant does not need the court’s permission to make the application.

(8) Claimants and defendants can keep an eye on the status of their claim, judgment and warrant online.

(9) “High volume” users, such as building societies and banks and housing associations could use direct debit to pay the court fees, and can connect their computer systems to input information into the Possession Claims Online system more easily.

5.93 The Minister, Vera Baird, in a recent speech, stated that in future most claims will be issued electronically and only where it is absolutely necessary will claims be made over the counter on paper: “online will be the norm. Manual processes will be the exception.” She thought that if a majority of civil business could be issued online, the cost of running the courts would fall significantly, as would court fees. She suggested there might be a cut of up to 25-30% in the fee to issue a claim by Possession Claims Online, to encourage use of the online process.69

5.94 We conclude that, whether or not rented housing possession claims were in future heard by a tribunal, the Possession Claims Online system should continue to operate. We think that it could be extended beyond rent arrears possession claims to include, for example, claims brought by landlords using the accelerated possession procedure for dwellings let on assured shorthold tenancies. We would

be interested in consultees’ views as to the scope for use of electronic filing of pleadings in other cases, for example disrepair cases, or homelessness statutory appeals and judicial review applications. Are there certain types of case for example, urgent claims or appeals, where these methods could not be used?

5.95 Do consultees agree that more housing claims, defences and other applications should be made electronically (in an extension of Possession Claims Online)?

Other uses of IT – the Parking Appeals Service

5.96 Another example of the use of information technology in an appeals system is the Parking Appeals Service (which hears appeals against parking tickets). The system is largely paper-based since, in most cases, neither local authorities nor appellants attend hearings. Appeals are made on paper forms issued by the local authority, which, along with any evidence from the local authority, are scanned into the computer by the contractor operating the system, EDS, on receipt. S –

5.97 Cases are assigned a reference number and are placed in the queue, to be dealt with within a set period of time (currently 35 days). If the appellant has asked for a personal (oral) hearing, they indicate what times and dates suit them. Administrative staff arrange a suitable date and time for the hearing. Determinations on the papers are automatically scheduled by the computer to fill gaps between personal hearings. This facilitates efficient workflow management. The technology automatically issues a notification letter to each appellant confirming the date of their hearing and provides the chief adjudicator and clerk with up-to-the-minute workflow information to enable them to schedule extra adjudication sessions if any backlogs are anticipated.

5.98 In personal hearings the adjudicator and applicant sit opposite each other with a computer in between. When the adjudicator has made his decision he simply tells the applicant and then begins to type it into the computer, along with his reasons. Personal appellants collect their copies of decision notices from reception on their way out. The computer automatically sends a copy of the decision to the applicant and to the relevant local authorities. Each evening bundles of decisions are sent to the local authority parking units along with summary information.


5.99 Research suggests that the Parking Appeals Service model would be most appropriate for tribunals with a large caseload; where most of the evidence is in documentary form; where documents must be transferred between agencies; and where the nature of decisions is fairly straightforward.\textsuperscript{76} It is also possible to imagine that certain classes of possession proceedings might be so dealt with.

A more radical approach – the “A2J” prototype

5.100 A more radical use of information technology to make the court system more user friendly for litigants in person has been proposed in a research project in the United States. The project aimed to identify the major barriers to access to justice for unrepresented litigants due to court procedures and administrative requirements (for example the scarcity of affordable legal services, the inherent complexity of the court system and restrictions on litigants such as lack of time or energy, language barriers), and redesign court processes to remove those barriers and provide litigants in person with efficient and effective access to the justice system. There was a strong emphasis on the use of information technology. An internet based prototype was then developed for implementation in the courts. After initial user testing, the developers learned that text-based information was often overwhelming, so they incorporated a lot of graphical information.\textsuperscript{77}

5.101 We recognise that the tools they suggested were part of a research project. The researchers stated that they did not just concentrate on ideas that were immediately feasible, but also demonstrated ideas that may be possible in the future with technological development. They gave a lower priority to cost and political viability than to the quality of the ideas presented.

5.102 We accept that the costs of developing and implementing the “system elements”, and providing the necessary IT infrastructure within the courts, would be significant.

5.103 We also accept that not all of these tools would be appropriate in all housing cases, especially where the unrepresented litigant is a defendant who only engages with the court process at the very late stages of a possession claim, and who may well not have the general or technological literacy to use them.

5.104 A number of those responding to the Issues Paper, for example Paddington Law Centre, doubted that telephone advice provision could replace face to face advice for many litigants, given the need to look at documents such as tenancy agreements and landlords’ notices. Electronic methods of educating and advising litigants may have similar limitations.


5.105 Electronic determination of disputes may also have limitations. One respondent thought that “determining disputes online sounds like the road to perdition”.

5.106 We nevertheless think that electronic methods of advice provision, legal education, filing of court or tribunal applications, and possibly even online mediation will have a role within the dispute resolution system. Such methods might be of more value to small private landlords bringing possession claims, or responding to disrepair claims.

5.107 We would be interested in consultees’ views as to whether and how these, or any other innovative technological developments, could contribute to the proportionate resolution of housing disputes in England and Wales.

5.108 Are there other information technology tools (such as elements of the American “A2J” prototype) that could be used to promote more proportionate dispute resolution in housing cases?

**SMALL CLAIMS LIMIT**

5.109 We did ask in the Issues Paper whether the small claims limit in the county court should be increased from £1000 in housing disrepair cases. There was some support, although others were strongly opposed. We do not propose to discuss this issue further in this Paper as we are proposing that housing disrepair cases be determined by the First-tier Tribunal. The Civil Procedure Rules small claims procedure would not therefore apply.
PART 6
LEGAL ADVICE AND REPRESENTATION IN
HOUSING DISPUTE RESOLUTION

INTRODUCTION

6.1 In our Issues Paper we set out our preliminary ideas about how improved advice, at the appropriate time, could lead to the more proportionate resolution of housing problems and disputes. We have already said that we are doing further work to explore how those preliminary ideas may be developed into practical reality.¹ In this Part we look more specifically at the provision of advice and assistance in the context of the formal resolution of housing disputes. Consultees are asked whether they agree that it would be inappropriate for tribunal staff to advise on the merits of cases, and whether independent advice should be provided at all tribunal venues hearing housing cases.

6.2 We do not see it as part of our remit to develop detailed proposals. In any event, with policy currently undergoing fundamental review by the Legal Services Commission, there is considerable uncertainty about what the details of the Community Legal Service will look like in the coming months and years. In particular, what the balance will be between funding for advice and assistance, and funding for representation is currently very uncertain.

6.3 Rather, as with the procedural matters considered in Part 5, we discuss the principles on which that policy should be based, with the view of ensuring that, as far as practicable, the values of fairness and equality of arms are met.

6.4 We seek consultees’ views on whether there should be restrictions on landlords’ representation in tribunal hearings, and on the use of conditional fee agreements in housing cases.

6.5 One issue we make clear at the outset. Current legal aid policy assumes that, for the most part, legal aid is not available before tribunals. Our reading of the responses from many of those who do not support the transfer of housing cases from the court to the tribunal is that they are based, at least in part, on a fear that legal aid will not be available before tribunals. We certainly do not regard it as inevitable that the current use of legal aid funds, as between courts and tribunals, would remain the same if our provisional proposals on jurisdiction are agreed.²

6.6 We welcome the comment from the Legal Services Commission, in its response to the Issues Paper, that “Currently there is a bar on legal aid in most Tribunal proceedings, but this policy can be reviewed.” We would go further and argue that current policy would have to be reviewed. We ask consultees if they agree that legal aid, currently available in housing cases heard by courts, should continue to be available, if they were in future heard by a tribunal.

¹ See Part 1 paras 1.12 to 1.16.
² Our provisional proposals are summarised in para 1.4 above.
PROVISION OF ADVICE AT THE TRIBUNAL

6.7 Often the first time that a tenant against whom possession proceedings are being brought will engage with the proceedings and seek advice is on attending the court for the hearing of the possession claim, or on an application for suspension of a warrant of possession. Thus, the availability of advice at the premises where the hearing is held is important.

6.8 At present, limited advice is provided by court and tribunal staff: many county courts also have duty possession desks.

Advice provided by courts and tribunals: current policy

6.9 The Courts Charter for the civil courts states that:

We can give you forms and offer guidance on how to complete them but we cannot give you legal advice or tell you what to say. We won’t be able to say if your case is likely to succeed, or tell you what the court will decide. Leaflets on various aspects of court cases are available from any county court. We will send you the leaflet you ask for within 10 working days. Information is also available on our website www.hmcourts-service.gov.uk

We can also tell you how to get advice from a solicitor, the Citizens Advice Bureau or other relevant or useful agencies.3

6.10 The Residential Property Tribunal Service (RPTS) states on its website that:

RPTS is required to remain impartial in dealing with disputes. Although we can advise you about the procedures we follow, we cannot provide you with legal advice, nor can we provide guidance about the best way to present your case.

The RPTS in its consultation response to our Issues Paper referred to the use of introductory videos to let parties know in advance what they can expect to happen.

6.11 In Scotland, the Private Rented Housing Panel, which will from September hear private rented housing disrepair cases, has a wider role. The regulations governing the Panel’s procedure provide that:

Where a party attends a hearing and is not represented by another person, the Committee may assist that party to make the best of his or case, without advocating the course that party should take.4

Tribunals, Courts and Enforcement Bill

6.12 The White Paper which preceded the Bill explained that:


Staff at the new tribunal organisation will be able to provide advice on procedure and may be allowed to offer a view on prospects or merits but they have to be neutral, in a way that an advisor does not. They do have a role in assisting independent advisors to give accurate information about procedural options. Because the independent advisor can advise both on the options and the merits it may make more sense from the user’s point of view for both types of advice to come from the same source.\(^5\)

6.13 The Tribunals Service, in its 2006-07 business plan, referred to a pilot project for enhanced advice. (It is not clear whether this relates to the provision of advice by tribunal staff or independent advice agencies.)

The first pilot will be undertaken jointly with the Legal Services Commission to provide customers with enhanced advice. The aim of the pilot will be to develop an innovative and cost-effective mechanism for providing additional or improved information and advice to potential users, with the following objectives:

- to inform customers of the options available to resolve their dispute
- to assist customers in making a well-informed choice
- to help customers to decide whether their case is worth pursuing, and
- to support users in presenting the best possible case.

We believe the outcome of this will be fewer cases but, equally importantly, those cases will be better prepared and require fewer adjournments.\(^6\)

**Assistance from court and tribunal staff – research**

6.14 Research into the experiences of unrepresented litigants in first instance proceedings\(^7\) suggests that court staff vary in the extent of the assistance, information or advice that they provide. The researchers revealed a tension between the desire of (some) staff to assist, and their capacity to deliver, particularly in the absence of appropriate training. There was also a tension between the need to see that substantive justice is done, and the need to protect an essentially adversarial system in which the court retains a neutral posture.

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\(^6\) Tribunals Service Business Plan 2006-07, p 19.

6.15 The researchers reported situations where court staff are asked by a private landlord whether he could simply go to the premises, or change the locks, to evict a tenant, rather than apply to the court, Some staff would say “It’s up to you, I can’t advise you” or feel unable to make a comment. Others would say “I wouldn’t advise it until you go and seek some legal advice, but I can’t say “yes” and I can’t say “no” because I don’t know”. Others would add “Be careful, and don’t do anything that breaks the law”.

6.16 The researchers commented that each of these approaches is entirely understandable. However, they went on to suggest

We think that staff might reasonably be encouraged to give a stronger response here, without themselves advising landlords what to do. We do not think it would be going too far if staff were trained to say to landlords something along the lines of, “I can’t advise you on your rights or what action you should take, but it is usually illegal to evict someone from residential premises without a court order, so you would be well advised to seek legal advice before doing anything.”

6.17 Some of the respondents to the study of the Leasehold Valuation Tribunal commented on advice provided by that tribunal. There seemed to be similar tensions.

Some leaseholders and freeholders reported that LVT staff were helpful “depending who you spoke to” and in some instances LVT staff or Panel members had offered help with the application or visited an applicant at home. Others said they received conflicting information, or that staff “seemed to make it up as they went along”.

**Assistance from court and tribunal staff – responses to the Issues Paper**

6.18 The Issues Paper asked to what extent should the court or tribunal itself try to help those who want to use its services. A few landlords thought that court staff could go further in assisting parties. Angus Bearn argued that what was needed was to

Just get on with properly resourcing the Courts; staff them with sensible people who can give you proper advice on what procedures to follow …

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There just needs to be someone at each Court who knows what to do if rent payments are missed etc and can send out suggested letters for landlords/tenants to send to each other. If legal stationers and landlord associations can do it, why can't the Courts? It is their job to provide justice, and their job to sort out the mess when individuals have made a hash of their relationships, so it is in the interests of the Courts to assist with pre-hearing type advice.

Victor Sullivan told us that “Court staff I feel could provide more information and help but the impression was that they feared to do so on the grounds that even impartial advice might be inappropriate.”

6.19 More respondents recognised the fear that provision of advice or assistance by court staff to litigants might be seen as jeopardising their impartiality. While agreeing that courts and tribunals should try to help those who want to use their services, others commented that this should be “without offering advice”.

6.20 Both Shelter and the Civil Justice Council thought that impartial legal advice on the nature of the disputes and the best way of resolving them, on the content and phrasing of an application (for example to suspend a warrant of possession), could not be provided by court staff, who could assist only with strictly procedural matters. They thought that an advice service, attached to, but independent of, the court office should be provided within the court precinct or nearby, to provide that type of advice.

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

**Advice provided by others - possession duty desks**

6.22 At many, though not we understand all, county courts, there is a duty possession advice desk, with advisors from, for example, local law firms, law centres or citizens advice bureaux. Such schemes are not new. Many date back over 25 years.

6.23 The Legal Aid Board commissioned a feasibility study in 1990.10 Lord Woolf recommended that court based or duty advice and assistance schemes funded by legal aid should be provided.11 Research in 1996 showed that duty schemes provide invaluable personal support and guidance on the court process, and helped defendants achieve better legal outcomes.12

6.24 The Legal Services Commission funded a pilot study of thirteen possession desk schemes, and in 2004 published a report on the outcomes.

Duty Schemes are not an alternative to mainstream advice services. The best option for any defendant in a possession case is to seek specialist advice well in advance of the hearing. However, for the many defendants who fail to access advice prior to attending court, Duty Schemes offer a valuable emergency service. In addition to providing immediate advice and representation to defendants at court, Duty Schemes can also respond to unmet legal need... This benefit is support by the finding of the “Legal Services Research Centre Periodic Survey of Legal Need” conducted in 2001, which showed that individuals facing the threat of repossession are highly likely to be facing a range of other related legal problems.”

6.25 The Legal Services Commission concluded that:

Duty Schemes can have a positive impact on local supply, not just in terms of providing an additional emergency resource but by improving referral relationships between local agencies, sharing casework experience and joint-working on social policy issues.

Feedback from the courts has suggested that Duty Schemes are beneficial not only to defendants but also to the running of the court itself.

At least 57% of all clients seen under the pilot had other legal problems. Clients received further help or were referred to other advice agencies in 41% of cases, demonstrating that Duty Schemes are effective in meeting the needs of the majority of clients at court, but where necessary are also providing a gateway to other services.

The overall picture in terms of quality is very positive, with the standard of work carried out by pilot Scheme being very good and in some cases outstanding. All feedback from the courts has also been very favourable, with Scheme advisers being described as professional, excellent or of a very high standard.

6.26 In addition to the pilot courts, Citizens Advice stated in a 2004 report that citizens advice bureaux “help run advice desks in 129 county courts, providing advice and representation for people attending court, including help on possession and eviction matters.”


6.27 A number of responses to our Issues Paper also emphasised the value of duty desks. Clarke Willmott solicitors referred to the “Housing Helpdesk” at Portsmouth County Court.

in our estimation the services offered by the Housing Helpdesk have a considerable impact for most of those who seek assistance from them. This impact most frequently takes the form of encouraging the tenant to “participate in the process”, for example by co-operating with the social landlord and/or the housing authority housing benefits department.

6.28 The NUS in its response commented that:

The court’s ability to establish the background to the matter is much more likely to be hampered if the defendant does not attend (which in public and social housing they often do not do because they have been told not to by their housing officer) or if the defendant is unrepresented and finds it difficult to get across his/her case. Thus court efficiency could be improved by encouraging defendants to attend court and enabling all defendants to be represented in these circumstances, including a comprehensive fully-funded court duty scheme for unrepresented defendants. We understand that funding for court duty schemes is already part of the [Legal Services Commission’s Community Legal Service] strategy and we can only encourage its expansion.

6.29 We think that duty desk services should be provided at all tribunal premises where rented housing possession claims will be heard under our proposals. The research on the exercise of discretion in rent arrears possession cases showed that where the tenant had been advised or was represented by someone from a duty desk, this increased the likelihood of the proceedings being adjourned, leading to a longer delay before the case is determined. However a combination of the rent arrears protocol and the ability of the tribunal to determine housing benefit claims may mean that there are fewer cases in future which have to be adjourned while housing benefit issues are resolved.

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

REPRESENTATION IN TRIBUNALS

The traditional view

6.31 A frequently claimed advantage of tribunals over courts is that it is easier for unrepresented litigants to participate and present their case before a tribunal.

6.32 The Residential Property Tribunal Service response to the Issues Paper also emphasised the accessibility of its proceedings to unrepresented parties.

One of the key factors in considering the success of tribunals is their accessibility to users. While procedure is determined by regulation, users in general feel less inhibited by the tribunal process. Many hearings can be conducted without the need for representation and unrepresented parties can be assisted by the inquisitorial approach that tribunals may take. The very absence of a dais makes the proceedings more user-friendly while the supportive behaviour of staff to parties, particularly to those who have not appeared at tribunals before, and the use of introductory videos to let parties know in advance what they can expect to happen all helps tribunals to be inclusive, especially to those who might otherwise feel excluded, suspicious or nervous of the judicial system.

The research

6.33 Research shows that tribunal users benefit from representation. In the literature review commissioned by the Lord Chancellor's Department and published by the Council on Tribunals, Adler and Gulland concluded that:

Most of the research concludes that appellants find it difficult to represent themselves. When people have the opportunity to be represented (because they are able to afford legal representation, because they are able to obtain legal aid, or because free lay representation is available) they tend to make use of it. Although some appellants choose to represent themselves, they often find that the process is more complex and legalistic than they had imagined and regret their decision afterwards. There is little research-based support for one of the central tenets of the Leggatt Report, namely that “a combination of good quality information and advice, effective procedures and well-conducted hearings, and competent and well-trained tribunal members” would make it possible for “the vast majority of appellants to put their cases properly themselves” ie without representation.17

6.34 In a more recent article on proportionate dispute resolution in tribunals, Adler noted that:

The White Paper … aims to reduce the need for representation through the introduction of alternative approaches to dispute resolution that divert cases from tribunals.18 To the extent that, as a

result of improving first-instance decision making, reviewing first-instance decisions in all cases and introducing early-neutral evaluation, fewer cases are subject to appeal, and to the extent that more of these cases are diverted from tribunals, the tribunal caseload will be smaller. However, if everything else remains the same, the need for representation in the smaller number of cases that still proceed to a tribunal hearing may actually be greater.¹⁹

6.35 But much depends on the nature and quality of the hearing. Adler also writes:

Ongoing research²⁰ indicates that, in social security appeals, tribunal chairs and members are taking the initiative in cross-questioning appellants in order to elicit relevant facts that will enable them to reach a decision and that this occurs even where the appellant is represented. If such an approach were to become widespread, it might be possible for the majority of appellants to conduct their case on their own and without the assistance of a representative.²²

6.36 Laurie highlighted the difficulty experienced by most appellants of presenting a further appeal in terms of a point of law. Conversely, an appellant who is represented has a distinct advantage given the flexibility of the formulations of “error of law”.²³ One of the Chief Social Security Commissioners interviewed commented that in difficult cases, particularly in Tribunal of Commissioners hearings, an absence of good representation would present real problems.

6.37 Research carried out for the Department for Constitutional Affairs into the experiences of litigants in person in courts revealed that in civil cases there were subtle differences in the different stages at which cases ended, depending on whether the case involved an unrepresented party or not. Cases involving unrepresented claimants tended to proceed to later stages in the High Court. More county court cases involving unrepresented litigants tended to proceed to later stages than cases where both parties were represented, especially where


²⁰ This research, on “The Potential and Limits of Self-Representation in Appeal Tribunals”, is funded by the ESRC (grant no. RES- 000-23- 0853) and is being conducted with Dr Richard Whitecross. It involves a telephone survey with 1,600 appellants in four tribunals, observation of 80 tribunal hearings and interviews with appellants, tribunal chairs and members, and representatives of the Tribunals Service. Data collection is currently underway.

²¹ Formerly under the auspices of The Appeals Service (TAS).


the claimant was unrepresented. In spite of this cases involving unrepresented litigants, even where active, did not seem to take much longer on average than cases where both parties were represented.24

6.38 Research from Australia has shown that legal representation may increase rather than reduce the chances of settlement. The Australian Law Reform Commission case file research on Administrative Appeals Tribunal cases showed that limiting the participation of lawyers and other representatives could increase the number of cases going to a hearing rather resolving them by agreement.25

The Issues Paper

6.39 In the Issues Paper we had suggested that:

The less hierarchical approach of tribunals is more in tune with the resolution of housing disputes and would enable apparent inequalities between landlord and tenant to be better balanced.

and that

The less formal approach of tribunals, with their emphasis on the “enabling role” might appear more appropriate for the resolution of housing disputes and to offer a more proportionate context for the determination of matters properly the responsibility of the formal dispute-resolution procedure.26

6.40 Some respondents, perhaps unsurprisingly lawyers or from the advice sector, disagreed with these statements. Paddington Law Centre was quite emphatic:

Many of the assumptions made in paragraph 8.20 are false. For example, sub paragraph 5 is simply not true. There are indications that there would be great inequality between landlord and tenant if tribunals were more routinely used in resolving housing disputes.

6.41 The Bar Council commented that:

we doubt the validity of the proposition in para 8.20(6) of the Paper… As we have stated, housing law is complex. The assistance provided to a litigant in person by a tribunal is no substitute for proper representation. Indeed, we would suggest that lack of proper representation for tenants not only risks injustice to tenants but can undermine landlords’ perception of a tribunal. We are certainly aware


that in the context of service charge disputes many landlords preferred to conduct litigation before a court because they consider that the leasehold valuation tribunal takes an actively pro-tenant stance. We consider that this perception is incorrect but is understandable as it undoubtedly derives from the tribunal’s obligation to assist litigants in person as much as it can in the conduct of often complex cases.

6.42 Shelter had similar concerns

the assumption of the Legal Services Commission (and the Legal Aid Board before it) has always been that legal representation is not required before tribunals because of that varying formality and inquisitorial approach. We would wish to challenge that assumption. It does not follow that representation is not required in these circumstances, although it may be that a form of representation, in which an emphasis is placed as much on conciliatory techniques as on adversarial techniques, is required.

6.43 When discussing the values we had identified for dispute resolution systems, the Advice Services Alliance noted that “Participation is also important. In most cases however, this will also require representation.”

6.44 The Civil Justice Council thought that the system should include fully funded duty representation schemes, especially for possession proceedings. “It is our experience that few individuals can represent themselves adequately or do their case justice when faced with the potential loss of their home.”

6.45 In addition to the benefit to the individual litigants, from being represented, it was also suggested that the promptness and efficiency of the court proceedings may be aided by representation. Anthony Collins Solicitors (who act for social landlords) commented that when advice “is taken away or funding removed, Court cases proceed more slowly – frequent adjournments for people to find advice.”

Restrictions on legal representation

6.46 Although respondents in the main strongly supported the availability of representation for parties in housing cases, there is a further question: does representation have to be provided by lawyers?

6.47 In the New South Wales Consumer, Trader and Tenancies Tribunal, for example, there is a generally restricted right to representation. Landlords, however, are allowed to be represented by real estate agents. The parties have carriage of their own case without the assistance of lawyers unless the Tribunal allows legal representation. Government-funded tenancy advice services (such as the Tenancy Advice and Advocacy Program) can assist tenants with the preparation and even presentation of their matters before the Tribunal.

6.48 There was limited support for some restrictions on the use of lawyers. Brent Private Tenants’ Rights Group thought this was a difficult issue:
Unfortunately in all too many cases the equality of arms value is not met in the status quo, and we see elderly regulated tenants being faced with barristers. We would like to see some good lateral thinking, to produce better disincentives for the use of expensive advocates.

6.49 A greater weight of responses was opposed to formal restrictions. The Advice Services Alliance stated that “We do not believe that there should be any restrictions on the use of legal representation”. Tessa Shepperson stated that “The main social housing organisations will have in house legal staff, it would be inequitable to prevent their tenants from using qualified representation.”

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

COMMUNITY LEGAL SERVICE FUNDING (LEGAL AID) FOR HOUSING CASES

6.51 We asked in the Issues Paper in what circumstances legal aid should be available for proceedings before tribunals or courts. While a very small number of landlords thought it should never be available, most respondents favoured the continuing provision of legal aid in housing cases. As we noted at the start of this Part, many were particularly concerned about the possible impact of a transfer of jurisdiction to tribunals for this reason.

6.52 A typical response was that of the National Union of Students:

We would be extremely concerned that the formation of a housing tribunal would result in the withdrawal of legal aid for housing proceedings. We are already in a situation where civil legal aid is being systematically reduced. It seems highly likely that the Legal Services Commission would take advantage of this opportunity to reduce further their expenditure on legal aid. We see representation as key in achieving justice for tenants. Representation not only assists the defendant, but also the court and the process as a whole, by enabling a decision to be reached on the full facts of the case. In order to qualify for legal aid for full representation, we consider that the party in question should have an arguable case with at least a 50% prospect of success.

6.53 Respondents’ concern arose from the fact that legal aid is not generally available for proceedings before a tribunal. The tribunals in which legal representation may currently be funded as part of the Community Legal Service are: the Employment
Appeal Tribunal, Mental Health Review Tribunal, Asylum and Immigration Tribunal, Protection of Children Act Tribunal, General and Special Commissioners of Income Tax and the Proscribed Organisations Appeal Commission. The Guidance explained that “For all other tribunals funding can be provided only for exceptional individual cases where application is made under section 6(8)(b) of the Act.”

6.54 A Citizens Advice briefing for the 2nd reading of the Tribunals, Courts and Enforcement Bill in the House of Lords concluded that

We therefore consider that for both the first tier and upper tribunals, the Access to Justice Act Funding Code should be amended so that representation can be included within the scope of Legal Services Commission contracts.

6.55 In a note for the House of Commons Library on the Bill, the authors summarised the Government’s response to the issue when it was raised in committee as follows:

The proposal to make legal aid widely available in tribunals risks changing the informal nature of tribunals. However, services that help unassisted parties understand what is going on may be considered at some point in the future.

There are limited funds available for legal aid in both criminal and civil cases and a balance will need to be struck between competing demands. This requires an overarching consideration which the Government has not yet completed.

6.56 Generally respondents strongly supported the availability of legal aid for housing cases in the future, even if they were determined by tribunals and not courts. The Advice Services Alliance stated that its minimum requirements for a housing court or tribunal would include access to advice and representation through the legal aid system. The Bar Council commented that:

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27 The Funding Code Guidance - Tribunal Representation Guidance published on the Legal Services Commission website refers to the Immigration Adjudicators and Immigration Appeal Tribunal, although these have now been replaced by the Asylum and Immigration Tribunal. See http://www.legalservices.gov.uk/docs/access_to_information/directions_on_tribunals.pdf (last visited 23 May 2007).

28 Access to Justice Act 1999, s 6(8)(b) provides that the Lord Chancellor may authorise the Legal Services Commission to fund the provision of any services provided as part of the Community Legal Service in specified circumstances, or if the Commission request him to do so, in an individual case.


if housing cases are to be dealt with by a tribunal we consider that legal aid should be made available for all the categories of case for which it is currently available in the court.

6.57 Many accepted that legal aid was not required in every case. As to the circumstances in which legal aid should, and should not, be available, a number of suggestions were made.

(1) Paddington Law Centre noted that “In the case of [assured shorthold tenancies] legal aid is normally not available except where a hearing has been ordered by the Court on a point of law defence. We see nothing wrong with this.”

(2) Anthony Essien of LEASE thought that legal aid should be available in the leasehold valuation tribunal “where the sums at issue are very large and/or where the claimant is particularly vulnerable and in need of assistance eg the elderly.”

(3) Tessa Shepperson thought legal aid should be available: “Where there is a genuine defence and it is reasonable for the tenant to be able to defend. For example if a tenant persistently behaves badly/re-offends, after a time legal aid should be withdrawn (if indeed it was ever made available).”

(4) Legal aid could be restricted to appeals to the Upper Tribunal. Simon Rahilly of Merseyside Housing Law Group thought “A case might be made for legal representation to be made at the (next) appeal stage.” Michael Adler, in his article, proposed that publicly funded representation, by a lawyer or lay expert, be available for appeals to the second tier (Upper) tribunal, even if the First-tier Tribunal adopted a more inquisitorial and user-friendly approach. He noted that the White Paper recognised that “there will still be a need for representation in some cases.”

(5) Shelter thought that the level of assistance that is appropriate will depend on the facts or allegations in the particular case, and whether issues of law or discretion are involved (and, if so, the relative complexity of those issues). Proper oversight would be required. Full legal representation will only be necessary if some alternative to litigation cannot be found. … If it is accepted, for example, that a proper level of help should be legal representation, but such representation is not available for funding or other reasons, we would wish to have that situation acknowledged as such, rather than disguised under the statistics for general “acts of assistance”.

6.58 Shelter advocated an extension of legal aid for homelessness cases. Homeless individuals who are working may fail the legal aid means test, since their means appear to be higher if, being homeless, they are not spending money on rent. The fact that they are not paying rent, being homeless, is, however, at the heart of their potential appeal. Shelter told us that for a homelessness appeal, individuals need legal representation and costs protection, which are available only to those with a full public funding certificate.

6.59 We see difficulty with the idea that legal aid should be restricted only to Upper Tribunal appeals. It seems almost to provide a perverse incentive to take cases on appeal, when the purpose of proportionate dispute resolution is to get the issue resolved as quickly and cheaply as possible.

6.60 We also share the concerns of respondents that given the fundamental importance to the individual of a home, it should continue to be available at First-tier cases, as it is at present.

6.61 We therefore provisionally propose that the Funding Code should be amended to permit Community Legal Service funding of housing cases, whether or not proceedings are before a court or tribunal, with funding decisions being made on the same principles as are currently applied. We acknowledge that, as the result of more general changes to legal aid policy, these principles may change. We urge that, however legal aid policy develops, in the context of resolving housing disputes, the same principles should apply, whether proceedings take place in court or tribunal.

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

REPRESENTATION OF LANDLORDS

6.63 A slightly different issue relates to the question of who can represent landlords in court or tribunal hearings. A company or other corporation may be represented at trial by an employee if the employee has been authorised by the company or corporation to appear at trial on its behalf, and the court gives permission.

6.64 Tessa Shepperson referred to landlords’ in-house legal staff, but landlords are not always represented in court by lawyers. The Chartered Institute of Housing noted that:

Much housing dispute work is taken through the courts by (non legally qualified) housing staff who strictly speaking do not have any rights of audience – this would not be a problem for tribunals.

6.65 The research on the exercise of judicial discretion in rent arrears cases also discussed the representation of landlords by non-lawyers.

32 See para 8.28 below.
33 Civil Procedure Rules, r 39.6.
Most representatives who now appear in housing possession cases are housing officers … A small number of district judges in our sample regretted this shift, for example because employees of the claimant might not be able to see the “whole picture” (DJ A). However, for most, the use of housing officers was a positive feature. There was a number of reasons for viewing this shift as positive, one district judge saying that he would rather hear the “organ grinder” (DJ C), and many regarded use of counsel as a waste of money. Counsel were said to feel that they had to plough through all the facts of the case, proving every point, which was regarded as a waste of time in lengthy court lists.

By contrast, there were many benefits of housing officers acting as representatives. For example, good housing officers knew their tenants and were able to answer questions about them where they did not appear. …

Good housing officers cared about their tenants and might “veer on the side of being as fair to the tenants as possible” (DJ R).

Local authority claimant representatives were generally regarded positively. There was said to be more variation as regards housing associations:34

6.66 Paddington Law Centre were concerned about landlords’ representation by non-lawyers. They told us that:

For example, in our experience, many RSL landlords decide to deal with possession proceedings without reference to a solicitor. Therefore housing officers attend court both to give evidence as witnesses and to act as advocates. In our view there are problems with this approach, for example:

- Housing officers have no duty to the court comparable to that of solicitors who are officers of the court
- They are not answerable to any professional body if they give false evidence or seek to prejudice the court
- They frequently attempt to mislead the Court and seek to prejudice the Court against the defendant.

6.67 Sometimes local authority owned homes are managed by an arms’ length management organisation (ALMO) or a tenant management organisation, whose staff are not employees of the council landlord. Some county court judges in the past have been content to allow staff of organisations managing, but not owning, the stock to bring possession claims. A recent memorandum to district judges by

the Master of the Rolls, emphasising that ALMO staff have no rights of audience, has now prevented this.\textsuperscript{35} This has led to organisations managing the stock having to take to court a lawyer or an employee of the landlord, which adds to the cost of bringing the possession claim.

6.68 The Tribunals, Courts and Enforcement Bill provides that Tribunal Procedure Rules may make provision conferring additional rights of audience before the First-tier Tribunal or the Upper Tribunal.\textsuperscript{36} Many of the issues that apply in the courts may not cause difficulty in proceedings before a tribunal.

6.69 \textbf{Should there be any restrictions on those who can represent landlords in tribunal hearings?} Would greater equality of arms be achieved by allowing non-lawyers, for example representatives of ALMOs, to act on behalf of a council landlord, as opposed to ALMOs having to engage lawyers with rights of audience? Should non-lawyers representing landlords be required to be a member of an accreditation scheme or professional body, such as the Association of Residential Letting Agents?

\textbf{CONDITIONAL FEE AGREEMENTS IN HOUSING CASES}

6.70 In the Issues Paper we asked whether conditional fee agreements (CFAs) contribute to access to justice or simply increase disproportional spending on litigation. Respondents' views were mixed, though there was little enthusiasm for CFAs. Respondents did not call for their use to be extended beyond disrepair cases (the only type of housing case in which they had been used).

6.71 Some respondents were very hostile, Clarke Willmott solicitors stating that “Conditional fee agreements have, in our opinion, been used by unscrupulous lawyers to increase disproportionate spending on litigation, especially in disrepair claims.” Similarly, Anthony Collins solicitors stated that CFAs “Can lead to extremely large costs and increase disproportionate spending.”

6.72 Others were neutral to sceptical. The Advice Services Alliance was “not convinced of the value of conditional fee agreements in housing cases.” Shelter thought that “At best, they are an irrelevance in housing cases, particularly to possession proceedings and homelessness appeals, and at worst they can contribute to disproportionate expenditure on litigation.”

6.73 Citizens Advice recognised that CFAs have provided a new funding mechanism, and that local authorities threatened with damages claims do act to resolve the problem in response. They were concerned that in the longer term the use of CFAs could have a significant impact on repair budgets. They thought there may be a need for further regulation if CFAs “are an inevitable development in this area of law, and one which could help stem the flow of private provision away from the sector”. Citizens Advice thought that allowing publicly funded legal advice to be advertised would help balance the impact of CFAs.


\textsuperscript{36} Tribunals, Courts and Enforcement Bill, sch 5, para 9.
6.74 The Law Society could see some benefits of CFAs. They thought CFAs may be useful in extending access to justice for those financially ineligible for legal aid, and supported the use of CFAs and legal expenses insurance where it is appropriate and meets the clients needs. They thought CFAs were only suitable where there is a strong prospect of obtaining a costs order against the opponent. Only in exceptional circumstances should they be used where a client is eligible for legal aid, as it is cheaper for social landlords to defend disrepair claims against a legally aided tenant than one who has a CFA.

6.75 Brent Private Tenants’ Rights Group were neutral as to the use of CFAs. CFAs work reasonably well in the hands of reputable and competent law practitioners, but they referred to anecdotal evidence that some practitioners have drummed up disrepair cases in the past, in particular against some social landlords who were seen as easy targets. For many if not most housing problems or disputes conditional fee agreements are unsuitable.

6.76 These responses lead us to think that the greater use of CFAs is unlikely to contribute to the more proportionate resolution of housing disputes. We do not propose an extension of their use, although we recognise that in some cases they may provide a mechanism for tenants ineligible for legal aid to enforce their landlord’s repairing obligations. We think however, that such cases would generally be better dealt with through mediation or other forms of non-court dispute resolution.

6.77 Do consultees agree that greater use of conditional fee agreements is unlikely to contribute to the more proportionate resolution of housing disputes? Should there be any further restrictions on the use of CFAs in housing cases?
PART 7
ALTERNATIVE DISPUTE RESOLUTION

INTRODUCTION

7.1 Our Issues Paper raised a large number of questions about the contribution different forms of alternative dispute resolution (ADR) might make to the proportionate resolution of housing problems and disputes. We shall be returning to these wider questions in the final report on this project. In this Part, we discuss specifically the scope for the use of mediation and early neutral evaluation in the resolution of housing disputes. We ask consultees to consider whether the tribunals hearing housing disputes should offer mediation and/or early neutral evaluation to the parties in every case, and whether restrictions on the instruction of expert witnesses before a tribunal would reduce the likelihood of settlement through such ADR methods.

MEDIATION IN COURTS AND TRIBUNALS

The current position

7.2 There have been several pilot schemes in which mediation has been offered at different courts within the court system. A number of these have been reviewed, with research findings published by the Department for Constitutional Affairs. In 2005, Her Majesty’s Courts Service produced a “Mediation Toolkit” to assist courts in setting up their own mediation schemes. It has also set up a National Mediation Helpline – a call centre operation which is able to put court users in touch with mediators in their areas. At present 44 county courts are using the Helpline.

7.3 In addition, current Her Majesty’s Courts Service policy in relation to small claims is to build on a successful pilot scheme in Manchester which offered mediation in small claims cases. Her Majesty’s Courts Service aims to ensure an in-court

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3 www.nationalmediationhelpline.com or telephone 0845 60 30 809.

mediator is appointed in every area by April 2008, and by the end of 2008, to introduce “a presumption that all but the most complex small claims are dealt with by way of mediation”.

7.4 We noted in paragraph 5.23 above that both the rent arrears possession and housing disrepair pre-action protocols provide that the parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation. The Disrepair Protocol specifically refers to mediation as an example of alternative dispute resolution which the parties might want to consider.

7.5 A pilot mediation scheme has been operating in the Leasehold Valuation Tribunal in London. Most of the cases that went to mediation concerned service charge disputes. Tribunal members or chairmen who are trained mediators carried out the mediation. If the mediation fails, the case goes to a tribunal in which the mediator takes no part.

7.6 We noted in Part 2 of this paper that the Secretary to the Private Rented Housing Panel in Scotland, on receipt of an application by a tenant seeking to enforce the landlord’s repairing obligations, will offer the parties mediation. If both parties agree to mediation, the Panel Secretary must facilitate it.

7.7 The Lord Chancellor, in the introduction to the Tribunals Service Framework document, stated that:

The Tribunals Service will play a major role in delivering the goals set out in the July 2004 White Paper “Transforming Public Services: Complaints, Redress and Tribunals” by setting up innovative pilot projects for finding alternative dispute resolution mechanisms and finding ways of improving the quality of original decisions.

7.8 The Tribunals Service 2006-07 Business Plan noted that:

Our third objective is to reduce the volume of appeals reaching a full tribunal hearing and to dispose of those that do in more effective and efficient ways. We believe that a large number of cases that come before tribunals could be resolved in ways more proportionate to the issue at stake. In some jurisdictions, success rates are significantly higher than in others. That may suggest that there is a case for an alternative to the full tribunal procedure to be used when reviewing the original decision. Such an approach would be beneficial to both the customer (for whom the procedure would be less complex) and less resource-intensive for the original decision-maker. During the

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year, we will start two separate pilots to test these concepts and provide the evidence upon which future policy and procedural changes can be based.

...The second pilot will cover early neutral evaluation, mediation and other alternative dispute resolution methods. The objective will be to identify, test and propose successful and cost-effective alternative mechanisms for resolving administrative and employment disputes without the need for a full hearing.8

Research

7.9 There has developed quite a body of empirical research into the use of mediation in civil proceedings. The Ministry of Justice and its predecessors have sponsored much of this work. In addition the Department for Constitutional Affairs sponsored a study of the use of mediation in Australian court and tribunal systems.9

7.10 The findings in the research literature are extremely consistent. In general, there is a high degree of client satisfaction with mediation. Parties to mediation like the fact that they can reach outcomes a court could not. They like participating in the process of achieving the outcome. Compared with adversarial methods, mediation produces higher compliance and lower re-litigation rates. There are usually cost savings, at least where the mediation results in settlement. Despite, these positive results, however, take up of mediation, particularly in England and Wales remains very low.

7.11 It is often assumed that ADR requires early intervention in a dispute. Genn has suggested that the earlier mediation is used, the greater the cost savings. Delay can also be reduced if mediation takes place early in the dispute resolution process. Thus the Administrative Appeal Tribunal of the Australian Capital Territory has noticed a significant reduction in waiting times by focussing on early, mediated resolution of cases.

7.12 Genn also notes that mediation can be helpful in any stage of the dispute resolution process. This is reflected in the Australian view that “there is not a universally optimal time to refer disputes to ADR”. Indeed the same study noted that early referral is not necessarily better as the parties may not be ready to settle and the dispute is not yet “ripe” for resolution. Hence ADR can increase costs by adding another layer to the dispute resolution process when used indiscriminately.”10 Another example of its potential later use of mediation is at a stage in proceedings just before a significant expense is about to be incurred.11

7.13 A number of factors are necessary for successful mediation to take place. These include: the capacity of the parties to participate safely or effectively on their own behalf; whether the parties are involved in a long-term business relationship (as they may be in the housing context) which could be undermined by litigation; the relative costs of ADR and litigation and the benefits of each; cultural factors; the need for or possibility of more flexible results not possible in an adjudicated outcome; and whether the parties or the public interest "may require a formal, public binding determination, or an authoritative interpretation and application of statute or case law".12

Compulsory mediation?

7.14 As one of the key elements of the definition of mediation is that it is a process that should be entered into voluntarily, there has been much debate as to whether there should be power for courts (or by extension tribunals) to order parties to mediate.

7.15 In Australia, after 1997 the Australian Federal Court obtained a power to require mediation before attempting formal legal proceedings. Compulsory mediation appears to have been a success, eliciting few complaints from parties. The policy underlying court-ordered mediation is that there may be some cases where, despite initial opposition by some parties, mediation could nevertheless be valuable. The settlement rate at mediation has averaged around 55 percent however mediations are still a small proportion of the overall caseload of both the Federal Court and the Federal Magistrates Court. Powell identifies a number of benefits of compulsory alternative dispute resolution:

[it] may assist in situations where the parties or their lawyers are so accustomed to the litigation process that they are unlikely to use ADR voluntarily, or where a particular lawyer has a prejudice against ADR which may be overcome by an order from the court to attend.13

7.16 Ingleby argues against mandatory mediation on three grounds:

(1) definitional: one of mediation’s defining characteristics is that the parties enter it of their own volition;

(2) lack of justification – the arguments in favour of compulsory mediation are based on unwarranted extrapolations from data about voluntary mediations;

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the rule of law – compulsory mediation represents a challenge to many of the ideas comprehended by the rule of law.\textsuperscript{14} Included under this heading are concerns that ADR is not capable of redressing power imbalances between parties.\textsuperscript{15}

7.17 In England, the formal position is that use of mediation is voluntary. However, the Civil Procedure Rules are based on an assumption that use of the courts should be a matter of “last resort”. And a number of important decisions of the courts since 2002\textsuperscript{16} have made clear that failure to consider mediation may result in significant adverse consequences, in particular on costs.

7.18 In her latest research report, Genn recommends that increased use of mediation is only likely if more information is given to those participating in disputes about the potential advantages of the use of ADR; this may be something that the Tribunals Service could particularly encourage. In addition, she argues that judges need a better understanding of the types of case in which use of ADR is likely to be of assistance and those where it may not. Again the Tribunals Service may be well placed to develop this understanding in the context of housing dispute resolution.

7.19 Adler recommends that appellants be offered the opportunity of conciliation or mediation before the tribunal hearing. However, he was opposed to compulsory mediation, and questioned whether the scope for mediation in disputes between the citizen and state was as great as the Department for Constitutional Affairs White Paper envisaged. If appellants were required to attempt conciliation or mediation, many of them might settle for less than that to which they are entitled. Tribunal hearings may therefore be needed to protect their interests. In addition, it may be in the public interest that some cases are taken to a tribunal so that there can be a clear and authoritative ruling on a point of law.\textsuperscript{17}

\textbf{Mediation in the Tribunals, Courts and Enforcement Bill}

7.20 Clause 2(3)(d) of the Bill requires the Senior President of Tribunals, when exercising the functions of that office to have regard to “the need to develop innovative methods of resolving disputes that are of a type that may be brought before tribunals”. Mediation could be one such “innovative method”.


\textsuperscript{15} Barton (ACT): Attorney- General’s Department, Civil Justice Review, Federal Civil Justice System: strategy paper (December 2003) p 134.


7.21 The Bill does not allow for compulsory mediation. Clause 24 of the Bill requires those making Tribunal Procedure Rules, or giving practice directions, to have regard to the following principles:

1. mediation of matters in dispute between parties to proceedings is to take place only by agreement between those parties; and

2. where parties to proceedings fail to mediate, or where mediation between parties to proceedings fails to resolve disputed matters, the failure is not to affect the outcome of the proceedings.

7.22 Mediation could be carried out by tribunal members, or by tribunal staff. A tribunal member who has been chosen to decide a case may act as a mediator, although a member who has begun to act as a mediator cannot (for example if the mediation attempt is unsuccessful) then go on to decide the case, unless the parties consent. Specific power is included in the Bill for fees to be prescribed for mediation conducted by tribunal staff.

Mediation in the Issues Paper

7.23 We asked a number of questions in the Issues Paper about the role for mediation, and in particular as to the types of housing dispute for which it was particularly suitable or unsuitable.

7.24 Many respondents saw mediation as part of a proportionate dispute resolution system. Views were divided as to whether there were any contexts where mediation should be made compulsory, with eleven respondents in favour, and six opposed. More (ten) felt that there was a need for further judicial activism in promoting mediation and changing the attitudes of legal advisors and parties to disputes than not (five). A number suggested that mediation should be offered by the tribunal or court system, whether as a compulsory step in the process, or an option.

7.25 Lancelot Robson, a Residential Property Tribunal Service (RPTS) chairman, referred to the cost savings that might result from a greater use of mediation.

RPTS members are hired by the day. A three member panel for one day currently costs about £1,000. Add in car hire for 2-3 hours for inspection of the property, plus the office use and staffing costs, suggests a figure of £1,700 per day falling on the state. If the parties

18 This function is conferred on the Senior President of Tribunals, and on Chamber Presidents (with the Senior President and Lord Chancellor’s consent): Tribunals, Courts and Enforcement Bill, cl 23.

19 Tribunals, Courts and Enforcement Bill, cl 24(1).

20 Tribunals, Courts and Enforcement Bill, cl 24(2).

21 Tribunals, Courts and Enforcement Bill, cl 24(5).

22 Tribunals, Courts and Enforcement Bill, cl 24(3).

23 Tribunals, Courts and Enforcement Bill, cl 24(4).

24 Tribunals, Courts and Enforcement Bill, cl 42(1).
bring legal advisers those costs are likely to average about £750 per adviser per day.

Contrast that cost with the RPTS mediation pilot scheme. One lawyer member sits for (say) one day at a cost of £400. Add in office use and staff costs to that point (less paperwork and no inspection) (say) £300. The parties rarely bring their lawyers. The cost to the state is about £700. Even if 50% of mediations are not successful ... there is still a direct cost saving to the state, even taking into account the direct cost of a mediation day in addition to a substantive hearing (about £450).

7.26 District Judge Russell Campbell commented that:

The development of a specialist body to hear housing cases would provide an opportunity to introduce effective case management as a key element in proportionate dispute resolution. This might best be undertaken by a court or tribunal officer to whom a case is allocated on issue. Rather than simply listing the case for hearing, mediation or some other means of resolving the dispute might be required before a case management conference is ordered. The parties might have to demonstrate that any steps required by an applicable protocol have been taken.

7.27 The Legal Services Commission did not go as far as recommending compulsory mediation.

We suggest that there should be a presumption in favour of mediation as a first step for all cases, subject to considerations about both parties being able to equally participate. Particularly social housing issues may be better mediated in first instance.

7.28 Macclesfield Wilmslow and District Citizens Advice Bureau provided a practical example of how procedural rules could be strengthened to encourage mediation. They referred to paragraphs in the existing court possession claim forms which ask what the landlord knows of the tenant's circumstances, and the steps that have been taken prior to issuing proceedings.

Rarely do the responses amount to more than bland assertions such as “letters have been sent and telephone calls made", or “we do not know if the defendant is employed”. Factual responses are generally limited to those such as “a letter was sent on 15.6.06". The requirements of these, and similar questions in other claim forms, could be strengthened, demanding clear evidence that early interventions had been made, and that active mediation had been sought. In the absence of proof that this had happened any application for costs should be disallowed, whilst a refusal by the defendant to enter into mediation would provide justification for costs to be awarded, or the Order requested by the Claimant to be granted.

7.29 Anthony Collins solicitors thought that further judicial activism is needed to promote mediation and change parties’ and advisors’ attitudes.
7.30 The Brent Private Tenants Rights Group suggested that:

The Housing Jurisdiction should include both. Tribunals are a great deal less intimidating, in practice as well as in “ring”. Could be further enhanced if operated on NSW model whereby the parties arrive a couple of hours before the hearing and are allocated a room to discuss the issues with the help of a “floating” facilitator. We understand that, in the vast majority of cases, the parties enter the tribunal with a request for it to rubber stamp the agreement they have reached.

7.31 Shelter thought that "There should be formal mechanisms for the cross-referral of cases between the courts and other forms of resolution such as arbitration, mediation."

7.32 Some respondents merely favoured providing information about mediation to the parties. The Advice Services Alliance told us that:

We do not believe that mediation should ever be compulsory. Therefore the assumption in Q5 that judges should promote mediation in order to change the attitudes of legal adviser and parties is wrong; however, there is a good argument for making information about mediation more readily available, so that parties involved in housing disputes can make informed decisions about whether or not it might be suitable for them.

7.33 We share the concerns of academic commentators and some of the respondents to our Issues Paper in relation to compulsory mediation. We do not propose that mediation should be a compulsory initial step in the process before a party can access a tribunal. In any event, the Tribunals, Courts and Enforcement Bill does not permit it.

7.34 However, we think that the tribunals system should provide mediation, and it should routinely be offered to parties in housing cases. It may be that, in practice, the pre-action protocols succeed in diverting cases at an earlier stage. But an offer of mediation should still be made. If the parties unreasonably refuse mediation, this could be taken into account in costs penalties. Mediation should be provided by tribunal members or staff. Although the Bill would allow a tribunal member who has attempted to mediate to go on to hear the case if the parties consent, we think that any tribunal member who has attempted to mediate a case should not then be further involved, if the matter proceeds to a formal determination.

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

7.36 Another form of alternative or appropriate dispute resolution to which some referred in their comments on the Issues Paper is early neutral evaluation. This may be defined as:

a preliminary assessment of facts, evidence or legal merits. This process is designed to serve as a basis for further and fuller negotiations, or, at the very least, help parties avoid further unnecessary steps in litigation.25

7.37 Early neutral evaluation is non-binding, and the parties are able to use the information they are given to decide how to proceed.

7.38 The Law Society argued that:

the power to give an Early Neutral Evaluation of the merits of a case would be useful and aid early resolution.

7.39 Simon Rahilly of Merseyside Housing Law Group commented that:

There was also some discussion as to the possible merits of having a housing version of ACAS which could make a recommendation before the parties decided whether they wanted to proceed to the tribunal.

7.40 Early neutral evaluation can be provided within the new tribunals to be established by the Tribunals, Courts and Enforcement Bill. It is another innovative dispute resolution method to which the Senior President of Tribunals must have regard in exercising his functions.

7.41 In the Detailed Policy Statement on Delegated Powers, the Department for Constitutional Affairs stated that it expected that one of the first areas to which the Tribunal Procedure Committee would turn its attention would be delegation to staff. The Department explained that:

It is intended that staff will undertake a wide range of functions in the new tribunals, although these will vary between jurisdictions. These may include responsibility for formal procedural steps (eg giving directions, summoning witnesses and extension of time limits) but also responsibility for conciliation, mediation and early neutral evaluation.26

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7.42 We provisionally propose that in appropriate housing cases, the tribunal should offer the parties early neutral evaluation. We would expect it to be of most relevance in disrepair cases. Early neutral evaluation would be offered by a legally qualified tribunal member. Anyone who provided early neutral evaluation should not determine the dispute.

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

7.44 We are interested in consultees’ views on the scope for early neutral evaluation if the parties were, as we suggest in Part 3, only able to instruct expert witnesses in disrepair cases with the tribunal’s permission. The Law Society’s response,27 suggested that a restriction on expert witnesses might discourage early settlement if the parties were unable to evaluate the strength of their case. Would the parties need their own expert reports, for early neutral evaluation to work, or would a suitably qualified evaluator be able to provide the necessary information?

7.45 Would restrictions on the instruction of expert witnesses without the tribunal’s consent increase or reduce the likelihood of parties achieving a settlement through mediation or early neutral evaluation?

OMBUDSMEN

7.46 We examined the role of ombudsmen in Part 6 of the Issues Paper. We do not propose to discuss their role in detail in this paper, in part because it is something that we are considering as part of our project looking at remedies against public bodies.28 We simply note here that several respondents, for example the Advice Services Alliance, Council on Tribunals and Local Government Ombudsmen, thought that there should be greater flexibility for ombudsmen and courts or tribunals to refer disputes to each other for resolution, or for ombudsmen to be able to investigate a case for which there may be a remedy in the courts or tribunals. We agree with these suggestions.

27 See para 2.18 above.
INTRODUCTION

8.1 In this Part we discuss issues relating to the fees and costs rules which should apply to the determination of rented housing possession and disrepair, mobile home and caravan possession, homelessness statutory appeal and housing and homelessness judicial review cases in the First-tier and Upper Tribunals. These are issues on which current practice of the courts is very different from practice in tribunals.

8.2 Two principal concerns emerged from responses to the Issues Paper.

(1) Fee levels should not act as a disproportionate deterrent to those seeking to use a court or tribunal for the resolution of a dispute.\(^1\)

(2) The potential use of costs orders to deter unwarranted litigation should not be lost.

8.3 In this Part, we ask consultees to consider whether, and if so when, the tribunal should be able to order one party to pay the other party’s costs, and whether the costs payable should be capped.

FEES

8.4 There is currently a very complex and varied set of rules relating to the fees which have to be paid to access either the court or the tribunals.

Court fees

8.5 Fees in the county court and High Court are currently prescribed in the Civil Proceedings Fees Order 2004.\(^2\)

(1) The fee to start a county court claim for recovery of land is £150. A county court warrant of possession costs a further £95, while the fee for an application to suspend a warrant of possession is £35.

(2) There may be other fees relating to the allocation of proceedings to a track, for counterclaims, for other applications and in respect of various enforcement proceedings.

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\(^2\) SI 2004 No 3121.
The fee payable for an application for permission to bring a judicial review is £50, and if permission is granted, a further £180 is payable.

However, no fee is payable by a party in receipt of a “qualifying benefit”, and who is not in receipt of either representation under Part 4 of the Legal Aid Act 1988 or Legal Services Commission funding for which a certificate has been issued under the Funding Code in respect of the proceedings.

The former Department for Constitutional Affairs recently published a consultation paper on Civil Court Fees. The Department proposes to introduce:

1. A revised system of fee concessions which aims to ensure that the system meets the objective of providing access to justice in a well-targeted and affordable way, and to tackle criticisms about the inconsistent application of the current system;

2. Hearing fees for civil cases and adjustments to other downstream fees, aimed at a better match of costs and income within the system;

3. Reductions in issue fees for civil business, weighted towards the fees for using electronic systems (like Possession Claims Online), reflecting their lower marginal cost, and in order to promote their use as part of Her Majesty’s Courts’ Service’s overall business strategy; and

4. Increases in many fees for civil proceedings in the magistrates’ courts, aimed at recovering about 50% of the full cost in 2007/08.

The paper noted that the present fee structure involves some litigants, in particular claimants paying issue fees in undefended debt claims, cross-subsidising others. This is undesirable for a number of reasons. The Department explained that:

Once a case has been issued, the remaining fees due are unlikely to encourage litigants to pause and consider whether to settle their case rather than proceed to trial. Charging a realistic fee at key decision points in the process would mean that litigants were subject (in the jargon) to appropriate price signals. This would in turn support our objective of encouraging as many cases as possible to settle before trial, whether as a result of negotiation, mediation or some other form of alternative dispute resolution. Early settlement saves money for both the parties and the court system; and the evidence suggests that

The qualifying benefits are income support; working tax credit and either child tax credit or a disability element and/or severe disability element, and the gross annual income taken into account for the calculation of the working tax credit is £16,017 or less; income based jobseekers allowance; guarantee credit under the State Pension Credit Act 2002.


mediated settlements tend to be better for the parties, with high levels of customer satisfaction and very little need for subsequent enforcement action.\footnote{7}

**Tribunal fees**

8.8 No fees are currently charged by Rent Assessment Committees for market or fair rent disputes.\footnote{8}

**Fees in the Residential Property Tribunal**

8.9 Fees for applications, appeals and hearings in the Leasehold Valuation Tribunal and Residential Property Tribunal can be prescribed by the Secretary of State and National Assembly for Wales in procedure rules for those tribunals.\footnote{9} Unless the regulations provide otherwise, the fee, or aggregate of fees, cannot exceed £500.\footnote{10} The regulations can allow fees to be reduced or waived by reference to the payer’s financial resources, which can be subject to means testing.\footnote{11}

8.10 The Residential Property Tribunal in both England and Wales charges a flat fee of £150 for all applications and appeals to it (although no fee is charged for appeals against a management order where the appeal grounds include a failure to deal with payment to deal with specified matters for example payment of surplus rents).\footnote{12} No fees are charged for appeals against the denial of the Right to Buy. No fee is payable if the party or his or her partner is in receipt of one of the qualifying benefits referred to in the Civil Procedure Fees Order.\footnote{13}

**Fees in the Leasehold Valuation Tribunal**

8.11 Fees can only be charged for some applications to the Leasehold Valuation Tribunal.\footnote{14}


\footnote{9 For the Residential Property Tribunal, see the Housing Act 2004, sch 13, para 11; and for the Leasehold Valuation Tribunal, see the Commonhold and Leasehold Reform Act 2002, sch 12, para 9.}

\footnote{10 Housing Act 2004, sch 13, para 11(3); Commonhold and Leasehold Reform Act 2002, sch 12, para 9(3).}

\footnote{11 Housing Act 2004, sch 13, paras 11(5) and (6); Commonhold and Leasehold Reform Act 2002, sch 12, paras 9(5) and (6).}

\footnote{12 Residential Property Tribunal (Fees) (Wales) Regulations 2006 (SI 2006 No 1642 (W 157)), reg 3(3); Residential Property Tribunal (Fees) (England) Regulations 2006 (SI 2006 No 830), reg 3(3).}

\footnote{13 However, the gross income taken into account for working tax credit is £14,213, not £16,017.}

\footnote{14 Service charge and choice of insurers applications under the Landlord and Tenant Act 1985; appointment of manager applications under Part 2 of the Landlord and Tenant Act 1987; variation of lease cases under Part 4 of the Landlord and Tenant Act 1987; or applications under s 168(4) of or sch 11 to the Commonhold and Leasehold Reform Act 2002.}
(1) The regulations provide that where the subject of the application is the service charge, insurance premium or administration charge the fees are based on the amount in question, and range from £50 to £350.

(2) For applications concerning dispensation with consultation requirements, determination as to the suitability of nominated insurers, appointment of managers and variation of leases, the fees are based on the number of flats to which the application relates, and vary from £150 to £350.

(3) Where the application covers both cases, the application fee will be whichever is the greater.15

(4) There are no fees for other applications to the Leasehold Valuation Tribunal.16

(5) Where the application fee is paid and the matter proceeds to an oral hearing, a further £150 hearing fee must be paid before the hearing is held.17

(6) No fee is payable if the party or his partner is in receipt of one of the qualifying benefits referred to in the Civil Procedure Fees Order,18 or legal aid funding in respect of proceedings transferred from a court.19

The Tribunals, Courts and Enforcement Bill

8.12 The Tribunals, Courts and Enforcement Bill enables the Lord Chancellor to prescribe fees payable in respect of anything dealt with by the First-tier Tribunal or Upper Tribunal, tribunals (but not courts) added by order, and in relation to mediation carried out by tribunal staff.20 The Senior President of Tribunals and


16 No fee is payable for applications to determine the terms or price in respect of enfranchisement or lease extensions (Leasehold Reform Act 1967 (houses) and Leasehold Reform Housing and Urban Development Act 1993 (flats)); applications for an order preventing the landlord recovering the costs of tribunal proceedings through a service charge (Landlord and Tenant Act 1985, s 20(c)); applications for an order to dispense with service of a preliminary notice prior to an action for the appointment of a manager (Landlord and Tenant Act 1987, s 22(3)); determination of liability to pay, or variation of, an estate management charge (Commonhold Leasehold Reform Act 2002, s 159); all applications arising from the right to manage (Commonhold and Leasehold Reform Act 2002, Part 2, ch 1); or applications for a determination that a breach of a covenant or condition in the lease has occurred.

17 Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 (SI 2003 No 2098), reg 5; and Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004 (SI 2004 No 683 (W 71)), reg 5.

18 However, the gross income taken into account for working tax credit is £14,213, not £16,017.


20 See Part 7 of this paper in relation to mediation.
the Administrative Justice and Tribunals Council must be consulted first,\footnote{Tribunals, Courts and Enforcement Bill, cl 42.} and Treasury consent is required to prescribe a new fee, but not to alter an existing fee. An order could provide for scales or rates of fees, as well as exemptions from or reductions in fees or remission of fees. There is no £500 limit on the level of fees.

8.13 The Tribunals Service has stated that:

The Tribunals Service is able to charge fees as set out in its governing legislation. Policy on charging and accounting for any fees collected by the Tribunals Service is a matter for agreement between the Tribunals Service and \{Department for Constitutional Affairs\} and should follow current guidance on fees and charges issued by HM Treasury.\footnote{Tribunals Service Framework Document (2006) p 14.}

8.14 The Tribunals Service is currently reviewing tribunal fees, and before implementing the Tribunals, Courts and Enforcement Bill, plans to consult on a number of questions, including fees. The Government has stated that:

The intention is that fees will continue to be charged where they are charged at present and to leave open the possibility that fees could be charged in other circumstances in the future. No decision has been taken as to where fees might be charged in the future, but two possibilities that have been considered are fees to regulated business and against refusal of visas. Fees will not be charged where to do so would cause financial hardship or where issues of personal liberty or asylum are concerned.\footnote{DCA, Tribunals Courts and Enforcement Bill: Detailed Policy Statement on Delegated Powers (December 2006) para 87.}

\textit{The Issues Paper}

8.15 In the Issues Paper, we referred to the role of fees in discouraging trivial complaints, and concerns about HM Court Service policy of ensuring that fees paid by court users fund the basic running costs of the court system.\footnote{Housing: Proportionate Dispute Resolution: An Issues Paper (2006) paras 8.41 to 8.43 available at \url{http://www.lawcom.gov.uk/docs/issues_paper.pdf}.} We asked whether there should be a uniform policy relating to the fees to be paid for taking proceedings in a court or tribunal.

8.16 Some respondents thought that the tribunals should not charge fees. The Legal Services Commission queried the appropriateness of legally aided parties paying court fees, “when it’s all taxpayers' money”.

8.17 A larger number thought that fees should be charged to discourage trivial complaints. Lancelot Robson noted that:
there is a tendency for people not to value what comes free. This is noticeable in the Rent Assessment jurisdiction where appeal forms are often sent in proposing a quite preposterous rent, and the party who has appealed then takes no further part in the proceedings, despite the considerable cost to the public purse and anxiety for the other party. The result is often the award of perhaps an extra £1 or £2 per week. Payment of a reasonable fee (subject to remission in hardship cases) would reduce this type of abuse.

8.18 There was no agreement as to whether there should be a uniform policy on fees. There was concern that high fees dramatically increase the cost of litigation and restrict access to justice. Some respondents thought fees should be modest, or proportionate, that is, reflect the nature of the dispute. Some supported means testing the payment of fees. A few landlords or their solicitors thought that remission of fees was abused and that the court should be able to remove the exemption from fees where a merit-less application had already been made.

8.19 If rented housing possession and disrepair cases in Wales were to be determined by the Residential Property Tribunal (if, contrary to our provisional proposal, the First-tier Tribunal did not extend to Wales) then the fees would be prescribed by the Welsh Ministers, under the powers in the Housing Act 2004, and limited to no more than £500. In England, if these cases were to be determined by the First-tier Tribunal, then the fees in future would be prescribed by the Lord Chancellor, and in theory need not be kept below £500.

Our provisional view

8.20 This paper is not the appropriate place to discuss the precise levels of fees which should be charged for tribunal applications and appeals. However, we are firmly of the view that the present position is one of unnecessary complexity which should be rationalised.

8.21 Our provisional view is that policy on fees should reflect the following principles:

1. If rented housing disrepair and possession cases, caravan and mobile home possession cases, homelessness statutory appeals and housing and homelessness judicial review applications were to be determined by the First-tier or Upper Tribunal, a fee should continue to be charged.

2. The fees charged must not be at a level which inhibits access to justice.

3. The fees should be proportionate to the subject of the dispute.

4. We think the suggestion that a higher fee be charged for proceedings commenced by paper application as opposed to electronically has some merit.

5. We would be very concerned at any general significant increase in fees, especially for possession claims.

Our provisional proposals are summarised in para 1.4 above.
8.22 Do consultees agree that the principles set out in paragraph 8.21 are those which should underpin the development of detailed rules on fees as they apply to the tribunals which would determine housing disputes and appeals?

CURRENT COSTS RULES

8.23 We have not suggested in Part 6 of this paper that the parties to housing disputes in the tribunals be prevented from being represented by lawyers. We therefore need to consider the rules which would apply in relation to the payment of a party’s legal costs. At present, the rules differ as between the courts and tribunals.

Costs in the county court

8.24 In the county court the payment by one party of another party’s costs is governed by the Civil Procedure Rules. Generally, the court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. If the court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party but the court may make a different order.

8.25 In deciding what (if any) order to make, the court must have regard to all the circumstances including:

(1) the conduct of the parties;

(2) whether any party has succeeded on part of his case even if he has not been wholly successful; and

(3) any payment into court or admissible offer to settle drawn to the court’s attention.

8.26 The conduct of the parties includes conduct before and during the proceedings, in particular the extent to which the parties followed any pre-action protocol; whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; the manner in which a party has pursued or defended his case or a particular allegation or issue; and whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

8.27 The Civil Procedure Rules and associated Practice Directions contain lengthy and detailed provision relating to costs, which we do not go into here. We discuss

26 Civil Procedure Rules, Parts 43 to 48; Civil Procedure Rules Practice Direction About Costs.

27 Civil Procedure Rules, r 44.3(1) .

28 Civil Procedure Rules, r 44.3(2).

29 Civil Procedure Rules, rr 44.3(4) and (5).
below some of the special costs rules for small claims, possession claims and fast track cases, which impose limits on what the unsuccessful party may be liable to pay towards the winner’s legal costs.30

8.28 The usual costs rules do not apply to the assessment of costs where the losing party is funded by the Legal Services Commission as part of the Community Legal Service (that is, they have legal aid), and therefore benefits from costs protection.31 Any costs ordered to be paid by a Legal Services Commission funded party must not exceed the amount which it is reasonable for that person to pay having regard to all the circumstances including their financial resources and conduct in connection with the dispute in relation to which the proceedings arose.32

**Small claims track**

8.29 In the small claims track (which includes claims for housing disrepair for less than £1,000, or claims for a specified amount of money of up to £5,000, which could include rent arrears) the court may not order one party to pay another’s costs, fees and expenses, including those relating to an appeal, except:

1. the fixed costs attributable to issuing the claim, that is the sum of the fixed commencement costs calculated in accordance with Table 1 of rule 45.2 (which vary from £50 to £110 depending on the amount of the claim, and the method of service, with an extra £15 for each additional defendant personally served) and the appropriate court fee or fees paid by the claimant;33

2. no more than £260,34 for legal advice and assistance in relation to a claim for an injunction or an order for specific performance;

3. any court fees paid by that other party;

4. expenses which a party or witness has reasonably incurred in travelling to or from a hearing or in staying away from home for the purposes of attending a hearing;

5. up to £50 per person,35 for any loss of earnings or loss of leave by a party or witness due to attending a hearing or to staying away from home for the purposes of attending a hearing;

6. no more than £200 per expert,36 for an expert’s fees.37

30 Civil Procedure Rules, r 44.9, Part 27 (small claims) and Part 46 (fast track trial costs).
31 Access to Justice Act 1999, s 11(1); Civil Procedure Rules, r 44.17; Civil Procedure Rules, Practice Direction About Costs, paras 21.1 to 23.17; Community Legal Service (Costs) Regulations 2000 (SI 2000 No 441).
33 Civil Procedure Rules, Practice Direction About Costs, paras 24.1 and 24.2.
34 Civil Procedure Rules, Practice Direction – Small Claims Track, para 7.2.
35 Civil Procedure Rules, Practice Direction – Small Claims Track, para 7.3(1).
Undefended possession claims

8.30 Special rules, which apply unless the court orders otherwise, fix the solicitors’ costs recoverable by the landlord from the unsuccessful tenant in undefended possession claims, and successful demotion claims. These rules apply to:

1. a possession claim under Part 55, whether or not it includes a sum of money, and the defendant gives up possession, pays the amount claimed if any, and the fixed commencement costs stated in the claim form;

2. a possession claim under Part 55, where the grounds include rent arrears, the court fixed the hearing date when it issued the claim and judgment is given for the possession of land (whether or not the order for possession is suspended on terms) and the defendant has neither delivered a defence, or counterclaim, nor otherwise denied liability; or has delivered a defence limited to specifying his proposals for the payment of arrears of rent;

3. an accelerated possession claim of land let on an assured shorthold tenancy and a possession order is made where the defendant has neither delivered a defence, or counterclaim, nor otherwise denied liability;

4. a successful demotion claim, either free-standing or included on the same claim form as a Part 55 possession claim.

8.31 Shelter explained in its response to the Issues Paper that these fixed costs rules do not apply where a defendant actively pursues a defence:

Where a claim for possession is defended, or where it is restored for hearing following an adjournment, it is likely that fixed costs will not apply and the landlord’s solicitors will present a schedule of costs. Except for defendants who have a public funding certificate, who receive costs protection, this amounts to a deterrent to any defendant from pursuing his or her defence. The issue even arises under the accelerated possession procedure for assured shorthold tenancies.

36 Civil Procedure Rules, Practice Direction – Small Claims Track, para 7.3(2).
37 Civil Procedure Rules, r 27.14.
38 Local authority and registered social landlords have powers to apply to the court to “demote” a tenant responsible for anti-social behaviour from a tenancy with security (secure and assured tenancies, respectively) to one without security of tenure (demoted and assured shorthold tenancies): see Housing Act 1985, s 82A and Housing Act 1988 s 6A respectively.
39 Civil Procedure Rules, Part 45, in particular rr 45.1(1) and (2).
40 Civil Procedure Rules, r 45.1(2)(c).
41 Civil Procedure Rules, r 45.1(2)(d).
42 Civil Procedure Rules, r 45.1(2)(e).
8.32 The rules fix the solicitors’ costs recoverable by the landlord from the unsuccessful tenant in the possession or demotion claims as follows.

(1) The landlord can recover fixed costs for commencement of a possession or demotion claim. The claimant can recover £69.50 if the claim form is served by the court or by any method other than personal service by the claimant. The claimant can recover £77, if he or she serves the claim form personally and there is only one defendant. The claimant can recover £15 for each additional defendant personally served at a separate address.\(^{44}\)

(2) Where judgment is entered in either a possession claim where the defendant gives up possession, pays arrears and the fixed commencement costs stated on claim form; or in a successful demotion claim, in addition to the fixed commencement costs, the landlord can recover a further £57.25 for solicitors’ charges.\(^{45}\)

(3) Where a possession order is made in an accelerated possession claim where the defendant has neither delivered a defence or counterclaim nor otherwise denied liability, £79.50 can be recovered for the claimant’s solicitors charges for preparing and filing the claim form; the documents that accompany the claim form and the request for possession.\(^{46}\)

(4) Further fixed solicitors’ costs are prescribed for various enforcement steps.\(^{47}\)

(5) Any appropriate court fee will be allowed in addition to these fixed solicitors’ costs.\(^{48}\)

8.33 In the fast track (which will include claims for disrepair of over £1,000), the trial costs which the court can award are also limited. For claims for up to £3,000 the court can award £350; for claims for more than £3,000 but not more than £10,000, and for claims only for a non-monetary remedy, it can award £500, and for claims for more than £10,000 it can award £750.\(^{49}\) An additional £250 can be awarded if a party’s legal representative attends the trial as well as the party’s advocate, and the court decides that it was necessary for a legal representative to attend to assist the advocate.\(^{50}\) If the successful party had a conditional fee

\(^{43}\) Civil Procedure Rules, r 45.1(2)(f).

\(^{44}\) Civil Procedure Rules, r 45.2A, table 2.

\(^{45}\) Civil Procedure Rules, r 45.4A(1).

\(^{46}\) Civil Procedure Rules, r 45.4A(2).

\(^{47}\) Civil Procedure Rules, r 45.6.

\(^{48}\) Civil Procedure Rules, r 45.1(3).

\(^{49}\) Civil Procedure Rules, rr 46.2(1) and (4).

\(^{50}\) Civil Procedure Rules, r 46.3(2).
agreement, the court may award a sum representing an additional liability (a success fee).\textsuperscript{51} A successful litigant in person can recover two thirds of the amount that would be otherwise paid (if they can prove financial loss); or if they fail to prove financial loss, an amount in respect of the time spent reasonably doing the work at a rate of £9.25 per hour.\textsuperscript{52}

8.34 Under the Pre-Action Protocol for Housing Disrepair Cases, if the tenant’s claim is settled without litigation on terms which justify bringing it, the landlord pays the tenant’s reasonable costs or out of pocket expenses.\textsuperscript{53}

**Costs in Tribunals**

**Costs in the Leasehold Valuation Tribunal**

8.35 As a general rule the Leasehold Valuation Tribunal cannot order one party to pay another's costs but it can order one party to reimburse any fees paid by another.

8.36 The Leasehold Valuation Tribunal may order the reimbursement of all or part of the application and hearing fees paid.\textsuperscript{54} This is entirely at the discretion of the tribunal. During the hearing, or after the hearing but before issue of the determination, an applicant may ask the tribunal for an order requiring the reimbursement of his application and/or hearing fee by the other party. The tribunal cannot order a party who would be exempt from paying a fee (because that person or their partner is in receipt of a qualifying benefit) to reimburse the other party’s fees.

8.37 A Leasehold Valuation Tribunal may only order a party to pay the other party’s costs where the application has been dismissed by the tribunal because it believes the application is frivolous or vexatious or otherwise an abuse of process; or where a person has acted “frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.”\textsuperscript{55} A party cannot be ordered to pay more than £500 towards the other party’s costs.\textsuperscript{56}

8.38 Some leases allow for a landlord to recover legal costs as part of the service charge. The Leasehold Valuation Tribunal has power to make an order preventing the landlord from doing this, by making an order under section 20C of

\textsuperscript{51} Civil Procedure Rules, r 46.3(2A).

\textsuperscript{52} Civil Procedure Rules, r 46.5, Civil Procedure Rules, Practice Direction About Costs, para 52.4.

\textsuperscript{53} Pre-Action Protocol for Housing Disrepair Cases, para 3.7.


\textsuperscript{55} Commonhold and Leasehold Reform Act 2002, sch 12, para 10.

\textsuperscript{56} Commonhold and Leasehold Reform Act 2002, sch 12, para 10(3). In theory the regulations could provide for payment of a higher amount towards the other party’s costs but they do not.
the Landlord and Tenant Act 1985. A tenant may ask for a section 20C order either in their application form or, if they are a respondent, in writing to the Leasehold Valuation Tribunal.\(^{57}\)

8.39 Paragraph 10(4) of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 provides that “A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.”\(^{58}\)

8.40 Paragraph 10(4) does not override a clause in a lease allowing a landlord to recover legal costs through a service charge, where the tribunal has refused to make a section 20C order. In *Staghold v Takeda*,\(^{59}\) Judge Levy QC, in the Central London County Court held that paragraph 10(4) did not preclude the landlord from including the costs of a successful case in the Leasehold Valuation Tribunal in a service charge.\(^{60}\) The Lands Tribunal in *Schilling v Canary Riverside Developments PTE Ltd*\(^{61}\) reached a similar conclusion (contrary to the views of the Leasehold Valuation Tribunal at first instance in that case\(^{62}\)) , noting that otherwise section 20C would have been rendered otiose.

**Costs in the Residential Property Tribunal**

8.41 The Residential Property Tribunal has broader costs powers than the Leasehold Valuation Tribunal. It may order a party to pay the costs incurred by the other party in connection with the proceedings where:

1. the party has failed to comply with an order made by the tribunal;
2. the tribunal has dismissed or not allowed, the whole of part of an appeal or application because a party has failed to provide the necessary information;
3. the tribunal has dismissed the whole or part of an appeal or application on the grounds that it was frivolous or vexatious or otherwise an abuse of process;


\(^{58}\) Commonhold and Leasehold Reform Act 2002, sch 12, para 10(4).

\(^{59}\) [2005] 3 EGLR 45.

\(^{60}\) An article in the Landlord and Tenant Review states that there have been two Leasehold Valuation Tribunal decisions, *Ionic Properties v Lessees of Melcombe Regis Court* (unreported, 2004) and *Sutton LBC v Leaseholders of Benhill Estate* (unreported, 2004) which reached a similar conclusion to Judge Levy: see M Marsh and Z Bhaloo, “Having your cake and eating it (or how to lose, but win on costs): Part 2” (2006) Vol 10 No 3 *Landlord and Tenant Review* 65.

\(^{61}\) HH Judge Rich QC, 16 December 2005, unreported, but available on Lawtel (document no AC0110785).

the party has, in the opinion of the tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.63

8.42 The tribunal cannot order one party to pay another’s costs without giving the potential payer the opportunity to make representations first.64 A party cannot be ordered to pay more than £500 towards the other party’s costs.65 A person may not be required to pay costs incurred by another person in connection with proceedings before a tribunal except by (a) a determination under paragraph 12 of Schedule 13 to the Housing Act 2004, or (b) in accordance with provision made by any other enactment.66

8.43 The Residential Property Tribunal may order one party to reimburse all or part of the fee paid by the other party.67 A person who would be exempt from paying a fee (because they or their partner is in receipt of a qualifying benefit) cannot be ordered to reimburse the other party’s fees.

The Tribunals, Courts and Enforcement Bill

8.44 The Tribunals, Courts and Enforcement Bill provides that the costs of and incidental to all proceedings in the First-tier Tribunal and Upper Tribunal shall be in the discretion of the Tribunal in which the proceedings shall take place.68 The relevant tribunal shall have full power to determine by whom and to what extent the costs are to be paid, subject to Tribunal Procedure Rules. The rules may provide for costs or expenses not to be allowed in respect of proceedings of a description specified in them, or for costs or expenses not to be allowed in respect of items of a particular type specified in them.69

8.45 The Explanatory Notes to the Tribunals, Courts and Enforcement Bill state that:

Many tribunals’ powers to award costs are currently limited, either because they have no powers to award costs, or because the scope of any power they have is limited. This clause grants the tribunals the discretion to order costs and expenses in the same way as courts. It is not intended that these provisions will apply in all jurisdictions, rather that there will be flexibility as part of the creation of the new system to determine where a costs regime would be appropriate and

63 Housing Act 2004, sch 13, para 12(2).
65 Housing Act 2004, sch 13, para 12(3). In theory the regulations could provide for payment of a higher amount towards the other party’s costs but they do not.
66 Housing Act 2004, sch 13, para 12(4).
68 Tribunals, Courts and Enforcement Bill, cl 29.
69 Tribunals, Courts and Enforcement Bill, sch 5, para 12(2).
whether there should be any limits to such a regime (for example, that costs should be awarded only against a party who has acted vexatiously or unreasonably). This is why subsection (1) is subject to provision made under the Tribunal Procedure Rules.70

8.46 In its document on the delegated powers the Department for Constitutional Affairs noted that costs were likely to be amongst the first areas to which the Tribunal Procedure Committee will turn its attention (after its establishment, expected in Autumn 2008).71 We understand that as most tribunals are brought within the new structures, they will initially retain their current costs regimes.72 In the long term costs rules may be aligned.

**Fees and costs – the research**

8.47 The Adler and Gulland literature review identifies five main costs that can act as a deterrent for users: tribunal fees, the cost of advice and/or representation, the cost of independent assessments, the cost of attending a hearing and the risk of having costs awarded against them.73 Higher fees for oral hearings than determination of visa appeals on the papers affected the appellant’s choice of procedure.

8.48 Adler and Gulland noted that the costs of legal advice and representation are particularly important in tribunals where legal representation is the norm. While some appellants complain about the cost of legal advice, but nevertheless pursue their appeals, Adler and Gulland thought that the costs of legal representation probably do constitute a deterrent for those who do not appeal.

8.49 They noted that the risk of having costs awarded against the unsuccessful party “is not currently an issue in most tribunals”. Even in those jurisdictions with power to award costs against an unsuccessful party, the powers appeared rarely to be used, or were sometimes not well understood by parties.

8.50 Blandy’s study of the service charge and insurance Leasehold Valuation Tribunal jurisdictions found that of the 349 lessees in the postal survey, 253 had at least one problem relevant to the new jurisdiction, of whom 191 had not submitted a case to an Leasehold Valuation Tribunal. 132 (69%) had considered making an application at one time or another: 36% gave uncertainties about the cost as a

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72 There may, however, be changes to the costs regimes for the direct and indirect tax tribunals.

reason for not approaching the tribunal while 25% said they could not afford the costs.\textsuperscript{74}

8.51 The research showed that the costs involved in pursuing a case can serve as a barrier when the sum of money in dispute is relatively small and the likely financial gain minimal. Leaseholders and freeholders talked about undertaking impromptu cost-benefit analyses, either before applying or upon realising the likely impact on their purse. This kind of calculation was particularly pertinent in service charge cases, where a specific sum of money was in dispute.

8.52 In some cases it was simply the tribunal fee which dissuaded potential applicants. 35% of those surveyed were unaware that the fees could be waived. Tribunal staff also thought that a fee of up to £500 was deterring people who were unwilling or unable to pay. The majority of applicants interviewed on the phone thought that the fees were set at an appropriate level (but the authors noted that by definition, those who had made an application had already demonstrated their willingness and ability to pay the fees).\textsuperscript{75}

8.53 Most of the comments about the financial implications of applying to the Leasehold Valuation Tribunal or responding to an application related to the totality of the costs, not the fees. Some referred to the costs of professional advice, time off work to prepare for and attend the hearing, and even sundries such as photocopying and phone calls. Most frequently mentioned was the cost of legal advice and representation, which many of those surveyed saw as essential.\textsuperscript{76} Some suggested that the level of the costs served as a barrier excluding some applicants and causing cases to be withdrawn.

8.54 As for whether the fact that the loser in a Leasehold Valuation Tribunal is not liable to pay the winner’s costs makes a difference, Blandy and her colleagues commented that:

One of the perceived advantages of the LVT over the County Court is that the losing party is not at risk of having to pay the other side’s costs. This should, in theory, make pursuing a case less of a risk. Two of the leaseholders involved in the case study disputes said that they had harboured concerns about the reasonableness of service charges and the management of the property for some years but had


\textsuperscript{75} S Blandy, I Cole, C Hunter, D Robinson, R Inniss and S Kane, \textit{Leasehold Valuation Tribunals: Extending the Remit – Analysis of appointment of a manager, insurance disputes and service charges cases before Leasehold Valuation Tribunals} (2001) pp 14 to 16.

not pursued their case through the courts because of the risk of having to pay costs. These leaseholders noted that the new jurisdiction of LVTs under the 1996 Housing Act finally allowed them to pursue their concerns in a cost effective manner.

8.55 At the time of the study, the Leasehold Valuation Tribunal did not have the powers now contained in the Commonhold and Leasehold Reform Act 2002 to allow the tribunal to order a party whose application has been dismissed as frivolous or vexatious or otherwise an abuse of process; or who has acted “frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings” to pay the opponent’s costs. A number of professional representatives surveyed by Blandy and her colleagues recommended the introduction of such a power.

8.56 Not all those surveyed were aware of section 20C of the Landlord and Tenant Act 1985, which allows the tribunal to prevent the landlord including costs relating to the tribunal proceedings in a service charge. Blandy and her colleagues noted that even with section 20C, leaseholders were running a risk.

… Leaseholders will not, however, know the outcome of any such application until the end of the case since the LVT does not judge on section 20C applications until making the determination. Some applicants might be unwilling to take the risk. One professional representative suggested that too few leaseholders fully appreciated the risk that they were actually taking and argued that the grounds for making section 20C orders should be made more explicit.77

8.57 Professional representatives interviewed by Blandy and her colleagues offered a number of suggestions for reform, “including a fee structure comparable with the courts, enforcing payment of fees by the losing party, and attempting to resolve dispute without recourse to the full LVT procedure.”

The application fee could be paid by the losing party. This would be one way of getting the show on the road, and provide a sanction for unreasonableness. Awarding professional costs would be a disincentive to taking a case, too much of a risk. (Solicitor representing leaseholder).78

8.58 Economists have also studied the effect of different costs systems on litigants’ decisions, to bring, discontinue or settle legal claims, although much of the research relates to personal injury cases, particularly in the United States. We published alongside the Issues Paper on the Law Commission website a paper


reviewing the law and economics literature on the influence of different costs rules, in particular comparing the “fee shifting” or “UK rule” (that the loser pays the winner’s costs), with “the US rule” (that each party bears their own costs, the general rule in tribunals).\(^79\)

8.59 We noted in that paper that there appeared to be little agreement between law and economics scholars modelling the issue theoretically. Some statistical and experimental work suggested that:

The US rule causes more low-merit claims to be filed. The UK rule causes higher expenditure and a higher proportion of filed cases to be dropped. The UK rule may produce a lower settlement rate. The net effect of these factors on the number of trials is ambiguous. A further complicating factor is risk aversion amongst the parties.\(^80\)

8.60 We went on to state that:

Clear conclusions are hard to pin down: some studies are inconclusive, and theorists disagree. Disagreement may result from theorists’ different assumptions (eg as to risk aversion, or informational asymmetry – where the claimant knows the quantum of damages and the defendant does not, or where the defendant knows if he is liable but the claimant does not).

**Costs in the Issues Paper**

8.61 In the Issues Paper we asked what the costs rules should be in a proportionate system of dispute resolution. We received a wide variety of responses, touching on the amounts of costs, the incentive effect of different costs rules, problems with current costs rules in courts and tribunals, and advocating particular regimes for a housing court or tribunal in future.

**Quantifying costs in housing cases**

8.62 Some respondents told us about amounts of costs in different housing disputes. As regards disrepair claims:

(1) Patrick Reddin (in a response for Reddin and Co and the Association of Building Engineers) commented that “costs normally exceed the value of the works”.

(2) Iain Wightwick, a barrister, estimated that “each contested disrepair case costs £10-20,000 to bring to trial – for the landlord – if the preparation is done properly and outside experts are instructed.”

8.63 In possession claims:


1. Shelter told us that a defendant who actively pursues a defence (for example arguing that the two months’ notice under s.21 of the Housing Act 1988 is invalid, because an incorrect date was stated, in a possession claim in relation to an assured shorthold tenancy) is “at risk, if his arguments are ultimately unsuccessful, of having an order for costs in the region of £1,000 made against him.”

2. Shelter stated that “The minimum (fixed) costs on a possession claim which results in a postponed possession order following an undefended hearing will be in the region of £250.00”, which then adds to the tenant’s debt. … Where there has been an adjournment, and a restoration of proceedings, the landlord is likely to present a full Schedule of Costs.”

3. Where a local authority requires a tenant facing possession proceedings to remain in their current accommodation until the last possible moment, to qualify as homeless, and the landlord has to obtain a possession order, the tenant will be faced with an order for fixed costs.81

4. Tessa Shepperson, a solicitor advising landlords, stated that “My fee for standard possession proceedings based on the accelerated procedure is £200 plus VAT and the court fee. This is fairly standard for those of us who offer fixed fees for this type of work. Other firms may charge more if charging on a time costing basis.”

8.64 The National Landlords’ Association has previously surveyed members about the costs involved in possession claims.

A fifth of landlords report that it costs more than £1,000 to evict a tenant using the courts, and one in twelve landlords expends more than £2,000 in the process. While over half of landlords get away with spending less than £500, the average cost still turns out to be in excess of £800 (£828 to be precise).82

**Comments on the incentive effect of different costs rules**

8.65 A number of respondents commented on the incentive effects of different costs rules. They included the Legal Services Commission, the Law Society and Paddington Law Centre.

8.66 Shelter told us that

We are aware that strong views exist that the costs sanction is a necessary means of bringing cases to settlement and of deterring unmeritorious claims or defence. The problem is that the costs sanction equally deters many meritorious claims which otherwise go by default. In our view, costs are a crude determinant, and it is no credit to the present system that the absence of funding and the risk of costs frequently dictate whether or not a person obtains a remedy for an obvious injustice. Many practitioners would also welcome being

81 See paras 8.30 to 8.32 above.
able to spend more time on actually helping their clients, and less on
the arid and reductive process of drafting bills of costs for
assessment."

8.67 Lancelot Robson, a Residential Property Tribunal Service (RPTS) chairman,
commented that:

Fear of unquantified costs is a major issue for most litigants. Many tell
us that they chose the RPTS to avoid that liability.

On the other hand, the RPTS often sees some quite hopeless claims,
and sometimes claims which are an abuse of the process, either
trying to delay the inevitable, or to harass the other side. Some
litigants seem keen to cause as much expense as possible for the
other party, although this is difficult to prove satisfactorily when
considering a discretionary costs order.

8.68 Anthony Collins solicitors expressed frustration that the fact that "costs cannot be
recovered from legally aided parties at first instance" meant that there was "no
incentive at all to reach compromises/work efficiently or to timescales, even those
set by the Court."

8.69 The Association of Residential Management Agents criticised the Leasehold
Valuation Tribunal costs rules.

At present an LVT cannot refuse a leaseholder an oral hearing even
though the amount in dispute may be small. Because the LVT is
meant (with few exceptions) to be a cost-free environment, the result
is that landlords, can be put to disproportionate expense to defend
cases.

Responses favouring each side bearing their own costs

8.70 Lawrence Greenberg thought that in a tribunal there should be no fee, but
everyone should pay their own costs. Clarke Willmott solicitors (who favoured a
specialist tribunal to determine housing disputes) thought that in a proportionate
dispute resolution system we should scrap the current (court) costs rules and that
each party should bear its own costs. Shelter’s response could be read as an
argument in favour of each party bearing their own costs, rather than the loser
(for example a tenant against whom a possession order is obtained) being
ordered to pay the successful landlord’s costs.

Responses favouring current court costs rules (loser pays)

8.71 The Legal Services Commission thought that: “the rules should remain as they
are.” The Law Society also wanted “The present costs regime to apply. In
particular the fixed costs rules for routine possession actions should be retained.”

8.72 Some respondents favoured specific aspects of the current court costs rules. For example, Patrick Reddin favoured “costs in the cause” as the rule which should apply to housing disputes. This suggests that he favours retention of a general power to make the loser pay the winner’s costs. Costs in the cause, or case, means that “The party in whose favour the court makes an order for costs at the end of the proceedings is entitled to his costs of the part of the proceedings to which the order relates”.83

8.73 Anthony Collins Solicitors thought that the costs rules should be “summary assessment but bearing in mind proportionality.” Summary assessment means “the procedure by which the court, when making an order about costs, orders payment of a sum of money instead of fixed costs or detailed assessment”.84 (We noted above that fixed costs apply in small claims, undefended possession cases, and fast track cases. Detailed assessment “means the procedure by which the amount of costs is decided by a costs officer in accordance with Part 47”,85 and would apply to larger more complex claims, in the multi-track.)

8.74 The Association of Residential Managing Agents thought that the Leasehold Valuation Tribunal should be given more discretion in respect of costs, for example to take into account a party’s refusal to try some form of appropriate dispute resolution, when making a decision about costs.

**Responses favouring different rules in different cases, or broader discretion**

8.75 Some respondents did not argue in favour of a single rule applying to all housing cases, or to courts and tribunals. The RPTS view was that the costs issue must be addressed in respect of each type of case.

A real difficulty for practitioners lies in the “no costs” regime of Tribunals. Our view is again, that this must be addressed in respect of each type of case. So far as costs are concerned, one size does not fit all. In some jurisdictions costs act as an unacceptable barrier to dispute resolution. In others they may be a necessary tool. In the same way, the incidence of fees for application and powers of reimbursement must be considered carefully.

8.76 Lancelot Robson stated that:

in tribunals, the starting rule should be that parties pay their own costs unless one side has been grossly unreasonable. Also if costs are to be awarded, then they should only be a small amount to mark the tribunal’s displeasure. The principles relating to costs are not well understood by the public, and the fear of an adverse award seems great. In courts, I see no reason why the present basic rules should not apply.

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83 Civil Procedure Rules, Practice Direction About Costs, para 8.5.
84 Civil Procedure Rules, r 43.3.
85 Civil Procedure Rules, r 43.4.
8.77 The Law Centres Federation, Citizens Advice, and the Advice Services Alliance all thought that the housing court or tribunal should have “the power to award costs where appropriate,” though when would be appropriate was not made clear.

Responses favouring some form of costs penalties

8.78 A few respondents specifically advocated costs penalties in certain situations, for example to encourage the use of other more appropriate dispute resolution methods. Thus:

(1) Paddington Law Centre suggested “refining the Protocol on Rent Arrears and the statutory guidance to registered social landlords to establish costs penalties where rent arrears cases have been issued prematurely”.

(2) The Association of Residential Managing Agents proposed that the Leasehold Valuation Tribunal should be able to determine that a case would not be heard unless the parties had tried some form of appropriate dispute resolution. And that if either party had refused alternative dispute resolution, then that would be a factor to be taken into account when making a decision about costs.

CONCLUSIONS

8.79 There are currently significant differences between courts and tribunals, both on fees and costs.

8.80 The Tribunal, Courts and Enforcement Bill provides support for the development of a more rational approach to both, in both courts and tribunals.

8.81 The law and economics research shows it is hard to predict whether if rented housing possession and disrepair claims were transferred to a tribunal, a change from the costs rules which currently apply to such cases under the Civil Procedure Rules would lead to more or fewer cases being brought, or settled before trial.

8.82 We think much will depend on the ability of the tribunal or court to use costs sanctions to get parties to adhere to the obligations set out in pre-action protocols, including appropriate use of alternative dispute resolution. In developing these, it is important to remember that many of the disputes that can arise in the housing context do so because Parliament has enacted legislation designed to protect landlords or occupiers. It is important that ordinary members of the public should not be denied access to formal adjudication in those cases where that is the only way of resolving a matter. Detailed policy and proposals relating to costs and fees should take account of this key background issue.

8.83 The broad thrust of responses to the Issues Paper appeared to favour giving the court or tribunal power to make one party pay the other’s costs, at least in some circumstances: to provide incentives against bringing a frivolous or premature case and in favour of settlement; to provide incentives to use appropriate dispute resolution methods; and to comply with procedural rulings. We would like to hear from consultees on how fees and costs rules could be developed to encourage the proportionate resolution of housing disputes.
8.84 We provisionally propose that the First-tier and Upper Tribunals hearing rented housing possession and disrepair claims, caravan and mobile home possession cases, and homelessness statutory appeals and judicial review cases, should have a power to award costs against a party.

8.85 Do consultees agree that the tribunal should be able to order one party to pay not only the fees paid by the other party, but also other costs incurred by that party?

8.86 Should the tribunal have discretion to order one party to pay some or all of the other's costs:

(1) routinely, where the payer has lost the case (but subject to considerations such as the parties' behaviour, compliance with pre-action protocols); or

(2) only where the payer has “misbehaved” (for example failed to comply with an order made by the tribunal, or to provide necessary information; or has made a frivolous or vexatious claim, or has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings)?

8.87 If an award of costs against a party should only be made where that party has “misbehaved”, what acts or omissions by the party should justify an award of costs against him?

8.88 To what extent should the costs recoverable from one party by another be capped (as currently are the fixed costs which apply to undefended possession claims, and costs orders in the Leasehold Valuation Tribunal and Residential Property Tribunal which are limited to £500)?

8.89 If the costs recoverable by one party from another should be capped, at what level should the cap be set?
PART 9
ENFORCEMENT

INTRODUCTION

9.1 To date tribunals have not had the direct enforcement powers which are available to courts. Tribunal judgments have had to be registered with the court before the court’s enforcement powers could be used. Currently, in housing possession cases, applications for warrants of possession, or to suspend their execution, are of great significance. Any proposal for rented housing possession and disrepair and caravan and mobile home possession cases to be heard by the First-tier Tribunal should not make enforcement of awards in such cases harder. We ask consultees to consider whether there should be any limitations on the numbers of applications a tenant can make for suspension of a warrant of possession; whether such warrants could be granted by a tribunal but executed by court enforcement agents, and whether any further reforms to enforcement powers are required for housing cases.

CURRENT POWERS

9.2 In a paper published on the Law Commission website alongside the Issues Paper, we discussed the enforcement powers available to the courts and tribunals in some detail.¹ None of these enforcement methods happens automatically: an application to the court must be made, and the appropriate fee paid.

Enforcement of possession orders

9.3 Arguably the most important method of enforcement in the context of housing disputes is the warrant of possession. Where a tenant fails to comply with an outright possession order requiring him to leave the house by a specified date, or where the tenant fails to comply with the terms of a suspended possession order, thus ending the tenancy, the possession order can only be enforced by the execution of a county court warrant of possession by bailiffs.²

9.4 The court can stay or suspend a warrant at any time before the execution of the possession order.³ Once the warrant has been executed, it can only be set aside if a successful application is made to set aside the possession order, in which case the warrant ceases to have effect,⁴ or, if the possession order cannot be set aside, if the warrant of possession was obtained by fraud, or there has been an abuse of process or “oppression” in its execution.

² County Court Rules, O 26, r 17.
³ Rent Act 1977, s 100(2); Housing Act 1985, s 85(2), Housing Act 1988, s 9(2).
Enforcement of money judgments

9.5 High Court and county court money judgments can be enforced by:

1. warrants of execution/writs of fieri facias – sending in the bailiffs (county court) or enforcement officers (High Court) to seize and sell goods owned by the judgment debtor;\(^5\)

2. third party debt orders – previously known as garnishee orders, these are a means of obtaining payment of the judgment debt from a third party who owes the judgment debtor money, or who holds money from him or her (for example a bank);\(^6\)

3. charging orders – these secure payment of the judgment debt against land, securities or funds in court held by the judgment debtor, and prevent the debtor selling the property without first satisfying the judgment debt;\(^7\)

4. stop orders or stop notices – these prohibit the registration of transfer of securities, payment of dividends or interest, acquisition of or other dealing with unit trust units, or dealing with funds in court or the income thereon;\(^8\)

5. attachment of earnings orders – these are available only in the county court and can direct the judgment debtor’s employer to deduct specified amounts from his earnings and pay them directly to the court to pass on to the judgment creditor;\(^9\)

6. the appointment of a receiver – a receiver can be appointed by the court to receive income from the judgment debtor’s property, for example rent, and apply it to discharge the debt;\(^10\)

7. writs of sequestration – a response to a contempt of court, it involves the court appointing four sequestrators to enter the judgment debtor’s land and take possession of its personal property and hold it until the court order is complied with;\(^11\)

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\(^5\) The rules on county court warrants of execution are in the County Courts Act 1984, ss 85 to 104 and County Court Rules, O 25 and O 26 (and O 33 for interpleader proceedings). For High Court writs of fieri facias, the Courts Act 2003, sch 7, and the High Court Enforcement Officers Regulations 2004 (SI 2004 No 400) and Rules of the Supreme Court O 45, O 46 and O 47 (and O 17 for interpleader proceedings) contain relevant provisions.

\(^6\) Supreme Court Act 1981, s 40; County Courts Act 1984, s 108; Civil Procedure Rules, Part 72.

\(^7\) Charging Orders Act 1979; Civil Procedure Rules Part 73.

\(^8\) Civil Procedure Rules, rr 73.11 to 73.21.

\(^9\) Attachment of Earnings Act 1971; County Court Rules, O 27.

\(^10\) Supreme Court Act 1981, s 37; County Courts Act 1984, ss 38 and 107; Civil Procedure Rules Part 69.

\(^11\) County Courts Act 1984, s 38; Rules of the Supreme Court O 46, r 1.
insolvency proceedings – the service of a statutory demand on the judgment debtor, which, if unpaid three weeks later, allows the creditor to file a bankruptcy petition (on an individual), or apply to wind up a corporate debtor.\textsuperscript{12} Insolvency proceedings may also restrict the ability of a judgment creditor to obtain enforcement of the judgment.\textsuperscript{13}

9.6 County court administration orders may also affect the ability of the judgment debtor to seek enforcement.\textsuperscript{14} A judgment debtor who has two or more outstanding debts (not exceeding £5,000), including at least one High Court or county court judgment debt, can apply for an administration order, under which the court will manage the payment of the debts and deal with the creditors. The debtor pays a single monthly sum to the court which divides it amongst the creditors.

9.7 Breach of an injunction can lead to:

(1) committal to prison;\textsuperscript{15} or

(2) a fine;\textsuperscript{16} and/or

(3) sequestration.

9.8 The judgment debtor can be required to attend court to provide information about his means, to allow an appropriate enforcement method to be chosen.\textsuperscript{17}

9.9 Tribunals have no enforcement powers of their own. If a tribunal award is not paid, usually the claimant has to register it with the county court, before the county court enforcement methods can be used. Decisions of the Leasehold Valuation Tribunal,\textsuperscript{18} and decisions of the Residential Property Tribunal,\textsuperscript{19} are enforceable with the county court's permission, like county court orders. There are no specific enforcement provisions for Rent Assessment Committee or Rent


\textsuperscript{13} In Harlow DC v Hall [2006] EWCA Civ 156, [2006] 1 WLR 2116; the issue in dispute was whether a suspended possession order could be maintained, or must be discharged, after the tenant had been declared bankrupt.

\textsuperscript{14} County Courts Act 1984, ss 112 to 118, County Court Rules O 39.

\textsuperscript{15} Rules of the Supreme Court Act, O 45, r 5, 6 and 7 and O 52; County Court Rules, O 29.

\textsuperscript{16} Rules of the Supreme Court, O 52, r 9; Practice Direction – Committal Applications, Annex.

\textsuperscript{17} Civil Procedure Rules Part 71.

\textsuperscript{18} Commonhold and Leasehold Reform Act 2002, sch 12, para 11 allows procedure regulations to provide for decisions of that tribunal to be enforceable with the permission of a county court in the same way as orders of such a court. See the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 (SI 2003 No 2099), reg 19; the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004 (SI 2004 No 681 (W 69)), reg 19.

\textsuperscript{19} Housing Act 2004, sch 13, para 13 allows procedure regulations to provide for decisions of the Residential Property Tribunal to be enforceable with the permission of a county court in the same way as orders of such a court. See the Residential Property Tribunal Procedure (England) Regulations 2006 (SI 2006 No 831), reg 34; and the Residential Property Tribunal Procedure (Wales) Regulations 2006 (SI 2006 No 1641 (W 156), reg 34.
Tribunal decisions, although some provisions specifically allow for recovery of overpaid rent in the county court. Lands Tribunal decisions are enforceable like arbitration awards, with the court’s permission in the High Court or county court.

9.10 Overpaid housing benefit (for example, following an Appeals Service tribunal decision) can be recovered by deduction from benefit, or in the county court as if payable under a county court order.20

THE TRIBUNALS, COURTS AND ENFORCEMENT BILL

9.11 The Government has carried out a major review of enforcement powers,21 which led to the inclusion of substantial provision relating to enforcement in the Tribunals, Courts and Enforcement Bill.

9.12 Part 3 of the Bill unifies the existing law relating to enforcement by seizure and sale of goods. Schedule 12 sets out a comprehensive code governing the procedure to be followed.22 The Bill also provides for the certification of bailiffs (or enforcement agents as they will be called).23 Powers in the Bill to allow enforcement agents to obtain a warrant allowing them to use reasonable force to enter premises to seize goods24 have proved controversial.25

9.13 Part 4 contains measures to help creditors in the civil court to enforce their judgments. It provides a new court-based mechanism to help the court obtain information about the judgment debtor, on behalf of the creditor, for example from the Department for Work and Pensions and Her Majesty’s Customs and Revenue. It also amends the legislation relating to attachment of earnings orders, to provide for fixed deductions.

9.14 Part 5 of the Bill amends the legislation governing county court administration orders, and enforcement restriction orders. It contains measures which provide debtors who cannot pay their debts with relief from enforcement and discharge from their debts. It also contains non-court based measures to help over-indebted persons and those with multiple debts to manage their situations.

20 Social Security Administration Act 1992, s 75.
22 In para 178 of its Detailed Policy Statement on Delegated Powers (March 2007), the DCA stated that “It is intended that sale by public auction will include sale by electronic methods such as eBay”, a development suggested in the futuristic “A2J” model of electronic court procedures proposed by the National Centre for State Courts in the USA: see para 5.100 above.
23 Tribunals, Courts and Enforcement Bill, cl 59.
24 Tribunals, Courts and Enforcement Bill, sch 12, paras 20 to 22.
As for enforcement of tribunal decisions, the Bill provides for sums payable in pursuance of First-tier and Upper Tribunal decisions to be recoverable as if they were county court or High Court decisions. Tribunal Procedure Rules may, however, provide for this not to be the case in relation to sums of a description specified in them. Tribunal awards for over £5,000 will continue to be enforceable only in the High Court.

Claimants will be able to go directly to the county court or High Court for enforcement. The Explanatory Notes to the Bill state that these changes will level the playing field between tribunal users and other civil claimants, and ensure that those owed money as a result of a tribunal hearing can benefit from improvements to the wider civil enforcement system.

THE ISSUES PAPER

In the Issues Paper we asked whether there were particular problems involved in the enforcement of decisions relating to housing, and whether tribunals should have enhanced enforcement powers.

Problems with current enforcement of housing decisions

Court decisions

Brent Private Tenants’ Rights Group referred to problems with enforcement, both in relation to tenancy deposits (for which new schemes made under the Housing Act 2004, sections 212 to 215 will now make provision) and in relation to “comparatively small disrepair and similar cases against small or elusive landlords”. The Group “would like to adopt a principle that failure to pay up will escalate the payment which is due, both to the claimant, for inconvenience, distress etc, and to the court.” They also suggested that “If the landlord is untraceable some action should be available in relation to the property to ensure the sum is paid.”

Several respondents referred to warrants of possession. The Brent Private Tenants’ Rights Group thought that the system should take account of the hardship, unhappiness and disruption in people’s lives that can be caused by the enforcement of warrants of possession.

Landlords and their lawyers had a different perspective. Clarke Willmott solicitors argued that there should be a limit to the number of occasions on which tenants can apply to suspend a warrant of possession, expressing frustration that tenants make multiple applications “even though the same story is told each time and/or the case appears to be hopeless.” Anthony Collins solicitors, another firm that acts for social landlords, commented that

26 Tribunals, Courts and Enforcement Bill, cl 27.

Too many rent warrants are stayed too many times because the tenant attends and the Judge does not like to evict. Many problems arise from [housing benefit].

Judges should be given structured discretion on rent warrant cases requiring them to consider if previous payment promises kept and effect on social landlord of repeated non-compliance.

The research on the exercise of judicial discretion in rent arrears cases also found that where the tenant attends court, some judges are less likely to make an outright order for possession, or to refuse an application to suspend a warrant.28

9.21 The British Property Federation argued that “courts need to better enforce possession proceedings that landlords are rightfully due”. The substance of the complaint related more to the procedural and evidential requirements for obtaining possession on the grounds of rent arrears or anti-social behaviour (for example the requirement to keep a diary of incidents of nuisance over a long period) than to the enforcement of an order for possession once obtained. The British Property Federation suggested that a quicker eviction process, for example for tenants of houses in multiple occupation responsible for nuisance, was required. Otherwise, landlords would continue to use the notice-only section 21 possession ground even where the substance of the dispute is rent arrears or nuisance. Where the accelerated possession procedure is used for section 21 claims, the landlord is unable to recover unpaid rent or compensation for damage to the property.

Tribunal decisions

9.22 The Association of Residential Managing Agents explained that if a leaseholder, having lost a Leasehold Valuation Tribunal service charge case, refuses to pay the service charge, the landlord has to go to the county court to enforce payment. The lack of Leasehold Valuation Tribunal enforcement powers meant that “the cost of recovering service charge and ground rent debts is excessive and encourages debtors never to pay up.”

9.23 Lancelot Robson told us that “specific problems occur in repair and management cases where money, documents and information are ordered to be handed over.”

Should tribunals have enhanced enforcement powers

9.24 Ten respondents thought that tribunals should have enhanced enforcement powers, with only one disagreeing.

9.25 The Association of Residential Managing Agents suggested that the Leasehold Valuation Tribunal be given full jurisdiction over service charge disputes with powers of enforcement over debts. Similarly Anthony Essien of the Leasehold

Advisory Service (LEASE) thought that tribunals should have enhanced enforcement powers: “for example the fact that enforcement of a decision of the leasehold valuation tribunal requires an application to the county court is, to say the least, inefficient.”

9.26 The Council on Tribunals thought that tribunals should have powers of enforcement. The Law Society thought that it is essential that the decisions of a tribunal can be enforced. If a tribunal were dealing with the types of cases the court presently deals with it is essential that its decisions can be enforced.

9.27 The Association of District Judges commented that

Currently, only the court has power to enforce decisions. It is likely that the court will continue to be the appropriate enforcement mechanism, which strengthens our belief that the court remains the best venue for resolution of housing disputes. The vast majority of housing cases are for possession. Most require the exercise of discretion by the judge on whether to grant and/or suspend/postpone possession. The orders are enforced by county court bailiffs. This is unlikely to change. In connection with enforcement, there are dozens of urgent applications to suspend every week in most courts, and most require a further exercise of discretion. Splitting the venue for hearing from the venue for enforcement makes no sense, would be costly, and inefficient because the file would have to be transferred to a different venue.

9.28 Lancelot Robson told us that:

In principle, tribunal decisions should have the same status as a court order. … However enforcement powers need an enforcement service to physically carry out orders. The most obviously available enforcement service is the County Court bailiff service.

9.29 The Housing Law Practitioners Association appeared sceptical about conferring enforcement powers on tribunals. It stated that:

it should be recognised that tribunals and Courts perform different functions. Tribunals may regulate terms and conditions between landlord and tenant or freeholder and leaseholder. Courts make enforceable mandatory orders – for possession, injunctions as to behaviour or to prevent harassment, for damages, and for the quashing of decisions made by central and local government and other government or quasi-government bodies. We suggest that it is, at least in part, because the orders made by courts are capable of being enforced by seizure of property and imprisonment if necessary that high quality of due process (including the provision of representation through the public funding process) is required. Traditionally tribunals do not make such orders. If they did they would start to look like courts. Moreover if they did then representation would become more important, particularly as people’s homes or their prospects of obtaining a home would be at stake, and legal argument and the presentation of evidence including cross – examination often
required. The only guarantee of proper representation would be through public funding for many. By this stage any housing tribunal would be indistinguishable from a Court.

9.30 The RPTS thought that a tribunal would need power to order injunctive relief in housing cases.

CONCLUSIONS

9.31 Clause 27 of the Tribunals, Courts and Enforcement Bill means that if rented housing possession and disrepair claims were heard by the First-tier Tribunal, a tenant would not have to register the judgment first before using county court enforcement powers to enforce the payment of damages for disrepair, and the landlord would not have to register any judgment for unpaid rent before seeking to enforce it. This should mean that enforcement of these decisions should be no more difficult, if they were made by a tribunal, than at present.

9.32 In addition the reforms to the general civil enforcement system in other Parts of the Tribunals, Courts and Enforcement Bill, for example in Part 4 of the Bill, to provide for the court to obtain information about debtors’ employment and finances from Her Majesty’s Customs and Revenue, should strengthen existing enforcement powers.

9.33 In relation to warrants of possession, we agree with the Association of District Judges that it would make no sense to split the venue for application for a possession order, and the venue for application for a warrant of possession or its suspension. Such a split would increase the risk that the person deciding whether to grant or suspend a warrant of possession would not have the full case history, including any previous suspensions. 29

9.34 We do not think that the fact that the application for a warrant of possession would be made to the tribunal necessarily means that the tribunal has to have its own staff of enforcement agents. Her Majesty’s Courts Service, as part of its Courts and Tribunals Modernisation Programme, is setting up a “National Enforcement Service”, a “distinct and clearly identifiable body of enforcement professionals”. 30 While the initial focus is on enforcement in criminal cases, for example securing the payment of fines payable to magistrates’ courts, Her Majesty’s Courts Service explained, on the launch of the service that it:

Will provide the opportunity to amalgamate civil and criminal enforcement activity. The feasibility of this needs further testing but all types of enforcement will come under the NES umbrella. That said, there are differences in the approach that needs to be taken with civil debt, which is governed by different rules, and we need to take this into account. 31


30 See, for example, DCA, Delivering Simple, Speedy, Summary Justice (2006) para 5.9.

If the National Enforcement Service was extended to cover enforcement of civil court judgments, it could also provide enforcement of warrants of possession obtained in tribunals. There would have to be effective links between the tribunals and the enforcement service, and further legislation may be needed. We think this would be preferable to possession orders being made in the tribunal, and possession warrants being dealt with by the courts.

Do consultees agree that it would be feasible for a warrant of possession to be granted by the tribunal, but executed by court enforcement agents?

If rented housing possession and disrepair cases in Wales were heard by the Residential Property Tribunal (if, contrary to our provisional proposal, the First-tier Tribunal did not extend to Wales), under the current provisions in the Bill, the county court’s permission would still be needed before enforcement of the tribunal decision. The Explanatory Notes to the Tribunals, Courts and Enforcement Bill state that

In relation to tribunals where the governing statute does not currently allow for enforcement through the court system, it is not intended to alter the position until the relevant jurisdiction is transferred to the new tribunals.

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

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32 Our provisional proposals are summarised in para 1.4.

PART 10
SUMMARY AND QUESTIONS

INTRODUCTION

10.1 In this final Part, we summarise the main points made in the paper and bring together the questions we would like consultees to address.

10.2 The central argument in this paper is that, where housing disputes need to be resolved by formal adjudication, more cases should be dealt with by a specialist adjudicatory body than is currently the case. To achieve this objective, we make four key provisional proposals, namely that:

1. There should be a transfer of jurisdiction over claims for possession and disrepair in respect of rented dwellings from the county court to the Residential Property Tribunal Service (RPTS). (This proposal is based on the assumption that the RPTS will be incorporated into the First-tier Tribunal to be created by the Tribunals, Courts and Enforcement Bill). We also suggest that jurisdiction over possession claims in relation to mobile homes and caravans could be transferred to the new tribunal.

2. Appeals on a point of law from the First-tier Tribunal should go to the Upper Tribunal, and would require the tribunal’s permission.

3. Homelessness statutory appeals currently heard by the county court, and housing and homelessness judicial review applications, currently made to the Administrative Court, should be transferred to the Upper Tribunal.

4. In relation to the position in Wales, we propose, not without some hesitation, that a reformed system should be a unified England and Wales one. (This would require the reversal of the devolution of the Welsh equivalent to the RPTS – RPT Wales – so that, jointly with the RPTS, it can be absorbed into the First-tier Tribunal.)

PART 1 – INTRODUCTION

10.3 Part 1 sets this paper in the context of the Law Commission’s Issues Paper on proportionate housing dispute resolution; its other work on the reform of housing law, and the wider context, including the Tribunals, Courts and Enforcement Bill, and the Legal Services Commission proposals for the development of Community Legal Advice Centres and Networks. We referred to our proposals for “triage plus”, and the resource constraints on any reforms (paras 1.5 to 1.31). It notes the objectives and values that should underpin any formal adjudicatory body (paras 1.18 and 1.19).

10.4 The paper makes three key assumptions:

1. that the RPTS will be brought into the Tribunals Service;

2. that any reform of housing dispute will be evolutionary, not revolutionary; and
(3) that there will be no significant increases in the public funds available for the resolution of housing disputes.

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

PART 2 – THE CASE FOR CHANGE

10.6 Part 2 sets out the case for change. It starts by considering the current position, in particular perceived problems with the county court, (such as delay, inconsistency and lack of specialist judicial knowledge) and the perceived advantages of tribunals (including their specialisation, their procedural flexibility, and their ability to offer a more user-focused service than the courts) (paras 2.3 to 2.6).

10.7 Many respondents to the Issues Paper argued for the creation of a more specialist adjudicatory body. We therefore start with a discussion of specialisation, and the advantages it offers – judges expert in housing law at both first-tier and appeal stages; other members with relevant expertise (for example surveyors), plus the flexibility to include members with knowledge of other areas of law, for example housing benefits (paras 2.7 to 2.32).

10.8 Do consultees agree that increased specialisation would offer significant advantages for the formal adjudication of housing disputes? (para 2.33)

10.9 We then consider delay (paras 2.34 to 2.56). We ask whether perceptions of delay in the courts match the current reality, and wonder whether, at least initially, moves towards more specialisation have the effect of increasing delay.

10.10 Do consultees agree that delay may be less of a problem, at least in some courts, than is sometimes thought to be the case? Do consultees think delay might increase, at least initially, if cases were transferred to a more specialised adjudicatory body? (para 2.57)

10.11 We then turn to the issue of consistency (paras 2.58 to 2.78). We note that there can be inconsistency in relation to both decision-making and administrative practice. We suggest that consistency may be improved more easily in the context of a specialist adjudicatory body.

10.12 Do consultees agree that consistency both of decision-making and administration may be achieved more easily by a specialist tribunal? (para 2.79)

10.13 We consider other issues which relate to the values which should underpin any system for the resolution of housing disputes. These include: access to justice and participation, and the need for the adjudicatory body to be locally accessible and develop local knowledge (paras 2.81 to 2.94).

10.14 How best can any formal adjudicatory body develop local knowledge of housing? (para 2.95)
10.15 We examine how the work of an adjudicatory body might have a wider impact, going beyond the determination of the case between the parties, for example through user groups and the provision of feedback to initial decision-makers (paras 2.96 to 2.101).

10.16 How best do consultees think that the decisions of any adjudicatory body could have a wider impact? (para 2.102)

10.17 Having considered the case for increased specialisation, and other issues, we note that while, historically, tribunals have been more specialised than courts, this does not have to be so. We consider three possibilities: the creation of a “stand-alone” housing court; the creation of a specialist housing court within the county court, or making greater use of the Residential Property Service Tribunals, We also note recent Scottish legislation providing for private rented housing disrepair cases to be determined by a tribunal, the Private Rented Housing Panel (paras 2.105 to 2.132).

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

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

10.20 Are there other benefits which consultees think might flow from such a re-balancing? (para 2.134)

10.21 We accept that any change on the lines proposed will have costs as well as benefits (paras 2.135 to 2.140).

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

10.23 We consider the implications of our provisional proposals for Wales. (paras 2.142 to 2.153) Having considered other options and despite obvious political sensitivities we provisionally propose that the preferable approach is to un-devolve the Residential Property Tribunal Wales and bring it into the new Tribunals Service along with the RPTS.

10.24 Is transferring responsibility for the RPT Wales back from the Welsh Ministers to the UK Government so that a single England and Wales system can be introduced the right option for Wales? If not, which of the other options should be preferred? (para 2.154)
PART 3 – HOUSING TRIBUNAL: PROPOSED JURISDICTIONS

10.25 In Part 3 we outline the classes of case which should be transferred from the courts to the specialist tribunals. We explain how we narrowed down the categories from a broader list of housing disputes (paras 3.1 to 3.14).

10.26 The outline proposals are then considered in more detail (paras 3.15 to 3.76). We consider issues which might arise during possession or disrepair cases, such as the status of the tenancy, housing benefit, succession and anti-social behaviour. While not wishing to encourage “forum shopping”, we want to avoid linked proceedings being heard by different tribunals or courts. We propose that jurisdiction under some of the statutory provisions identified in the Appendix should be exercised by the tribunal only if the issue arose in the course of a rented housing possession or disrepair claim.

10.27 We explain why we thought that if the Upper Tribunal heard homelessness statutory appeals, it should also have the power to hear related housing and homelessness judicial reviews, which could be conferred on it under the Tribunals, Courts and Enforcement Bill.

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

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

10.30 Do consultees agree that there should be a general provision to ensure that tribunals have jurisdiction to determine those preliminary matters that need deciding before they can deal with the principal substantive issue? (para 3.34)

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

10.32 Do consultees agree that, in possession cases involving allegations of anti-social behaviour, the tribunal should be able to order the demotion of a tenant, but not have power to grant a warrant of arrest or attach a power of arrest to an injunction? (para 3.42)

10.33 Does table 1 in the Appendix identify all the relevant statutory provisions conferring jurisdiction on the county courts in rented housing possession and disrepair cases which should be exercisable by the First-tier Tribunal? (para 3.50)

10.34 Do any other connected issues arise in claims for possession or disrepair in relation to rented housing, other than the jurisdictions identified in table 1 in the Appendix, which the tribunal would also need to be able to determine? (para 3.51)
Are there any other cases where applications might have to be made both to an RPTS/RPT Wales tribunal and to the county court to resolve an individual housing dispute (in which the opportunity presented by this project should be taken to reform jurisdictional boundaries)? (para 3.52)

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

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

Are there any other measures (apart from the Rent Arrears Possession Pre-action Protocol) which would reduce the number of rent arrears possession claims coming before the tribunal in which housing benefit is an unresolved issue? (para 3.63)

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

If jurisdiction is transferred to the Upper Tribunal in relation to homelessness statutory appeals under sections 204 and 204A of the Housing Act 1996, which homelessness and housing related judicial review applications should the Upper Tribunal be given power to determine? (para 3.74)

Do consultees agree that jurisdiction should be transferred from the county court to the First-tier Tribunal in respect of caravan and mobile home possession claims? (para 3.76)

We also set out the jurisdictions which we do not propose should be conferred on the tribunals, for example in relation to mortgage possession claims, long leases, family law applications and criminal jurisdiction (paras 3.77 to 3.89).

Do consultees agree that these issues should not be transferred to the proposed tribunal? (para 3.90)

PART 4 – THE UPPER TIER: AUTHORITY AND PRECEDENT

In Part 4, we discuss appeal rights, both in existing courts and tribunals and in the Tribunals, Courts and Enforcement Bill, noting the complexity of current arrangements. We refer to the role of the Upper Tribunal in hearing appeals from the First-tier Tribunal (paras 4.1 to 4.23).

Do consultees agree that there should be a right of appeal only on a point of law against decisions of the First-tier Tribunal in housing cases? Should the same rule apply to all of its housing jurisdictions? (para 4.17)

Do consultees agree that permission of the First-tier Tribunal or Upper Tribunal should be required for any appeal against the First-tier Tribunal’s decisions in housing cases? (para 4.18)
Part 5 – Procedural Principles

10.47 Do consultees agree that the Tribunals, Courts and Enforcement Bill provides the opportunity for a much more straightforward structure for appeals; and ensures that authoritative precedents will be dealt with by judges who have expertise in housing law? (para 4.24)

10.48 We refer to the powers for tribunals to review their own decisions, which may preclude the need for appeal in some cases (paras 4.25 to 4.29).

10.49 Should the First-tier Tribunal’s power to review its own decisions be subject to any limitations? (para 4.30)

10.50 Should the Upper Tribunal’s power to review its own decisions be subject to any limitations? (para 4.31)

10.51 We discuss the role of appellate courts and tribunals in creating precedents and developing housing law. We explain that the Upper Tribunal’s decisions should be capable of being precedents, in order to further the coherent development of housing law, and increase the impact of tribunal decisions (paras 4.32 to 4.53).

10.52 Do consultees agree that decisions in housing cases of the First-tier Tribunal should not be laterally binding precedents in other cases before the First-tier Tribunal? (para 4.48)

10.53 Do consultees agree that some if not all decisions of the Upper Tribunal should be vertically binding precedents on the First-tier Tribunal? (para 4.54)

10.54 If consultees agree that only some decisions of the Upper Tribunal should be binding, how and by whom should the precedential value of decisions be determined? (para 4.55)

10.55 Part 5 concerns the principles that should shape the procedures of the proposed specialist tribunal (paras 5.1 to 5.9).

10.56 Which current procedure court and tribunal procedure rules and regulations applicable to the resolution of housing disputes work well and should be retained if rented housing disrepair and possession claims, and caravan and mobile home possession claims, were to be determined by the First-tier Tribunal? (para 5.10)

10.57 Which current procedure rules and regulations applicable to the resolution by courts and tribunals of housing disputes do not work well and require reform? (para 5.11)

10.58 What, if any, changes to court and tribunal procedure rules would assist in securing proportionate dispute resolution in housing cases? (para 5.12)

10.59 We look at overriding objectives as a way of embedding values in a dispute resolution system (paras 5.13 to 5.15).
10.60 Do consultees agree that an overriding objective, to which those deciding housing disputes must have regard, would assist in securing more proportionate dispute resolution? (para 5.16)

10.61 We refer to pre-action protocols, regarded by many, though not all, respondents to our Issues Paper as a valuable mechanism for encouraging proportionate dispute resolution and preventing premature or unnecessary recourse to the courts (paras 5.17 to 5.27).

10.62 Are any amendments required to the Pre-action Protocols on Housing Disrepair and Possession Claims for Rent Arrears to better secure proportionate dispute resolution in housing cases? (para 5.28)

10.63 Should any further pre-action protocols be developed to help secure proportionate dispute resolution in other housing cases? (para 5.29)

10.64 We discuss the conventional wisdom, and research evidence, about the relative informality of tribunal procedures (paras 5.30 to 5.36).

10.65 How can the procedure rules governing tribunals in housing cases secure the appropriate level of formality/informality for their proceedings? (para 5.37)

10.66 We look at the powers of case management and power to make directions and hold pre-trial reviews (paras 5.38 to 5.56).

10.67 What case management powers do consultees think are needed for the proportionate resolution of housing cases? In particular, do consultees agree with the suggestions of the Civil Justice Council (in para 5.49)? Do consultees have views on how case management powers can be exercised effectively? Are other powers needed to secure the proportionate resolution of housing disputes? (para 5.50)

10.68 Do consultees agree that automatic dismissal of claims or defences should not be permitted where case management directions are not complied with? Do consultees agree that tribunals should be more willing to exercise their discretion to dismiss cases on this ground? (para 5.57)

10.69 We consider whether oral hearings are needed in all cases (paras 5.58 to 5.81).

10.70 Do consultees agree that, in addition to retaining an equivalent of the accelerated possession procedure for cases where possession is sought on notice-only grounds, the tribunals should be able to determine other rented housing possession and disrepair cases, caravan and mobile home possession cases, homelessness statutory appeal and housing and homelessness judicial review cases without an oral hearing, where the parties agree to dispense with an oral hearing? (para 5.82)
Finally we examine the scope for information technology to play a more significant role in dispute resolution by tribunals, whether through electronic filing of claims and other pleadings; the use of video conferencing; the role of information technology in efficient tribunal administration; and mention the more radical “A2J” model developed in the United States to assist litigants in person (paras 5.83 to 5.108).

Do consultees think that there is greater scope for the use of video conferencing, for hearings, or “virtual visits” to premises the subject of a dispute? (para 5.90)

Do consultees agree that more housing claims, defences and other applications should be made electronically (in an extension of Possession Claims Online)? (para 5.95)

Are there other information technology tools (such as elements of the American “A2J” prototype) that could be used to promote more proportionate dispute resolution in housing cases? (para 5.108)

Part 6 – Legal Advice and Representation in Housing Dispute Resolution

Part 6 considers the need for advice and legal representation in tribunals. We examine both the role of courts and tribunals providing advice, and the scope for independent agencies to offer advice (for example the possession duty desk schemes found at many courts) (paras 6.1 to 6.29).

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

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

We also look at the benefits of representation in tribunal cases (paras 6.31 to 6.49).

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

We consider the scope for Community Legal Service (legal aid) funding in tribunals and argue that the transfer of cases from courts to tribunals must not be used as an excuse to withdraw legal aid from housing cases (paras 6.51 to 6.61).

Do consultees agree that legal aid should continue to be available in those housing cases for which it is currently available if they are heard by the tribunals in future instead of the courts? (para 6.62)
10.82 We also discuss the representation of landlords in court and tribunal proceedings. (paras 6.63 to 6.68).

10.83 Should there be any restrictions on those who can represent landlords in tribunal hearings? Would greater equality of arms be achieved by allowing non-lawyers, for example representatives of Arms Length Management Organisations (ALMOs), to act on behalf of a council landlord, as opposed to ALMOs having to engage lawyers with rights of audience? Should non-lawyers representing landlords be required to be a member of an accreditation scheme or professional body, such as the Association of Residential Letting Agents? (para 6.69)

10.84 We mention the use of conditional fee agreements to fund housing cases (paras 6.70 to 6.76).

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

PART 7 – ALTERNATIVE DISPUTE RESOLUTION

10.86 In Part 7 we considered the extent to which mediation of housing disputes can be encouraged, possibly through being offered and provided by the tribunal system itself (paras 7.1 to 7.34).

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

10.88 We consider the scope for early neutral evaluation, to assist the parties to a case to weigh up their prospects of success (paras 7.36 to 7.44).

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

10.90 Would restrictions on the instruction of expert witnesses without the tribunal's consent increase or reduce the likelihood of parties achieving a settlement through mediation or early neutral evaluation? (para 7.45)

10.91 Finally we mention ombudsmen and agree with suggestions for more flexibility between them and the courts/tribunals (para 7.46).

PART 8 – FEES AND COSTS

10.92 Part 8 considers principles relating to the fees which should apply in courts and tribunals determining housing disputes (paras 8.1 to 8.21).

10.93 Do consultees agree that the principles set out in paragraph 8.21 are those which should underpin the development of detailed rules on fees as they apply to the tribunals which would determine housing disputes and appeals? (para 8.22)
10.94 Part 8 also considers a number of issues relating to costs. It looks at the rules which currently apply in courts and tribunals and explores the extent to which fees and costs rules can provide incentives to encourage proportionate dispute resolution (paras 8.23 to 8.84).

10.95 Do consultees agree that the tribunal should be able to order one party to pay not only the fees paid by the other party, but also other costs incurred by that party? (para 8.85)

10.96 Should the tribunal have discretion to order one party to pay some or all of the other's costs:

(1) routinely, where the payer has lost the case (but subject to considerations such as the parties' behaviour, compliance with pre-action protocols); or

(2) only where the payer has “misbehaved” (for example failed to comply with an order made by the tribunal, or to provide necessary information; or has made a frivolous or vexatious claim, or has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings)? (para 8.86)

10.97 If an award of costs against a party should only be made where that party has “misbehaved”, what acts or omissions by the party should justify an award of costs against him? (para 8.87)

10.98 To what extent should the costs recoverable from one party by another be capped (as currently are the fixed costs which apply to undefended possession claims, and costs orders in the Leasehold Valuation Tribunal and Residential Property Tribunal which are limited to £500)? (para 8.88)

10.99 If the costs recoverable by one party from another should be capped, at what level should the cap be set? (para 8.89)

PART 9 – ENFORCEMENT

10.100 Part 9 considers the enforcement powers currently available to secure compliance with court and tribunal decisions. It notes that the Tribunals, Courts and Enforcement Bill will allow the enforcement of First-tier and Upper Tribunal decisions in the same way as county court decisions, without the need for first registering the judgment. We propose its extension to the existing Residential Property Tribunal Service tribunals. We examine concerns about existing enforcement methods, and suggest that warrants of possession should be issued by the tribunal which hears the possession claim (paras 9.1 to 9.37).

10.101 Do consultees agree that it would be feasible for a warrant of possession to be granted by the tribunal, but executed by court enforcement agents? (para 9.36)
10.102 Are any further reforms (in addition to the removal of the requirement to register a tribunal judgment in the court before using the county court’s enforcement powers) required to give a tribunal hearing rented housing possession and disrepair cases and caravan and mobile home possession cases effective enforcement powers, in relation to money judgments and warrants of possession? In particular, should there be any limit on the number of applications a tenant can make for suspension of a warrant of possession? (para 9.38)

CONCLUSION

10.103 This Paper makes a series of bold proposals for the reform of housing dispute resolution which reflect many of the points made to us by respondents to the Issues Paper we published in 2006. These proposals must be seen in the context of the work we have already completed on the reform of substantive housing law, our other work on proportionate housing dispute resolution, and on the regulation of the private rented sector. Some of the problems referred to in responses to our Issues Paper were, or will be, addressed in those other projects.

10.104 As an illustration of this broader picture, we conclude by referring to the response to the Issues Paper that we received from a firm of solicitors, Clarke Willmott. They set out a list, which they thought identified some of the most crucial problems, in relation to housing disputes, and Clarke Willmott’s proposed solutions. To their original list of problems and solutions (in the first two columns of the table on the following page), we add our own response, in the third. We hope that consultees will agree that this demonstrates how we are seeking to address the broader issues in an area of law that makes a crucial difference both to individuals, and society generally.
<table>
<thead>
<tr>
<th>Problem</th>
<th>Solution</th>
<th>Law Commission response</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Tenant’s ignorance of terms of tenancy</td>
<td>More tenant-friendly tenancy agreements</td>
<td>Our Renting Homes final report included model occupation contracts which are more comprehensive and comprehensible</td>
</tr>
<tr>
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<tr>
<td>2. Access (especially for the tenant) to early advice</td>
<td>Triage plus? (but preferably by another name!)</td>
<td>We are consulting separately on how triage plus could operate in practice</td>
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<tr>
<td>3. Dispute/ misunderstandings about amount of rent arrears</td>
<td>Documentary certification from Housing Benefit of amount claimed</td>
<td>We also propose that the tribunal should be able to determine housing benefit payable where housing benefit issues are raised as part of possession proceedings</td>
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<td></td>
<td></td>
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</tr>
<tr>
<td>4. Inefficient/ineffective resolution of disputes in County Court</td>
<td>Dedicated and expert tribunal staff</td>
<td>This is what we propose – an expert housing chamber of the First-tier Tribunal</td>
</tr>
<tr>
<td></td>
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</tr>
<tr>
<td>5. Lengthy resolution of disputes</td>
<td>More determinations by written evidence and submissions</td>
<td>We suggest that the parties should be able to agree to a determination on the papers, although an oral hearing would remain an option</td>
</tr>
</tbody>
</table>
### APPENDIX

**JURISDICTIONS TO BE CONFERRED ON TRIBUNALS**

**TABLE 1: JURISDICTIONS CURRENTLY EXERCISED BY COUNTY COURT TO BE CONFERRED ON FIRST-TIER TRIBUNAL**

<table>
<thead>
<tr>
<th>Statutory provision conferring jurisdiction on a court</th>
<th>Subject matter</th>
<th>Provision saying it is county court which has jurisdiction</th>
<th>Other bodies with jurisdiction</th>
<th>Our proposal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Caravan Sites Act 1968 (&quot;CSA 1968&quot;), s 4(1)</td>
<td>Suspend enforcement of order enforcing right to exclude occupier from protected site or from any caravan which he was entitled under a (now expired or determined) residential contract to station and occupy, or occupy thereon, or to remove or exclude any such caravan from the site</td>
<td>CSA 1968, s 5</td>
<td>Registrar of the county court (district judge), with leave of the judge, unless court rules provide otherwise (which they do not)</td>
<td>Transfer</td>
</tr>
<tr>
<td>CSA 1968, s 4(3)</td>
<td>Extend, reduce or terminate period of suspension of execution of order enforcing right to exclude occupier/caravan from protected site</td>
<td>CSA 1968, s 5</td>
<td>Registrar of the county court (district judge), with leave of the judge, unless court rules provide otherwise (which they do not)</td>
<td>Transfer</td>
</tr>
<tr>
<td>Rent (Agriculture) Act 1976 (&quot;RAA 1976&quot;), s 3(3)</td>
<td>Determine who is a protected occupier on death of previous protected occupier of dwelling house</td>
<td>RAA 1976, ss 4(4) and 26(2)</td>
<td>High Court, though costs not recoverable – see RAA 1976, s 26(3)</td>
<td>Concurrent if raised</td>
</tr>
<tr>
<td>RAA 1976, s 4(4)</td>
<td>Determine entitlement of family member to assured tenancy of dwelling</td>
<td>RAA 1976, ss 4(4) and 26(2)</td>
<td>High Court, though costs not recoverable – see RAA 1976,</td>
<td>Concurrent if raised</td>
</tr>
<tr>
<td>Act Section</td>
<td>Description</td>
<td>References</td>
<td>Court</td>
<td>Notes</td>
</tr>
<tr>
<td>-------------</td>
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<tr>
<td>RAA 1976, s 4(5B)</td>
<td>Determine entitlement of surviving spouse or civil partner to assured tenancy of dwelling house by succession</td>
<td>RAA 1976, ss 4(5B) and 26(2)</td>
<td>High Court, though costs nor recoverable – see RAA 1976, s 26(3)</td>
<td>Concurrent if raised</td>
</tr>
<tr>
<td>RAA 1976, s 6</td>
<td>Order possession of dwelling house subject to protected occupancy or statutory tenancy</td>
<td>RAA 1976, s 26(2) and County Courts Act 1984, s 21(1)</td>
<td>High Court, though costs not recoverable save where possession ordered on mandatory grounds – see RAA 1976 s 26(3)</td>
<td>Transfer</td>
</tr>
<tr>
<td>RAA 1976, s 6(3)</td>
<td>Order damages where possession order for dwelling house subject to protected occupancy or statutory tenancy obtained by misrepresentation or concealment of facts</td>
<td>RAA 1976, s 26(2)</td>
<td>High Court, though costs would not be recoverable save where possession ordered on mandatory grounds – see RAA 1976, s 26(3)</td>
<td>Transfer</td>
</tr>
<tr>
<td>RAA 1976, s 7(3)</td>
<td>Stay, suspension, postponement, or rescission of possession dwelling house subject to statutory tenancy or protected occupancy</td>
<td>RAA 1976, s 26(2), and County Courts Act 1984, s 21(1)</td>
<td>High Court, though costs not recoverable – see RAA 1976, s 26(3)</td>
<td>Transfer</td>
</tr>
<tr>
<td>RAA 1976, s 8</td>
<td>Give leave for distress for rent of dwelling house subject to protected occupancy or statutory tenancy, other than distress levied under s 102 of County Courts Act 1984</td>
<td>RAA 1976, s 26(2)</td>
<td>High Court, though costs not recoverable – see RAA 1976, s 26(3)</td>
<td>Transfer</td>
</tr>
<tr>
<td>RAA 1976, s 10</td>
<td>Statutory tenancy – correct bona fide</td>
<td>RAA 1976, ss 16(4) and</td>
<td>High Court, though costs not</td>
<td>Concurrent if</td>
</tr>
<tr>
<td>Section</td>
<td>Description</td>
<td>Reference 1</td>
<td>Reference 2</td>
<td>Reference 3</td>
</tr>
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<tr>
<td>s 16(4)</td>
<td>errors or omissions in notices of rent increases which would otherwise have invalidated the notice</td>
<td>26(2)</td>
<td>recoverable – see RAA 1976, s 26(3)</td>
<td>raised</td>
</tr>
<tr>
<td>RAA 1976, s 22</td>
<td>Amend rent book when court determines recoverable rent for dwelling-house subject to statutory tenancy</td>
<td>RAA 1976, s 26(2)</td>
<td>High Court, though costs not recoverable – see RAA 1976, s 26(3)</td>
<td>Concurrent if raised</td>
</tr>
<tr>
<td>RAA 1976, s 23(7)</td>
<td>Terminate or modify right of tenant to use shared accommodation other than living accommodation</td>
<td>RAA 1976, s 26(2)</td>
<td>High Court, though costs not recoverable – see RAA 1976, s 26(3)</td>
<td>Transfer</td>
</tr>
<tr>
<td>RAA 1976, s 26(1)(a)</td>
<td>Determine whether any person is protected occupier or statutory tenant, and material matters</td>
<td>RAA 1976, s 26(1)</td>
<td></td>
<td>Concurrent if raised</td>
</tr>
<tr>
<td>RAA 1976, s 26(1)(b)</td>
<td>Determine subject matter, terms or conditions of a statutory tenancy, and material matters</td>
<td>RAA 1976, s 26(1)</td>
<td></td>
<td>Concurrent if raised</td>
</tr>
<tr>
<td>RAA 1976, s 26(2)</td>
<td>Deal with any claim or other proceedings arising out of Part 1 (protected occupancies and statutory tenancies – preliminary)</td>
<td>RAA 1976, s 26(2)</td>
<td>High Court, though costs not recoverable – see RAA 1976, s 26(3)</td>
<td>Concurrent if raised</td>
</tr>
<tr>
<td>RAA 1976, s 26(2)</td>
<td>Deal with any claim or other proceedings arising out of Part 2 (except Part 2 of Schedule 4 – mandatory grounds for possession of protected occupancies and</td>
<td>RAA 1976, s 26(2)</td>
<td>High Court, though costs not recoverable – see RAA 1976, s 26(3)</td>
<td>Transfer</td>
</tr>
<tr>
<td><strong>RAA 1976, s 26(2)</strong></td>
<td>Deal with any claim or other proceedings arising out of Part 3 (protected occupancies and statutory tenancies – supplementary) not otherwise in county court’s jurisdiction</td>
<td><strong>RAA 1976, s 26(2)</strong></td>
<td>High Court, though costs not recoverable – see RAA 1976, s 26(3)</td>
<td>Concurrent if raised</td>
</tr>
<tr>
<td><strong>Rent Act 1977 (“RA 1977”), s 5A(5)</strong></td>
<td>Treat a lease as a qualifying shared ownership lease</td>
<td><strong>County court – if it was hearing the proceedings in question</strong></td>
<td></td>
<td>Concurrent if raised</td>
</tr>
<tr>
<td><strong>RA 1977, s 22(6)</strong></td>
<td>Terminate or modify right of tenant to use shared accommodation other than living accommodation</td>
<td><strong>RA 1977, s 22(6)</strong></td>
<td>High Court (see Green Book III L &amp; T 65 which states that the High Court has jurisdiction under the Rent Act 1977)</td>
<td>Transfer</td>
</tr>
<tr>
<td><strong>RA 1977, s 98</strong></td>
<td>Possession order for dwelling house let on protected tenancy or subject to statutory tenancy</td>
<td><strong>RA 1977 ss 141(3) and (5)(c) and County Courts Act 1984, s 21(1)</strong></td>
<td>High Court, though costs not recoverable (save where possession ordered on mandatory grounds) – see RA 1977, s 141(4)</td>
<td>Transfer</td>
</tr>
<tr>
<td><strong>RA 1977, s 99</strong></td>
<td>Possession order for dwelling house let on protected tenancy or statutory tenancy which (if at low rent) would be a protected occupancy or statutory tenancy within the RAA 1976</td>
<td><strong>RA 1977 ss 141(3) and (5)(c) and County Courts Act 1984 s 21(1)</strong></td>
<td>High Court, though costs not recoverable – see RA 1977, s 141(4)</td>
<td>Transfer</td>
</tr>
<tr>
<td><strong>RA 1977, s 100</strong></td>
<td>Adjourn possession proceedings, stay or suspend</td>
<td><strong>RA 1977 ss 141(3) and County Courts Act 1984 s 21(1)</strong></td>
<td>High Court, though costs not recoverable – see RA 1977, s 141(4)</td>
<td>Transfer</td>
</tr>
<tr>
<td>Action Description</td>
<td>Relevant Sections</td>
<td>Authority</td>
<td>Notes</td>
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<tr>
<td>Execution of possession order, postpone date of possession</td>
<td>(5)(c)</td>
<td>RA 1977, s 141(4)</td>
<td></td>
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</tr>
<tr>
<td>Order landlord to pay compensation where possession order obtained by misrepresentation or concealment of material facts</td>
<td>RA 1977 ss 141(3) and (5)(c)</td>
<td>High Court, though costs not recoverable—see RA 1977, s 141(4)</td>
<td>Transfer</td>
<td></td>
</tr>
<tr>
<td>Reduce the previously extended period at end of which notice to quit a dwelling subject to a restricted contract will take effect</td>
<td>RA 1977 ss 106(4)(c) and (d), 141(3) and (5)(c) and (d)</td>
<td>High Court, though costs not recoverable—see RA 1977, s 141(4)</td>
<td>Transfer</td>
<td></td>
</tr>
<tr>
<td>Stay, suspend or postpone possession of dwelling house subject of a restricted contract entered into after the commencement of s 69 of the Housing Act 1980</td>
<td>RA 1977 ss 141(3) (5)(c)</td>
<td>High Court, though costs not recoverable—see RA 1977, s 141(4)</td>
<td>Transfer</td>
<td></td>
</tr>
<tr>
<td>Determine whether a tenancy is a protected tenancy</td>
<td>RA 1977 s 141</td>
<td>High Court (see Green Book III L &amp; T 65 which states that the High Court has jurisdiction under the Rent Act 1977)</td>
<td>Concurrent if raised</td>
<td></td>
</tr>
<tr>
<td>Determine whether a person is a statutory tenant of a dwelling house</td>
<td>RA 1977 s 141(1)</td>
<td>High Court (see Green Book III L &amp; T 65 which states that the High Court has jurisdiction under the Rent Act 1977)</td>
<td>Concurrent if raised</td>
<td></td>
</tr>
<tr>
<td>Determine any question as to the application of Part 5 (rents under</td>
<td>RA 1977 s 141(1)</td>
<td>High Court (see Green Book III L &amp; T 65 which states that the</td>
<td>Transfer in relation to RA 1977, ss 103 to 106, but not</td>
<td></td>
</tr>
</tbody>
</table>

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<p>| RA 1977, s 141(1)(e) | Determine whether a protected, statutory or regulated tenancy is a furnished tenancy | RA 1977, s 141(1) | High Court (see Green Book III L &amp; T 65 which states that the High Court has jurisdiction under the Rent Act 1977) | Concurrent |
| RA 1977, s 141(1) | Determine any matter which is or may become material for determining any question (referred to in s 141(1)) | RA 1977, s 141(1) | High Court (see Green Book III L &amp; T 65 which states that the High Court has jurisdiction under the Rent Act 1977) | Concurrent |
| RA 1977, s 141(3) | To deal with any claim or other proceedings arising out of Part 7 (security of tenure) (except ss 98(2) (mandatory grounds for possession for protected and statutory tenancies) and 101 (immediate possession of overcrowded house)) | RA 1977, s 141(3) | High Court, though costs not recoverable – see RA 1977, s 141(4) | Transfer |
| RA 1977, s 141(3) | To deal with any claim or other proceedings arising out of s 147 of the RA 1977 (court leave for distress for rent, adjournment, stay, suspension or postponement) even not otherwise | RA 1977, s 141(3) | High Court, though costs not recoverable – see RA 1977, s 141(4) | Transfer |
| RA 1977, s 147 | Give leave for distress for rent, other than under s 102 of the County Courts Act 1984; adjourn, stay, suspend or postpone | RA 1977, ss 147(1) and 141(3) and (5) | High Court, though costs not recoverable – see RA 1977, s 141(4) | Transfer |
| RA 1977, sch 1, para 2(3) | Decide who is to be treated as surviving spouse or civil partner for purpose of who is to be statutory tenant after death of previous statutory tenant | RA 1977, s 141(1)(a) sch 1, para 2(3) | High Court (see Green Book III L &amp; T 65 which states that the High Court has jurisdiction under the Rent Act 1977) | Concurrent if raised |
| RA 1977, sch 1, para 3(1) | Decide which family member shall be entitled to an assured tenancy of the dwelling-house by succession, after death of statutory tenant | RA 1977, sch 1, para 3(1)t | High Court (see Green Book III L &amp; T 65 which states that the High Court has jurisdiction under the Rent Act 1977) | Concurrent if raised |
| RA 1977, sch 1, para 6(1) | Decide which of original tenant’s family residing with first successor should be entitled to assured tenancy of dwelling-house by succession | RA 1977, sch 1, para 6(1) | High Court (see Green Book III L &amp; T 65 which states that the High Court has jurisdiction under the Rent Act 1977) | Concurrent if raised |
| RA 1977, sch 15, Part 2, case 11 | Dispense with notice requirements of paras (a) and (b) in possession case | County Courts Act 1984, s 21 | High Court (see Green Book III L &amp; T 65 which states that the High Court has jurisdiction under the Rent Act 1977) | Transfer |
| RA 1977, sch 15, Part 2, case 12 | Dispense with notice requirements (a) and (b) in possession case | County Courts Act 1984, s 21 | High Court (see Green Book III L &amp; T 65 which states that the High Court has jurisdiction under the Rent Act 1977) | Transfer |</p>
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<td>County Courts Act 1984, s 21</td>
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<td>Protection from Eviction Act 1977 (&quot;PEA 1977&quot;), s 2</td>
<td>Enforce any right of re-entry or forfeiture in lease of premises let as a dwelling</td>
<td>PEA 1977, s 9(1)(a), and County Courts Act 1984, s 21</td>
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<td>PEA 1977, s 3(1)</td>
<td>Order possession of premises let as a dwelling under tenancy or licence, which is not statutorily protected or excluded, which has ended where occupier continues to reside in the premises or part of them</td>
<td>PEA 1977, s 9(1)(a) and County Courts Act 1984, s 21</td>
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<td>PEA 1977, s 4(3)</td>
<td>Suspend execution of possession order against agricultural employee, on terms and conditions</td>
<td>PEA 1977, s 9(1)(a) and County Courts Act 1984, s 21</td>
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<td>PEA 1977, s 4(4)</td>
<td>Suspend execution of possession order made within 6 months of end of former tenancy of agricultural employee</td>
<td>PEA 1977, s 9(1)(a) and County Courts Act 1984, s 21</td>
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<td>PEA 1977, s 4(7)</td>
<td>Vary or terminate the period of suspension of possession order</td>
<td>PEA 1977, s 9(1)(a) and County Courts Act 1984, s 21</td>
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<td>PEA 1977, s 4(10)</td>
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<tr>
<td>County Courts Act 1984, s 21</td>
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<td>HA 1980, s 86(1)</td>
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<td>County Courts Act 1984, s 21</td>
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<tr>
<td>MHA 1983, s 5(1)</td>
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Against agricultural employee: Act 1984, s 21.
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<td>MHA 1983, sch 1, para 4</td>
<td>Allow owner to terminate agreement if occupier has breached a term of the agreement and not complied with the notice to remedy the breach in a reasonable time and it is reasonable for the agreement to be terminated</td>
<td>MHA 1983, s 5(1)</td>
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<tr>
<td>MHA 1983, sch 1, para 5</td>
<td>Allow owner to terminate agreement (entitling someone to occupy mobile home as his sole or main residence on land forming part of a protected site) forthwith if court is satisfied that occupier is not occupying the mobile home as his only or main residence</td>
<td>MHA 1983, s 5(1)</td>
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<tr>
<td>MHA 1983, sch 1, para 6(1)</td>
<td>Allow owner to terminate at the end of a relevant (5 year) period if court is satisfied that mobile home is having a detrimental effect on the amenity of the site, or is likely to have such an effect before the end of the next</td>
<td>MHA 1983, s 5(1)</td>
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<td>MHA 1983, sch 1, para 6(4)</td>
<td>Adjourn termination proceedings to allow repairs to be carried out</td>
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<td>County Courts Act 1984 (“CCA 1984”), s 15</td>
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<td>CCA 1984, s 15</td>
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<td>CCA 1984, s 21(1)</td>
<td>Confers jurisdiction to hear and determine any claim for recovery of land</td>
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<td>Housing Act 1985 (“HA 1985”), s 82(3)</td>
<td>Fixed term secure tenancy – ending by court in pursuance of provision for re-entry or forfeiture</td>
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<td>HA 1985, s 83(1)</td>
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<td>HA 1985, s 83A(5)</td>
<td>Dispense with service of notice seeking possession on partner who has left dwelling house let under secure tenancy where possession sought</td>
<td>HA 1985 s 110(1)</td>
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<td>HA 1985, s 84 Secure tenancy – possession order</td>
<td>HA 1985 s 110(1)</td>
<td>High Court, though costs not recoverable – see HA 1985, s 110(3)</td>
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<tr>
<td>HA 1985, s 85 Adjoin, stay, suspend, postpone possession, or rescind or discharge possession order of dwelling subject to secure tenancy, where possession claimed on discretionary grounds</td>
<td>HA 1985 s 110(1)</td>
<td>High Court, though costs not recoverable – see HA 1985, s 110(3)</td>
</tr>
<tr>
<td>HA 1985, s 96(3)(d) Determine questions arising under local authority secure tenant right to repair regulations</td>
<td>HA 1985, s 96(3)(d) and SI 1994 No 133, reg 10</td>
<td>High Court, though costs not recoverable – see HA 1985, s 110(3)</td>
</tr>
<tr>
<td>HA 1985, s 99A(5)(c) Determine questions as to compensation payable where a secure tenant has improved property</td>
<td>HA 1985, s 99A(5)(c) and SI 1994 No 613, reg 7</td>
<td>High Court, though costs not recoverable – see HA 1985, s 110(3)</td>
</tr>
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</table>
| HA 1985, s 110 Determine questions arising under Part 4 (ss 79 to 117 – secure tenancies) and claims for any amount in connection with a secure tenancy | HA 1985, s 110 | High Court, though costs not recoverable – see HA 1985, s 110(3) | Amend to make clear that possession claims can only be brought in tribunal, save where landlord also seeks anti-social behaviour remedy (eg
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<th>Section</th>
<th>Description</th>
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<th>Parallel Jurisdiction</th>
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<td>Landlord and Tenant Act 1985 (&quot;LTA 1985&quot;), s 12</td>
<td>Authorise inclusion of provision in lease or collateral agreement contracting out or modifying s 11 landlord repair obligation</td>
<td>LTA 1985, s 12(2)</td>
<td>High Court – Green Book III L &amp; T 162 states that High Court has concurrent jurisdiction, and see CPR Part 56 Practice Direction, paragraph 2.2</td>
<td>Transfer</td>
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<tr>
<td>LTA 1985, s 15</td>
<td>Declare that LTA 1985 s 11 applies or does not apply to a lease</td>
<td>LTA 1985, s 15</td>
<td>High Court – Green Book III L &amp; T 162 states that High Court has concurrent jurisdiction, and see CPR Part 56 Practice Direction, paragraph 2.2</td>
<td>transfer</td>
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<tr>
<td>LTA 1985, s 17</td>
<td>Order specific performance of repairing covenant re dwelling</td>
<td>County Courts Act 1984, s 23(3)</td>
<td>High Court, where value of property exceeds county court limit, or in exceptional circumstances Green Book III L &amp; T 162 states that High Court has concurrent jurisdiction, and see CPR Part 56 Practice Direction, paragraph 2.2</td>
<td>Concurrent</td>
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</tbody>
</table>
| Housing Act 1988 ("HA 1988"), s 5 | Ending assured tenancy | HA 1988, s 40(1) | High Court – see HA 1988 s 40(4), though costs not recoverable, unless proceedings joined with other pending High Court | Transfer, save where landlord also seeks other anti-social behaviour remedy (e.g. injunction or anti-social behaviour order) when
<p>| HA 1988, s 6A(2) | Demotion order from assured tenancy to demoted assured shorthold for anti-social behaviour | HA 1988, s 40(1) | High Court – see HA 1988 s 40(4), though costs not recoverable, unless proceedings joined with other pending High Court proceedings – see HA 1988, s 40(5) | Concurrent |
| HA 1988, s 7 | Possession order – assured tenancy | HA 1988, s 40(1) | High Court – see HA 1988 s 40(4), though costs not recoverable, unless proceedings joined with other pending High Court proceedings – see HA 1988, s 40(5) | Transfer, save where landlord also seeks other anti-social behaviour remedy (eg injunction or anti-social behaviour order) when jurisdiction should be concurrent |
| HA 1988, s 8(1)(b) | Dispense with notice seeking possession requirement for assured tenancy possession proceedings | HA 1988, s 40(1) | High Court – see HA 1988 s 40(4), though costs not recoverable, unless proceedings joined with other pending High Court proceedings – see HA 1988, s 40(5) | Concurrent |
| HA 1988, s 8A | Dispense with service of notice on partner who has left, for assured tenancy possession proceedings where domestic violence ground relied on | HA 1988, s 40(1) | High Court – see HA 1988 s 40(4), though costs not recoverable, unless proceedings joined with other pending High Court proceedings – see HA 1988, Concurrent |</p>
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<th>Section</th>
<th>Description</th>
<th>Section</th>
<th>Court Details</th>
<th>Reference</th>
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<td>HA 1988, s 9</td>
<td>Adjourn proceedings, stay or suspend execution or postpone date of possession in assured tenancy possession order, impose conditions on suspension, stay or postponement, discharge or rescind order, unless landlord entitled to possession on mandatory grounds</td>
<td>HA 1988, s 40(1)</td>
<td>High Court – see HA 1988 s 40(4), though costs not recoverable, unless proceedings joined with other pending High Court proceedings – see HA 1988, s 40(5)</td>
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<tr>
<td>HA 1988, s 10(3)</td>
<td>Terminate or modify right of assured tenant to use shared accommodation other than living accommodation</td>
<td>HA 1988, s 40(1)</td>
<td>High Court – see HA 1988 s 40(4), though costs not recoverable, unless proceedings joined with other pending High Court proceedings – see HA 1988, s 40(5)</td>
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<tr>
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<td>Determine tenant’s reasonable removal expenses payable by landlord where assured tenancy possession order given on ground 6 (redevelopment) or 9 (suitable alternative accommodation)</td>
<td>HA 1988, s 40(1)</td>
<td>High Court – see HA 1988 s 40(4), though costs not recoverable, unless proceedings joined with other pending High Court proceedings – see HA 1988, s 40(5)</td>
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<td>Transfer</td>
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<td>Section</td>
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<td>HA 1988, s 17(5)</td>
<td>Determine who is to be treated as spouse or civil partner to succeed to assured periodic tenancy</td>
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<tr>
<td>HA 1988, s 19(1)</td>
<td>Give leave for levy of distress for rent (but not distress under s 10 of the County Courts Act 1984) for dwelling let on assured tenancy</td>
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<tr>
<td>HA 1988, s 21</td>
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<td>HA 1988, s 40(1) S 21 is in Chapter 2</td>
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<td>Award damages for unlawful eviction, attempted eviction or harassment of</td>
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<td><strong>HA 1988, s 40(1)</strong></td>
<td><strong>HA 1988, s 40(1)</strong></td>
<td><strong>High Court – HA 1988, s 40(4)</strong></td>
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<tr>
<td>County court has jurisdiction to determine any question arising under any provision of Chapters 1 (sections 1-19 - assured tenancies) 2 (sections 19A-23 - assured shorthold tenancies), 3 (assured agricultural occupancies) and 5 (transitional provisions - phasing out Rent Act tenancies) of or sections 27 and 28 (damages for unlawful eviction by landlord) of the Housing Act 1988 (other than a question falling within the Rent Assessment Committee's jurisdiction)</td>
<td>if proceedings taken in High Court, person can't recover more costs than he'd have been entitled to if proceedings brought in county court unless brought in High Court to enable them to be joined with proceedings already pending before High Court</td>
<td>Amend to make clear that possession claims can only be brought in tribunal, save where landlord also seeks anti-social behaviour remedy (eg injunction or anti-social behaviour order) when jurisdiction should be concurrent</td>
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<td><strong>HA 1988, sch 1, para 14(2)</strong></td>
<td><strong>HA 1988, s 40(1) and sch 1, para 14(2)</strong></td>
<td><strong>High Court – see HA 1988 s 40(4), though costs not recoverable, unless proceedings joined with other pending High Court proceedings – see HA 1988, s 40(5)</strong></td>
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<td>Determination of apportionment of rateable value of dwelling house, for purposes of Part 1 of Schedule (tenancies which cannot be assured)</td>
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<tr>
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<td><strong>HA 1988, s 40(1)</strong></td>
<td><strong>High Court – see HA 1988 s 40(4), Transfer</strong></td>
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<td>Dispense with notice requirement</td>
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</tbody>
</table>
| Section | Description | Condition | Court | Transfer
|---------|-------------|-----------|-------|-----------
| where landlord wants possession to use house as his or his spouse's or civil partner's home | though costs not recoverable, unless proceedings joined with other pending High Court proceedings – see HA 1988, s 40(5) | | | 
| HA 1988, sch 2, ground 2 | Dispense with requirement of notice where mortgagee requires possession of mortgaged house to dispose of it with vacant possession under power of sale | HA 1988, s 40(1) | High Court – see HA 1988 s 40(4), though costs not recoverable, unless proceedings joined with other pending High Court proceedings – see HA 1988, s 40(5) | Transfer
| HA 1988, sch 2, ground 7 | Direct that possession proceedings can commence within 12 months of landlord's knowledge of death rather than date of death | HA 1988, s 40(1) | High Court – see HA 1988 s 40(4), though costs not recoverable, unless proceedings joined with other pending High Court proceedings – see HA 1988, s 40(5) | Transfer
| Housing Act 1988, sch 3, para 3(4) | Determine who is qualifying member of family in determining whether agricultural worker condition is fulfilled | HA 1988, s 40(1) and sch 1, para 14(2) names county court | High Court – see HA 1988 s 40(4), though costs not recoverable, unless proceedings joined with other pending High Court proceedings – see HA 1988, s 40(5) | Concurrent if raised
| HA 1988, sch 3, para 3(6) | Determine who is qualifying partner of previous qualifying occupier | HA 1988, s 40(1) and sch 1, para 14(2) | High Court – see HA 1988 s 40(4), though costs not recoverable, | Concurrent if raised
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<th>unless proceedings joined with other pending High Court proceedings – see HA 1988, s 40(5)</th>
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<td>Housing Act 1996 (&quot;HA 1996&quot;), s 204</td>
<td>Appeal on point of law by dissatisfied internal applicant after internal review of homelessness decision, or non-notification of review decision</td>
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