

Consultation response

## **Department for Communities and Local Government**

### **A new mandatory power of possession for anti-social behaviour**

November 2011

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## Introduction

Shelter fully understands how anti-social behaviour can have a devastating impact on neighbourhoods and communities, and our advisers frequently support households whose lives are blighted by the anti-social behaviour of their immediate neighbours. In 2010 our advisers supported over 1,500 individuals who were suffering from harassment and nearly 900 with nuisance neighbours. We also offer advice to those who have been accused of anti-social behaviour, assisting more than 700 such households in 2010. We believe that appropriate measures, including injunctions and ASBOs, must be available to protect individuals and the community at the earliest stages of anti-social behaviour problems. We also accept that eviction can sometimes be a necessary last resort when other interventions have failed to protect neighbours.

However, we believe anti-social behaviour can be most effectively tackled when pursued through a balanced approach that combines prevention, support and resettlement alongside enforcement. In this context it is concerning that Supporting People budgets, which can be used to tackle the underlying causes of anti-social behaviour, are being cut or directed away from ASB work. Shelter argues strongly that an effective response to anti-social behaviour must include funding of support services. We favour the effective 'whole family' approach taken by Family Intervention Projects, which recognise that an individual's ASB does not occur in isolation. However, many projects funded by Supporting People currently do not take this approach. Shelter would like to see better coordination between Supporting People and Children and Young People funding to enable a 'whole family' approach to be pursued where Family Intervention Projects are not available.

Through our services, Shelter has a positive track record of tackling anti-social behaviour while avoiding eviction, providing better outcomes for "problem families" and their neighbours. The Shelter Inclusion Project, based in Rochdale, Greater Manchester, was set up in September 2002 to provide support to households that are homeless or at risk of homelessness due to alleged anti-social behaviour. The project works with adults and children, providing a range of support to households threatened with eviction.

An independent evaluation of the Inclusion Project concluded it was an effective and cost-effective response to anti-social behaviour<sup>1</sup>. It found the project had "considerable success" in tackling ASB while also promoting social inclusion and community stability. The project resulted in a high level of tenancy sustainment and significantly reduced levels of ASB. Sixty per cent of closed cases no longer exhibited antisocial behaviour, and many service users said the project had helped them regain confidence, control and self-respect. Significantly 84 per cent of closed cases were assessed as no longer being at risk of homelessness following contact with the project.

We hope that the decision to place the "Troubled Family" team within the Department of Communities and Local Government will enable these arguments to be made at the heart of the ASB and social inclusion agenda, and ensure that any housing policy responses to ASB compliment preventative measures targeted at the most troubled families.

While we welcome the acknowledgement from the Minister that "eviction should only be pulled out of [the] toolkit as a last resort" we note that nothing contained within this proposal will guarantee that eviction really is treated as the last resort. Without sufficient funding for early interventions there is a risk that landlords will move to evict problem tenants before other interventions have tried and failed.

**Overall we are not in favour of the proposals set out in this consultation paper for a mandatory power of possession for ASB. We believe it will lead to eviction being pursued in cases where it is not appropriate and, where tenants have access to legal representation, it will not necessarily meet the Government's aims of fast tracking the process. We are firmly opposed to the**

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<sup>1</sup> Jones et al: Addressing antisocial behaviour: An independent evaluation of the Shelter Inclusion Project. University of York. 2006.

**additional question proposing to extend the powers for discretionary possession to include criminal behaviour outside of the locality.**

## **Proposed extension of discretionary grounds**

### **1. Do you agree that we should extend the scope of the current discretionary ground for possession for anti-social behaviour and criminality in this way?**

Shelter does not agree that the discretionary ground for possession should be extended to cover anti-social behaviour and criminality outside of a perpetrator's neighbourhood.

This measure is inequitable as it will impose an additional punishment on social tenants which will not be levied on offenders in other housing tenures. This risks discriminating against those in the tenure and stigmatising social tenants. Ministers have not adequately explained or justified why social tenants should be penalised more severely than rioters from other tenures.

Beyond acting as a symbolic gesture, it is not at all obvious why Ministers feel a specifically housing-related sanction is the appropriate response to non-housing related disorder. Ministers have not adequately explained why it would be appropriate for a social landlord to take action "where a social tenant or a member of their household decides to wreck havoc in someone else's community". It is entirely understandable that Ministers wish for some action to be taken if an offender has "wrecked havoc" on a community, but it does not follow from this that a social landlord serving an eviction notice is the appropriate response or would do anything to practically support communities affected by rioting.

The proposal distorts the original intention of the discretionary ground for possession, which was designed to protect neighbouring tenants from anti-social behaviour by an occupier of a property. It was not intended to punish the occupier. If the grounds for possession are extended beyond the locality, then it can no longer be argued that possession would protect neighbouring tenants and eviction becomes a purely punitive act.

It is questionable whether the proposal is even lawful. Article 8 of the European Convention on Human Rights, as applied in cases such as *Kay v United Kingdom*, requires that eviction must be a proportionate means of achieving a legitimate aim. Criminal behaviour unrelated to the tenant's housing circumstances cannot in itself justify eviction in these terms when other measures, both criminal and civil, are available for dealing with such behaviour

In defending the need for sanctions when anti-social behaviour takes place beyond the tenant's neighbourhood, Ministers demanding tougher housing policies have ignored the role of the wider criminal justice system. Shelter considers that existing measures available to the Courts are a more appropriate deterrent and punishment for serious anti-social behaviour when it takes place outside of a household's locality and does not harm or intimidate their immediate neighbours. Provisional figures from the Ministry of Justice suggest that the criminal justice system is responding robustly to the rioting; of those convicted and sentenced in Magistrates Courts 43 per cent have received a custodial sentence for an average length of 5.1 months. This compares to an average of 12 per cent and 2.5 months for offenders convicted and sentenced for comparable offences in 2010<sup>2</sup>.

If enacted this proposal will do little to tackle the causes of social unrest or provide meaningful redress for affected communities, and instead could create unintended consequences. For example, a tenant housed by a social landlord in community A and convicted of rioting in community B could be evicted under this measure but nothing would prevent them or their family from moving into private rented sector housing in community B. Evicting tenants for rioting provides no guarantee that affected communities will be made safer and does little to prevent a repeat of the violent disorder.

The proposal is a direct response to the riots of August 2011 and as such has been drawn very tightly to cover specific types of criminal behaviour. While we would in no way wish to see the range of relevant

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<sup>2</sup> MoJ: Estimates of Initial Court hearing outcomes of suspects involved in recent disturbances. 12 September 2011.

convictions extended, it is illogical that a tenant could be evicted for rioting, but not for a spate of muggings or burglaries which could be equally unsettling for a community. The fact that Ministers have proposed a specific punishment for convicted rioters does create the impression that the measure has been suggested as a very visible response to recent events, rather than because Ministers consider it to be a useful tool to combat criminal behaviour, or an appropriate tool for housing providers.

Polling of MPs would appear to support this scepticism. The ComRes parliamentary panel suggests that MPs do not think social housing had any meaningful connection to the riots<sup>3</sup>. Instead, parliamentarians blamed greed and opportunism, a lack of sense of responsibility and a disregard for authority as the three most significant contributory factors to the riots.

One of the more troubling implications of this policy is the risk of collective punishment which it would impose. It risks making an entire family homeless due to the unacceptable behaviour of a single member, who will often be a sibling rather than a parent, or indeed a visitor to the household. Ministers may argue that this will encourage parents to discipline their children but this takes a naïve view of the struggles facing many parents. If Government wishes to encourage, or better still support, families it should invest in specific support schemes rather than punishing whole families.

## **Proposed mandatory grounds**

### **2. Do you agree that we should construct a new mandatory power of possession in this way?**

Shelter is not persuaded by the argument for a new mandatory power of possession. We acknowledge that in some circumstances, where other tools have proved ineffective, possession is the correct course of action. But we argue this should only ever be pursued as a last resort and should be considered on a case by case basis to ensure that it is reasonable, taking into account the behaviour and the offender's circumstances. This principle is incompatible with the idea of mandatory grounds for possession when broad "triggers" have been met, which would mean reasonableness cannot be considered.

While eviction can provide respite for the immediate neighbourhood it does not deal with either the anti-social behaviour or the underlying causes and simply displaces the problem elsewhere. In addition it is a cause of homelessness, and because tenants evicted for anti-social behaviour are likely to be found intentionally homeless they may struggle to secure permanent accommodation. This will have an unfairly negative impact on any children or siblings of the individual responsible for the anti-social behaviour. Any moves that risk increasing the ease or number of evictions should therefore bring benefits that outweigh this risk of harm.

The Housing Minister has previously argued that the threat of mandatory possession will act as a powerful incentive not to commit anti-social behaviour. However, Shelter is concerned that any positive gains will be outweighed by the risks created by this policy, specifically increased homelessness. In addition Shelter argues that to be truly effective, measures to tackle anti-social behaviour should address the underlying causes and not simply move the problem elsewhere. As such responses should strike the right balance between prevention, support and enforcement. Tools must be available to tackle ASB but these must be proportionate. These could include options such as demoted tenancies, which could send a clear signal that anti-social behaviour has consequences without immediately resorting to possession proceedings.

We are concerned that introducing mandatory grounds for possession would give the Courts no discretion to examine the nature of the anti-social behaviour, the individual's personal circumstances and vulnerability or the failure of other interventions, thereby preventing judges from making informed choices as to whether the loss of a home is a suitable response. We argue strongly that tenants should be able to question the reasonableness of eviction, and not just whether it is proportionate in terms of Human Rights. Similarly the Courts need discretion to respond to the complexities of individual circumstances and to ensure that eviction remains a serious sanction of last resort and not the default response.

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<sup>3</sup> ComRes parliamentary panel survey September 2011.

For example, in April 2011 Shelter supported a very vulnerable client in Sheffield whose landlord applied for immediate possession following anti-social behaviour by her adult sons. The judge was sympathetic to the client's vulnerability and lack of moral culpability and ordered instead that a Suspended Possession Order was appropriate for breach of tenancy conditions. The judge's discretion was vital in enabling action to be taken against the ASB, while also ensuring that a vulnerable client avoided homelessness.

Shelter's Inclusion Project found that often the individual committing anti-social behaviour is not the tenant themselves but a child of the tenant. Other siblings may be put at risk of homelessness for behaviour which they or their parent have little capacity to control. Ministers may argue that the threat of possession will force parents to discipline their children; however, this is simplistic and ignores the intensive support some parents may need, especially if ASB is a symptom of underlying problems within the family. Inclusion Project leaders work with parents to improve their parenting skills but also with offending children to explore their relationship with their parents and the reasons for their behaviour, and with other family members to understand how their behaviour impacts on the whole family. This provides an effective remedy for anti-social behaviour without the knock-on risks of homelessness which would be created by this policy.

While we agree that the measure could broadly save time in cases where a proportionality defence is not raised, it will still not provide an instant remedy to neighbours suffering from ASB. Landlords will have to serve a notice of seeking possession before issuing a possession claim in Court, followed four to six weeks later by a Court hearing. Assuming the correct procedure has been followed and a possession order is granted it may still be a further 14 to 28 days before it takes effect. Since most tenants will not have anywhere else to go, it is likely to take another two to three weeks for bailiffs to carry out an eviction. In addition, it will still be possible for the first hearing to be adjourned if the tenant raises a proportionality argument or the landlord has not prepared the paperwork properly.

### **3. Are these the right principles which should underpin a mandatory power of possession for anti-social behaviour?**

The consultation document refers to ASB being "proved a second time" before possession can be granted and the need to avoid this duplication. However, this is a distortion of the rules of evidence which apply at a civil hearing. Under the current system a conviction or injunction can be cited in evidence and it is not necessary for the landlord to prove again the full facts that led to the conviction, injunction or ASBO.

We accept that possession cases can be time consuming, but this is a reflection of the serious consequences involved. This process provides an essential safety valve to enable the Courts to consider the facts in individual cases and ensure that eviction is a reasonable response.

The principles set out in the consultation document are intended to ensure that only clear cut cases are pursued using the mandatory grounds. However, while the ambition is that landlords will have to be satisfied that the principles are met and eviction is proportionate, there will be no consequences if this is not the case, other than that the landlord may be penalised with costs. Furthermore, the Court will not be able to consider whether eviction is or is not proportionate, unless the tenant specifically raises this defence.

Where tenants do raise the proportionality question at the first hearing this will trigger a full proportionality review. This is a time consuming process, often more so than the reasonableness test which could be applied under discretionary grounds. Courts are rarely in a position to summarily dismiss arguments that a landlord's action is not proportionate. It is likely therefore that in any case where the proportionality defence is raised the process will be delayed. The "fast track" cases will be those where tenants are unrepresented and not aware of the option of raising a proportionality defence, and there is a risk that such tenants could be the most vulnerable.

### **4. Have we defined the basis for the new mandatory power correctly? If not, how could we improve the definition?**

We are concerned at the suggestion that breach of an Anti-Social Behaviour Injunction should be sufficient to pursue the mandatory ground and believe this could create an overly broad trigger. The threshold for obtaining an ASBI is very low, and although it is unclear how these injunctions will operate under the reformed ASB framework, there is a risk that they could be imposed for behaviour that would not merit eviction.

Under the current framework of anti social behaviour injunctions, an individual can be subject to an injunction if their behaviour “is capable of causing nuisance or annoyance to any person.” Only the civil standard of proof is required to grant an injunction, meaning that it rests on the balance of probabilities. This creates considerable scope for individuals to be subject to ASBIs for a wide-range of behaviour. For example, clients engaged with Shelter’s Inclusion Project were referred for anti-social behaviour ranging from criminal activity (12% of clients) to rubbish hoarding (4%) with noise nuisance the most common form of ASB (38%)<sup>4</sup>. Shelter argues that it is not proportionate for someone who breaches an injunction for failure to maintain their garden to face the same sanction as someone engaged in criminal activity. We agree that action should be taken where an injunction is breached but this should be based on the nature of the act. Eviction should exist as the ultimate sanction, but it cannot be appropriate in every circumstance.

It is unclear from the proposals how it will be established that an ASBI has been breached. We would be extremely concerned if landlords had the discretion to decide that an ASBI had been breached, and were able to use this as a trigger for pursuing the mandatory grounds.

The use of a criminal conviction as a trigger also risks drawing in cases where eviction would not usually be considered a reasonable response. If a tenant is convicted of dealing drugs from their property then eviction may be the correct response, and there could be strong support from neighbouring tenants for this option. However, a tenant or relation of a tenant convicted for possessing two cannabis plants is not inflicting the same level of harm on their neighbours and eviction may not be a reasonable response in addition to the conviction. However, the basis for the new mandatory possession as drafted would not allow these differential considerations to be taken into account.

We consider the most appropriate route to be the current discretionary grounds for possession, which will allow the Court to consider reasonableness in individual circumstances.

We recommend that if the mandatory ground for possession is adopted, then the basis for it should be tied much more closely to behaviour which is causing harm and distress to neighbours. This would acknowledge the rights of, and provide protection to, people with no choice but to live in the vicinity of the perpetrator. However, it would also provide protection for tenants who are subject to an injunction for behaviour which is not causing distress to their neighbours. For example, a Shelter client who was highly vulnerable breached an injunction that prevented him from keeping cats. His behaviour posed a problem to his landlord from a housing management point of view, but it is difficult to see how his neighbours suffered from his continued presence in the property. Under the proposal set out in the document, the breach of the injunction would have been a sufficient trigger for his landlord to pursue the mandatory grounds.

##### **5. As a landlord, would you anticipate seeking possession using the mandatory power in some or all of the instances where this would be available?**

Shelter is not a landlord, but we are not convinced by the Government’s statement that landlords should not always seek possession in cases where the triggers for possession are present, and that they should not always use the mandatory ground if seeking possession. There are very few safeguards set out in this consultation to prevent a landlord pursuing a zero tolerance approach to ASB and using the mandatory grounds for possession in all cases where the triggers can be demonstrated. Landlords may well take a measured approach to the question of whether eviction is the correct option, but in cases

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<sup>4</sup> Jones et al: Addressing antisocial behaviour: An independent evaluation of the Shelter Inclusion Project. University of York. 2006.

where they issue possession proceedings we question why they would not do so under the mandatory grounds if they believed that the preconditions were met. If the Government wishes to ensure a more nuanced approach is taken to combating ASB than it should ensure the Courts can retain discretion in possession hearings.

Although landlords will “need to consider whether proportionately is easily demonstrated” the consequences are not a detriment if they opt for the wrong route. With cuts to legal aid and the likelihood that some tenants will not be represented – and therefore unlikely to raise a proportionality defence - there is a risk that dubious cases would pass unchallenged through the mandatory route. The proposed ground does not require landlords, or allow the Courts, to consider whether reasonableness is easily demonstrated, and it is the loss of this discretion which risks turning eviction into a blunt tool.

The consultation states that CLG “intend to place eviction clearly at the end of a continuation of interventions of increasing severity and provide a clearer line of sight to the threat of eviction, as an effective driver of improved behaviour at an earlier stage.” However, this is an unconvincing statement as there are no guarantees that other interventions will be pursued. Because of the way the mandatory grounds are framed, a judge will not even be able to take the lack of prior interventions into account.

We anticipate that further guidance would have to be produced for local authorities if this policy is adopted and we would expect this to make much clearer recommendations about when the mandatory grounds are appropriate. Specifically we would like the guidance to advise landlords against pursuing the mandatory grounds when a tenant can be shown to be vulnerable. Such cases should continue to rest with the judge’s discretion.

#### **6. Are there other issues related to the introduction of a mandatory power for possession for anti-social behaviour that we should consider?**

We note that CLG states its objective “is not to increase the number of evictions for anti-social behaviour and nor do we expect [introducing the measure] to do so”. If this is the case, and the Government does proceed to implement these proposals, we recommend that CLG monitors the overall number of possession cases brought for anti-social behaviour, on both mandatory and discretionary grounds, and that the department should commission a review of the policy if numbers rise considerably.

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## **Until there’s a home for everyone**

In our affluent nation, tens of thousands of people wake up every day in housing that is run-down, overcrowded, or dangerous. Many others have lost their home altogether. The desperate lack of decent, affordable housing is robbing us of security, health, and a fair chance in life.

Shelter believes everyone should have a home.

More than one million people a year come to us for advice and support via our website, helplines and national network of services. We help people to find and keep a home in a place where they can thrive, and tackle the root causes of bad housing by campaigning for new laws, policies, and solutions.