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Mortgage Repossessions (Protection of Tenants Etc.) Bill

Bill No 15 of 2009-10

RESEARCH PAPER 10/05 25 January 2010

The *Mortgage Repossessions (Protection of Tenants Etc.) Bill* was presented in the House of Commons on 16 December 2009 and is due to have its second reading on 29 January 2010.

In July 2009 the Government announced that it would legislate to ensure that tenants are given adequate notice to vacate their property if their landlord defaults on their mortgage. Over the summer of 2009, the Government consulted on legislative options to achieve this end. On 3 December 2009, Dr Brian Iddon, who drew first place in the Private Members' Bill ballot, announced that he would introduce a Bill to protect private tenants whose landlords default on their mortgage. The Bill has Government support.

Robert Long

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Summary

The recent 'credit crunch' and subsequent housing crisis has led to an increase in the number of households dealing with mortgage arrears and potential repossession of their homes. The Government has introduced several measures aimed at reducing the number of repossessions and assisting households facing difficulty to remain in their homes. However, these measures are not directed at those people who rent out their mortgaged property. Consequently, when these people default on their mortgage payments it is their tenants who find themselves being made homeless.

During the course of 2009, several bodies recommended that action be taken to protect private tenants where their landlords default on their mortgage and repossession proceedings are brought. In February, a report by the Communities and Local Government Select Committee recommended that more consideration be given to the situation of tenants, and in March a joint publication by Crisis, the Citizens Advice Bureau, Shelter and the Chartered Institute of Housing highlighted the issues faced by tenants and urged the Government to take action to counter the problem.

In its response to the Rugg and Rhodes Review of the private rented sector in May 2009, the Government stated that it was looking into the best ways to provide help for tenants caught up in repossession cases, and subsequently confirmed its intention to legislate on the matter at the earliest opportunity. A consultation was launched during the summer of 2009 discussing potential legislative options.

The consultation paper focused on unauthorised tenancies, where the mortgagee does not seek the lender's consent before renting out the property, or is forbidden to do so. It discussed the options of giving unauthorised tenants the right to be heard at the possession hearing; enhancing the notification of the possession hearing to tenants; requiring lenders to notify their intention to enforce possession and granting unauthorised tenants a mechanism to request a two-month delay; and to provide a mechanism for unauthorised tenants to request a two-month stay in the warrant of possession. These options could be implemented either individually or in combination. The Government stated in the paper that it was attracted to giving unauthorised tenants a right to be heard at a possession hearing, and requiring lenders to notify their intention to enforce possession and granting unauthorised tenants a mechanism to request a two-month delay.

The consultation received responses in broad support of the need for legislation, but with less agreement on what form this legislation should take. The Government's preference as stated in the consultation paper received support from housing charities (albeit with some proposed modifications), but the proposed requirement on lenders to notify their intention to enforce possession and grant unauthorised tenants a mechanism to request a two-month delay, and the other options raised, were objected to by lenders as being excessively weighted against them.

On 3 December 2009 Dr Brian Iddon, who drew first place in the Private Members' Bill ballot, announced that he would use this opportunity to introduce a Bill to protect private tenants from losing their homes in the event of their landlord defaulting on the mortgage payments. The Bill was originally called the *Protection of Tenants (Mortgage Repossessions) Bill*, and, if passed, would apply to England and Wales. Like the Government's consultation paper, it addresses unauthorised tenancies.

The Bill is brief, having only two substantive clauses, and is broadly in line with the Government's preference as outlined above. The Housing Minister, John Healey, has stated that the Government will support the Bill. The Bill has also received support from housing organisations.

1 Introduction: An Overview of Tenants' Rights

In the wake of the global 'credit crunch' the number of households dealing with mortgage arrears and potential repossession of their homes has increased. In November 2009 the Council of Mortgage Lenders predicted that repossessions in 2009 would reach 48,000, a significant reduction from its original forecast of 75,000, but still a large rise on previous years.[1] The Government has introduced several measures aimed at reducing the number of repossessions and assisting households in difficulty to remain in their homes.[2] However, these measures are not directed at a key sub-set of mortgagors, i.e. those people who rent out their mortgaged property. Consequently, when these people default on their mortgage payments it is their tenants who find themselves being made homeless.

It is difficult to assess the precise extent of the problem. In particular, unauthorised tenancies (those where the landlord has not sought the permission of the lender) are by their nature difficult to collect statistics on. In the third quarter of 2009 the number of buy-to-let properties taken into possession rose from 1,400 to 1,600 across the UK, equivalent to 0.14% of all buy-to-let mortgages.[3] In its consultation paper on the protection of tenants in repossession cases, the Government estimated that 2,000-3,000 tenancies (authorised and unauthorised combined) were repossessed in the financial year 2008/09, with 17,000 tenants sent notification that their lenders were seeking possession in the same year.[4] Some advice agencies have suggested that the numbers may be higher: in a joint paper, Crisis, the Citizens Advice Bureau, Shelter and the Chartered Institute of Housing estimated that there would be around 8,000 buy-to-let repossessions in 2009, while stressing that there is no way of knowing how many people live in rented properties where the lender's permission has not been sought. The interim findings of a Crisis survey suggested that advisers helping people across the rented sector had seen a marked increase in the number of tenants seeking help because their landlords had been repossessed.[5]

It is frequently the case that the first indication a private tenant has that their landlord has not been paying his or her mortgage is when the bailiffs appear with a warrant for possession of their home. Despite the fact that tenants may be up to date with their rent payments, they may be caught between the lender and the landlord in these circumstances.

The following sections 1.1-1.4 outline the current 'rights' of tenants who find themselves in this situation.

1.1 Notice of proceedings

Under the Civil Procedure Rules (CPR) the lender (mortgagee) which has issued a claim for possession of a property must serve a notice addressed to "the occupiers" advising that proceedings have been commenced. Since 6 April 2009 lenders have had to send this notice out within five days of receiving notification of the hearing date from the court – the aim of this change was to give occupiers more notice of the proceedings.[6]

The Government commissioned an independent review of the private rented sector by Julie Rugg and David Rhodes in 2008, the findings of which were published as *The Private Rented Sector: its contribution and potential* in October 2008. The Government response

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1 Homemove, *CML slashes repossession forecast*, 12 November 2009

2 See House of Commons Library note SN/SP/4769, *Mortgage Arrears and Repossessions*.

3 Council of Mortgage Lenders, *Buy-to-let market grows for first time in two years*, 12 November 2009

4 Department for Communities and Local Government, *Lender repossession of residential property: protection of tenants*, p12

5 Crisis, Citizens Advice Bureau, Shelter and the Chartered Institute of Housing, *A private matter? Private tenants: the forgotten victims of the repossessions crisis*, March 2009, p4-5

6 Practice Direction 55 amended by 49th update to the CPR from 6 April 2009.

and consultation paper followed in May 2009. In its response, *The private rented sector: professionalism and quality,* Communities and Local Government (CLG) included a reference to the notice period that should be given to tenants whose landlords default on their mortgages:

> 54. A specific strand alongside our commitment to support and encourage growth in the sector has been our work with mortgage lenders to increase protection for tenants whose landlords default on a mortgage.
>
> 55. Since 6 April 2009, lenders taking possession proceedings must give the maximum possible notice to occupiers of the affected property.[7] Tenants will usually get nearly two months' notice of these proceedings, a significant increase on the previous two weeks. We are looking to see what more help we can provide for tenants who are caught up in a repossession case through no fault of their own. We urge landlords and lenders to communicate with tenants so that they are given time to make alternative arrangements if their home is at risk.
>
> 56. We would like to work with mortgage lenders to help ensure that those of their customers who are intending to let a property have a full understanding of the business that they are undertaking.[8]

In fact, the two months' notice referred to is not a statutory requirement but reflects the time period that may elapse between issue of a claim for possession and the hearing, which CPR part 55.5 sets at four to eight weeks.[9]

There is no equivalent notice requirement at the warrant stage.

Once a tenant becomes aware of the mortgage possession proceedings they can participate in the case. Some courts will require tenants to make a formal application to be joined on as a second defendant while others will allow the tenant to attend the possession hearing described in the notice to occupier.

The following Parliamentary Question from December 2008 set out the Government's position on private-sector tenants whose landlords have defaulted on their mortgages:

> **Sarah Teather:** To ask the Secretary of State for Communities and Local Government what steps her Department takes to protect tenants of private landlords who have their property repossessed.
>
> **Iain Wright:** We believe it is good practice where possible for the lender to let the tenancy run and use the rental payments to cover the mortgage repayments until the end of the tenancy or where the tenancy has become a periodic tenancy to give the statutory two month notice period as a minimum. Where this is not possible we would hope that as a matter of best practice the mortgage lender would feel able to keep the tenant informed and to give them as much notice as possible if they have to find alternative accommodation. Officials are in discussions with the Council of Mortgage Lenders to explore ways in which best practice can be implemented and tenants can be kept better informed in these situations. If a tenant becomes homeless as a result of their landlord's failure to keep up with mortgage payments the local council should be

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7 Civil Procedure Rules Part 55.10(2) provide that lenders are required within five days of receipt of the date of the court hearing to notify the occupier of the details of the hearing. This gives occupiers the maximum possible warning – which can be up to seven weeks. From October 2009 the notification which is usually addressed to "the occupier" has had to specifically mention tenants.

8 Department for Communities and Local Government, *The private rented sector: professionalism and quality*, May 2009

9 Civil Procedure Rules Part 55.5

able to help in terms of providing temporary accommodation and assisting the tenant in their search for somewhere to live.[10]

1.2 Where the tenancy is binding on the lender

There are limited circumstances in which a tenant can claim a right to remain in their home in the face of the landlord failing to fulfil their mortgage commitments – these circumstances are outlined in the following three sections.

If it is established that the tenancy does bind the lender, the court must order that the lender can recover possession against the borrower/landlord but not against the tenant.

Overriding interest

Where the tenancy was granted *before* the inception of the mortgage, the tenant may be able to claim an "overriding interest" as a person in actual occupation, or as a person in occupation under a tenancy agreement for a term of years not exceeding seven years, which is binding on the lender under Schedules 1-3 to the *2002 Land Registration Act*. An overriding interest will prevent the lender from evicting the tenant without following due process.

There is a good deal of case law around the question of when a tenancy agreement will prevail over the mortgage. In the circumstances outlined below a tenancy will be binding on a lender even where it has been created in breach of the mortgage agreement:

- Where, as a result of delays in registration, the landlord is registered as the legal owner of the property and grants a tenancy before the lender's charge is registered.[11]

- Where the landlord is the registered owner at the time the tenancy is created and has an existing mortgage that tenancy will not be binding on the lender. However, if the landlord remortgages, and in so doing pays off the existing mortgage, then the new mortgage, which is registered *after* the tenancy has been created, *will* be binding on the new lender.

- Where the landlord changes during the lifetime of the tenancy the question arises as to how the purchase has been financed. If the property has been sold and the new owner finances the purchase with a new mortgage, the tenancy which would not have been binding against the original lender will be binding upon the new landlord's lender.

The lender agrees to the tenancy

Most mortgage agreements contain provisions requiring the borrower to obtain the lender's written consent before granting a tenancy. Often, specific consent to each individual tenancy is needed, even in buy-to-let mortgages. Therefore, it is important for a borrower to read the mortgage terms and conditions before granting a tenancy. If a tenancy has not been granted in breach of the mortgage terms it will be binding on the lender, i.e. the lender will not be able to seek possession in these circumstances by bringing possession proceedings against the borrower. If this is attempted the tenant can apply to be joined to the proceedings and can oppose possession. Alternatively, the lender can appoint a receiver to collect rent from the tenant.[12] If the tenant does not pay then the lender would be able to take possession

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10 HC Deb 9 December 2008 c63W

11 *Barclays Bank v Zaroovabli* (1997) 2 All ER 19

12 If the power of sale has become exercisable the lender can appoint a receiver to receive any rental income from the property. Payment of rent in this way does not of itself create a new tenancy as the receiver is deemed to be the agent of the borrower not the lender under the *1925 Law of Property Act*.

proceedings against the tenant in accordance with the terms of the tenancy agreement and/or any applicable statutory provisions.

In regard to buy-to-let mortgages, the Council of Mortgage Lenders included the following section in its response to the Ministry of Justice's recent review of mortgage remedies:

> 509 Buy to let loans are commercial loans...there may well be a tenant or tenants in situ who do risk losing their home and it is consideration for those tenants that is paramount with buy to let loans. In some cases there is also a rental stream which is part of the value of the property.
>
> 510 If a lender has a buy to let loan it can follow the court order route and obtain possession. It is however important to remember that an order for possession against the borrower is just that – it is not an order for possession against the tenant. Where there is a tenancy which is binding on the lender the lender will need to decide how best to proceed both for itself and the tenant(s).
>
> 5.11 Assuming that the tenancy has lender consent (**and most buy to let loans imply consent so long as the tenancy complies with terms and conditions** – usually an assured shorthold) if the lender has a court order against the borrower and wants to sell with vacant possession it can only do what the borrower as landlord could have done to remove the tenant from the premises. In most cases this would be by serving a notice ending the tenancy or proving a ground for possession. Once the property is vacant because the tenancies have been brought to an end in accordance with legislation it is not always worthwhile the lender obtaining a court order against the borrower – it will only add to the borrower's costs for the lender to do so. The lender does not acquire better rights than the borrower.
>
> 5.12 However in many buy to let cases the lender may choose to sell without vacant possession. The rental stream from the tenancies may actually be the main value attaching to the property so to sell with vacant possession would adversely affect the borrower. In these cases the lender may choose not to obtain an order for possession against the borrower at court and, following sale, the tenants simply have a new landlord. S101[13] affords protection to the borrower as it gives the borrower notice that he is in breach. The lender will either sell to a buyer directly or if its terms and conditions allow it to do so may appoint a receiver (see below) to do this.
>
> 5.13 Again it is important to remember that the equity of redemption applies until exchange of contracts and that the common law duty to obtain the best price reasonably available in an arms' length transaction applies.
>
> 5.14 The LPA allows the lender to appoint a receiver. The receiver is the agent of the borrower and its main duties under the LPA are to collect rent and manage the security. A receiver's powers can be extended by the lender in its terms and conditions. Receivers appointed by lenders are often surveyors, lawyers, managing agents, asset managers or other professionals experienced in property management. Property management is now a very complex area and the use of professionals in this way affords protection to tenants.[14]

The section highlighted in bold indicates that the CML believes that a lender gives implied consent to a letting on granting a buy-to-let mortgage and that that letting is binding upon the lender.

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13 Of the *1925 Law of Property Act.*

14 CML response, *Mortgage Remedies (Possession and Sale) Review*, January 2009

As a general rule, a tenancy granted in breach of the mortgage deed is not binding on the lender.[15]

Recognising the tenancy

This issue here is whether, for example, by knowingly accepting rent payments a lender creates a tenancy between itself and the occupier. Whether such actions do in fact create a binding tenancy will depend on the circumstances of each individual case. The fact that a lender knows that a tenant is living in the property concerned will not, of itself, make the tenancy binding on the lender.[16]

1.3 Where the tenancy is not binding on the lender

Court orders

Where the tenancy does not bind the lender (i.e. none of the circumstances set out above apply) the lender is not obliged to let the tenant remain in occupation until the expiry of their contract. Any eviction order that the lender obtains in proceedings against the borrower will be enforceable against the tenant.

Action against the landlord

Landlords who default on their mortgage payments and whose tenants lose their home as a result of possession action by lenders will be in breach of their contracts with their tenants. That a landlord may have rented a property without permission would not affect the position of the tenants who have been renting in this respect. It is open to tenants to bring a civil claim for compensation against their landlords based on breach of an implied term in the tenancy that the landlord will not "derogate from the grant of the tenancy", i.e. act in such as way as to fundamentally undermine the existence of the tenancy. However, if the landlord is in a severe financial situation seeking compensation may be of limited benefit to the tenant.

2 Pressure for Change

During the course of 2009, several bodies recommended that action be taken to protect private tenants where their landlords default on their mortgage and repossession proceedings are brought. In addition to these, 126 Members signed EDM 1154 of the 2008-09 session of Parliament, tabled by Sally Keeble on 23 March 2009, which stated:

> That this House recognises that tenants in the private rented sector risk losing their homes through repossession when landlords default on mortgages; notes that many tenants are evicted with little or no notice, sometimes only finding out when the bailiff arrives on their doorstep; further notes that many of these tenants could be at risk of homelessness through no fault of their own; and calls on the Government to take urgent action to avert a potential crisis by giving courts the discretion to defer possession and allow tenants sufficient time to find another home.

2.1 Communities and Local Government Select Committee

In February 2009 the Communities and Local Government Committee published the results of its enquiry into *Housing and the Credit Crunch*, which discussed the issue of repossession of privately rented properties.

The report discussed the uncertain extent of this problem within the wider housing market crisis:

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15 *Britannia Building Society v Earl* [1990] 2 All ER 469

16 *Nigar & Nigar v Mann* (1998); *Taylor v Ellis* (1960) 1 All ER 594

> There was no consensus amongst the written submissions we received about the rate of repossession of privately rented properties. Crisis states "the number of buy-to-let landlords being repossessed in the first half of 2008 is double that of the first half of last year". Tom Parkinson, an individual who was the victim of just this problem, suggests in evidence to us that "anecdotal evidence from a local estate agent concurs that buy-to-let properties are being repossessed at a vastly disproportionate rate". The National Landlords Association disagrees, stating "figures from the Council of Mortgage Lenders indicate that currently only 1.1% of buy-to-let mortgages are in arrears of more than 3 months (compared to 1.33% in the wider market). The rate of repossessions is the same as for owner-occupied property: 0.16%".[17]

The limited protection afforded to most tenants in this situation (outlined in part 1 of this paper) was raised by several respondents. In written evidence to the Committee, Citizens' Advice stated:

> In these circumstances, the tenant, who may have an unblemished rent account, is often not entitled to even the limited protection which an assured shorthold tenancy normally offers – i.e. two months' notice followed by a possession order through the accelerated possession route. Instead, the rights of the lender to repossess the property normally override those of the tenant, who, as "occupier", is only entitled to receive notification of the possession proceedings and eviction date.[18]

In its recommendation on the issue, the Committee argued that more consideration should be given to the situation of tenants, stating:

> We welcome consideration being given by the Ministry of Justice to extending the period of notice a lender is obliged to give a tenant that their home is at risk of repossession. We recommend that the Government also produce guidance stipulating that lenders repossessing properties where there is a sitting tenant make arrangements for the professional management of the property for a minimum of six months after repossession or until the end of the contractual tenancy period if sooner.[19]

2.2 A private matter?

In March 2009 Crisis, Citizens Advice, Shelter and the Chartered Institute of Housing jointly published *A private matter?*, highlighting their concerns around the problems faced by private tenants during the repossession crisis. The paper made the following recommendations:

> The Government must take urgent action to avert this potential crisis. Tenants need legal protection to ensure that they at least have a reasonable time to find somewhere else to live.
>
> - We are calling for amendments to the Administration of Justice Acts 1970 and 1973 and the Consumer Credit Act 1974 to give courts the discretion, where an outright possession order is granted and there is a tenant in occupation, to defer possession for a limited period of time, taking into account the circumstances of the tenants. The court would then have flexibility in making this decision so that it could take into account the interests of any children or vulnerable people in the household and the household's economic circumstances. The lender could appoint a receiver of rent during this time.

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17 Communities and Local Government Committee, *Housing and the Credit Crunch*, HC 101 2008-09, para 91
18 *Ibid*., Ev 166
19 Communities and Local Government Committee, *Housing and the Credit Crunch*, p43

- More needs to be done to make tenants aware of possession proceedings and their rights by ensuring a notice is sent to the property by the courts as well as the notice from the lender. Both should include information for tenants about their rights and where they can go to get further advice. To increase the chances of a tenant opening the notice, envelopes should be marked with a message such as 'your home is at risk'.[20]

2.3 Government Response to the Rugg and Rhodes Review

As noted in section 1.1 of this paper, in 2008 the Government commissioned an independent review of the private rented sector by Julie Rugg and David Rhodes, the findings of which were published as *The Private Rented Sector: its contribution and potential* in October 2008. In May 2009 the Government published its response to the Rugg and Rhodes review of the private rented sector. It stated that:

> Since 6 April 2009, lenders taking possession proceedings must give the maximum possible notice to occupiers of the affected property. Tenants will usually get nearly two months' notice of these proceedings, a significant increase on the previous two weeks. We are looking to see what more help we can provide for tenants who are caught up in a repossession case through no fault of their own. We urge landlords and lenders to communicate with tenants so that they are given time to make alternative arrangements if their home is at risk.[21]

Subsequent to this, the Government confirmed an intention to legislate "at the earliest opportunity to fill a gap in legal protection for private tenants whose landlords are repossessed to ensure that those tenants get adequate notice to vacate the property, regardless of whether their tenancy has been authorised by the landlord's lender."[22]

3 Consultation on the Protection of Tenants

3.1 Background

On 5 August 2009 the Government launched its consultation *Lender repossession of residential property: protection of tenants*, which sought to address the problems of tenants whose landlords default on their mortgages. The consultation closed on 14 October 2009. The paper defined the Government's objective in seeking to legislate as:

> 2.9 We want to give comfort to all genuine tenants that if they are required to move due to their landlord's mortgage default, they will still have a reasonable period of notice in which to make arrangements.
>
> 2.10 The Government's objective is to enable unauthorised tenants in this situation to have two months' notice that they need to vacate the property, while causing the minimum of delay to mortgage lenders and borrowers.
>
> 2.11 It seems right for unauthorised tenants to continue to pay rent during the notice period. However, it is not intended that a new tenancy should arise between the "tenant" and the lender as a consequence of the lender accepting this payment. We will consider how to provide for this, if necessary, in the legislation.[23]

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20 Crisis, Citizens Advice Bureau, Shelter and the Chartered Institute of Housing, *A private matter? Private tenants: the forgotten victims of the repossessions crisis*, March 2009, p5

21 Department for Communities and Local Government, *The private rented sector: professionalism and quality*, May 2009 , p26

22 HC Deb 13 July 2009 c134W

23 Department for Communities and Local Government, *Lender repossession of residential property: protection of tenants*, p16

The proposed changes to legislation would apply to England and Wales.

The consultation paper defined the 'unauthorised tenancies' that would be the target of its proposed legislation as follows:

> **Unauthorised tenancies**
>
> It is a standard term in most owner-occupier mortgages that the borrower is prohibited from renting out the property or that the lender's consent must be sought before any such tenancy is entered into. Where a borrower lets his property in breach of this requirement or related conditions (e.g. failing to provide required information to the lender) the "tenancy agreement" will be void as against the lender. We refer to these as "unauthorised tenancies". The effect of this is that the "tenant" has no right against the lender to enforce the terms of that agreement. After repossession therefore they will have no right to remain in occupation and no right to notice of termination of the agreement. Even if the "tenants" are aware of possession proceedings and attend the court hearing, the court has very limited powers to take their situation into account.
>
> Certain tenancies will be binding on the lender. In these cases the tenant should be given notice in accordance with their tenancy agreement for the termination of their tenancy and subsequent eviction. A tenancy will usually be binding on the lender if:
>
> a) The tenancy was entered into before the mortgage agreement was made; or
>
> b) The tenancy was entered into with the consent of the lender and in full compliance with any terms specified in the mortgage deed.
>
> We are working with lenders and their representatives to increase awareness of tenancies that must be honoured in this way.
>
> Tenancies in properties supported by a Buy-to-Let (BTL) mortgage are very often binding on the lender, although some will not be if particular terms have been breached. A significant number of people have let out a property that is supported by an owner-occupier mortgage, without gaining the lender's consent to let. We are calling this a Residential-Turned-Let (RTL) mortgage. Tenancy agreements created in such a way will very rarely be binding on the lender. The result is that people who thought they had a genuine tenancy agreement with their landlord, and complied with it, can nevertheless be evicted at very short notice. In such a situation, the tenant and the lender may both be adversely affected by the actions of the borrower landlord.[24]

The consultation paper set out five proposals for proceeding; the first would involve making no legislative change. It continued:

> **Option 2** would give unauthorised tenants the right to be heard at the possession hearing, and give courts the power to postpone possession to allow unauthorised tenants who have proved their claim a decent time to move. These tenants would therefore have up to two months from the date of the possession hearing to vacate the property. Rental income may contribute to the mortgage arrears in this interim period, minus any related costs.
>
> We believe that this approach would meet the policy objective in some circumstances, but not in all. We are therefore considering additional measures that might also be put in place in order to achieve a reasonable level of security for all tenants in this position. These are:

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[24] *Ibid*., p11

> **Option 3:** To enhance the notification of the possession hearing, so that more unauthorised tenants attend and make representations at the hearing.
>
> **Option 4:** To require lenders to notify their intention to enforce possession, and provide a mechanism for unauthorised tenants to request a two-month delay.
>
> **Option 5:** To provide a mechanism for unauthorised tenants to request a two-month stay in the warrant of possession.
>
> We are currently attracted to pursuing Options 2 and 4 together, and would welcome views on this proposal.[25]

Within the framework of these options, the consultation paper then set out more precise questions discussing how these proposals might be implemented, and any associated drawbacks.

3.2 Consultation Responses

The *Mortgage Repossessions (Protection of Tenants Etc.) Bill* was announced prior to the results of the consultation being published. However, several of the key stakeholders in the housing industry published their responses to the consultation online. It was broadly agreed that legislation should be enacted, but there was less agreement on what form this legislation should take. Option 2 was strongly supported; however, while several organisations considered that it would be appropriate to implement this alongside option 4, this approach was questioned by others, particularly by mortgage lending associations.

Making reference to the Government options set out above, Shelter stated in its response:

> We wholeheartedly support the objective and methods proposed. Whilst the majority of tenants - particularly in buy-to-let properties - should expect to be protected from sudden eviction by lender good practice, it is important that a legal minimum exists for those tenants who are not. In particular, tenants of amateur or unprofessional landlords, or lenders who are wilfully unscrupulous or simply ignorant of their legal obligations with regard to occupiers.
>
> We agree that the best combination of legislative options is Option 2 plus Option 4. Option 2 would give courts the power to defer possession where a tenant has made themselves known. Option 4 would then create further opportunities for tenants who might not come forward in the first instance. However, we suggest some minor amendments to Option 4 to ensure it is sufficiently robust.[26]

Crisis voiced a similar view, although they were concerned that option 2 still left some tenants without protection, and put forward an amended version of option 4 to fill these perceived gaps. Their response set out two additional measures for an amended 'option 4 plus':

> 1. **Positive referral to the court:** Any dispute between the tenant and the lender would be positively referred to the court by the lender. This would encourage lenders to carefully consider applications from tenants as they will be aware that refusals will automatically go to the court for a decision. It will also remove the onus from the tenant of having to lodge a further appeal during what is a difficult and uncertain period for them.

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25 *Ibid.*, p7

26 Shelter, *Response to the Communities and Local Government Consultation, Lender repossession of residential property: protection of tenants*, October 2009, p3

> Such a referral would have the added advantage of discouraging fraudulent claims which seek to delay possession by the property owner or their associates. Claimants would be aware that any disputes would be positively referred to the court by the lender and the court would then have the power to award costs against them if their claim is found to be spurious. We are aware that fraudulent claims have been raised as a concern by some lenders and we believe that this proposal would help reduce such claims and therefore also be in the lender's interest.
>
> 2. **Right to remedy:** Up to the point of eviction, the tenant should have the right to apply to the county court for two months' notice in cases where they have not had the earlier opportunity to make an application to the lender or in cases where they have not had the opportunity to have had a refusal by the lender reviewed by the court.
>
> We envisage that this right would only be exercised in fairly unusual circumstances and so would cause very limited extra delays or cost to the lender. However, in giving the tenant a right to apply for a delay to the eviction, there should also be a mechanism for review if they have not had the opportunity to exercise this right.[27]

The Council of Mortgage Lenders were supportive of a version of option 2 being implemented. However, they were opposed to options 4 and 5 both as stand alone alternatives and in possible conjunction with option 2:

> We believe that a fair and proportionate solution is the introduction of option 2 with certain safeguards and limitations. This option gives the court the ability to oversee fairness between the three parties involved. This should be combined with a requirement on the court to serve notice to the tenant or occupier and a publicity campaign funded by government alerting tenants to the importance of such notices.
>
> A combination of option 2 with options 4 or 5 does not seem to us to work. They should not be combined – we cannot see why an unauthorised tenant would use option 2 if the unauthorised tenant knew that a further delay could be achieved under options 4 or 5.
>
> Option 4 seems to unfairly prejudice lenders and borrowers and we are opposed to this proposal. Option 5 has similar flaws. These options could be rogues charters and lead to deliberate delaying tactics by borrowers.
>
> Through its proposals in options 4 and 5 government seems to be attempting to resolve the issue through imposing all the burden on lenders. This is inequitable given that the position arises through borrower breach.[28]

The Building Societies Association (BSA) raised similar concerns with options 3, 4 and 5, believing they were excessively weighted against lenders:

> The BSA supports the proposal to allow tenants to make a representation at a court hearing and to allow the court to grant additional time for the tenant to vacate where appropriate.
>
> However, we do think that there are some fundamental issues to resolve before this is implemented. The most pressing issues are the implications of the lender recognising the tenancy and therefore acting as landlord as well as the increased costs involved in delaying possession.

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27 Crisis, *Lender repossession of residential property: protection of tenants: Crisis's response to the CLG consultation*, October 2009, p4-5

28 Council of Mortgage Lenders, *Lenders repossession of residential property: protection of tenants*, consultation response, 13 October 2009, p1

> We do not believe that adequate work has been undertaken in relation to the impact of the lender as the landlord. We have serious concerns that this has not been fully assessed, nor fully understood and we believe that further work should be undertaken to ensure that lenders are not adversely affected.
>
> We do not believe that options 3, 4 or 5 are proportionate to the scale of the situation and would place far too great a responsibility upon the lender, who like the tenant have not caused this situation to arise.
>
> Whilst we appreciate the sentiment behind option 4, it is in our view a step too far, especially as we do not know the full extent of the issue. Whilst option 4 is more realistic compared to option 3 and 5, it still places far too much responsibility upon the lender. The lender cannot be expected to be responsible for the tenant not acting on any correspondence sent to them.
>
> In addition, we would strongly resist option 4 on the grounds that it would fundamentally overhaul the eviction process. The comment in 3.12 of the consultation, that this change could benefit all homeowners may be true, but this should be considered carefully and as part of a much more detailed consultation.[29]

As noted above, the consultation closed on 14 October 2009. Before a summary of responses or further action was announced by the Government, Dr Brian Iddon announced his intention to introduce the *Mortgage Repossessions (Protection of Tenants Etc.) Bill*.

4 *Mortgage Repossessions (Protection of Tenants Etc.) Bill*

4.1 Announcement and Government Support

On 3 December 2009 Dr Brian Iddon, who drew first place in the Private Members' Bill ballot, announced that he would use this opportunity to introduce a Bill to protect private tenants from losing their homes in the event of their landlord defaulting on the mortgage payments. The Bill was originally called the *Protection of Tenants (Mortgage Repossession) Bill*. He gave his reasons for introducing this Bill:

> As soon as the announcement was made my office was overwhelmed with correspondence. This made it a very difficult decision to make as there were so many good causes I would have liked to take action on. I wanted to take forward The Protection of Tenants (Mortgage Repossession) Bill because I believe in protecting people who may lose their home through no fault of their own and, given the limited time available in this truncated Parliamentary session, I am keen to bring in a Bill that is relatively simple and that will command widespread support in the House."
>
> The Protection of Tenants (Mortgage Repossession) Bill will give private tenants rights if their landlord defaults on their mortgage and the lender takes steps to repossess the property. Currently, if a landlord is renting out a property and they have not informed the lender that it is being let, when repossession notices are sent out, they will not be addressed to the tenant. This means the tenant may be totally unaware of any repossession order until a court summons is received or the bailiffs arrive. This leaves the tenant potentially homeless.
>
> It is very difficult to collect accurate figures on this problem; for example, only if the tenant presents to the local authority as homeless would such data be registered. Government figures suggest that, in 2009, 2,000-3,000 people have been affected.

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[29] Building Societies Association, *CLG consultation on lender repossession of residential property: protection of tenants, Response by BSA*, 13 October 2009

> However, advice agencies such as the Citizens Advice Bureau suggest the figure is much higher.
>
> Legislation in this area is urgently needed. The Government have already undertaken a consultation on this issue and I have support for the Bill from Shelter, Crisis, the Citizens Advice Bureau and the Chartered Institute of Housing. I will be campaigning very hard to ensure that my Bill passes into law before the General Election so we can start protecting private tenants as soon as possible.[30]

The Housing Minister, John Healey, indicated the Government's support for this Bill:

> I welcome Brian Iddon's decision to use his Bill to close the gap in legal protections for tenants whose landlords face repossession and I will work with him closely on this important legislation. These families can end up with little or no notice that they have to move when the home they live in is taken away. I am committed to seeing the law changed to give them new protection.
>
> Since the downturn began, over 330,000 families have benefited from the comprehensive range of Government support available to help them avoid losing their homes - including free debt advice and legal representation in court to help with mortgage interest payments and, for the most vulnerable families, the Mortgage Rescue Scheme. Dr Iddon's Protection of Tenants Bill will offer much-needed breathing space for tenants so they don't face being thrown out onto the street and have time to find a new home.[31]

The Bill was presented on 16 December 2009. The debate on its Second Reading is scheduled for 29 January 2010. On 19 January 2010 Dr Iddon put down an Early Day Motion drawing attention to issues raised in the Bill.[32] At the time of writing this EDM had 45 signatories.

4.2 The Bill

The Bill has two substantive clauses. **Clause 1** would give the court power when granting a court order for possession, on application of the tenant of an 'unauthorised tenancy' (see section 3.1 above), to postpone the date of delivery of possession for up to two months (clause 1(2)).[33] If an application is not made prior to the order being granted, clause 1(4) would give the court a further power to stay or suspend the execution of the order for up to two months on application of the tenant. This power could only be exercised where the tenant has already asked the mortgagee (in writing) to delay enforcement for two months and the mortgagee has refused. It will only be exercisable where the court has not already exercised its powers under clause 1(2) or, if it did, the applicant was not the tenant when the power was exercised.

In considering whether to exercise its powers under clause 1 the court will consider the circumstances of the tenant and any breach by the tenant of the terms of the unauthorised tenancy.

The court may require the tenant to make payments to the lender in return for occupation during the period of any stay or suspension of possession proceedings, these payments will not create a tenancy or obligations between the lender and the unauthorised tenant.

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30 Website of Dr Brian Iddon MP, *The Protection of Tenants (Mortgage Repossession Bill)*, 3 December 2009
31 *Ibid*.
32 EDM 643, Session 2009-10
33 Clause 1(2)

Clause 2 would make provision for giving tenants notice of the execution of a possession order by the mortgagee. The mortgagee would have to give notice of the proposed execution of the order at the property before the order is executed. This would apply in the case of an outright possession order, a breached suspended possession order and also where the borrower agrees to the repossession and the mortgagee seeks a court order to sell with vacant possession.

Enforcement of the possession order would only be possible where the tenant has been given notice and only after the end of a prescribed period beginning with the date on which the notice is served.[34] Regulations would specify this period, and may also prescribe the form of notices and the way in which they must be given.[35] The Explanatory Notes to the Bill suggest that Regulations may require the notices to be delivered by recorded delivery.[36]

Clause 3 defines some of the key terms in the Bill and clause 4 provides for commencement. The Bill's provisions extend only to England and Wales.

5 Comment on the Bill

5.1 The Bill and the Government Consultation

Both Dr Iddon's Bill and the Government's consultation paper focus on unauthorised tenancies.

The proposals in clause 1 of the Bill are most similar to options 2 and 4 in the Government's consultation paper. Clause 1 gives the courts the power to postpone the date of delivery of possession for up to two months, gives the tenant the right to apply for a postponement on the delivery of the possession order, and also gives the tenant the right to apply for a stay or suspension of the order once it has been made. Aspects of option 4 relating to a new notice of the intention to enforce possession are tackled in clause 2. This states that the mortgagee must give the tenant notice setting out a prescribed time frame for the execution of the possession order, or the order cannot be enforced. The mechanism for this notification is left for the Secretary of State to set out in regulations.

The issue of enhanced notification of the possession hearing, raised in option 3 of the Government's consultation as well as previous reports (for instance, the joint report by Crisis, Citizens Advice, Shelter and the Chartered Institute of Housing, *A private matter?*), is not part of the Bill. While the Bill's clause 2 states that a possession order cannot be executed until after a prescribed period after notice of possession is given, there is no mention of enhanced means for notification of possession hearings, as discussed in option 3 within the consultation.

5.2 Other reaction

After the Bill was announced Crisis, Citizens Advice, Shelter and the Chartered Institute of Housing released a joint press notice in support of the Bill:

> **Leslie Morphy, Chief Executive of Crisis**, said: "We are delighted that Brian Iddon has taken up the baton and pledged to work to give private tenants the protection they so desperately need. There are around 324,000 households who would be at risk of losing their homes with little or no notice if their landlord was repossessed so this legislation can't come soon enough. We now hope that Government and all parties will work together ensure this legislation is passed without delay."

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34 Clause 2 (2)
35 Clause 2 (3) and (4)
36 Explanatory Notes to Bill 15 of 2009-10

> **Citizens Advice Chief Executive David Harker** said: "This Bill sets out to end a clear injustice whereby private tenants who have paid their rent and kept to all the terms of their tenancy agreement can be evicted without notice if their landlord is repossessed. CAB advisers report seeing cases where the first the tenant knows about the situation is when they come home to find bailiffs in their home, or to find their belongings have been put out on the street and the locks have been changed. We would urge all MPs and peers to give the Bill their full support so that these forgotten victims of repossession get the legal protection they deserve."
>
> **Sarah Webb, Chief Executive of CIH**, said: "We are very pleased indeed that Brian Iddon MP is giving his support to this important issue. It is absolutely crucial that households living in the private rented sector are afforded basic legal protection when they are facing the consequences of their landlords being repossessed."
>
> **Shelter deputy director of policy and campaigns Caroline Davey** said: "It is shocking that innocent tenants who have caused no problems and paid their rent on time can be forced to leave their home with as little as a few hours notice if their landlord has failed to keep up mortgage payments. We welcome Brian Iddon's commitment to protecting private tenants and hope that sufficient time is made to ensure this vital piece of legislation will now be passed before the general election."[37]

The Residential Landlords Association (RLA) also released a notice in support of the Bill:

> The association - whose members own over 100,000 private rented properties throughout the UK – is backing Bolton South East MP Dr. Brian Iddon's bill because "it does not help the reputation of the private rented sector for tenants to lose their homes in this way, often with little or no warning," says the RLA secretary and solicitor Richard Jones.
>
> "We responded to recent consultations by urging the government to introduce appropriate legislation and, despite the many legal issues involved, this needs to be kept as simple, straightforward and non-controversial as possible.
>
> "We are more than willing to provide assistance or comments, as the bill is drafted, because a solution to the mortgage defaulting problem can only benefit landlords and tenants alike without creating undue consequences for commercial mortgage lenders."[38]

The Council of Mortgage Lenders was supportive of the Bill's aims but uncomfortable with some of the perceived implications of the Bill's provisions:

> The bill is intended to help tenants in a much smaller number of cases where a borrower falls into arrears with a residential mortgage and is letting the property without the lender's knowledge or consent. When this happens, it is often only when an action for possession is started that the lender and tenant become aware of each other's interest in the property.
>
> Lenders are sympathetic to the plight of tenants in these cases. But the lender is also in a difficult position because of a potential conflict between the interests of the borrower/landlord, to whom the lender has contractual obligations, and the tenant.
>
> Depending on the individual circumstances, it may be in the borrower's interests for the lender to seek immediate vacant possession of the property and sell it as soon as

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37 Chartered Institute of Housing press release, *Housing Charities Welcome Bill To Protect Private Tenants*, 3 December 2009

38 Residential Landlords Association, *Landlords Back New Bill on Mortgage Defaulting*, 17 December 2009

possible to minimise arrears. But lenders accept that this may not be in the best interests of the tenant, who may have been paying his rent in full and on time every month, even though his landlord has not been using the funds to pay his mortgage.

We therefore support key proposals in the Protection of Tenants (Mortgage Repossessions) Bill, due to have its second reading later this month.

We accept that tenants should be able to take part in possession proceedings brought by a lender against a borrower/landlord. And we would like the court to be able to consider the tenant's position and – subject to safeguards, including the continuing payment of rent – delay possession for two months to give the tenant a reasonable period to find somewhere else to live.

We are, however, concerned that some of the provisions in the bill, introduced by the Labour MP for south east Bolton, Dr Brian Iddon, are inappropriate to the scale of the problem and could add significantly to costs and complexity.

In particular, we are concerned that the bill could apply to every case of possession – not just the small number involving an unauthorised tenant. Additionally, clause two of the bill appears to prevent lenders from executing a warrant for possession unless they have served a notice at the property and waited for a period of time. The actual period of notice required of lenders is not specified in the bill and would be left to regulation. If it is longer than the two weeks we believe is appropriate to protect unauthorised tenants, the cost to borrowers would rise further.

Delays that add unnecessarily to arrears reduce the scope for lenders to continue negotiating to avoid possession, thereby creating further detriment for borrowers.

The government is doing all it can to ensure that the bill is enacted before the general election. But we are concerned that, as drafted, the bill could be used as a 'rogue's charter' to delay possession, and that there is a lack of safeguards to prevent this happening.

We are continuing to have useful discussions about the bill and hope that it can be modified to address lenders' concerns, while still providing the intended protection for unauthorised tenants. We support the overall aspiration of the bill, but want to make sure that it is proportionate to the scale of problem and does not have expensive and problematic unintended consequences.[39]

[39] Council of Mortgage Lenders, Lenders support aims of tenants bill, 19 January 2010