

## Briefing:

# Repeal of section 21 – government consultation

19 September 2019

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This briefing shares the implications of, and seeks feedback on, the proposed repeal of section 21 of the Housing Act 1988. Please [share your views](#) by 5 October to feed into our sector response.

### Summary of key points:

- In April the Government announced plans to repeal section 21 of the Housing Act 1988. This is the provision that allows landlords to end assured shorthold tenancies by notice, without having to demonstrate the usual possession grounds.
- The overall effect of repealing section 21 is that landlords will be able to end an assured tenancy only if at least one of the normal grounds for possession is demonstrated in court (subject to the exercise of the court's discretion if the relevant ground is not mandatory). All assured tenancies, whether in the housing association sector or the private rented sector, will therefore be 'lifetime'. The assured shorthold tenancy, as a separate category, will cease to exist.
- This proposal is driven by issues arising in the private rented sector, but it will also affect housing associations, who use assured shorthold tenancies in a range of circumstances.
- The housing association sector makes widespread use of assured shorthold tenancies as a probationary regime for new tenancies. In addition, the fixed-term tenancy regime operated by some associations is also a form of assured shorthold tenancy.
- Many types of supported housing use assured shorthold tenancies, and housing associations also use shortholds in a number of specialized forms of housing.
- The housing association sector needs to consider the potential impact of the repeal of section 21 and the circumstances in which the continued availability of no-fault possession may be necessary or desirable.
- The Government has launched a formal consultation on the implications of repealing section 21 (but not on the principle involved). The deadline for responses is 12 October.

## 1. Introduction

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On 15 April 2019, the then Secretary of State for Housing, Communities and Local Government, James Brokenshire, announced the Government's intention to repeal section 21 of the Housing Act 1988.

The Government set out its plans in more detail in a consultation paper, [A New Deal for Renting: Resetting the Balance of Rights and Responsibilities between Landlords and Tenants](#), which was published in July. The consultation paper makes it clear that the Government is committed to the repeal of section 21, so it does not seek views on the principle involved. It does, however, raise a number of issues about the implications of the repeal, alongside some other issues about the operation of assured tenancies.

Although the decision to repeal section 21 arose from concerns relating to the private rented sector, as noted below, the focus of this briefing is on the implications for the housing association sector, and potentially on local authority housing as well.

This briefing:

- provides an outline of the consultation paper ([skip to section](#))
- gives an overview of how section 21 is currently used by housing associations ([skip to section](#))
- sets out the consultation's implications for housing associations, and indicates the Federation's initial thinking on a sector response ([skip to section](#))

So that we can respond to this consultation on behalf of the housing association sector, we are seeking views from our members. **Please contact John Bryant, Policy Leader, via [john.bryant@housing.org.uk](mailto:john.bryant@housing.org.uk) to share your views – by 5 October.** This is so that there is time to take them into account when we write the Federation's official response.

Housing associations can also respond directly to the Government by 12 October.

## 2. Outline of consultation paper

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[The Government's consultation paper](#) sets out the aim of allowing landlords to manage their properties effectively while at the same time recognizing that tenants need security in their homes. It identifies the end of a tenancy as a critical point at which the law must strike the right balance between the rights and interests both of landlords and of tenants.

It stresses that the great majority of assured tenancies end amicably and without dispute. Where the landlord and tenant are at odds, however, the current law provides that if the tenancy is assured shorthold, the landlord need only serve two months' written notice (a 'section 21 notice') in order to be certain of gaining possession without having to demonstrate any breach of tenancy or other fault on the part of the tenant (hence, 'no-fault possession').

An important consequence of this lack of security is that the possibility of eviction may deter tenants from seeking to enforce their legal rights, for instance to have repairs carried out or gas fittings checked for safety.

The proposed repeal of section 21 is thus intended to rebalance the relationship between landlord and tenant.

The consultation paper acknowledges that the repeal will render meaningless the current distinction between full assured tenancies and assured shortholds. In effect, all will be full assured, and this will apply from the very outset of the tenancy (i.e. there will be no 'introductory' or 'probationary' stage).

The consultation paper proposes some modifications to the grounds for possession, including new mandatory grounds allowing landlords to regain possession, without showing fault, if they wish to sell the property or move into it.

The paper also asks whether the repeal of section 21 should apply across the board to all landlords that use assured tenancies, including housing associations; and it seeks views on circumstances in which no-fault possession may be appropriate. These are issues of particular importance to the housing association sector and are considered in detail in this briefing.

The consultation paper also considers the operation of the courts in possession cases, and how they can be made faster and more effective.

### **3. Use of section 21 by housing associations**

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Housing associations meet the landlord condition in the 1988 Act and therefore use assured tenancies. In most cases, their assured tenancies are non-shorthold, which means the landlord can end them only by showing in court one of the grounds for possession listed in the 1988 Act, such as rent arrears or anti-social behaviour.

However, housing associations, like any other landlord within the scope of the 1988 Act, are also legally free to use assured shorthold tenancies allowing no-fault possession under section 21. They have done so in a number of significant areas.

#### **3.1 General needs social housing**

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##### **Fixed-term tenancies**

The Localism Act 2011 incorporated provisions allowing the use of fixed-term tenancies by social landlords. The rationale for this is that a fixed-term tenancy allows the landlord to reassess the tenant's circumstances every few years (typically, five). Such a system, however, currently relies for its effectiveness on the availability of no-fault possession if the tenancy is deemed no longer to be needed.

In practice, the principal application of fixed-term tenancies would be in cases where family-sized housing has come to be underoccupied because the size of the tenant's household has diminished over time; typically because children have grown up and left home.

If the tenant is below pension age the social housing size criteria will provide an incentive to downsize. However, this cohort of tenants is one of the least likely to be on welfare: Housing Benefit and/or Universal Credit is claimed by only 42.5% of childless households underoccupying by two bedrooms or more with a head aged 45-64, compared with 59% for

working-age housing association tenants overall). For tenants not affected by the size criteria (because they either are not receiving benefits, or are above pension age) the flatness of housing association rents means there is very little material incentive to downsize.

A possible alternative would be the creation of a new, mandatory ground for possession available in cases where the property is underoccupied, but to safeguard the interests of the tenant it would be available only if:

- notice had been given before the start of the tenancy that this ground might be used, and
- the landlord offered, or had secured an offer of, suitable alternative accommodation.

### **Probationary tenancies**

Much the most extensive use of assured shorthold tenancies, however, is for probationary purposes. That is, before receiving a lifetime (or fixed-term) tenancy, a new tenant is granted an assured shorthold, typically twelve months. This allows the housing association to evaluate the tenant and if it becomes clear that the tenancy is unlikely to succeed, to use section 21 to end the tenancy at the end of the probationary phase without the time and expense involved in demonstrating formal grounds in court. (Although our discussions with members indicate that in practice the actual service of a section 21 notice is rare, because once it becomes clear that a probationary tenancy will not be confirmed, the tenants usually anticipate the formal notice by moving out.)

The use of probationary tenancies is very common practice in the sector, accounting for some 84% of new housing association tenants in general needs housing (excluding transfers). However, the effect of maintaining such a mechanism would be to put social housing tenants in a less favourable position than private rented sector tenants, who, once section 21 is repealed, will enjoy full statutory security from the very outset of the tenancy.

It seems immediately counter-intuitive that tenants of housing associations should lack a level of statutory protection enjoyed by tenants of private landlords. In addition, if housing association tenants are no longer to be subject to probationary arrangements, the question arises of why local authority tenants should be subject to the very similar introductory regime. Although the technical provisions for local authorities are different (being located in section 124 of the Housing Act 1996), the policy concerns are identical and it seems logical that a single approach should be taken to probationary and introductory tenancies in both the housing association and local authority sectors.

When no-fault possession was abolished in Scotland, the short Scottish secure tenancy was introduced. This resembles an assured shorthold tenancy in that the landlord may end it without grounds by serving two months' notice (provided the tenancy runs for at least six months overall), but the key difference is that it can be used only in specified circumstances, and the tenant has the right to go to court to have the tenancy converted to a full Scottish secure tenancy. The short Scottish secure tenancy can be used, for instance, if the tenant has previously been evicted for anti-social behaviour or if the tenant or a member of his or her family

is subject to an ASBO. So the short Scottish secure tenancy lacks the ubiquity of the assured shorthold and cannot be used for new tenants in general.

### **Demoted tenancies**

As an alternative to eviction, housing associations sometimes ask the court to 'demote' a tenancy: that is, to convert it to shorthold form so that the landlord can end it using section 21. Demoted tenancies thus raise similar issues to probationary tenancies, but with one key difference: before a tenancy can be demoted, a court must be satisfied that this action is warranted. This gives the tenant a degree of protection that does not currently apply to a probationary tenancy.

## **3.2 Supported housing**

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Housing associations also use assured shorthold tenancies, and no-fault possession, in some types of supported (as opposed to sheltered) housing. The principal cases are listed below. If the availability of no-fault possession is essential for these types of housing, they will require some kind of special legislative provision once section 21 is abolished.

### **Loss of support**

Some types of supported housing rely on the delivery of support, either directly or by means of financial provision, from an external agency. If this is withdrawn, for reasons that may be entirely beyond the control of the housing association, the housing cannot be sustained and section 21 is used to end the tenancy.

### **Ending of need for support**

A further case is where supported housing is supplied in circumstances where the need for it may cease to apply at some future point. An example would be the letting of a property with major adaptations that meet the serious mobility needs of one member of a couple. If the resident with mobility problems then dies, the property will be occupied by the surviving partner, who may have no need for the adaptations.

In this situation, especially if the adapted property is urgently needed by someone else, the housing association may require possession even if the conduct of the tenancy has been immaculate. (Of course in this situation the housing association would normally offer an alternative. However, doing so gives rise only to a discretionary possession ground, and courts are very reluctant to use their discretion in such a case.)

### **Need for rapid possession**

Some associations argue that it is important for the effective management of certain schemes for very challenging client groups that no-fault possession be available so that the landlord can, in the last resort, evict a tenant without having to demonstrate grounds. This may apply, in particular, to properties involving a substantial shared area.

### 3.3 Other special cases

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#### **Temporary housing**

There are many cases where housing is clearly intended to be temporary. This arises, for instance, where the housing association has only a lease of a property for a certain number of years, at the end of which it must be restored to the freeholder with vacant possession. Another example would be property that is unavailable for permanent living because of 'planning blight' (e.g. it is in the path of HS2). In this situation no-fault possession is clearly unavoidable; the alternative would be to leave the property empty.

#### **Young people, key workers, temporary housing for homeless people**

There are other cases such as housing intended for young residents (e.g. under 25) or for key workers, where if the purpose of the scheme is to be maintained it is essential to use no-fault possession if the tenant ceases to meet the qualification. The Federation welcomes suggestions from members of other specialized categories of housing to which similar arguments will apply.

Temporary housing for homeless people, pending determination of their case by the local authority or the offer of permanent housing, is already excluded from statutory security by section 209(2) of the Housing Act 1996.

#### **Intermediate rent leading to ownership (including London Living Rent)**

A number of housing associations operate schemes at intermediate rents, aimed at tenants on middle incomes, in the expectation that within a few years the tenant will be able to progress to some form of purchase such as shared ownership.

The London Living Rent (LLR) scheme takes a similar approach. The schemes typically use fixed-term tenancies (three years in the case of LLR) and envisage that renewal of the tenancy, if sought by the tenant at the end of the fixed term, will be on the understanding that the tenant will be able to enter upon some form of ownership within a reasonable time. Once section 21 is repealed, schemes of this type will not be able to continue in their current form unless specific legislative provision is made for them.

#### **Termination of a superior lease**

Housing associations sometimes acquire housing under leasing arrangements that, typically, require the property to be returned with vacant possession on the termination of the lease. In order to comply with this requirement, the association will let the premises on a shorthold tenancy so that section 21 may be used to terminate the tenancy as the end of the lease approaches.

With regard to existing leases, entered into by associations in the expectation that section 21 would be available, it would be reasonable to seek a specific legislative exemption to allow no-fault eviction as the end of the lease approaches.

However, applying the same approach to new leases, as opposed to existing ones, would be open to the objection that it would allow landlords enter into contrived lease arrangements allowing them to circumvent security of tenure.

### **Market renting schemes**

Another case where assured shorthold tenancies are routinely used by housing associations is in their market renting schemes, where they naturally mirror the tenancy terms offered by private landlords. However, housing associations should expect that the repeal of s21 will apply to this type of provision.

## **4. Mechanism for retention of no-fault possession**

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Assuming that the Government accepts the necessity of no-fault possession in certain cases, the question remains of how to effect this. Essentially, there are two approaches:

- exclude the tenancy from assured status, and therefore from statutory security, by adding it to the list of exclusions in Schedule 1 to the 1988 Act, meaning that it can be ended by simple notice to quit
- add new mandatory grounds for possession to Schedule 2 to the 1988 Act.

If certain categories of tenancy are excluded from assured status, they will become so-called 'bare' or 'contractual' tenancies, which will mean they lose not only security of tenure but certain other statutory rights as well, such as that of challenging rent increases. They will, however, still be subject to the landlord's repairing covenant and fitness duty, because these do not depend on assured status.

If the route is taken of creating new mandatory grounds, they may (depending on the circumstances in which they are available) have certain special conditions attached, for instance that the tenant was formally notified before the start of the tenancy that this ground might be used, or that the landlord has offered, or secured an offer of, suitable alternative accommodation.

Since it is clearly undesirable either to remove significant numbers of tenants from assured status, or to allow the number of mandatory grounds to proliferate, these approaches should be applied only to a limited number of special cases in which the housing in question can be narrowly and precisely defined.

If a case is made in respect of any particular category of housing, either for creating a new mandatory ground or for excluding it from assured status altogether, it is suggested that this should be generally available and should not be restricted to registered providers. This is to protect the interests of unregistered housing associations as well as of other socially-minded landlords (for instance, some charities, although not primarily housing bodies (and therefore not qualifying as housing associations), nevertheless possess some residential property that they let in furtherance of their aims). The types of property that might qualify for continued no-fault possession are unlikely to be let by rent-maximizing private landlords.

## 5. A Housing Court

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Even if mechanisms are put in place retaining no-fault possession in certain categories of housing, the loss of section 21 will inevitably increase pressure on the courts to improve processing of possession cases. This will apply particularly in the private rented sector, where landlords dealing with cases of rent arrears or ASB will be reliant on showing grounds in court.

This is, therefore, an opportunity to press further our argument for removing housing cases from the County Court and establishing a court specializing in housing cases, adequately resourced so that it can deal speedily and effectively with possession cases and other housing issues.

## 6. Timetable for change

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The repeal of section 21, as well as many of the other changes suggested, will require primary legislation. Given the fluidity and unpredictability of the political situation, it is not possible to suggest a timetable. It is possible that the repeal of section 21, and allied changes, will be implemented alongside other housing-related reforms, such as those affecting leasehold tenure, in a major housing bill.

## 7. Key issues for the sector

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We set out below a number of key issues arising from the proposed repeal of section 21. In doing so – however, we stress that our members, in responding to this paper, should feel free to address any issues arising from the proposed repeal. You do not need to confine yourself to these specific questions.

### How important are fixed-term tenancies to the sector?

**Proposed response:** There is a tension struck between the understandable interest of residents in remaining in their family home, and the legitimate interests of social landlords in ensuring that their properties are used as efficiently and effectively as possible to meet housing need. The Federation's view is that each association is best placed to strike the balance in the light of its own circumstances, and that a mandatory ground for possession, where a property is underoccupied, should be available to associations if they think it is justified by the need to make best use of their stock. Such a ground should incorporate safeguards for the tenant, in particular the offer of suitable alternative accommodation.

### Do we agree that probationary tenancies should no longer be available? If so, should LA introductory tenancies also be abolished?

**Proposed response:** We do not think it is acceptable that housing association tenants should receive a lesser degree of statutory protection than that enjoyed by private sector tenants; therefore we agree that the abolition of section 21 should extend to our sector. While local authority introductory tenancies are not strictly the subject of this consultation, we think their continued existence will be politically unsustainable if private rented sector tenants and housing association tenants enjoy full security from the outset.

### Should tenancy demotion still be available?

**Proposed response:** Yes. Although relatively little use is made of this mechanism, it does not compromise security of tenure because a tenancy can be demoted only by an order from the court. When a tenancy is demoted, the landlord should be able to end it by notice.

### Is there merit in a mechanism, akin to the short Scottish secure tenancy, allowing a shorthold style of tenancy, with no-fault possession, but only in exceptional circumstances (e.g. a demonstrable history of anti-social behaviour)?

**Proposed response:** We think there is merit in creating a special form of tenancy allowing possession by notice during a probationary phase, but this tenancy should be available only in narrowly-defined circumstances ensuring that its use is very much the exception rather than the norm.

### In which forms of supported housing may it be necessary to have recourse to no-fault possession?

**Proposed response:** Certain types of supported housing are likely to require continued access to no-fault possession and we urge the Government to work with providers to identify and define cases where this is needed. We envisage, however, that these cases will be exceptional and that the great majority of supported housing tenants will enjoy full security of tenure.

### In which other specialized forms of housing may it be necessary to have recourse to no-fault possession?

**Proposed response:** Where housing is clearly and explicitly intended to be temporary, no-fault possession is essential and the statutory regime needs to provide for this. We agree that the circumstances should be precisely and narrowly defined to avoid creating loopholes. In addition, no-fault possession should be allowed against tenancies carved out of existing leases (although not new ones). The Government should also recognize that no-fault possession is essential to maintain the integrity of certain types of scheme, such as key worker housing.

## 8. Other questions raised by the consultation paper

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The consultation paper itself asks 50 specific questions about the proposed repeal of section 21. The first of these questions is about whether the proposed repeal should extend to bodies such as housing associations; but the remaining 49 questions reflect the consultation paper's general focus on the private rented sector. The answers, however, are likely to affect all landlords covered by the 1988 Housing Act, including associations.

Our initial response to the issues raised is as follows.

- **Fixed terms and break clauses:** Fixed-term tenancies and break clauses rely on the availability of section 21 as an enforcement mechanism. Consequently we expect that there will be very limited interest in these mechanisms once section 21 is repealed (Q2 and Q3).

- **Rent increases:** We note that the Government does not propose to introduce rent controls. The paper does, however, propose technical legislative changes to prohibit excessive rent increases in circumstances where section 13 of the Housing Act 1988 is not available to protect the tenant against rents above market level. We suggest that the Government should go further and amend section 13 so that is available in the event of any proposed rent increase, regardless of whether the tenancy is periodic or fixed-term, and that it should no longer be possible for any term in assured tenancy agreement to have the effect of ousting sections 13 and 14 (paragraphs 2.24 to 2.27 of the consultation paper; no corresponding question is asked).
- **Ground 1 (landlord formerly resident):** The proposed changes to ground 1 have no application to housing associations; therefore we do not express a view on the issues involved (Q4 – Q11).
- **Intention to sell:** We support the creation of a new mandatory ground when the landlord intends to sell the property, subject to safeguards to show that the intention is genuine. We agree that two months' notice is reasonable. While we agree that this ground should extend to housing associations, we expect that any association invoking it against a social tenant would offer suitable alternative accommodation (Q12 – 16).
- **Ground 8 (mandatory rent ground):** The consultation paper suggests a restructuring of ground 8 (the mandatory rent ground). We do not agree with this change, which will have the effect of allowing mandatory possession even when the arrears have been partly paid off by the time of the hearing. We suggest that the ground is retained unchanged. Discretionary grounds 10 and 11 are available in less serious rent arrear cases (Q17).
- **Anti-social behaviour:** The consultation paper raises a number of issues about grounds 7A, 12 and 14, which deal with anti-social behaviour. We welcome dialogue with the Government about ensuring that these grounds allow landlords to deal promptly and effectively with ASB, whilst also protecting the interests of tenants (Q18 – Q23).
- **Domestic abuse:** We also support reviewing ground 14A to ensure it is as effective as possible in dealing with domestic abuse (Q23 – Q27).
- **Landlords' right of access:** We agree it is important that landlords should be able to gain access to tenanted property, at reasonable times and subject to reasonable notice. We agree that failure to provide this access, without a reasonable excuse, should be a discretionary ground of possession. However, we do not agree with the suggested approach of tying this to the existing ground 13, because this ground relates to waste on the part of the tenant and the circumstances in which landlords reasonably require access extend well beyond instances of the somewhat arcane legal concept of waste. We suggest that any new ground should relate to landlords' duties in relation to repairs and fitness as well as to waste (Q28).
- **Possession without a formal hearing:** We agree with allowing certain types of possession cases to proceed without a formal hearing, but only in cases where the ground can be demonstrated by the submission of documents. A hearing should always be

available when the tenant has a realistic prospect of arguing that the ground has not properly been made out (Q29).

- **Circumstances where no-fault possession may be needed:** The consultation paper sets out a number of special cases in which no-fault possession may be appropriate: letting to students; short-term lets; properties required for a religious worker; certain types of agricultural tenancy; build-to-rent. While we agree, as sent out in this briefing, that there may be a number of cases where no-fault possession is needed, we do not think that the categories suggested by the consultation paper adequately address the issue (Q30 – Q36).
- **Landlords' experiences of possession action:** Members may wish to respond to factual questions about their experience of possession procedures (Q37 – Q44).
- **Wider impact of repealing section 21:** Regarding the wider impact of the change, it is being brought forward at a time when, for a range of other reasons (including but not limited to the recent changes in the tax treatment of private landlords), private renting is arguably becoming a less attractive prospect. Anecdotal evidence suggests that significant number of private landlords are now opting to leave the market. If the effect is to tilt the private housing sector away from private renting and toward owner occupation, there will be winners and losers. Some groups currently reliant on private renting, either directly or indirectly, are likely to find it harder to access, and local authorities may find it more difficult to meet their housing duties through the use of properties in the private rented sector. For the Government, this represents a substantial policy challenge but it is one that goes beyond the scope of the present consultation (Q45 – Q50).

## 9. Conclusion

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The proposed repeal of section 21 represents the most fundamental change to the assured tenancy regime since it was introduced in 1989. It has significant implications for the housing association sector, not only because of a number of technical issues in relation to certain types of supported or specialized housing, but also to more general questions about the role and purpose of social housing and how it is differentiated from the private rented sector.

**The Federation welcomes members' views on the issues raised by the consultation. Please email these to [john.bryant@housing.org.uk](mailto:john.bryant@housing.org.uk) by 5 October 2019.**

Members may also wish to respond directly to the Government consultation, for which the deadline is 12 October 2019.

If you have any questions about the consultation, or the Federation's response, please contact John Bryant, Policy Leader, via [John.bryant@housing.org.uk](mailto:John.bryant@housing.org.uk) or 020 7067 1082.