

RESPONSE OF THE HOUSING LAW PRACTITIONERS ASSOCIATION TO:
LAW COMMISSION – CONTEMPT OF COURT: CONSULTATION PAPER, No 262

The aims of the Housing Law Practitioner Association (HLP A) are:

- To promote, foster and develop equal access to the legal system.
- To promote, foster and develop the rights of homeless persons, tenants and others who receive housing services or are disadvantaged in the provision of housing.
- To foster the role of the legal process in the protection of tenants and other residential occupiers.
- To foster the role of the legal process in the promotion of higher standards of housing construction, improvement and repair, landlord services to tenants and local authority services to public and private sector tenants, homeless persons and others in need of advice and assistance in housing provision.
- To promote and develop expertise in the practice of housing law by education and the exchange of information and knowledge.

HLP A membership constitute solicitors (both in private practice and not for profit organisations), barristers, legal executives, surveyors and students. HLP A membership have particular relevant experience in defending contempt proceedings against tenants and residential occupiers for breach of anti-social behaviour injunctions and undertakings. Also, the membership have experience is the use of contempt proceedings against landlords and public bodies to enforce injunctions requiring repairs to accommodation and enforcing housing standards.

HLP A will respond in a limited way and will not respond to all consultation questions posed given the limits on expertise and propose to use this method of response rather than the online form.

A particular concern of HLP A which does not appear a prominent issue is how tenants and occupiers of accommodation who may lack capacity to understand the terms of an injunction or undertaking and/or the consequence of breach leading to committal proceeding are dealt with. This is an issue which many HLP A members have to deal with in practice both in possession and contempt proceedings and often with overlapping proceedings within the Court of Protection. We consider this issue relevant to be considered under consultation question 137 concerning equality impacts and safeguards for persons who lack capacity in terms of securing

compliance with a court order. Also, in this context we are concerned as to the limited nature of the consultation in respect of potential sentences under question 116 and mental health orders, given the distinct issues arising between mental disorder and mental incapacity and admission to psychiatric hospital. HLPAs do have clients in possession proceedings and injunction/undertaking cases who do experience poor mental health and this can lead to anti-social behaviour and interim orders being made which expose them to the risk contempt proceedings. It is of note that there appears no specific consideration of the Government's proposal for reform of the Mental Health Act 1983 in the consultation paper. Furthermore, in the discussion of community sentences in respect of "non custodial sentences" especially on questions 113 and 114 there is no clear reference as to how persons with mental health disorders may be dealt with using community sentencing or whether they will receive additional support to ensure and aid compliance with the terms of their tenancy or any court order made.

In addition HLPAs have expertise in legal aid issues, and working with the LAA and the Legal Aid Practitioners Associations.

We make these following responses to specific consultations questions within our expertise.

1. Question 1: For HLPAs we disagree and consider that there should remain a distinction between civil and criminal contempt. First, that in civil contempt the underlying principle is to ensure that people comply with court orders to regulate their behaviour in the context of a civil dispute. Secondly, this concerns fair and proper labelling and not labelling or equating persons who may be in breach of a court order and a criminal. Also, we consider this distinction important for the purposes of funding as below.
2. In respect of a provisional position of the Law Commission on Q 1 – 8 we agree but to be able to reconsider these issues on consideration of the response and analysis of responses.
3. On Q9 – 10 we agree, on Q12(b) we disagree with the application of recklessness to the fault element of general contempt. On Q13 if recklessness is to be considered then we agree with the test applied. On Q14 – 17 we agree.
4. On Q 18 – 20 we agree.
5. On Q 21 we disagree as we consider it is important that fault is linked to precise knowledge of the precise term given the consequences of proof of breach.
6. On Q22 we agree.

7. On Q23 – 25 we disagree – the purpose of contempt proceedings are to ensure compliance with an order and we disagree with provision of interim remedies given (a) interim order are available and in any event the terms of the existing order can be varied on an interim basis to secure compliance and (b) the interim remedies proposed are punitive in nature and it is suggested there be proof to a lower standard.
8. On Q26 if interim remedies are to be available we agree with this provision.
9. On Q27 we disagree with these remedies save for (3) but there should be provision for restoration of the access to the passport on application.
10. On Q28 we do not consider interim remedies should be available in housing cases.
11. On Q 29 we agree.
12. On Q30 we consider that if contempt proceedings are brought against social landlords both the head of housing and the body corporate should be identified as Defendants. We do not consider there is sufficient information within the consultation to provide response to 13.31.
13. We are not making a response to Q31 – 40 as these are outside of our expertise.
14. We are not revising a response to Q41 – 50 as these are outside our expertise,
15. We are not providing a response to Q 51 – 67 as these are outside our expertise.
16. We agree with provisional proposals in Q 68 – 70.
17. Although we are concerned with the proposal in Q 71 about immediate custody of a defendant we agree with a there should be a very clear specified procedure and the proposals in Q 72 – 73.
18. We agree with Q 74 – 76 and also Q 77.
19. We do not have specific evidence to respond to Q 78 but agree with the proposal in Q 79.
20. We agree with Q 80.
21. We do not make any response to Q 81.
22. We agree with Q 82 but we do not agree with Q 83 as we consider this proposal impractical and it would be difficult to understand a consistent approach.
23. We agree with Q 84.
24. We agree with Q 85.
25. We agree with Q 86.
26. We agree with Q 87 – 88 but subject to applications for anonymity in specified circumstances.
27. We agree with Q89 – 91.

28. Questions 94, 95 and 96.

29. 9.40 To what extent are defendants in civil contempt proceedings hampered in their access to legal aid? Are defendants in anti-social behaviour injunction proceedings at a particular or specific disadvantage?

- Litigants often get signposted to solicitors which in my experience in the south west and other areas of the UK are a mix of housing and criminal solicitors. In addition there can be delay for housing solicitors securing individual criminal legal aid contracts.

- Often criminal solicitors will not take on breach of an ASB 2014 injunction or undertaking if they do will agree to breaches without advising on the housing implications for mandatory grounds for possession proceedings.

- Housing solicitors often struggle with capacity and engagement quickly enough with a matter to get a handle on what has gone on. They will often only be involved if they have been involved earlier on. Further, the complicating aspect of the Legal Aid and contempt proceedings is the classification of contempt proceedings as criminal proceedings and the use of non-means tested criminal legal aid but with the corresponding loss of protection against costs of the other party. This is problematic for housing solicitors or non-profits as the present civil legal aid Housing contract does not provide for defending contempt proceedings although it does provide for defending injunction proceedings and in respect of undertakings subject to a means test. Also, civil legal aid is available for enforcement.

- Litigants in person then admit the breach in the witness box having failed to be properly advised beforehand to mitigate the sentence or at least give a basis of plea to mitigate sentence/potentially help with inroads for a later defence to possession.

- Therefore, there is in practice a particular disadvantage with many unrepresented litigants in contempt proceedings. They are often not equipped to negotiate with their landlords and so represented parties naturally get better outcomes.

30. 9.41 What changes to the current law or the current processes would remedy problems with access to legal aid for defendants in civil contempt proceedings?

- The view of HLPAs is that a better and more rational approach would be for the MOJ to change the scope to include civil contempt proceedings especially when housing related to be included in the civil contract and not be means tested. It would afford easier access and give costs protection to the tenant defendant.

31. Thus, on Q 92 legal aid provision is correct in terms in terms of these matters being covered by criminal legal aid but we consider this is the wrong approach in civil cases especially concerning housing cases and the present legal aid contract specifications.
32. On Q 93 we agree but that we consider this should be civil legal aid in housing cases.
33. On q 94 we consider in housing cases this should be civil legal aid provision and be considered civil proceedings but with proof of breach to a criminal standard.
34. Q 95 we disagree there be means testing and specifically there should not be means testing for tenants and other occupiers in housing cases
35. On Q96 please see our comments as above and we consider (1) contempt proceedings should fall within scope of civil legal aid and part of the contracts; (2) should be non-means tested given there is risk to liberty of the subject; (3) there should be costs protection afforded by the civil certificate. All of this would require changes to LAPSO 2012.
36. On Q 97 we agree that CFAs should not be available if contempt is classified as criminal proceedings but even if the proceedings were to be classified as civil that CFAs any form of conditional agreement should not be lawful.
37. On Q 98 we agree subject to our arguments on civil legal aid above, and the process of assessment should be that applied in the criminal courts and not the process under the Civil Procedure rules.
38. On Q 99 we do not consider conduct should be an issue in costs issues unless there is “unreasonable” conduct within proceedings and the focus of costs should be on means of the defendant to pay rather than both parties.
39. On Q 100 we agree on the maximum sentence remaining the same.
40. On Q 101 we consider this remain the same.
41. On Q 102 this is outside our expertise.
42. On Q 103 at 13.111 we agree on the issue of regime for suspended sentences being set out in statute and the scheme as identified in 13.112 but we have no specific proposals as to (2) and (3).
43. On Q 104 – 105 we agree.

44. On Q 106 – 108
45. On Q 109 we agree and on (8) whether here are any specific health reasons or issues with remaining within the custodial environment and whether a form of resentencing or a community order may be relevant by way of application to the court rather than by appeal.
46. On Q 110 we do not have that evidence to assist but there would need to be consideration of specialist Care Act 2014 and capacity assessments in addition to pre-sentence reports and this would require specialist assessments in accordance with the Mental Capacity Act 2005 in terms of litigation capacity and also on specific issues concerning the understanding to the terms of any order and contempt proceedings.
47. Q 111 we consider there should be proper detailed consultation on this issue and this is not provided for within the present preliminary consultation document.
48. On Q 112 we agree.
49. On Q 113 we agree with the Law Commission understanding but we have little experience in its use and there needs to be greater clarification of its application in contempt proceedings and a procedural guide to its use.
50. On Q 114 we agree.
51. Q 115 this is beyond our expertise but we are concerned as to its application to young persons who can be tenants in equity i.e. 16 and 17 who are deemed capable of understanding the obligation under the Mental Capacity Act 2005 but often have no support structure around the management of these equitable tenancies.
52. On Q 116 We disagree as although hospital orders are available there is a lack of a regime for dealing with such issues within the context of community sentences and engagement with social and mental health services as an alternative.
53. On Q 117 we agree but with clear procedural rules and clear sentencing guidance.
54. On Q 121 we agree.
55. On Q 121 we agree.
56. On Q 123 we agree.
57. On Q 124 we agree and also want support services are provided for contemnors in prison as distinct from criminal prisoners including services in support of release.
58. On Q 125 we are not able to comment on this issue as this is beyond our expertise.
59. On Q 126 we do not have such evidence available to us.
60. On Q 127 we agree.
61. On Q 128 we agree.

62. On Q 129 we prefer option 2(3).
63. On Q 130 we disagree with the requirement for permission as a filter.
64. On Q 131 we agree with the proposals if enacted.
65. If this test is to apply we agree with Q 132.
66. On Q 133 - 135 this is beyond our expertise.
67. On Q 136 we do not have such data available.
68. On Q 137 we do not have such data available but are willing to enter into further discussions with the Law Commission on this issue if we can secure such information from our membership.

We hope you find our responses of assistance.

HLPAs are open to further engagement and any future meetings with the Law Commission in respect of our consultation responses or any other matter

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Co-Chairs on behalf of HLPAs

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