

Explanatory Memorandum to draft The Housing (Replacement of Terminated Tenancies) (Successor Landlords) (Wales) Order 2009

This Explanatory Memorandum has been prepared by the Housing Directorate and is laid before the National Assembly for Wales in accordance with Standing Order 24.1.

1. Description

This Order applies to an occupant of a residential property who is subject to a possession order and whose landlord has changed since that order was made. If such an occupant ceased to be a tenant and instead became a “tolerated trespasser” under the original landlord, the Order ensures that on the commencement date a new tenancy will arise.

2. Matters of special interest to the Subordinate Legislation Committee

None.

3. Legislative Background

The relevant legal power for Welsh Ministers to make an order in relation to successor landlord cases is paragraph 24 of Schedule 11 to the Housing and Regeneration Act 2008 (“the 2008 Act”).

This SI follows the affirmative resolution procedure.

4. Purpose and intended effect of the legislation

4.1 The immediate legislative context for this Order is provision in the 2008 Act to remedy the “tolerated trespasser” status. The number of tenants affected by this status in Wales is unknown as official statistics regarding this matter are not collected. The phrase “tolerated trespasser” was coined by the courts to describe a residential occupant, formerly a tenant, whose tenancy has ended as a result of the court granting the landlord a possession order.

4.2 The types of tenancy which are affected by the tolerated trespasser reforms in the 2008 Act are –

- secure periodic tenancies under the 1985 Act (held by most local authority tenants and – from before 1988 – about 10% of housing association tenants);
- fixed term secure tenancies of 21 years or less under the 1985 Act (rarely used);
- local authority introductory tenancies which will become secure tenancies after a year if all goes well (introduced by the 1996 Act);

- demoted tenancies – these are created by a court making a demotion order against a local authority secure tenant, or a secure or assured tenant of an RSL (housing associations which are not RSLs cannot apply for a demotion order); provisions are in the 1985, 1988 and 1996 Acts; a demoted tenancy will revert to the previous secure or assured tenancy after a year if all goes well (but not if a possession order has been granted in the meantime);
- full assured periodic tenancies under the 1988 Act (held by most RSL tenants);
- fixed term assured tenancies under the 1988 Act (held by many shared ownership leaseholders);
- assured shorthold tenancies – these may be periodic or fixed term, and are used by some RSLs as “starter” tenancies; RSL demoted tenancies are also assured shortholds; and virtually all private tenants have assured shorthold tenancies.

4.3 Part 1 of Schedule 11 to the 2008 Act (“Schedule 11”) amends the relevant statutes to prevent tenants becoming tolerated trespassers in the future. Part 2 of Schedule 11 provides replacement tenancies for those who are tolerated trespassers when the provisions are commenced, but only in those cases where the landlord has not changed. A power was added during progress of the Bill through the House of Lords for the Secretary of State to make similar provision for cases where the landlord has changed while the occupant is a tolerated trespasser (“successor landlord cases”), by modifying and applying Part 2 of Schedule 11 in such cases. Subject to Parliamentary approval, this Order is made in exercise of that power.

4.4 The Order applies Part 2 of Schedule 11 to successor landlord cases, with necessary modifications. The main policy objectives behind the modifications in the Order are –

- to provide, as far as possible, that both landlord and tenant are in the same position as they would have been had the tenant not become a tolerated trespasser, and that neither is disadvantaged by the changes; and
- to ensure that the provisions in relation to successor landlord cases are kept as close as possible to the provisions for other existing tolerated trespassers in Part 2 of Schedule 11.

4.5 Articles 2 and 3 extend Part 2 of Schedule 11 to successor landlord cases and ensure that it covers cases where the property is subsequently transferred to another landlord.

4.6 Article 4 modifies paragraph 17 of Schedule 11 which deals with the nature of the replacement tenancy, to provide that wherever possible the new tenancy is the same type as the original tenancy. Where this is not possible the Order provides for the new tenancy to be the nearest equivalent. Accordingly, Article 4 provides:

- Where the property transfers between RSL's and the original tenancy was a full assured tenancy, the new tenancy will also be a full assured tenancy.
- Where the property transfers between RSLs and the original tenancy was an assured shorthold tenancy, the replacement tenancy will also be an assured shorthold tenancy.
- Where the original tenancy was a secure tenancy (mostly given by local authorities), the replacement tenancy will be a secure tenancy, if the new landlord is a local authority, and a full assured tenancy, if the new landlord is an RSL (since RSLs cannot grant secure tenancies).
- Where the original tenancy was a local authority introductory tenancy, the replacement tenancy will be an introductory tenancy, if the new landlord is a local authority, unless the local authority does not operate an introductory tenancy regime. In that case, the replacement tenancy will be a secure tenancy. If the new landlord is an RSL, the replacement tenancy will be an assured shorthold tenancy. Again, this is because neither RSLs nor local authorities which do not operate an introductory tenancy regime can grant introductory tenancies.
- Where the original tenancy was a demoted tenancy, the replacement tenancy will also be a demoted tenancy. This will be the case, even where the property has transferred from a local authority to an RSL, although different statutory provisions will apply to the new demoted tenancy.
- In exceptional circumstances, although the original tenancy was a demoted tenancy the new landlord will not be one which is able to apply for a demoted tenancy – for example, where a property has been transferred to a housing association which is not an RSL. In these circumstances, the new tenancy will be an assured shorthold.
- The modified paragraph 17 also covers a change of landlord from an RSL to a local authority. The government is not aware of any cases of such transfers, but has included provision as a precaution. An original full assured tenancy under the RSL will become a secure tenancy under the local authority; a "starter" assured shorthold under the RSL will become an introductory tenancy if the local authority runs an introductory tenancy regime, or a secure tenancy if it does not; and a demoted tenancy under the RSL will become a demoted tenancy under the local authority, though subject to the different appropriate statutory provisions.

4.7 These provisions include reference to assured tenancies. In *Knowsley* the House of Lords considered the question of when the tenancy ends in relation to the appellant, Ms White, who was an assured periodic tenant. However, the term “assured tenant” in the 1988 Act includes other types of tenancy. The Welsh Assembly Government has therefore decided that all types of original tenancy should be catered for in the Order.

4.8 In modifying paragraph 18 of Schedule 11, article 5 provides that the terms and conditions of the replacement tenancy will be the same as the original one, subject to any modifications which may be needed to reflect the fact that the two tenancy types are different.

4.9 Paragraph 21 of Schedule 11 is modified in relation to both “relevant purposes” and “relevant claims”. For a relevant purpose the new tenancy will be treated as the same as and continuous with the original tenancy. This ensures, for instance, that a tenant who has already become a successor under the original tenancy cannot acquire additional succession rights under the new one (both the 1985 and 1988 Acts provide that there can only be one succession).

4.10 The relevant claims provision in paragraph 21 gives the court discretion to allow either tenant or landlord to bring a claim relating to the termination period. Article 6 modifies paragraph 21(3) and (4) with regard to relevant claims, to extend the court’s discretion to the types of claim which may arise in a successor landlord case. It gives the court discretion to allow claims between the newly-restored tenant and the original landlord, and between the newly-restored tenant and the new landlord, relating to the relevant period when the tenant was a tolerated trespasser. This includes claims between the newly-restored tenant and the new landlord relating to the original tenancy, but only where rights and obligations in relation to the original tenancy have transferred to the new landlord.

4.11 For the purposes of a claim regarding breach of the original tenancy agreement between the ex-tenant and the original landlord, the original tenancy is deemed to extend to the date the original landlord transferred the stock. For the purposes of a claim regarding breach of the original tenancy agreement between the ex-tenant and the new landlord (that is, the successor landlord, who is the landlord at the date the Order comes into force), the original tenancy is deemed to extend to the date the new landlord took over (such a claim will only be possible if the new landlord has also taken over rights and liabilities in relation to the original tenancy). For a claim regarding breach of the new tenancy, the new tenancy may be deemed to have started when the new landlord took over. In addition, where there is a claim between the ex-tenant and the new landlord involving a breach continuing through both the original and the new tenancies, the court may order that the new tenancy is deemed the same as and continuous with the

original tenancy (again, the element relating to the original tenancy will require that rights and liabilities have transferred to the new landlord).

4.12 Article 7 makes the necessary modifications to paragraph 26 of Schedule 11, which provides definitions for Part 2.

5. Policy background

5.1 The Welsh Assembly Government's policy is to remove the problems created by the existence of tolerated trespassers by (a) ensuring that no tolerated trespassers are created in future and (b) resolving the problem for existing tolerated trespassers, including those in successor landlord cases.

5.2 Neither a former tenant who has become a tolerated trespasser, nor the former landlord can rely on the terms of the tenancy agreement or the provisions in the relevant Housing Acts. For the ex-tenant, probably the most serious consequences are that no succession will be possible on death, and that there is no entitlement to compensation for disrepair. For the landlord, problems include uncertainty about entitlement to annual increases in rent, and about whether tolerated trespassers should be allowed to vote in stock transfer and tenant management ballots.

5.3 Extending provision to successor landlord cases ensures equal treatment of all tolerated trespassers regardless of whether their landlord has changed. In every large-scale transfer of local authority or RSL properties, there are very likely to be some occupants of transferred properties who at the date of transfer are ex-tenants, having become tolerated trespassers as a result of possession proceedings. Failure to extend Schedule 11 to such ex-tenants would mean that the question of whether or not they are offered a new tenancy, and if so what type of tenancy they are offered, would continue to be under the control of the successor landlord. The Welsh Assembly Government takes the view, supported by consultation, that it is unfair for a change of landlord, which is outside tolerated trespassers' control, to determine whether they have their status as a tenant restored or not. There is also a very real risk that if the situation for transferring ex-tenants is not remedied, it could lead to litigation, once the provisions in Schedule 11 are brought into force (a risk mentioned in some consultation responses).

5.4 The most usual situation in which a tolerated trespasser's landlord changes is following a large scale voluntary transfer of stock from a local authority to a housing association which is a registered social landlord. Other examples are where one RSL merges with or takes over the stock of another, or where one local authority is substituted for another, for example as a result of boundary changes. However, these are likely to be rare.

5.5 Where a landlord changes, occupants who are already tolerated trespassers probably remain so unless the new landlord grants a new tenancy (there is no binding judicial decision directly on this point). In regards to stock transfers in Wales, the Assembly Government has made it a requirement that a new tenancy is granted upon transfer. In some instances, however, the ex-tenant may have failed to respond to the offer of a new tenancy and the Act will ensure that these outstanding cases are now addressed.

5.6 No data is available on the total number of transferring ex-tenants in stock transfer cases who are not subsequently granted a new tenancy. In Wales the figures are anticipated to be much lower than in England, as outlined in 5.5 above, as the majority of stock transfer landlords should have issued existing tolerated trespassers' with a new tenancy agreement.

5.7 We have no information either on the number of occupants who remain as tolerated trespassers following a change of RSL landlord, or change of local authority landlord. However, since a change of landlord in these situations happens only very rarely, it is likely that the number of such tolerated trespassers will not be considerable.

6. Implementation

6.1 The intention is that this Order and the equivalent England Order should come into force on the same date. The intention is that the substantive provisions of Schedule 11 will also come into force on the same date. This will ensure that the whole package of tolerated trespasser law reform in England and Wales is commenced on the same date. To achieve this, it is intended that –

- a parallel draft Order will be laid in Parliament around the same time as this Order is laid, subject also to an affirmative procedure. The intention is that both Orders will be made on the same date and will come into force on the following day, and
- the Secretary of State will make a Commencement order which will bring section 299 and the remainder of Schedule 11 (with some exceptions in Part 1 of the Schedule which are not relevant to this Order) into force on the same date as this Order and England's equivalent order in relation to both England and Wales.

6.2 If this Order is not made then landlords and tenants where the landlord has changed will continue to face uncertainty and potential costs in relation to resolving their legal position. If the legislation is not brought into force at the same time as in England, then this will result in tolerated trespassers in Wales who have transferred to a new landlord

being placed at a disadvantage compared to their counterparts in England. Furthermore, it is intended that the Order should come into force at the same time as the Commencement order. In this way, transferring tolerated trespassers will not be disadvantaged by the timing of these changes as against tolerated trespassers whose landlord has not changed.

7. Consultation

Details of the consultation undertaken are included in the Regulatory Impact Assessment below.

8. Regulatory Impact Assessment

8.1 Options (for achieving the policy objective – as set out in paragraph (iv) above)

- (A) The base case, ie not using power in Part 2 of Sch 11 to 2008 Act.
- (B) Use power and modify Part 2 to give like for like tenancies in successor landlord cases, except in case of LA/RSL transfer where for former secure and introductory give full assured tenancy
- (C) As for (B), except for former secure and introductory give assured shorthold
- (D) As for (B), except for former secure give full assured, and for former introductory give assured shorthold

8.2 Option A: Do nothing

This option represents a continuation of the existing ways of dealing with occupants who transfer to a new landlord as tolerated trespassers and who are not granted a new tenancy by the successor landlord.

Currently for many tolerated trespassers the option exists of applying to the court to exercise its discretion to restore tenancy status by amending the original order by resetting the date for possession in the future. There has been a suggestion that this may apply in successor landlord cases, even though the new landlord is not a party to the possession proceedings, but there are no judgments directly on this point. The process of applying to vary the terms of the possession order is burdensome to both tenants and landlords, since it can only occur on a case by case basis. In many cases tenants make applications in person and without legal representation as Legal Aid costs are being curtailed, requiring a hearing in front of a judge – a further burden on the courts.

8.3 Options B, C and D

All three options would use the Order making power to extend the provisions in Part 2 of Schedule 11 to the 2008 Act so as to restore tenancy status to existing tolerated trespassers whose landlord has changed.

The options would do this by providing that a new tenancy is treated as arising on the commencement date, provided that the dwelling-house in which the tenant lives continues to be his/her principal home. The provisions would mirror those for existing tolerated trespassers in the 2008 Act, as far as practicable. So, the new tenancy would be on the same terms and conditions as the original tenancy as far as practicable, subject to appropriate modifications necessitated by the change of landlord.

Likewise, for some purposes, the new and original tenancies would be treated as the same one continuing uninterrupted, subject again to modification as necessary. In particular, the Order would provide for continuation to ensure :

- that the newly restored tenant does not acquire new succession rights as a result of the new tenancy
- that time spent as a tolerated trespasser would count towards qualification for the right to buy or preserved right to buy.
- that the court may allow claims relating to the period when the tenant was a tolerated trespasser.

8.4 Change of RSL due to a merger or take-over : here the proposal would be the same for Options B, C and D. The aim would be to mirror the provisions in part 2 of Schedule 11 for existing tolerated trespassers of RSLs, so that former tolerated trespassers would get a new tenancy on commencement on a like-for-like basis, ie:

- (a) a person who had previously held a full assured tenancy would become a full assured tenant of the new RSL landlord
- (b) a person who had previously held an assured shorthold tenancy would become an a an assured shorthold tenant of the new RSL landlord
- (c) a person who had previously held a demoted tenancy would become a demoted tenant.

Where the assured shorthold had been granted under a “starter tenancy regime”, the replacement tenancy would also be under the starter tenancy terms and conditions.

8.5 Change of local authority landlord (eg due to a boundary adjustment) – again the proposal here would be the same for Options B, C and D, the aim being to mirror the provisions in part 2 of Schedule 11 for existing tolerated trespassers of local authorities, so that former tolerated trespassers would get a new tenancy on commencement on a like for like basis. Thus -

- (a) a person who had previously held a secure tenancy would be granted a new secure tenancy;

- (b) a person who had previously held an introductory tenancy would be granted a new introductory tenancy, or a new secure tenancy where the new landlord does not operate the introductory tenancy regime;
- (c) a person who had previously held a demoted tenancy would become a demoted tenant of the new landlord.

8.6 Change of landlord following a transfer of stock from a local authority to an RSL

Options B, C and D would be the same in respect of tolerated trespassers who had previously held a demoted tenancy under the local authority landlord, in that they would be granted a new demoted tenancy under the RSL (although different statutory provisions would apply to the new tenancy).

However, if the original tenancy was either introductory or secure, it cannot become either of these under the successor RSL landlord. In these circumstances, it will be necessary for the Order to specify whether the new tenancy is a full assured tenancy or an assured shorthold. At present RSLs can decide this for themselves. In specifying this within the Order, it is recognised that this will be removing an element of discretion from RSLs.

It is in this respect that options B, C and D differ. Specifically:

- Option B would grant a full assured tenancy to former introductory and secure tenants.
- Option C would grant an assured shorthold tenancy to former introductory and secure tenants.
- Option D would grant an assured shorthold tenancy to former introductory tenants; and a full assured tenancy to former secure tenants.

9. Benefits and costs

Benefits and costs of (A)

9.1 No benefits to tenants or the courts. Benefits to landlords: discretion as to whether or not grant tenancy and, if so, what type. No information about numbers, and unable to quantify benefits. Also anecdotal evidence suggests that some landlords are charging higher rents to tolerated trespassers.

Costs of options (B),(C), and (D)

9.2 The intention is to ensure as far as possible that landlords and tenants are not disadvantaged by the legislative changes relating to existing tolerated trespassers. No costs or disadvantages are identified for ex-tenants.

9.3 However, it is recognised that there will be some disadvantages to ex-landlords attached to all three options from removing the existing discretion to decide whether to grant a new tenancy, and in the case of RSL landlords what type of tenancy to grant.

9.4 There may also be some disadvantages to landlords where tenancy rights are restored. Currently landlords may gain through a tenant's loss of succession rights as the freeing up of properties may enable them to make better use of their existing stock and meet the needs of those on waiting lists. However, an under-occupation ground for possession already exists following succession and a family member who cannot succeed to the tenancy may apply to the landlord for housing assistance in any case. Landlords may also gain from charging higher rents from tolerated trespassers but there is no evidence that this happens on a large scale. The benefit in terms of increased income is likely to be small, and the practice could bring an increased risk of challenge in the courts.

9.5 There may be some costs attached to the provision in all three options that the time spent as a tolerated trespasser will count towards qualification for the right to buy (in the case of new local authority landlords) and the preserved right to buy (in the case of new RSL landlords). However, as newly restored tenants subject to a possession order will continue to be precluded from the right to buy, it is considered that these costs are likely to be minimal.

9.6 Option B envisages granting all former introductory and secure tenants who transfer to an RSL a full assured tenancy. Arguably this does not meet the Government's intention of providing like for like tenancies and, as such, is not in line with the provisions in part 2 of Schedule 11. There is a risk that this could lead to RSLs challenging the Order – particularly those who are more likely to grant assured shorthold tenancies to transferring tolerated trespassers - leading to costs for RSLs, the Government and the court service.

9.7 Option C envisages granting assured shorthold tenancies to all former introductory and secure tenants who transfer to an RSL. This would confer less of a benefit on tolerated trespassers than the grant of a full assured tenancy, since shorthold tenancies can be terminated simply by notice without need for proving a reasoned ground. In addition, it could be argued that this does not meet the Government's intention of providing like for like tenancies, and/or that it is not in line with the provisions in part 2 of Schedule 11. There is a risk that this could lead to former secure tenants challenging the Order – leading to costs for former tenants, the Government and the court service.

Benefits of options (B), (C) and (D)

9.8 A number of benefits would attach equally to Options B, C and D. These are set out in paragraphs 13.2-8 below.

9.9 The options would resolve the problem of tolerated trespasser status for all successor landlord cases and remove the risk that failure to do so could

lead to further litigation between landlord and tolerated trespasser. However, there is a risk that Options B and C could result in the Order itself being challenged – see “costs” section above.

9.10 They would ensure that the position of tolerated trespassers in successor landlord cases is brought in line with other existing tolerated trespassers and should thus ensure greater fairness and consistency than option A (the do-nothing option) and greater certainty for successor landlords and occupants. If the Government does not extend the provisions in relation to existing tolerated trespassers in the 2008 Act to successor landlord cases, litigation risks arise. There would be a risk of challenge to the Secretary of State’s decision not to do so. In addition it would increase the likelihood that cases involving this issue would go to appeal level so that some certainty as to the rules could be established.

9.11 For tolerated trespassers, the following potential costs/disadvantages associated with loss of tenancy status would be removed (we are unable to quantify these costs):

- Loss of succession rights on their death – spouses or family members who would have succeeded if there had been a tenancy will lose their chance to stay in their current home, and will be likely to incur expenses in finding new accommodation.
- Loss of right to exchange – there is a theoretical loss of opportunity (although in practice landlords can already refuse an exchange to a tenant subject to a possession order).
- Right to repairs & damages for disrepair – this could lead to financial loss for occupants. Although necessary repairs may be carried out (since it is in landlords’ interests to maintain their properties in an adequate state of repair), landlords are unlikely to pay compensation for any disrepair suffered. However, this will not be the case where the courts restore tenancy status in order to allow a disrepair claim for compensation to go ahead.
- Increases in rent - although costs are unknown, anecdotal evidence suggests that some landlords are charging higher rents to tolerated trespassers.

9.12 For landlords, Options B to D would remove the risk of challenge in relation to tolerated trespassers’ rights to vote in stock transfer and tenant management ballots (though to date we are unaware of such challenges taking place). This is a problem for local authorities primarily. However, we have been informed that some landlords are balloting tolerated trespassers and tenants separately, which must involve extra costs.

9.13 Existing tenants subject to possession orders will no longer need to apply to the courts to restore tenancy status (although court appearances would remain necessary for disrepair claims, for example). Although it is recognised that such applications are likely to be rare – if they happen at all – in successor landlord cases at present, it is possible that heightened

awareness of tolerated trespasser issues due to the provisions in the Housing & Regeneration Act 2008, and the perception of unfairness in comparison with existing tolerated trespassers whose landlord has not changed, could lead to an increase. These litigation risks have cost implications for tenants, landlords and the courts, and in some eventualities also for the Government.

9.14 Where an application is made which could result in restoration of tenancy status, if both tenant and landlord are in agreement it is likely that costs to the landlord will not exceed £300, including staff time. However given that these applications often arise following a dispute with a landlord, usually over damages for disrepair, it is probable that a hearing will be needed leading to an increase in costs for both landlord and tenant. Where this is the case, we estimate the costs to the landlord could be up to £500 per case. We estimate that the costs to tenants of such applications are likely to be in the region of £35 to £65 per case, if the tenant is unrepresented, or up to £800 if represented. The costs to the Court Service are estimated at between £72 and £200 per case.

10. Competition Assessment

Competition will be unaffected by any amendments to legislation as proposed.

11. Consultation

11.1 On 26th September 2008 CLG published a consultation paper on behalf of Wales and England seeking views on options for extending the provisions in part 2 of Schedule 11 to the 2008 Act to successor landlord cases. The consultation document and accompanying draft impact assessment, were sent to over 500 interested organisations, key stakeholders and local authorities. The consultation document was also made available on the CLG website. A total of 18 responses were received. A full analysis of the responses has been made and is available from the CLG website at www.communities.gov.uk.

11.2 Respondents to the successor landlord consultation were unanimously in favour of amending the legislation to restore tenancy status to existing tolerated trespassers whose landlord has changed, citing fairness, consistency and certainty, as the main rationales. A few respondents referred to the potential costs to landlords if they were required to continue to administer a separate system for tolerated trespassers; while others referred to the potential for challenges under the Human Rights legislation.

11.3 Respondents accepted that there were, or could be seen to be, benefits in the existing situation for the landlord, where it is at the landlord's discretion whether to grant a tenancy and what type of tenancy to grant. Two respondents mentioned the absence of the repair obligation – but considered that in practice this was only a limited benefit since there were ways for tenants to make a disrepair claim. A few suggested that tolerated trespasser status could provide an incentive to ex-tenants to clear their arrears. Nevertheless, where respondents expressed such a view, all agreed that

these (potential) benefits were outweighed by the disadvantages of the existing situation.

11.4 All respondents who expressed a view agreed that tolerated trespassers who transfer from one RSL to another, or one local authority to another, should be issued with the same type of tenancy as the original one. The exception to the like-for-like rule was where the original tenancy had been an introductory tenancy and the new landlord did not operate an introductory tenancy regime. In this case, it was agreed that the replacement tenancy should be secure.

11.5 In the case of a change of landlord from local authority to RSL, there was general (though not unanimous) agreement that the new tenancy should be as near an equivalent as possible to the original.

11.6 Most respondents considered that, where the new tenancy was a demoted or introductory tenancy, the trial period should apply in full, either because this was consistent with part 2 of Schedule 11, or because it would be impractical for landlords to calculate the balance period in each case. However, a minority of respondents preferred to see the trial period last only for the balance of time left over from the original tenancy, considering this to be fairer to the occupant. There are two reasons for the decision that the full “trial” period should apply. Firstly, for consistency: this is what will apply where Part 2 of Schedule 11 operates directly to provide replacement tenancies in non successor landlord cases. Secondly, the decision regarding this provision was made because it could be very difficult for landlords, and cause uncertainty which might lead to further litigation, to determine exactly when the introductory or demoted tenancy had ended (which it would be necessary to establish in order to calculate how much of the “trial” period is left). The question would only arise if the possession order were discharged; for all those who continue to be subject to a possession order, the introductory or demoted tenancy also continues.

11.7 Respondents were asked a number of questions concerning the extension of the provisions in part 2 of Schedule 11 to succession rights, particularly in the context of transfers between local authorities and RSLs. Where respondents expressed a view, a majority (10 out of 12) considered that the newly restored tenant who was already a successor should acquire additional succession rights, although most respondents (8 out of 12) considered that otherwise the rules on succession appropriate to the new (RSL) landlord should apply. The Government does not believe that it would be appropriate to provide for newly restored tenants who have already succeeded to the property to have additional succession rights. This would be inconsistent with the provisions relating to successors in all other cases in part 2 of Schedule 11. However, provision in the Order preventing new statutory succession rights arising would not prevent landlords from voluntarily giving further succession rights if they feel it is appropriate to do so.

12. Conclusion

12.1 Option B would be more favourable to all transferring tolerated trespassers than option 3, and more favourable to those who were formerly introductory tenants than option 4.

12.2 Option C would be more favourable to RSLs than Options B or D. However, it would be less favourable to those who were formerly secure tenants than options B or D.

12.3 Of the three options, Option D would be most in line with the Welsh Assembly Government's aim of offering like-for-like tenancies and in line with the provisions for existing tolerated trespassers in the 2008 Act. It would lead to more equitable outcomes for RSLs and for transferring tolerated trespassers and would thus minimise the risk of the Order itself being challenged. This is the option which was supported by the majority of responses to consultation.

12.4 For these reasons, the Welsh Assembly Government has decided to implement Option D.

13. Guidance

13.1 The Welsh Assembly Government intends to issue guidance to landlords to assist them in implementing the provisions in Schedule 11 and the provisions of this Order. The guidance has no statutory basis but will suggest good practice. It will be available on the Assembly Government's website at www.wales.gov.uk in due course.

14. Post implementation review

The effect of the changes will be subject to review in due course.

15. Summary

The main aim of the Order is to remove the problems which the tolerated trespasser doctrine has caused to landlords and tenants. This will be achieved by making the order, which will then restore tenancy status to people who have transferred as an existing tolerated trespasser to a different landlord but have not been given a new tenancy by the successor landlord. It will assist to prevent any further litigation arising out of the tolerated trespasser doctrine. There should also be cost savings to landlords, tenants, and the court service arising from removal of the need to apply to the court to restore tenancy status. Making the Order is considered the most effective means of addressing the issue.