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Housing disputes as relationship breakdown: a useful model or an accommodation with a broken system?

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Abstract

*T*his article critically considers the proposal of the JUSTICE Working Group for the establishment of a Housing Dispute Service (HDS) to replace first instance court and tribunal adjudication of housing disputes. The JUSTICE proposal is based on two assertions: the first, that housing disputes are essentially about broken relationships; the second, that it is a weakness of the current system that court or tribunal adjudication resolves only the issue or issues the parties ask it to resolve. The proposed solution follows from these two perceived problems: a new holistic, inquisitorial system that will determine the "underlying issues", and the parties "real interests", in order to mend the relationship. The Working Group Report puts forward no convincing rationale for such an approach. The Report does identify many of the issues that cause housing disputes, including the shortage of affordable accommodation, the consequential power imbalance between landlords and tenants, and the difficulties local housing authorities face in meeting their legal obligations to homeless people. It also identifies issues that currently hinder proper resolution of disputes, including cuts to legal aid, "advice deserts" and court closures. But the case for excluding the parties to housing disputes from first instance adjudication by courts or tribunals is not made out. The proposed alternative, the HDS, is based on a false characterisation of the nature of housing disputes and

its proposed operating method would remove the autonomy of anyone party to a "housing dispute"; it would require submission to an intrusive inquisition, operating without clear principles and with no transparency as to how it reaches its "determinations".

Introduction

In March 2020 a JUSTICE Working Group published its report, *Solving Housing Disputes*. The headline proposal was for a new Housing Dispute Service (HDS) to replace the first instance court and a tribunal-based adjudication for all housing disputes:

"The HDS would be an entirely new and distinct model for dispute resolution. It would fuse elements of *problem-solving, investigative, holistic and mediative models* utilised elsewhere in the justice system. It offers a new approach premised not just on dealing with individual disputes, but rather on *remedying underlying issues that give rise to housing claims* and sustaining tenant-landlord relationships beyond the life of the dispute" [emphasis in the original].[1]

The Report recommends that the service be piloted initially on a limited basis, overseen by an Engagement Group chaired by a High Court judge.

The Executive Summary identifies the current problems in the following way:

"Too many people in England and Wales find it difficult to enforce access to housing or other housing rights. Over the past decade, homelessness has more than doubled, putting further strain on the sector. Local authorities are struggling to discharge homelessness duties with limited housing stock. Early legal advice and intervention to address housing problems, homelessness and associated or underlying issues has been greatly attenuated by the cuts to

civil legal aid. This has caused large parts of the housing advice sector to collapse, resulting in 'advice deserts'. Moreover, court closures have further frustrated access to justice as respondents simply cannot afford to attend possession hearings outside their own towns.

Once in the system, housing dispute resolution suffers from disaggregation: there are too many places a person might go to resolve a dispute, with adversarial processes that can be difficult to access, navigate and understand for lay people.

This Working Party builds upon the current endeavours of Government to improve the way housing disputes are resolved by presenting proposals to create a more unified and accessible housing dispute system. Key to these reforms are *greater coherence, access to legal advice and information, and conciliatory methods to resolve disputes*" [emphasis in the original].

Access to housing or access to housing rights?

The Report's opening statement is that: "Too many people … find it difficult to enforce access to housing or other housing rights." This is an odd formulation but presumably describes two distinct issues: access to housing, and the enforcement of housing rights.

"Access to housing" depends on an adequate supply of affordable accommodation for people on low incomes. The Report refers to the increase in homelessness over the last 10 years,[2] and the difficulties local authorities face in meeting their duties to homeless people, with their limited housing stock. Both are symptoms of the well-documented shortage of affordable housing in England and Wales.[3] Arguably, the limited and diminishing housing stock held by local authorities is also a *cause* of the problem.[4]

In relation to enforcing housing rights, the Report highlights cuts to civil legal aid, which have prevented early advice and intervention to address housing problems, and the consequential "collapse" of the housing advice sector resulting in "advice deserts". Additionally, the closure of courts has further "frustrated access to justice".

Finally, the current *system* of housing dispute resolution is identified as a problem, with its "disaggregation" and "adversarial processes that can be difficult to access, navigate and understand for lay people".

The Report fails to distinguish adequately the substantive issue of access to housing and the way that disputes about housing are resolved ("access to housing rights"). It may be the case that adversarial processes are difficult for lay people to navigate but providing an easier or more accessible form of "dispute resolution" will not address the structural problems that create the dispute. No system of dispute resolution can do this. The Report does not claim that the HDS can resolve the issue of "access to housing" but by failing to distinguish between the two issues, it manages both to identify government policies that have created, or exacerbated, the substantive problems while claiming a desire to work with government to "improve the way housing dispute are resolved."

Current problems and their causes

Apart from the two issues concerning the dispute resolution process, disaggregation and adversarial processes, the current problems highlighted in the Executive Summary are the result of government policies: increased homelessness, cuts to legal aid and court closures. The Report also identifies a recognised cause of increased rent arrears and homelessness: the introduction of Universal Credit.[5] Universal Credit, along with the capping of housing benefits for private rents, was part of the government programme of "welfare reform".[6]

Limited local authority (and other social housing stock) is the result of decades of under-investment in social house building.[7] Reducing the scope of civil legal aid and court closures[8] were more recent government policies, part of the "austerity" measures introduced by the coalition government elected in 2010 and continued by the Conservative government after 2015.

These problems, identified in the Report as affecting access to housing, access to advice, and access to court-based enforcement of housing rights are all the result of government policy. Yet the Working Party's aim was to "build upon the current endeavours of Government to improve the way housing disputes are resolved".

That a government which implemented policies that have diminished both access to housing and access to housing rights claims a desire to "improve" the way housing disputes are resolved demands more critical scrutiny. But the Report describes recent government proposals as "individually encouraging" and states that the problem is that they do not offer "a holistic solution for the housing dispute resolution/problem-solving system. Nor do they offer a unified architecture in which tenants and landlords can effectively vindicate rights and interests, without recourse to eviction, conflict and financial loss".[9]

The Report does not explain how the HDS can achieve this within the confines of the current law. And it is impossible to imagine how rights and interests can be vindicated without recourse to eviction and financial loss. A landlord's right to possession can only be vindicated if the tenant is evicted and a tenant's right to damages for breach of the repairing obligation will cause financial loss to the landlord.

The operating method of the HDS

The Report describes the way the HDS would operate in broad terms, setting out the stages of the process of reaching a "determination". But it offers very little detail as to how determinations will be made, by whom, or applying what principles.

According to the Report, the HDS would not be "a court, tribunal or ombudsman. It would be something entirely new".[10] It would be "distinct from traditional approaches to housing dispute resolution through its new culture and operating method".[11] This operating method involves several stages:

"Disputes would be resolved through a staged approach. Following an investigation, there would be an initial and provisional assessment which would include a preliminary view of what should follow from it in terms of resolution, before what might be called an ADR stage and if need be, concluded by final determination. Appeals from the HDS would be available to a court or tribunal as of right. The intention is not to add a layer to the resolution system but to substitute HDS for the FTT (PC) and DJ stage. That being so, the HDS must be established as a powerful dispute resolution service, capable of conducting dispute resolution, actively resolving individual issues and advising parties on respective rights and obligations to the highest level." [12]

So, the HDS would investigate and resolve issues between the parties and advise the parties on their rights and obligations. It would replace the first instance court or tribunal but there would be an appeal "as of right" of an HDS determination, on the facts or the law. This appeal would be to a circuit judge or upper tribunal judge, "as befitting a first tier dispute resolution service".[13]

However, it is also proposed that at least during the pilot there would be "a need for oversight where the outcome of the dispute is the making of a possession order". The recommendation is that possession "determinations", even if not appealed, would be subject to review by a district judge who could direct that there be a hearing.[14]

So, the intention is to replace the current system of court or tribunal adjudication with a mandatory scheme for all housing disputes that will comprise: (1) investigation; (2) provisional assessment; (3) ADR, and if necessary (4) a final determination. These are the four stages identified in the report but, at least initially, if the "final determination" involved the making of a possession order this would be reviewed by a district judge who could direct there to be a hearing. Further, there would be an appeal stage, exercisable as of right. For possession claims, this could therefore be a six or seven-stage procedure, not including the enforcement of any order. The intention is that all "determinations" would be made by the HDS without a hearing, unless a judge reviewing the determination directed there to be one.[15]

The values of the HDS: access to justice?

If the Working Group's express aim is to "build upon the current endeavours of Government to improve the way housing disputes are resolved", it should make clear what values are, or should be, reflected in a system of housing dispute resolution. The Report does not set this out explicitly but does state that the evaluation of the HDS pilot "against access to justice outcomes will tell us how effective the service can be".[16] This suggests that access to justice is at least one measure on which the HDS should be judged.

The JUSTICE Report does not commit to any definition of access to justice. Nonetheless, the "evaluative measures" to be applied to the pilot, specifically in relation to "procedural justice outcomes", refer to the report of Dr Natalie Byrom, *Developing the Detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice*.[17] That report set out a definition of access to justice that was also adopted in the more recent report, *The impact of COVID-19 Measures on the Civil Justice System, Report and Recommendations*.[18] These two reports state that under the common law of England and
Wales the following four elements are recognised as essential to "access to justice":

access to the formal legal system;

access to a fair and effective hearing;

access to a decision on the merits of the case; and

access to a remedy.

The proposed HDS would prevent first instance access to the formal legal system, and would not provide access to a fair and effective *hearing*.[19] It would also depend upon the courts to provide access to a *remedy* to enforce its determinations. The HDS does claim that it would provide access to a decision on the merits of the case. However, it is unclear how and by whom the merits would be decided.

Both of the Byrom reports also refer to art.6 of the European Convention on Human Rights (ECHR) which provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Clearly, the HDS would not offer a hearing at all, save at the appeal stage. Whether a procedure comprising possibly six or seven stages prior to access to a court would be "within a reasonable time" is open to question.

The JUSTICE Report deals with the issue of whether the HDS would be compliant with the requirements of art.6 in a single footnote[20] referring to recent case law, and concluding: "our Working Party's view is that the establishment of the HDS as a mandatory scheme would not amount to a fetter on Article 6".

The JUSTICE Report also cites the 2016 lecture by Lord Justice Ryder, *The Modernisation of Access to Justice in Times of Austerity*. Lord Justice Ryder recommends a "problem solving", conciliatory approach to the resolution of disputes. However, this is predicated on the principle that, in the absence of agreed resolution, there will be an adjudication by an independent adjudicator within the tribunal system, albeit adopting a more inquisitorial approach. As in the Byrom Report, access to the formal legal system is seen as essential to the constitutional right to access to justice. This does not appear to be something that the HDS proposal intends to uphold.

The JUSTICE Report does, as it claims, make a "bold" proposal. The question is whether it offers sufficient justification for effectively abandoning most of the key elements generally accepted as necessary for "access to justice".

The definition of a "housing dispute"

The JUSTICE Report proposes that a very wide range of disputes, referred to as "housing disputes", be removed from the civil justice system. The Working Group did not formulate a *definition* of a housing dispute or suggest any theoretical or practical justification for seeking to treat "housing disputes" as distinct, or worthy of similar treatment within the justice system. The nearest the Report comes to a justification for this separate treatment is the

assertion that “in housing disputes, courts are called upon to provide a legal resolution to relationships that have broken down for any number of reasons”.[21]

While not offering a definition, the Report states “at its widest, housing disputes may arise in relation to any law, regulation or code applicable to residential occupation”.[22] On this basis, a housing dispute would include:

”property law, conveyancing, planning, compulsory purchase and compensation, matrimonial/domestic cohabitation law, neighbour disputes (boundary or otherwise), contract and tort as well as what is now a very substantial body of statutory and case law developed under the rubric housing law.” [23]

However, the Report anticipates that any pilot would focus on just some of a narrower range of disputes.[24]

Types of housing disputes falling within the HDS

The narrower list of disputes, expected to come within the remit of the HDS, are those falling under the broad heading of “the statutory and case law which is widely recognised as comprising housing law”.[25] The types of disputes falling under this heading are then listed in a single paragraph.[26] These are set out below, grouped here into four categories

Private law disputes

Disputes that are essentially “private law” disputes include those regarding “security of tenure, terms and payment in relation to rented (including leaseholder) and mortgaged housing (including mobile homes and houseboats), enfranchisement (including right to buy) and extension of leases, harassment and eviction”. These are all founded on a contractual

relationship between two parties: that of landlord and tenant and mortgagor and mortgagee. The applicable law is a combination of the law of contract, land law and tort, with a significant degree of statutory intervention (the statutory intervention is largely to protect or give additional statutory rights to the "weaker party": the tenant/leaseholder or mortgagor).

Public law disputes

Some of the housing disputes listed can be described as "public law" disputes. "Homelessness and allocations" disputes are essentially about welfare provision and challenges will mostly be based on administrative law. In housing cases such disputes usually involve just two parties—an applicant for housing and a local housing authority but the legal duties of the local housing authorities are public law duties; they are duties to a class of the public, and are based on statutory provisions for social welfare.

Regulatory disputes

A third group of cases might be described as "regulatory"; they also concern public law duties and powers to regulate local housing conditions. This group would include:

"improvement grants, management provisions, the regulation of social landlords, as well as the traditional areas of action in relation to unsatisfactory housing (individual and area, including houses in multiple occupation and selective licensing), the development of housing by local authorities, housing-related compensation."

The central aim of this branch of "housing law" is the maintenance of safe and healthy residential accommodation. Local authorities are exercising statutory regulatory powers, some of which carry criminal sanctions.

Welfare benefits

The fourth group of cases are referred to in the Report as "Housing welfare benefits". Benefits for housing costs are currently administered by either local housing authorities or the Department of Work and Pensions (DWP).[27] Eligibility, decision-making, and the appeal procedures are governed by a national scheme and appeals made to the First-tier Tribunal (Social Security and Child Support).

Of the list of disputes the HDS would *primarily* deal with this leaves: "anti-social behaviour" and "the various housing maladministration jurisdictions". Anti-social behaviour describes not a discrete legal issue but a type of conduct that the law deals with in many different ways, some specifically linked to social housing.[28] Within residential accommodation such conduct may also be actionable in private law as "nuisance"; a neighbour can bring a legal action against the perpetrator. Further, the statutory ground of "nuisance" can be used by a landlord to seek possession. "The various housing maladministration jurisdictions" refer to the *mechanisms* for dealing with complaints relating to housing. These are predominantly complaints against public bodies (including social landlords) but the Housing Ombudsman Service is also available to private landlords and agents who wish to be voluntary members.[29]

To attempt to apply such a classification to the JUSTICE Report's list can no doubt be criticised as a "legalistic" approach to dispute resolution, its starting point being the nature of the law or procedure. The HDS instead aims to address "relationships", and problems arising within those relationships, and intends to "establish a new culture, collaborative, open and ethical, designed to allow the parties to the relationship to fulfill their continuing roles otherwise than at each other's cost".[30] But this idea of the nature of housing disputes and the

best way to resolve them requires the acceptance that all housing disputes are essentially about relationships that have broken down, that the parties' interests are fundamentally aligned and that one party can enforce a right without cost to the other party.

It may be superficially attractive to attempt to treat all legal issues and causes of complaint that may arise within a "housing relationship" at the same time and in the same way. But in the main there are good reasons for resolving different types of dispute in different ways. The legal rules and principles the courts and tribunals apply to each type of dispute are different and the remedies or penalties available have a different purpose. A tenant forced to endure poor housing conditions because of a landlord's failure to carry out repairs can seek an order that the landlord carry out repair works and pay damages to the tenant for the loss of enjoyment of their home. The remedy is to enforce contract compliance, and to compensate the tenant for the breach, not to punish the landlord. In contrast, local authorities may impose fines of up to £30,000 on landlords for breaches of notices served to improve dwellings, or to prevent the letting of premises as dwellings, and may apply for banning orders.[31] The purpose is the enforcement of housing standards. Local authorities may also prosecute landlords, both under the Environmental Protection Act 1990 (in relation to housing conditions) and under the Protection from Eviction Act 1977 (for illegal evictions and harassment offences). The criminal sanctions available for illegal eviction include terms of imprisonment. The purpose of such sanctions is punishment and deterrence.

Some distinctions between jurisdictions may be less significant and there is merit in relaxing rules that preclude all aspects of a distinct problem from being determined in the same proceedings.[32] But the JUSTICE Report fails to put forward a convincing case for abandoning distinctions between civil and criminal proceedings or between public and

private law. Moreover, it provides no detail as to how the person or persons making an HDS determination will apply the law. Indeed, the implication is that the process will not be about applying the law at all, but about healing broken relationships. Stage 2 of the process will consist of a "preliminary written assessment of the relationship and what [the HDS] considers oughtto follow from it by way of resolution". The HDS is expected, at this stage, to "have identified the considerations that have brought the parties into dispute and the underlying issues within the relationship which necessarily includes identifying and vindicating all parties' legal rights".[33]

How the task of identifying the underlying issues and at the same time vindicating all parties' legal rights will be achieved is not explained. To consider how realistic such an aim is, it is useful to consider it in relation to two mainstream types of housing dispute: landlord and tenant disputes and homelessness.

The nature of housing disputes and the process of resolution

Possession claims

As the Report states, "most housing disputes in any given year are possession claims, involving relationships between a landlord, whether private or social, and a tenant".[34] It is certainly true that possession claims, both landlord and mortgage claims, make up a significant proportion of the business of the county court. As the Report confirms, in 2018 there were more than 140,000 possession claims issued, of which more than 120,000 were claims against tenants.[35]

It is important to bear in mind a key point about claims for possession: this is that a court order for possession must be obtained (and executed by court enforcement officers) before a

landlord can lawfully take possession.[36] This is the case even where a tenant has no long-term rights and the landlord is entitled, as of right, to possession of the dwelling at the end of the tenancy. Almost all private tenants, being "assured shorthold tenants", are now in this situation.[37] So, a significant proportion of possession claims will be to enforce undisputed rights. Approximately 37% of all landlord possession claims are claims against private tenants (of these 16% are brought under the accelerated procedure and 21% under the ordinary "fixed date" procedure set out in CPR Part 55). So, a significant proportion of possession claims against tenants are claims in which there
can be no substantive defence.[38]

The other point to bear in mind is that where a tenant is in breach of the tenancy agreement, the landlord is entitled to make a claim for possession. Therefore, a claim for possession is needed before a landlord can enforce a lawful right of possession of a dwelling, and for tenants with security of tenure, the possession claim is the landlord's way of enforcing contract compliance.[39] This is part of the reason for the very high numbers of such claims.

The proposal of the HDS, approaching the issue as a relationship that has broken down and requires repair, is understandable, and may be appropriate to some types of possession claims. It seems that the HDS starting point would not be to consider whether the landlord's right to possession is made out as a matter of law but to ensure that "issues [were] proactively identified and the underlying motivations and interests of parties to housing relationships explored in a mediative fashion".[40] Quite how this will operate where a landlord has a legal right to possession and wishes to enforce that right without delay is not made clear.

Claims by tenants

In addition to claims for possession, disputes arise where the tenant seeks to enforce the terms of the tenancy agreement.

Given the lack of data kept by HMCTS it is difficult to know what types of claim tenants most commonly bring against landlords. Arguably, the two most common claims (or complaints) by tenants against landlords will be claims for "disrepair" and for "unlawful eviction and harassment". Such claims rely on statutory rights and implied contractual terms. It is implied into all tenancy agreements granted for periods of less than seven years that a landlord must keep premises in a proper state of repair.[41] Under the common law, a covenant is also implied that landlords must allow tenants quiet enjoyment of premises let. In addition, unlawful eviction and harassment are statutory torts under the Housing Act 1988 and the Protection from Harassment Act 1997. Can such claims or complaints be classified as being essentially about "relationship breakdown"? Certainly, where a landlord refuses or fails to carry out repairs, or unlawfully evicts or harasses a tenant, the landlord and tenant relationship may be said to have broken down, or at least to be under severe strain. But is the model of relationship breakdown a correct, or helpful, way of characterising such claims, or a basis for designing a system of dispute resolution?

The landlord and tenant "relationship"

To understand why the JUSTICE Report applies the relationship breakdown model to housing disputes, it is necessary to consider how it describes the nature of the landlord and tenant relationship.

The Report states that:

”Historically, landlords and tenants are perceived as being at odds even though their wishes and interests can align: a return on investment and a place to live. The potential is ever present for the relationship to become adversarial. Once it does so, the most commonly used dispute resolution mechanisms are adversarial. These do nothing to smooth future relations or to minimise the likely distress which will be caused by their termination. Though it is commonly in the interests of (at least) both parties to preserve the relationship, adversarial proceedings commonly exacerbate tensions. Housing cases are skirmishes, neither the beginning nor the end of strife: they may resolve an immediate issue, but they do not foster let alone bring a lasting peace. We recommend they be replaced by a mechanism which can.”

On this analysis the relationship of landlord and tenant is fundamentally one of aligned interests but with a potential for conflict and disputes, which the current dispute resolution system, being “adversarial”, exacerbates.

Like any contract, a tenancy agreement sets out the terms of a legally defined relationship; there are rights and obligations on both sides. A contract may be of mutual benefit but that is not the same as an alignment of interests. For more than 100 years there has been extensive statutory intervention in this particular contractual relationship, mainly for the protection of tenants as the weaker of the parties.[42] The reason for this is that the parties’ interests are not aligned. The interest of private landlords is in the highest possible return on their investments; for tenants it is to obtain a safe and secure home for the minimum expenditure. This fundamental conflict of interests is at the heart of all landlord and tenant disputes: the tenant wants his or her home to be kept in a good state of repair, while the landlord’s return will be higher the less that is spent on maintenance (while recognising the interest in

preserving the value of a capital asset); the tenant wants the security of a settled home, while the landlord wants the right to liquidate an asset by being able to take possession without hindrance.

Rather than an alignment of interests, the relationship of landlord and tenant is better described as a relationship of mutual benefit in which the conflicting interests of the parties are regulated within a contractual relationship. The parties need recourse to the courts only when there is an alleged breach of the contract, or when one of the parties wishes to enforce an uncontested contractual right.[43] The fact that each party has the right to use the courts to enforce their contractual rights helps to ensure that, in most cases, contractual obligations are observed. That is the point of a contract; it is legally binding and can be enforced by a court. It is true, as the Report highlights, that restrictions on the ability to use the courts (whether because of limited legal advice and representation, the complexity of the procedures or court closures) undermines this principle so that contractual breaches may go unchallenged. But an answer to this would be to make legal advice and representation more readily available[44] and to ensure that procedures are made simpler for litigants in person. The JUSTICE Working Group appears to accept that legal aid is now limited, and courts have closed, so the focus must shift from enforcing legal rights to conciliation and mending relationships between parties whose interests are aligned.

Homelessness disputes

The JUSTICE Report mischaracterises the landlord and tenant relationship as one of aligned interests. But the relationship breakdown model is even more inappropriate when applied to disputes arising in relation to homelessness applications. While the Report does not explicitly apply the relationship breakdown model to homelessness disputes, it is clear that such

disputes would ultimately fall to be determined by the HDS, with its approach of establishing "a new culture, collaborative, open and ethical, designed to allow all parties to the relationship to fulfill their continuing roles otherwise than at each other's cost".[45]

The Report makes reference to two types of homelessness disputes: "gatekeeping" and the conduct of reviews into negative decisions. These are considered in Part 3 of the Report, which deals with improvements to the current system. The recommendations in relation to both issues illustrate the extent to which the Working Group ignores the prime driver of the disputes that arise: the increased incidence of homelessness and the inability of local authorities, with their diminishing resources, to meet their legal obligations. This is what causes some local authorities to adopt hostile, and often plainly unlawful, methods of dealing with homeless applicants.

Homelessness: the law

Local housing authorities have legal duties to homeless people. They must secure suitable accommodation for homeless applicants provided they are satisfied of certain statutory criteria: that the person is eligible (this relates to immigration status), homeless (a statutory test which goes beyond rooflessness and includes having accommodation which it is not reasonable to continue to occupy[46]), in priority need (a list of categories of applicant, including those with dependent children and those deemed to be vulnerable), and not intentionally homeless (a statutory test which limits duties owed to those who caused their own homelessness). These legal tests and the framework for decision-making are set out in Part 7 of the Housing Act 1996, as amended by the Homelessness Reduction Act 2017. The Act also sets out when an authority's duty to investigate a homelessness application arises and when it must provide interim accommodation pending investigations.[47] It also prescribes

the way decisions must be communicated (in writing, with reasons for adverse findings and notification of the right of review) and how negative decisions can be challenged.[48] Since 1997 most homelessness decisions are subject to a right of internal review, followed by a county court appeal "on a point of law". The legal principles applied by the county court in such appeals are those of "judicial review".[49] However, some decisions do not carry a right of statutory review and appeal, and for these the only possible challenge is by way of judicial review. These include: refusing or failing to accept a homelessness application; refusing to provide interim accommodation pending inquiry; and the suitability of interim accommodation. By definition, these issues arise at the start of the process, before any substantive decision has been made.

Currently disputes about homelessness may be heard in either in the county court or the Administrative Court but the applicable law is "public law": the courts are applying well-established principles of administrative decision-making when scrutinising the decisions of local authorities. Most importantly, the courts are not substituting their own decisions for those of local authorities but "reviewing" the lawfulness of their decisions. This is a fundamental principle of constitutional law: public bodies are given powers and duties and must exercise them lawfully and the courts' task is limited to scrutinising the lawfulness of their decisions.

The nature of homelessness "disputes"

Homelessness may be caused by relationship breakdown but the "disputes" that arise between homeless applicants and local housing authorities are not about relationship breakdown. They are about a particular type of social welfare provision and arise in the context of the rationing of such provision. There is no "ongoing relationship". Instead, there

is an application for a "benefit" (in the form of relief of homelessness) and disputes that arise are primarily about either a refusal to consider an application or a negative decision.[50]

Gatekeeping

There is little available data on different types of homelessness disputes and their frequency. The statutory review procedure applies to most substantive decisions, but issues commonly arising at the start of the process are not subject to that mechanism, as explained above. A challenge to a local authority that avoids or declines to accept a homelessness application, or refuses to provide interim accommodation, can only be by way of judicial review. HMCTS do not keep data that would reveal the numbers of such claims. Further, many claims are resolved before issue, following a letter before claim.[51] The practice of refusing to take homelessness applications, or employing methods to discourage them, is known as "gatekeeping". The JUSTICE Report makes reference to "gatekeeping" in relation to two issues: the unlawful practices arising as a result of local housing authorities' inability to fulfil their homelessness duties and the reported policies of some local authorities to accept homelessness applications only by way of digital portals.[52]

The Report refers to gatekeeping being adopted over the past decade as authorities "struggle to discharge homelessness duties"[53] but the practice has a much older pedigree. In April 2006 the then housing minister Yvette Cooper was forced to write to local authorities following reports that the government's "homelessness prevention" strategy was being used to justify unlawful practices whereby authorities discouraged applications or created additional barriers to stop people applying as homeless.

The practice has continued however. In July 2011, a Local Government Ombudsman (LGO) special investigation resulted in the report *Homelessness: how councils can ensure justice for*

homeless people.[54] This focused on the "serious injustice" caused to homeless people by gatekeeping and referred to the following practices: using homelessness prevention activity to block or delay the consideration of a homelessness application; insisting that applicants for help with homelessness must complete a specific form, or be interviewed by a specialist homelessness assessment officer; placing the burden of proof on the applicant, whereas authorities should make their own enquiries when considering applications; and deferring taking an application because the application appears to be a non-priority.

Nine years later, in July 2020 the Ombudsman (now the Local Government Health and Social Care Ombudsman) issued another special report focusing on the Homelessness Reduction Act 2017, *Home truths: how well are councils implementing the Homelessness Reduction Act?* [55] It reported, "We still regularly see problems with councils 'gatekeeping' access to homelessness services by delaying taking, or not taking, homelessness applications." Further, "We have seen examples of councils not providing interim accommodation when there was reason to believe an applicant may be homeless, eligible for assistance and in priority need."

Such blatantly unlawful practices are rarely considered by the courts; arguably they are not "disputes" in the sense of being based on any legal or other argument. They are unlawful practices adopted by local authorities because of the difficulties they face in meeting their statutory duties to homeless applicants. However, a careful reading of the facts in some reported cases on other substantive issues illustrates the practice in its crudest forms. In *R. (M) v LB Hammersmith & Fulham* [56] the House of Lords considered duties under the Children Act 1989 to homeless teenagers. But the facts leading to the case coming before the court revealed that a child told to leave the family home by a mother suffering from inoperable cancer sought help from the council and was sent away on three occasions, twice

being told that she needed more evidence from her mother. The next time she came to the council's attention was as an adult having been imprisoned for criminal offences. By then, she was owed no duties by either the housing or social services departments.

This case illustrates a form of gatekeeping to someone who was undeniably homeless and in priority need: being told repeatedly to obtain more evidence.[57] Another is when advice is given to a would-be applicant that they will fail a key "homelessness test" so there is no point in pursuing an application.

This happened in the case of *R. (IA) v Westminster CC*.[58] An Iranian refugee had been imprisoned and subjected to mental and physical torture in 2005 before coming the UK. He first approached the council when facing eviction but was told that he would be unlikely to have a priority need and so there would be no duty to rehouse him. He returned after a possession order was made, having taken advice and obtained medical evidence. The court found that the council had started and completed its enquiries into the homelessness application within an hour or so of the claimant arriving at the office and that the inquiries consisted of no more than a face-to-face interview with the housing caseworker during which she typed out the non-standard parts of a decision letter. It was held to be:

"irrational and, indeed, perverse for the defendant to conclude that there was no reason … to believe that the claimant was vulnerable and in priority need and to screen him out of the section 184 inquiries that it had otherwise had a duty to undertake." [59]

The challenge in *IA* was a judicial review of the council's refusal to provide interim accommodation, pending an internal review of the non-priority need decision. At this stage

an authority has a discretion as to whether to provide the accommodation. But the decisions of housing authorities earlier in the process are not discretionary: there is a clear duty to investigate applications and, where there is apparent homelessness and priority need, to provide interim accommodation pending a decision.

The JUSTICE Report considered a particular gatekeeping practice: limiting homelessness applications to a single online portal.[60] It criticised the practice because of the risk of "vulnerable and digitally excluded people being turned away in times of crisis".[61] The Report cited evidence from Shelter that "some portals are extremely poor and fail to retain information submitted". The Report's recommendation that the Homelessness Code of Guidance be strengthened so as to require authorities to offer multiple channels for contact is welcome.

However, the Working Group also asserted the benefits of online portals for accessing the HDS as well as homelessness services.[62] In relation to homelessness, it is stated that "a well-functioning portal would feature comprehensive and clear information from an authority on their obligations, the assistance a person might be able to access and direct contact details for the relevant team".[63]

No-one would deny that a well-designed, well-functioning portal would be an improvement on a badly functioning one. Further, digital resources including information about legal rights would be welcome. But the hopes pinned on a technological solution to the problem of unlawful conduct by public bodies are misplaced. The most recent Ombudsman report highlighting gatekeeping practices[64] included the case of a disabled man unable to leave hospital as he had no wheelchair accessible accommodation to go to. His homelessness

application via the online portal was not referred to the relevant officer for three weeks and after the officer met the man it was another 10 days before the council decided it had enough information to trigger the "relief duty"[65] and another five weeks before it informed him of this. No amount of well-designed technology, or information available to applicants, will address such determined "gatekeeping".

It must be acknowledged that the current method of challenging gatekeeping is disproportionately complex. The only legal action available is judicial review with an application for interim relief. This is all but impossible for anyone ineligible for legal aid, or unable to find lawyers to help. How exactly the HDS would approach such "disputes" is not set out. With no power to compel parties to act, it would be reliant on the courts to make enforceable orders.

One thing the JUSTICE Report intends for the HDS is that part of its "ongoing functions would include reports on systemic housing issues and reporting to Parliament". It compares this activity to the systemic focus reports currently produced by the LGSCO.[66] And in relation to housing providers, it would work with them "to develop their policies, procedures and complaint handling processes, producing reports on systemic issues within housing and feeding back information and data on problem type to housing regulatory bodies".[67]

The collection of data and the identification of systemic housing issues is welcome, but it is naïve to suppose that simply feeding back information and data to decision-makers will solve the problem. Unlawful gatekeeping has been condemned by a government minister and also now by two Ombudsman special reports. Yet the practice continues, because the true "underlying cause" of such disputes is the difficulties local housing authorities face in

meeting the needs of a growing homeless population, as the Report itself acknowledges in the Executive Summary.

Statutory reviews

Another aspect of homelessness the Report focuses on is the way internal statutory reviews of negative decisions are conducted.[68] In section 3 of the Report, setting out recommendations for improving the current system, it is proposed that the HDS takes over this function. The reason for proposing an independent review is that:

”Taking over internal reviews from local authorities represents the prospect of a more fulsome assessment of a claimant’s personal circumstances than might currently be provided by local authorities where a paucity of housing stock informs decision-making.”

Again, while a more independent and thorough level of inquiry at the review stage would be a welcome improvement for homeless applicants, the fundamental issue will remain; the key driver of homelessness disputes is the “paucity of housing stock”. Local housing authorities will still struggle to discharge their duties to homeless applicants and will still be under pressure to deter applications and to make negative decisions.

Relationship breakdown as the “model” for housing disputes

The corollary to the claim that courts are being asked to “provide a legal resolution to relationships that have broken down” is the assertion that the exercise the HDS will perform “might be described as one in which the housing relationship is turned over to the HDS to be brought up to standard and handed back to the parties fully compliant and functional”.[69]

Having characterised housing disputes in this way, the proposed form of dispute resolution is predicated on maintaining relationships. The landlord and tenant relationship is portrayed as one in which the parties' interests are fundamentally aligned so that it is the current *process* of resolving housing disputes that "exacerbates tension" within that relationship.[70] Since court proceedings focus on "the immediate issue" they do not "foster let alone bring a lasting peace" and the HDS is "a mechanism which can".[71] In contrast to this aspect of the current system:

"[t]he HDS would adopt an inquisitorial approach, addressing all aspects of the relationship which require resolution whether or not the particular complaint which has given rise to its involvement, as well as addressing underlying problems, such as benefits issues, mental health and family issues inherent in housing disputes." [72]

Identifying the issues: by whom and how?

This analysis identifies a central principle (and criticism) of the adversarial system: the extent of "party control". Lord Woolf found that too much party control of a dispute after it entered the civil justice process was a problem: the system was "too *adversarial*: cases are run by the parties, not by the courts. The rules of court are, all too often, ignored by the parties and not enforced by the court".[73] But it was not suggested that the parties should not be able to decide the issue or issues they wanted the court to determine. The Woolf reforms increased the courts' case management powers but did not undermine the fundamental principle that the parties may decide what they want the court to determine.[74] Further, and importantly, the parties have the right to withdraw or settle their claims without the sanction of the court.[75] In contrast, under the HDS, once a case has been referred, the HDS will have complete control of the process, deciding what it will investigate and what theparties' "real interests" are:

”The investigation would include identifying, assessing and attempting to find solutions for the underlying problems giving rise to the housing dispute and meeting participants’ real interests in the outcome.” [76]

Lord Justice Ryder stated: “the right to effective access to justice is an important corollary of the autonomy of the citizen and that citizen’s responsibilities to and place in society”.[77] In contrast, the JUSTICE Working Group propose a system in which the parties have no autonomy once a dispute has been referred to the HDS. Furthermore, there will be no transparency as to the process that leads to an HDS determination.

Exactly how the HDS will either identify or “address” the “underlying issues” is not set out. The type of underlying issues that are anticipated are referred to above: “benefits issues, mental health and family issues inherent in housing disputes”. Issues such as “compliance with notice and other contractual and regulatory requirements”[78] are also referred to as potential “underlying issues” but these are impersonal, procedural matters. The strong implication is that the underlying issues relating to the individual parties are expected to concern the personal circumstances of the tenant (or homeless applicant).

It is well established that benefit issues often cause rent arrears, and that “mental health and family issues” can lead to homelessness. And, as the Report recognises, a lack of advice and assistance at an early stage to address such issues may lead to “housing disputes” (and indeed other legal problems).

The "clustering" of legal problems is also well established[79]: those involved in "housing disputes" will often have other, related, legal problems, such as benefit, employment, immigration and debt problems.

The implication of the JUSTICE Report is that the underlying cause of housing disputes is likely to be the vulnerability or personal inadequacy of a tenant or housing applicant. An alternative analysis is that it is poverty and economic disadvantage, and the consequent lack of control over personal circumstances, that render individuals more vulnerable to unlawful acts by landlords and local housing authorities. Further, that the underlying causes of housing disputes are to be found in government policies that have exacerbated structural inequality and increased poverty.

There is no denying that many tenants and homeless applicants are "vulnerable" in that they often have high levels of poverty, disability, unemployment and illiteracy.[80] In response the HDS proposals is for a "protective, non-adversarial and investigative method to claims". It explains:

"Protective denotes an approach that ensures all parties are made aware of their respective rights and obligations, modifying the process for vulnerable people, conducting the process to ensure people can participate effectively and deploying internal expertise and experience to address underlying drivers behind a dispute." [81]

Effective participation is vital for any person involved in a housing dispute process. But the concern is the claim that the HDS's internal expertise and experience will address the underlying drivers behind a dispute.

The Report does not offer any detail on how the investigation will be carried out or the basis on which the "underlying drivers" will be identified. So, it is useful to consider what "internal expertise and experience" will be deployed. It is stated that the "holistic and multi-disciplinary" HDS:

"would be capable of investigating and addressing the underlying causes of a dispute. An array of skill sets would exist within the HDS: environmental health officers, surveyors, investigators, DWP officers, advisors, as well as social and mental health workers, capable of addressing the fundamental, underlying reasons for a dispute and all other features of the housing relationship which call for attention." [82]

Of these, surveyors and environmental health officers are recognised experts in relation to housing conditions and frequently assist courts and tribunals in such disputes. DWP officers, we are told, would be seconded, so as to correct decisions and expedite appeals. While this would be helpful for individuals coming to the attention of the HDS, a better approach would be to ensure that correct decisions and prompt appeals were the norm within the government agencies that administer benefits. No detail is given as to the role of social and mental health workers within the HDS. It may well be that assistance and support for mental health or other family problems would assist an individual involved in a housing dispute. But it is not made clear what the role or powers of these professionals would be. Social workers and mental health workers employed by local authorities and NHS Trusts have statutory powers in relation to child protection and psychiatric detention. There is clearly a risk that any person who does not want to be involved with such statutory services would be deterred from resolving their housing disputes.

Conclusion

The main criticism of the JUSTICE Report is not based on an expectation that the HDS could solve the structural economic problems that lie behind housing disputes. But, if a better dispute resolution system is to be proposed, it is essential to understand that in the main it is structural economic problems that create housing disputes The reason disputes arise within the landlord and tenant relationship (at least in the private sector) is because the interests of the parties are *not* aligned and currently landlords are in a significantly stronger position than tenants. If the shortage of affordable accommodation cannot be addressed, then tenants do need a better way of enforcing their legal rights. But the answer is not to characterise the relationship as one of aligned interests in which disputes can be resolved by conciliation and a "cost free" outcome achieved. Similarly, the reason public bodies make unlawful decisions is not because they lack the necessary data or technology but because they are placed in an impossible situation; they are given clear legal duties without the resources to meet those duties. No system of dispute resolution can solve these problems. However, acknowledging the true causes of housing disputes would avoid the imposition of a false model: housing disputes as relationship breakdown with the purpose of dispute resolution being to heal the relationship.

Not only does the HDS proposal fail to convince as an improvement in dispute resolution but it offers a very unattractive model in which the parties must submit to an intrusive investigation over which they would have no control, and which would lack transparency.

The JUSTICE Working Group correctly identified many of the issues that in recent years have led to an increase in housing problems, and inhibited people's ability to resolve their

housing problems. But JUSTICE appears to follow the government agenda in simply accepting that legal aid is no longer affordable and courts are no longer accessible, so that disputes must be re-framed as relationship breakdown. The proposed HDS is claimed as a bold initiative, but it would have been bolder still to call out the government on the disastrous effects of its programme of "welfare reform" and the cuts to legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Instead, JUSTICE proposes the HDS under which the purpose of dispute resolution is not the vindication and enforcement of rights, but an accommodation with a broken housing market and a diminished civil justice system.

Diane Astin

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[1] The Executive Summary records that "The HDS is not an idea accepted by all our members and was rejected by all the tenant lawyers we consulted" (p.3). The Housing Law Practitioners Association (HLPA) had two representatives on the Working Group and their dissent is published within the Report followed by a reply from the Chair of the Working Group.

[2] The JUSTICE Report cites an increase in homelessness of 165% between 2010 and 2018. See para.1.3 and fn.8.

[3] *HC Library Briefing Paper No.07747, What is Affordable Housing?, 23 December 2019*. This records that in the decade 2002–2012 social rented housing stock was stable at around four million homes but has declined in recent years. Increased discounts for Right to Buy, introduced in 2012, have led to a further diminution of local authority stock available for rent and the commitment to replace the sold properties within a three-year period is not being met. See p.29.

[4] Within the social sector the proportion of tenancies with so-called "affordable" rents, which may be up to 80% of market rents has increased and the proportion with the much lower "social" rents has decreased over the last 10 years.

[5] See JUSTICE Report, para.1.3. The Report also refers to the reluctance of private landlords to let to tenants in receipt of Universal Credit.

[6] Although not mentioned in the Report, the Local Housing Allowance (LHA) limits the amount that can be paid for private rents to those on a low income. The capping of the LHA in 2012 (part of the "welfare reform" programme) has also led to increased rent arrears and homelessness: Shelter Briefing: Westminster Hall Debate on the Local Housing Allowance and Homelessness, July 2019

https://england.shelter.org.uk/professional_resources/policy_and_research/policy_library/policy_library_folder/briefing_local_housing_allowance_and_homelessness [Accessed 28 July 2020].

[7] In 2004 the Barker Review of Housing Supply recommended the addition of between 70,000 and 210,000 new private sector homes a year toprevent an unhealthy level of house price inflation, and the provision of 23,000 new social and affordable homes per year. This did not happen and in 2014 Dr Alan Holmans' analysis suggested a need for about 170,000 additional private sector houses and 75,000 new social sector houses per year. See https://www.cchpr.landecon.cam.ac.uk/Research/Start-Year/2014/Other-Publications/Housing-need-and-effective-demand-in-England/Report [Accessed 28 July 2020].

[8] Between 2020 and 2018, 90 of 240 county courts and 162 of 323 magistrates' courts were closed. In addition, 18 of 83 dedicated tribunal buildings closed. See HC Library Debate Pack, No.CDP-0156, 18 June 2019.

[9] JUSTICE Report, para.1.7. The government proposals cited include: the *MHCLG consultation Strengthening Consumer Redress in the Housing Market* (about housing complaints): the Rented Homes Bill, which proposes the abolition of "no-fault" eviction; the MoJ post-implementation review of LASPO; the establishment of a Working Group for the Regulation of Property Agents; and the online possession project to digitise elements of possession claims.

[10] JUSTICE Report, para.2.10.

[11] JUSTICE Report, para.2.21.

[12] JUSTICE Report, para.2.14.

[13] JUSTICE Report, para.2.40. Although the appeal is said to be "as of right" on both facts and law, there is also reference to the striking out of unmeritorious appeals. It is hard to understand how exactly an appeal can be "as of right" on facts and law if it is subject to a "merits" test.

[14] JUSTICE Report, para.2.40.

[15] It is not clear whether this hearing would be an HDS hearing or a court hearing. It is repeatedly stated that there would be no hearings under the HDS, so presumably this would be a court hearing. See, e.g. JUSTICE Report, para.2.18: "The HDS would not have hearings. Instead, the method for dispute resolution would be negotiation and ADR."

[16] JUSTICE Report, para.2.23.

[17] Legal Education Foundation, 2019, p.19, https://research.thelegaleducationfoundation.org/wp-content/uploads/2019/02 [Accessed 28 July 2020].

[18] *The impact of COVID-19 measures on the civil justice system, Report and Recommendations by Dr Natalie Byrom, Sarah Beardon, Dr Abby Kendrick, published jointly by the CJC and LEF on 5 June 2020 [5.80*], and N. Byrom, *Developing the Detail: Evaluating the Impact of Court Reform in England and Wales on Access to Justice (LEF, 2019).*

[19] See JUSTICE Report, para.2.21(g): "In the HDS, there are no hearings or parties' lawyers; there are investigative interviews and ADR methods deployed but nothing akin to an adjudicative hearing."

[20] JUSTICE Report, fn.50.

[21] JUSTICE Report, para.2.6.

[22] JUSTICE Report, para.2.11.

[23] JUSTICE Report, para.2.11.

[24] JUSTICE Report, paras 2.10–2.11.

[25]JUSTICE Report, para.2.12. It is stated that "[r]ealistically, the HDS would be likely to focus on some of [these] areas for the foreseeable future".

[26]JUSTICE Report, para.2.11(ii) lists the following: "the statutory and case law which is widely recognised as comprising housing law, which includes security of tenure, terms and payment in relation to rented (including leaseholder) and mortgaged housing (including mobile homes and houseboats), enfranchisement (including right to buy) and extension of leases, harassment and eviction, anti-social behaviour, homelessness and allocations, improvement grants, management provisions, the regulation of social landlords, as well as the traditional areas of action in relation to unsatisfactory housing (individual and area, including houses in multiple occupation and selective licensing), the development of housing by local authorities, housing-related compensation, housing welfare benefits and the various housing maladministration jurisdictions."

[27]The government's intention is that benefit paid for "housing costs" will be part of a single Universal Credit (UC) payment for all recipients nationally. However, since the "roll out" of UC nationally has been delayed many benefit recipients still receive "housing benefit" administered by local housing authorities, but governed by rules that apply nationally. UC was initially intended to be fully operational by April 2017, but in February 2020 the government announced this would not happen until September 2024 at the earliest.

[28]These provisions are found in the Housing Act 1996, the Anti-social Behaviour Act 2003, the Housing Act 2004 and, most recently, the Anti-social Behaviour, Crime and Policing Act 2014.

[29]Maladministration has no statutory definition but generally refers to the administrative failings of public bodies or poor processes.

[30]JUSTICE Report, para.2.16.

[31]Housing and Planning Act 2016.

[32]All of the members of the Working Group, including those dissenting from the HDS proposal, supported the recommendations for specialist housing judges and "cross ticketing". The JUSTICE Report also refers to the Residential Property Deployment of Judges Pilot which has enabled disputes requiring determinations by the County Court and the Property Tribunal to be dealt with by a single judge.

[33]JUSTICE Report, para.2.53.

[34]JUSTICE Report, fn.28, para.2.6.

[35]See JUSTICE Report, para.4.1 and fn.271. In 2018, there were 121,712 landlord possession claims and 19,508 mortgage possession claims issued in the county court, "Mortgage and Landlord Possession statistics, July to September 2019" (Ministry of Justice, 14 November 2019), https://www.gov.uk/government/statistics/mortgage-and-landlord-possession-statistics-july-to-september-2019 [Accessed 28 July 2020].

[36]See Protection from Eviction Act 1977 s.3 and *Haniff v Robinson (1994) 26 H.L.R. 386, CA.*

[37]Since February 1997 the "default" tenancy in the private sector has been the assured shorthold tenancy. A landlord wishing to grant a non-shorthold tenancy must serve notice or make express provision in the tenancy agreement.

[38]It is true that for assured shorthold tenancies the court now has an expanded role in monitoring landlords' compliance with various regulatory duties: recent legislation limits a landlord's right to serve a valid possession notice where there is a failure to comply with various statutory requirements, including the protection of deposits and the service of statutory information on the tenant. But these are procedural matters: the court has no *discretion* as to the making of a possession order and the only defence a tenant can raise is one of regulatory non-compliance. Such a defence can only postpone the making of an order; a landlord who then complies, can serve notice and obtain possession as of right.

[39]Save for the mandatory Ground 8 for assured tenants (rent arrears of at least eight weeks or two months), the court will always have a discretion where a landlord is relying on a breach of the tenancy agreement. The court also has an extended discretion to adjourn, postpone and suspend orders and when exercising these

powers the court will usually impose conditions. Thus, the court is ensuring contract compliance by the tenant and, importantly, when considering the making of an order will take into account the tenant's personal circumstances.

[40]JUSTICE Report, para.2.16.

[41]Landlords' obligations to keep rented properties in repair were first implied by the Housing Act 1961 and are now found in the Landlord and Tenant Act 1985. In 2019 the obligations were extended to keeping such premises in a habitable state by the Homes (Fitness for Human Habitation) Act 2018.

[42]The Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 restricted landlords' rights to evict tenants and to increase rents. This was an emergency war time measure but security of tenure and rent control continued in some form throughout the 20th century until the Housing Act 1988 enabled the granting of Assured Shorthold Tenancies.

[43]Just as many possession claims are essentially the enforcement of uncontested rights, claims based on a landlord's repairing covenant are often about enforcement of the repairing obligation rather than reflecting any genuine dispute about rights and obligations under the tenancy.

[44]Some of the cuts to legal aid were changes to scope which can mean some parts of the same claim are covered by legal aid and others not. As the JUSTICE Report explains at para.3.16: "Under current arrangements, disrepair is in scope only where there is a serious risk of harm to the health and safety of a client or their family, and as a counterclaim to possession, but not as a standalone claim for damages."

[45]JUSTICE Report, para.2.16.

[46]Where continued occupation would result in a risk of violence it is not reasonable for a person to remain and she should be treated as homeless: see Housing Act 1996 s.177(1) and *Bond v Leicester City Council [2002] H.L.R. 6, CA.*

[47]There is no prescribed way of making a homelessness application: if an authority "has reason to believe" a person "may be" eligible and homeless the duty of inquiry is triggered and if the authority also has reason to believe the person is in priority need, there is also a duty to provide interim accommodation pending completion of inquiries. See Housing Act 1996 ss.183 and 188.

[48]The Housing Act 1996 created the statutory right of review and county court appeal, previously homelessness decisions were challenged by way of judicial review.

[49]See *Nipa Begum v Tower Hamlets LBC 32 H.L.R. 445, CA* and *James v Hertsmere BC [2020] EWCA Civ 489.*

[50]Increasing numbers of disputes are about the suitability of accommodation offered under the various accommodation duties and this too is a symptom of structural problems in the housing market: local authorities are frequently forced to accommodate homeless families many miles from the area in which they are settled: see, e.g. *Nzolameso v Westminster CC [2015] UKSC 22.*

[51]See *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing (June 2009), Public Law Project*, https://publiclawproject.org.uk/wp-content/uploads/data/resources/9/TheDynamicsofJudicialReviewLitigation.pdf [Accessed 28 July 2020]. This research revealed the high rate of settlement of judicial review claims. Overall, only 10% of claims actually issued and only 5% of all disputes in which a letter before claim was sent ended in a substantive hearing. The settlement rate was higher in cases involving housing and community care services than the overall figure.

[52]JUSTICE Report, para.3.60. It is recorded that "Our consultation revealed that some local authorities have sought to make digital portals the mandatory method of contact for a person seeking homelessness assistance, although there is considerable doubt about the legality of doing so."

[53]JUSTICE Report, para.1.3.

[54]https://www.lgo.org.uk/information-centre/news/2011/jul/lgo-highlights-councils-failings-over-legal-duties-to-homeless-people [Accessed 28 July 2020].

[55]https://www.lgo.org.uk/information-centre/news/2020/jul/ombudsman-highlights-where-councils-can-improve-services-to-homeless-people [Accessed 28 July 2020].

[56]*R. (M) v LB Hammersmith & Fulham [2008] UKHL 14.*

[57]The practice is clearly unlawful. The duty to investigate and to provide interim accommodation is triggered what an authority has "reason to believe" that the person "may be" homeless, eligible and in priority need.

[58]*R. (IA) v Westminster CC [2013] EWHC 1273, 20 May 2013*. The case is about interim relief and permission to appeal so ordinarily would not be a binding authority but the court directed that because of the "importance and topicality" of the case, it could be cited as an authority.

[59]HHJ Anthony Thornton at [26]–[27].

[60]JUSTICE Report, paras 3.60–3.62

[61]JUSTICE Report, para.3.62.

[62]See para.2.60 which states that "the HDS portal [should] contain a 'fast track' for urgent complaints to be filed digitally by default, but with paper-based channels retained, and for the HDS to include a dedicated duty team to deal with these urgent matters 24/7".

[63]JUSTICE Report, para.3.64.

[64]*Home truths: how well are councils implementing the Homelessness Reduction Act?,* see fn.54 above.

[65]The Homelessness Reduction Act 2017 introduced new duties intended to ensure that help was given at an early stage; these include the prevention duty and the relief duty.

[66]JUSTICE Report, para.2.21 and fn.56.

[67]JUSTICE Report, para.2.30.

[68]The Report refers to tenant solicitors complaining about the lack of an open-minded approach to reviews. But no reference is made to the fact that so few reviews are requested. See, *David Cowan and Simon Halliday, with Caroline Hunter, Paul Maggin and Lisa Naylor, "Gatekeeping administrative justice?" in The Appeal of Internal Review (OUP, 2003)*. Also, David Cowan, Simon Halliday and Caroline Hunter, "The case of homelessness internal reviews" (2012) 15(6) Journal of Housing Law 122–125.

[69]JUSTICE Report, para.2.17.

[70]JUSTICE Report, para.2.3.

[71]JUSTICE Report, para.2.3.

[72]JUSTICE Report, para.5.5.

[73]See "Access to Justice", Interim Report to the Lord Chancellor on the civil justice system in England and Wales, p.1.

[74]The parties also decide what law and evidence they rely on in bringing or defending their claim. It is certainly true that unrepresented parties struggle with this aspect of litigation but the answer is not to dispense with the adjudicative process entirely but to simplify the procedures and to provide more assistance to litigants by way of independent advice and representation, and/or by a more inquisitorial approach by the adjudicator.

[75]These rights are set out in the Civil Justice Rules. Parties may settle the claim after it has been issued and, unless the terms of settlement are to be contained in an enforceable consent order, or the settlement is on behalf of a child or protected party, the court has no role as to the terms of settlement: CPR Part 21. Subject to liability for an opponent's costs a claimant may unilaterally withdraw a claim at any time. This need not be

sanctioned by the court unless permission is required because the court has granted an interim injunction, a party has given the court an undertaking or an interim payment has been made: CPR Part 38.

[76]JUSTICE Report, para.2.10.

[77]See "The Modernisation of Access to Justice in Times of Austerity", 2016, referred to above.

[78]JUSTICE Report, para.2.1.

[79]See Pascoe Pleasence, Nigel Balmer, Alexy Buck, Aoife O'Grady and Hazel Genn, "Multiple Justiciable Problems: Common Clusters and Their Social and Demographic Indicators" (2004) 1(2) Journal of Empirical Legal Studies 301–329.

[80]See *David Rhodes and Julie Rugg, Vulnerability amongst Low-Income Households in the Private Rented Sector in England, University of York, Centre for Housing Policy and Nationwide Foundation,* http://www.nationwidefoundation.org.uk/wp-content/uploads/2018/09/Vulnerability-report.pdf [Accessed 28 July 2020].

[81]JUSTICE Report, para.2.18 and fn.48.

[82]JUSTICE Report, para.2.21(b).