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Information, Advice & Representation in Housing Possession Cases

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Executive Summary

This report presents the findings of an investigation into the legal process of housing possession, with particular focus on the ability of court users to supply information to the court, and to obtain advice and representation on the day of the possession hearing.

Losing a home can be very traumatic and have a long-lasting impact. According to research by Shelter, in the twelve months from October 2012 to September 2013, one household in every 105 in England was put at risk of losing their home. In some parts of the country the figure was much higher, with four local authorities in London having a rate of repossession higher than one in every 40 households.[1] In 2013 there were more than 220,000 claims for possession issued in England and Wales, approximately 66% by landlords and 33% by mortgagees,[2] but not all of these claims resulted in orders for possession being made.

It is important that everyone involved in the decision as to whether or not to evict someone from their home is fully informed of the circumstances and that help is available to assist court users through the process. In this report, we evaluate the way in which information is supplied and the extent to which the current system of handling housing possession cases offers court users simple and effective access to justice.

This report is based on evidence from two surveys carried out in late 2012-early 2013 involving representatives of Housing Possession Court Duty Schemes (HPCDS) in England, and County Court Delivery Managers (DMs) in England and Wales.[3] We comment also on changes that have occurred since the surveys were completed. In addition, we interviewed a number of key actors involved in the process of housing possession, including district judges and mortgage lenders. Our detailed methods are set out in Annex 1 and the responses to the surveys are in Annexes 2 and 3. Throughout the report we refer to our interviews, as well as to previous studies and other sources, in order to explain the context of this research and to draw out wider implications.

[1] Eviction and Repossession Hotspots, 2013 Data, Shelter. Available at <http://perma.cc/7R5J-6FQY>.
[2] Ministry of Justice, *Mortgage and Landlord Possession Statistics Quarterly*, October to December 2013, 3, <http://perma.cc/6HES-L2FN>.
[3] Previously known as Court Managers but changed to Delivery Managers from April 2012 as part of a management restructuring initiative.

This report focuses on possession claims brought by a landlord or a mortgagee. Both surveys also addressed questions relating to actions brought under the Trusts of Land and Appointment of Trustees Act 1996 (TLATA 1996) but we elicited little information about these.[4]

Summary of Findings

Information about the Defendant's Circumstances

There is a lack of 'joined up thinking' within the legal process. This means that information about the defendant's circumstances, that may be important to the judge's decision about whether or not to order possession, may not be known to the judge. Improvements should be made to court forms and the use of the rent and mortgage protocols to improve information flows. Particular concerns were raised about how claimants should handle cases where there are mental health issues.

Importance of Defendant Participation in the Hearing

If the defendant participates in the possession process by filing a defence form and attending the hearing there is more likely to be an outcome beneficial to the defendant, but participation rates are low. However, the average time allocated to mortgage and social rent cases is 5-6 minutes and if attendance rates were to increase this would put a further strain on court resources. Consideration should be given to reforming the possession process to improve the level of defendant participation within resource constraints.

Importance of Legal Advice and Representation

HPCDS advisers play a significant role in assisting occupiers. Frequently this leads to a more favourable outcome, perhaps by agreeing more realistic repayment terms with claimants. Judges consider such schemes to be valuable and yet the emergency legal advice offered by such schemes is not available in all courts, or for all users, when possession lists are heard. Few defendants receive any legal advice prior to the court hearing, and the cuts in funding for legal aid and voluntary advice will make it even harder to receive help before a hearing. It is important therefore that funding for housing possession schemes continues and is extended to enable all courts to offer emergency advice and representation to all those threatened with the loss of a home.

[4] The data contained in the annexes contains the small amount of information we did gather about TLATA cases.

Private Landlords

Private landlords present a particular challenge to court resources because of a lack of understanding of process requirements by both landlords and their agents. The time allocated to private landlord cases is commonly twice that devoted to other possession cases, and sometimes three times as long. Cases that could be determined by use of the paper-based accelerated possession procedure without a hearing often take up unnecessary court time because the correct procedure has not been followed. There needs to be improvement in the information available to private landlords about how to claim possession.

Information Gaps

There is no data available on several issues important to access to justice. In particular there are no statistics kept in relation to how many defendants attend court or whether they are represented at the hearing. Further, there is no central database of HPCDS. We recommend that information is collected and published in relation to defendant participation in possession cases and levels of representation and that a central administrative body should be established to undertake strategic oversight and training of HPCDS.

In Chapter 7 we expand on our key findings and areas for improvement.

Acknowledgements

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Abbreviations used in this Report

1996 Nixon Study: J. Nixon, C Hunter, Y Smith, and B. Wishart, 'Housing Cases in County Courts' (The Policy Press, 1996)

2002 Blandy study: S. Blandy, C. Hunter, D. Lister, L. Naylor and J. Nixon, 'Housing Possession Cases in the County Court: Perceptions and Experiences of Black and Minority Ethnic Defendants', Department for Constitutional Affairs 11/02 (2002);

2005 Hunter Study: C Hunter and others, *The Exercise of Judicial Discretion in Rent Arrears Cases* (DCA, London 2005)

2010 Pawson Study: Pawson et al, *Rent arrears management practices in the housing association sector* (March 2010)

BME Study: S. Blandy, C. Hunter, D. Lister, L. Naylor and J. Nixon, 'Housing Possession Cases in the County Court: Perceptions and Experiences of Black and Minority Ethnic Defendants', Department for Constitutional Affairs 11/02 (2002)

CAB: Citizens Advice Bureau

DM: Delivery Manager

DMQ: Delivery Manager Questionnaire

HMCTS: Her Majesty's Court & Tribunal Service

HPCDS: Housing Possession Court Duty Scheme

HPCDSQ: Housing Possession Court Duty Scheme Questionnaire

LASPO: Legal Aid, Sentencing and Punishment of Offenders Act 2012

LiP: Litigant in Person

LiP Lit Rev: Kim Williams, Litigants in Person: a literature review (MoJ, Research Summary 2/11)

Judicial Working Group on LiPs: the Judicial Working Group on Litigants in Person: Report, July 2013

MPAP: Pre-Action Protocol for Possession Claims Based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property

MoJ: Ministry of Justice

Moorhead and Sefton: Moorhead, R. and Sefton, M., 'Litigants in Person: Unrepresented Litigants in First Instance Proceedings', Department for Constitutional Affairs Research Series 2/05, March 2005

Myers-Wilson study: Legal Services Commission, Improving access to advice in the Community Legal Service, Report on Evaluation Research on Alternative Methods of Delivery, July 2004

RPAP: Pre-Action Protocol for Possession Claims Based on Rent Arrears

TLATA 1996: Trusts of Land and Appointment of Trustees Act 1996

Chapter 1: Introduction

More than 220,000 possession claims are issued each year. Not every claim will lead to eviction but around 70% of claims do result in an order for possession, and approximately 20% eventually lead to repossession.[5] For most people the loss of home is deeply upsetting. Research conducted for the housing and homeless charity, Shelter, has found that losing a home is:

> a traumatic experience that can have lasting effects on well-being and family life, from disrupting children's education to triggering stress and depression. Indeed, the public perceive repossession and homelessness to be two of the three most serious civil problems anyone could face.[6]

It seems imperative therefore that possession is avoided whenever possible, but for many the fear of losing a home and the uncertainties surrounding the legal process mean that they do not participate in it. The worry is triggered as soon as the possession claim is received. The BME study conducted in 2001[7] found that the arrival of court papers caused stress and anxiety. Tenants and borrowers who had received summons reported:

> overwhelming feelings of powerlessness and of being 'paralysed by fear' that they were unable to come to terms with their situation and the prospect of going to court.[8]

This report looks at how occupiers engage with the process (if at all) and assesses the extent to which the current legal system of handling housing possession cases offers court users simple and effective access to justice. In particular, it explores how information relating to the occupier's circumstances is supplied to the court, and the advice and representation opportunities available to those who turn up at court without already having received legal advice. In order to understand these issues more fully, we conducted surveys of DMs and HPCDS representatives and interviewed some key players. Our methods are set out in Annex 1 and the responses from the surveys are in Annexes 2 and 3. The chapters of this report build upon the findings of these surveys and interviews, as well as drawing on other research and sources.

[5] Ministry of Justice, *Mortgage and Landlord Possession Statistics Quarterly* (n 2), 3.
[6] Eviction Risk Monitor, Local rates of landlord and mortgage possession claims, in: Shelter policy library December 2011, p. 3. The research used in the Shelter report is based on 'Analysis for Shelter, by Pascoe Pleasance and Nigel Balmer, June 2011, based on English and Welsh Civil and Social Justice Survey, 2010, Legal Services Commission and IPSOS MORI, 2011.'
[7] S Blandy, C Hunter, D Lister, L Naylor and J Nixon, 'Housing Possession Cases in the County Court: Perceptions and Experiences of Black and Minority Ethnic Defendants', Department for Constitutional Affairs 11/02 (2002).
[8] Ibid, 34-36.

The Importance of Advice and Support

It is important that help is available to those faced with the prospect of losing a home. The Civil Justice Council (CJC) states that basic principles for achieving effective access to justice include the availability of objective advice and the demystification of the legal process, noting that technology and written materials are no substitute for personal support.[9] This support should begin early on, even *before* litigants decide to issue or defend claims.[10]

The BME study confirms that access to effective legal advice and support is essential to ensure a just outcome in legal proceedings but when investigating housing possession cases it found a 'range of practical difficulties and barriers which can effectively prevent people from accessing appropriate help and advice'.[11] Research in 1996 similarly found that many of the defendants who attended court were unlikely to have received advice before then (the 1996 Nixon Study).[12]

For many court users it is therefore very important that advice and support is available on the day of the court hearing. Since the early 1990s a number of court based advice schemes have been funded through the legal aid system so that a defendant arriving in court can be given some professional support. These schemes are now available in many courts on the days that possession lists are heard, but not all courts provide this service. Although it is always best to obtain legal advice early on in the process, it is recognised that HPCDS provide an important kind of emergency service and studies show that they provide invaluable personal support. In Chapters 4 and 5 we examine further the support available through these schemes.

The Importance of Information to Good Decision Making

Once in court, the decision has to be made as to whether or not to order possession and so it is important that the judge has sufficient information about the case to ensure that the most appropriate decision is made. The types of considerations that a judge is able or required to take into account will depend on the particular situation involved.

When a mortgagee is seeking possession, the court may adjourn, suspend or postpone possession if the mortgagor is likely to be able to pay any sums due under the mortgage within a reasonable period.[13] If not, immediate possession must be ordered, which means possession within 28 days. In order to determine whether the mortgagor can pay the arrears, the judge will need information about the defendant's

[9] Civil Justice Council, 'Access to Justice for Litigants in Person (or Self-Represented Litigants)', November 2011, para. 20.
[10] N Madge, 'Entering the Ring (Judicial Skills with Litigants in Person)' (2002) 15 *Judicial Studies Board Journal*, available at <http://perma.cc/X75F-45WT>.
[11] BME Study (n 7), 45.
[12] J Nixon, C Hunter, Y Smith, and B Wishart, 'Housing Cases in County Courts' (The Policy Press, 1996) 17.
[13] Administration of Justice Act 1970, s 36.

(i.e. the occupier's) income and general ability to pay.

In rental cases, the judge may need to consider not simply financial information but a wide range of factors. For example, in some cases involving possession by a local authority landlord, the court is only able to grant possession if it is 'reasonable' to do so,[14] and this requires consideration of 'all relevant circumstances'. In addition, following a decision of the Supreme Court in November 2010 (the *Pinnock* case),[15] it is clear that the effect of Article 8 of the European Convention on Human Rights is that 'any person at risk of being dispossessed of his home at the suit of a local authority' should be able to raise the question of the proportionality of eviction.[16] The law is not yet settled in the area of Article 8's application to possession cases but the *Pinnock* approach is probably not confined to cases where it is the local authority seeking possession and applies more generally whenever the court is considering making a possession order.[17]

In all of these contexts, the judge needs to know not only about bare facts, such as whether there are arrears, but may need to be told the 'personal stories' that reflect on the defendant's ability to pay arrears and, often, much broader circumstances. For example, in *Bracknell Forest BC v Green*, the court had to consider whether it was reasonable to order possession when the local authority landlord was seeking possession based on the fact that the tenant occupied property bigger than required for his needs.[18] The local authority was offering alternative accommodation to the tenant and his sister who lived with him. The judge referred to the 'genuine emotional attachment' to the property which they had 'as part of the family', the fact that 'decades of family memories which they hold dear' were located in this home, and that the property provided a 'profound sense of security – connected as it is with their family memories – which sustains them.'

The Busyness of Courts and Receiving Information

The very large number of possession cases that come before the courts means that cases tend to be 'block listed' and the average length of an individual case is just a few minutes. This gives little opportunity for detailed information to be supplied to the judge during the hearing, and makes it all the more important that the information needed for the judge to consider all relevant circumstances is supplied in an efficient manner. In Chapter 2 we explain how the process of possession works and the opportunities for the claimant and defendant to exchange information before the issue of court proceedings, as well the information that the claimant is required to provide on claim forms. As will be seen in Chapter 3, the defendant has an opportunity to provide information on the defence form before the hearing, but only a small proportion of defence forms are returned. It is also possible to supply information at the hearing but, as Chapter 3 shows, defendants often do not attend

[14] Housing Act 1985, Sch 2.
[15] *Manchester City Council v Pinnock & Ors* [2010] UKSC 45.
[16] Ibid, [45]
[17] *Malik v Fassenfelt* [2013] EWCA Civ 798 [26].
[18] [2009] EWCA Civ 238 [15-17]. Other reported cases in which the court has taken account of how long the tenant has lived in the property also involve estate management grounds for recovery: see *Battlespring v Gates* (1984) 11 HLR 6.

hearings. If they do attend, the speed at which hearings take place, and the unfamiliarity of defendants with the setting, means that a defendant who is not supported in court by someone with experience of the possession process is unlikely to take the opportunity to disclose much personal information to the court.

Summary

In order to ensure effective decision-making within the legal process of possession, it is crucial that occupiers participate in it or, at the very least, that information relating to their circumstances is fed into it. The following chapter explores the extent to which occupiers are encouraged to engage in the early stages of the process. It examines also the opportunities that exist for them to tell their story *prior to court action* and for claimants to supply information to the court. It describes, in particular, the steps that have to be taken before court action and how possession claims are initiated by claimants.

Chapter 2: Information Exchange Prior to Court Action

Possession claims can be brought for a number of reasons including breach of tenancy, rent or mortgage arrears, or the fixed term of a tenancy coming to an end. This chapter looks at claims brought using the standard procedure for mortgage arrears and on the grounds of rent arrears as these are the most common reason for possession claims. [19] *Tenancy cases can alternatively be brought using the accelerated possession procedure, which we look at in Chapter 6.*

In order to encourage greater communication and dialogue between the parties before court action is taken protocols have been issued that apply to arrears based possession claims brought by social landlords and by mortgagees.

This chapter looks at the impact of these protocols as well as the opportunities for the claimant to supply information to the court about the defendant's circumstances. Chapter 3 looks at the ways in which the defendant is able to supply information to the court.

The Number of Possession Cases

In 2013, there were 53,659 claims for possession issued by mortgagees, representing a fall of 62% since 2008.[20] During the same year, there were 113,175 standard procedure claims by social landlords (local authorities and housing associations),[21] the vast majority of which will have been on the grounds of rent arrears.[22] In addition, there were 23,196 standard procedure claims issued by private landlords (individuals and private companies).[23]

Although the number of landlord possession claims fell from 194,645 in 2002 to 134,961 in 2010, it has since increased by 26% to 170,451 in 2013.[24]

Since April 2013 major changes have been introduced in the welfare payments system and the legal aid system. Benefit payments have been cut, and in particular the under-occupation penalty (commonly known as the 'bedroom tax') has reduced benefit payments available to those households who are deemed to have spare

[19] Ministry of Justice, *Mortgage and Landlord Possession Statistics Quarterly* (n 2), 5.
[20] Ibid, 3.
[21] Ministry of Justice, *Mortgage and landlord possession - statistical tables - quarter 4 - 2013* (Excel), Table 5, available at http://perma.cc/69PB-WF87. The social landlord statistic is for claims issued by standard procedure only; this is the procedure that will be used for arrears cases but social landlords may also issue some claims using the accelerated possession procedure that is discussed in Chapter 6.
[22] A postal survey of social landlords in 2002/3 found that almost 98% of actions entered in court were due to rent arrears, see H Pawson and others, *The Use of Possession Actions and Evictions by Social Landlords* (ODPM, London 2005) 40. See also J Neuberger, *House Keeping: Preventing homelessness through tackling rent arrears in social housing* (Shelter, London 2003) 12.
[23] Ministry of Justice, *Mortgage and landlord possession - statistical tables - quarter 4 - 2013* (Excel), Table 5 (n 21).
[24] Ministry of Justice, *Mortgage and Landlord Possession Statistics Quarterly* (n 2), 3.

rooms according to specified conditions. Austerity measures have also impacted on the number of advice providers and on court resources.[25] Shelter has closed nine of its offices and in Birmingham, one CAB has closed and four others have reduced their opening hours with the threat of more closures.[26]

While households threatened with the loss of home will continue to be eligible to apply for legal aid, the removal of other areas from the remit of legal aid has the potential to impact significantly on the ability of community based advice services, including charitable institutions, to provide an effective level of service. By removing legal aid for welfare and general housing matters, fewer households will receive the assistance they need to help them manage their debts and housing payments. This will trigger higher levels of arrears and more possession cases, leading to the conclusion that 'legal aid now only responds at the point of crisis.'[27]

Consequently, it is very likely that the number of possession actions based on arrears will continue to rise. Official statistics show that the number of possession claims issued by social landlords using the standard procedure in the last two quarters of 2013 rose from 50,379 in 2012 to 60,844 in 2013.[28] The National Federation of Housing Associations published data in February 2014 indicating that one in seven social housing tenants affected by the bedroom tax had received notices seeking possession and were at risk of eviction.[29]

These various changes will impact upon some of the findings of our research in so far as they relate to how busy the court system is, how well resourced it is, and the challenges facing the work of HPCDS.

Official statistics show that private landlords brought 23,196 claims by the standard procedure in 2013 but do not show the grounds on which the claims are based. In 2013 there were 34,080 claims using the accelerated possession procedure and although it is likely that the majority of these are brought by private landlords the accelerated possession route can also be used by social landlords.[30]

Engagement before Court Action

When arrears have arisen, it is important that the parties talk to each other as soon as possible so as to agree on how the situation might be resolved and possession avoided. If that dialogue is to prove effective, both sides must engage with the process and ensure that any information they provide is accurate and up to date.

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[25] Civil Justice Council, 'Access to Justice for Litigants in Person (or Self-Represented Litigants)', November 2011, paras. 45-46.
[26] See O Bowcott, 'Legal aid cuts force closure of almost a third of Shelter offices' (*The Guardian*, 11 March 2013) <http://perma.cc/DU59-K4HZ> and D Morris and W Barr, 'The Impact of Cuts in Legal Aid Funding on Charities' (2013) 35 (1) *Journal of Social Welfare & Family Law* 79-94, at 91.
[27] Morris and Barr, (n 26), 84.
[28] Ministry of Justice, *Mortgage and landlord possession - statistical tables - quarter 4 - 2013* (Excel), Table 5 (n 21).
[29] 'Two thirds of households hit by bedroom tax are in debt as anniversary approaches' (National Federation of Housing Associations Press Release, 12 February 2014) <http://perma.cc/Z38T-LEW3>
[30] Ministry of Justice, *Mortgage and landlord possession - statistical tables - quarter 4 - 2013* (Excel), Table 5 (n 21).

For some occupiers, however, acknowledging the problems they are experiencing (which can include not only debt but also bereavement, unemployment, relationship breakdown, mental health issues, etc.) can prove difficult, resulting in a failure to respond to their landlord or lender's attempts at communication. The Ministry of Justice (MoJ) observes that 'individuals in debt are a group that is difficult to access, and they behave in unpredictable ways; they rarely seek advice and information from the sources that can help'.[31] Some describe this as the 'ostrich effect',[32] and a Shelter/YouGov survey found that 18% of those surveyed said they would not open their post in case it was a bill or a late payment reminder.[33]

There has also been evidence, in recent years, of landlords and lenders engaging in disreputable and unethical behaviour in an attempt to pressurise occupiers into repaying their arrears.[34] The relationship between such practices and the 'ostrich effect' demonstrated by some occupiers was made clear by one of the HPCDS representatives we interviewed:

> [the lender] is just ringing them every day and bombarding them. So, I think people don't answer their phones. They could have a lot of debt issues and it all just gets too much for them. (DDS 2)

Until 2008, the arrears management practices of mortgage lenders was largely a matter of internal company policy, supplemented by different regulatory regimes.[35] Research into these practices revealed inconsistency in the treatment received by borrowers, with some lenders willing to negotiate an agreement to clear arrears without initiating court proceedings, while others sought a court order even where an agreement had been reached.[36]

In an effort to promote best practice and to encourage more effective communication and negotiation before legal proceedings are initiated, social landlords and mortgage lenders are now required to follow certain procedures set out in pre-action protocols.

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[31] Ministry of Justice, Solving disputes in the county courts: creating a simpler, quicker and more proportionate system, Cm 8045, para 100, p 32.

[32] 'One in 11 Brits worry they can't pay the rent or mortgage this January' (Shelter/YouGov Survey, 6 January 2014), available at <http://perma.cc/R8R2-Z6RY>.

[33] '1.4 million Britons falling behind with the rent or mortgage' (Shelter/YouGov Survey, 4 January 2013) available at <http://perma.cc/LE3F-DRS9>.

[34] 'Set Up To Fail: CAB Clients' Experience of Mortgage and Secured Loan Arrears Problems' (Citizens Advice, 12 December 2007) available at <http://perma.cc/ZC8W-FHJ4> and 'Mortgage Arrears Protocol: Response by Citizens Advice to the Civil Justice Council' (May 2008), available at <http://perma.cc/P3AP-JPYV>. See also, Financial Services Authority, 'Mortgage Effectiveness Review: Arrears Findings' (Illuminas, London, Research Report Project no. 30895, August 2008).

[35] For example, first legal mortgages on residential property taken out after October 2004 are subject to regulation by the *Mortgages and Home Finance: Conduct of Business Sourcebook* while second mortgages are subject to regulation under the Consumer Credit Act 1974.

[36] 'Set Up To Fail: CAB Clients' Experience of Mortgage and Secured Loan Arrears Problems' (Citizens Advice, 12 December 2007), n 34; J Ford, E Kempson and M Wilson, *Mortgage Arrears and Possessions; Perspectives from Borrowers, Lenders and the Courts*, (HMSO, London, 1995); House of Commons Treasury Committee, 'Mortgage Arrears and Access to Mortgage Finance' HC (2008-09) 767; and L Whitehouse, 'The Impact of Consumerism on the Home Owner' in D Cowan, (ed.), *Housing: Participation and Exclusion* (Ashgate, Aldershot 1998), 126 – 146 and L Whitehouse, 'A Longitudinal Analysis of the Mortgage Repossession Process 1995-2010: Stability, Regulation and Reform', in S Bright, (ed.) *Modern Studies in Property Law*, (Hart Publishing, Oxford, 2011) 151-174.

Pre-Action Protocols

A social landlord bringing a possession claim for rent arrears against a secure tenant is obliged to comply with the *Pre-Action Protocol for Possession Claims Based on Rent Arrears* (RPAP).[37] The Protocol applies not only to local authority landlords but also to housing associations[38] and Housing Action Trusts. The protocol came into effect in October 2006 and was based on the *Guide on Effective Arrears Management* published by the Department for Communities and Local Government in August 2006.[39]

A pre-action protocol was also introduced in November 2008 to promote dialogue between lenders and borrowers before court action is taken for mortgage arrears, the *Pre-Action Protocol for Possession Claims Based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property* (MPAP).[40]

Both Protocols aim to encourage more pre-action contact between the parties. The Protocols recognise that it is in the interests of all parties to resolve difficulties wherever possible without court proceedings. They aim also to enable court time and resources to be used more effectively.

In the next two sections we focus on the ways in which the Protocols support the exchange of information prior to court action, as well as how they may help to direct tenants and borrowers towards advice agencies.

Pre-Action Protocol: Social Landlord Claims Based on Rent Arrears

RPAP encourages the landlord and tenant to reach agreement on an affordable way for the tenant to pay off arrears. The landlord should postpone court proceedings so long as the tenant keeps to such agreement.

Information about the Tenant

The protocol represents one of the first regulated opportunities that tenants have to tell their story to their landlord. This is made clear in the opening sections of the protocol which requires the landlord to make contact with the tenant so as 'to discuss

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[37] *Pre-Action Protocol for Possession Claims Based on Rent Arrears* (RPAP), available at <http://perma.cc/BYA4-PHN3>.

[38] Following the Housing and Regeneration Act 2008, the correct term to use is 'Private Registered Provider of Social Housing' (PRPSH) but the protocol refers to registered social landlords (as housing associations were briefly known). We refer to them throughout as housing associations as this is the more familiar title, but PRPSHs are not confined to housing associations.

[39] Available at <http://perma.cc/UH23-NQWC>.

[40] *Pre-Action Protocol for Possession Claims Based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property* (MPAP), para 3.1, available at <http://perma.cc/Z4FE-ZFRW>. For more on the Protocol see L Whitehouse 'The Mortgage Arrears Pre-Action Protocol: An Opportunity Lost' (2009) 72 *Modern Law Rev* 793. MPAP applies equally to all mortgages, regardless of whether they are regulated under the *Mortgages and Home Finance: Conduct of Business Sourcebook*, the Consumer Credit Act 1974 or remain unregulated.

the cause of the arrears, the tenant's financial circumstances, the tenant's entitlements to benefits and repayment of the arrears.'[41]

Providing Information and Support to the Tenant

Information about Arrears and Payment

The landlord is required to set out clearly any time limits which the tenant is to comply with in relation to arrears payments (para. 2) and provide comprehensible rent statements (para 3). If the landlord is aware of any difficulty the tenant has in reading or understanding information given the landlord should take reasonable steps to ensure that the tenant can understand (para 5).

Debt Advice

The landlord should also advise the tenant to seek assistance from CAB or other agencies as soon as possible.

In recognition of the large number of social tenants who are in receipt of housing benefit,[42] the protocol also requires the landlord to offer assistance to the tenant in respect of any housing benefit claim and to desist from starting possession proceedings if the tenant has submitted a realistic housing benefit claim.[43]

The Importance of Attending Court

If possession proceedings are initiated then the landlord is obliged to inform the tenant of the date and time of the court hearing and to advise the tenant to attend.

Ensuring Compliance with the Rent Arrears Protocol

It is perhaps an obvious point to make, but RPAP's success is dependent upon the willingness of both the social landlord and tenant to engage with its provisions and to enter into meaningful dialogue. In an effort to encourage engagement with it and to punish those who fail to adhere to its terms, the protocol makes clear the sanctions that may follow. In relation to social landlords who unreasonably fail to comply with the protocol, the court may make an order for costs. In addition, where a case is not brought on mandatory grounds, the court may adjourn, strike out or dismiss the claim.[44] In relation to a tenant, the court can take the failure to comply with the protocol into account 'when considering whether it is reasonable to make possession orders.'[45]

Social landlords are not formally required to complete a checklist prior to the hearing indicating how they have complied with the protocol, in contrast to lenders who do have to show compliance with MPAP. Many judges, however, encourage social

[41] RPAP (n 37), para. 1.
[42] In 2012 there were 3,436,000 social tenants claiming housing benefit in England and Wales. UK Housing Review 2013, available at <http://perma.cc/9EHY-EGCN>.
[43] RPAP (n 37), paras 6 and 7.
[44] Ibid, para. 14.
[45] Ibid, para. 15.

landlords to prove compliance and produce their own checklists. One judge stated that his court does use a checklist (DJ3). This is not, however, a universal practice. The 2010 Pawson study likewise found that:

> [...] in one court association representatives were asked to produce a checklist to demonstrate compliance with the PAP, while other courts required no such explicit demonstration of compliance.[46]

Asked whether the court had a pro-forma checklist that it used, one judge we interviewed stated:

> [...] there are some pro-formas floating around that some courts use... but we do not. I think we did debate it, and we decided not to do so, for practical reasons, and the fact that if a defendant comes up and challenges the protocol we'll deal with it then. But if the local authority or the representative says, 'Yes it has been complied with,' we accept that. (DJ8)[47]

Pre-Action Protocol: Mortgage Claims

MPAP aims to ensure that lenders and borrowers 'act fairly and reasonably' with each other. It seeks to encourage the parties to reach an agreement about the repayment of arrears based on full and frank information, thereby making a possession claim unnecessary. It states that

> [s]tarting a possession claim should normally be a last resort and such a claim must not normally be started unless all other reasonable attempts to resolve the position have failed.[48]

The protocol goes on to list some of those 'reasonable attempts' including extending the mortgage term or capitalising the arrears.[49] It recognises, however, that 'in some cases an order for possession may be in the interest of both the lender and the borrower.'[50]

Information about the Borrower

The parties are required to 'take all reasonable steps to discuss… the cause of the arrears, the borrower's financial circumstances and proposals for the repayment of the arrears'. [51] In determining whether alternative payment measures should be implemented, both the lender and borrower are encouraged to base their deliberations on 'the individual circumstances of the borrower and the form of the agreement.'[52]

[46] H Pawson et al, Rent arrears management practices in the housing association sector (March 2010), 46.
[47] Different practices were also noted in H Pawson et al (n 46), 46.
[48] MPAP (n 40),para. 7.
[49] Ibid, para.7(1) and (4).
[50] Ibid, para. 1.3.
[51] Ibid, para. 5.2.
[52] Ibid, para. 7.

Like much of the possession process (see below), MPAP focuses attention on the borrower's 'financial circumstances' but in making specific reference to the reasons for the arrears, it represents an early opportunity for the borrower to tell their story to their lender and for the lender to be made aware of their circumstances, whether financial or otherwise.

Providing Information and Support to the Borrower

Information about Arrears and Payment

The lender is required to provide the borrower with an information sheet and details of the arrears, outstanding loan, and any interest or charges.[53]

Debt Advice

The lender should also refer the borrower to appropriate sources of independent debt advice and advise the borrower to make early contact with the local authority's housing department (para 5.3).

The Importance of Attending Court

In contrast to the RPAP there is no requirement for the lender to advise the borrower to attend court if there are possession proceedings.

Ensuring Compliance with the Mortgage Arrears Protocol

As with the rent protocol described above, MPAP's success in deterring possession claims is dependent upon the willingness of both the lender and the borrower to engage in dialogue. If the borrower does not respond to the lender's contact the lender is not obliged to delay possession.

Alternatively, it may be the lender who fails to engage with the spirit or the letter of MPAP. In such circumstances, MPAP is silent as to the penalties to be imposed. As Marshall notes,

> [o]ther protocols allow judges to penalise offending parties by awarding costs against them. Similar sanctions were included in the draft of the mortgage protocol but were removed before it was published.[54]

MPAP states merely that the, 'parties must be able to explain the actions that they have taken to comply with this protocol.'[55]

In assisting the parties to demonstrate the actions they have taken, the lender is required to complete two copies of a checklist[56] and to present those to the court on the day of the hearing.[57] The eight questions listed on the checklist require the lender

[53] MPAP (n 40), para. 5.1.
[54] T Marshall, 'Anger in Court' (May/June 2009) 34 *Roof*, 28.
[55] MPAP (n 40), para. 9.1.
[56] Form N123 available at <http://perma.cc/M6AG-ZYKM>.
[57] CPR, Practice Direction 55A, 5.5, available at <http://perma.cc/63X7-X4P5>.

to confirm whether they have complied with certain aspects of the protocol, to summarise any attempts within the last three months to discuss repayment of the arrears with the defendant and to indicate whether any proposals for repayment by the defendant have been rejected. The form does not request any information regarding the reasons for the arrears or the defendant's circumstances.

If the lender fails to complete the checklist or if the explanation provided by the lender is not considered satisfactory then the protocol, unlike its counterpart in the social housing sector, leaves open the type of penalty that might be imposed by the court.

The lack of sanctions within the protocol was noted by respondents to a MoJ consultation, undertaken between March and June 2011, on reforms to the civil justice system,

> Members of the Bank/Financial sector welcomed the recent changes that have strengthened the protocol but suggest that further improvements could be made. They consider that there should be consideration as to what sanctions are applicable for non-compliance with the protocol as they are concerned that the current protocol contains very little by way of sanctions for non-compliance, which mitigates its strength and effectiveness.[58]

Impact of the Protocols: Early Evidence

Earlier studies showed that the protocols impacted positively on the possession process.

First, there was improvement in the practices of many landlords and lenders. Research conducted by Citizens Advice shortly after the introduction of RPAP indicated that while there was concern over compliance with it by some Housing Associations the overwhelming response of CAB advisers was that it had impacted beneficially on the behaviour of social landlords.[59] The overall positive impact was also found in a detailed study of rent arrears management practices of social landlords in 2010, particularly in promoting earlier intervention when arrears emerge, although this improvement was not uniform:

> while three quarters of associations had modified their rent arrears management practices in response to the Rent Arrears PAP, this leaves a significant proportion of landlords (disproportionately the smaller landlords) whose procedures had remained unchanged.[60]

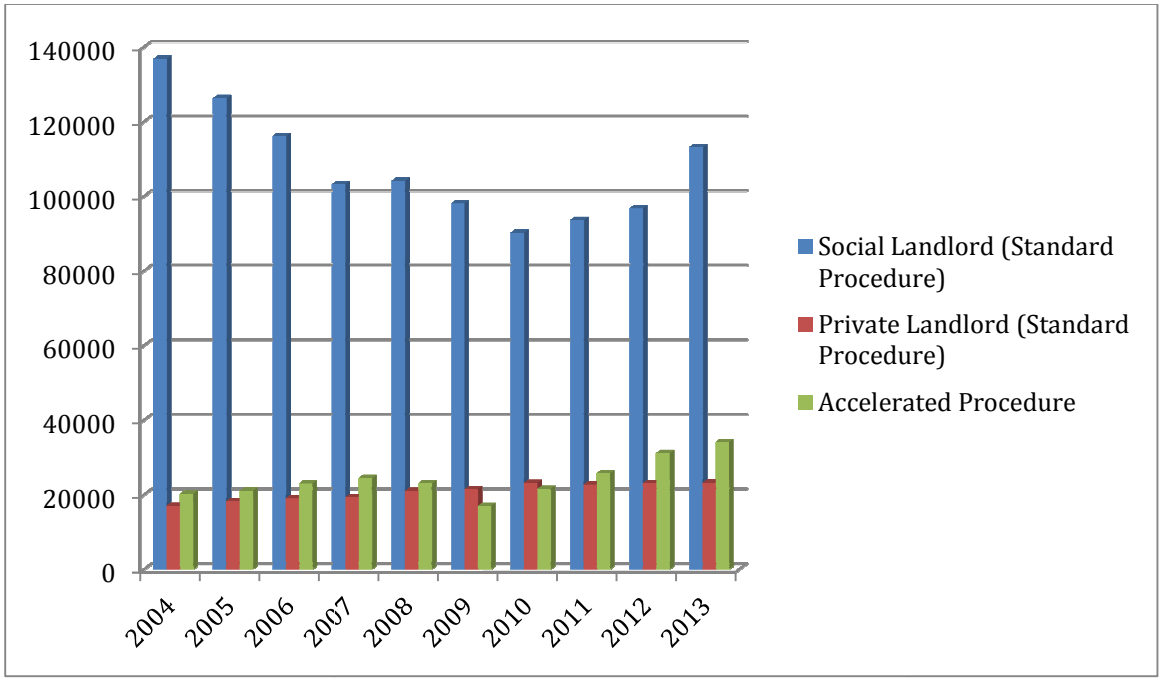
A similar pattern has been reported in relation to mortgagee behaviour. A survey conducted in 2009 found that

[58] Ministry of Justice, 'Solving disputes in the county courts: creating a simpler, quicker and more proportionate system. A consultation on reforming civil justice in England and Wales. The Government Response', CM8274, February 2012, 27.
[59] 'Unfinished Business' (Citizens Advice, May 2008), available at <http://perma.cc/36D4-KMU2>.
[60] H Pawson et al (n 46), 8.

> overall, mainstream lenders' arrears and possession practices had largely improved, whereas the practices of sub-prime lenders and second charge secured lenders had remained the same.[61]

Secondly, it is likely that the introduction of the Protocols reduced the number of possession claims brought. As the following chart shows, the number of possession claims by social landlords decreased following the introduction of RPAP.

Table 2.1 Landlord Possession Claims by Type of Procedure and Landlord: 2004-2013

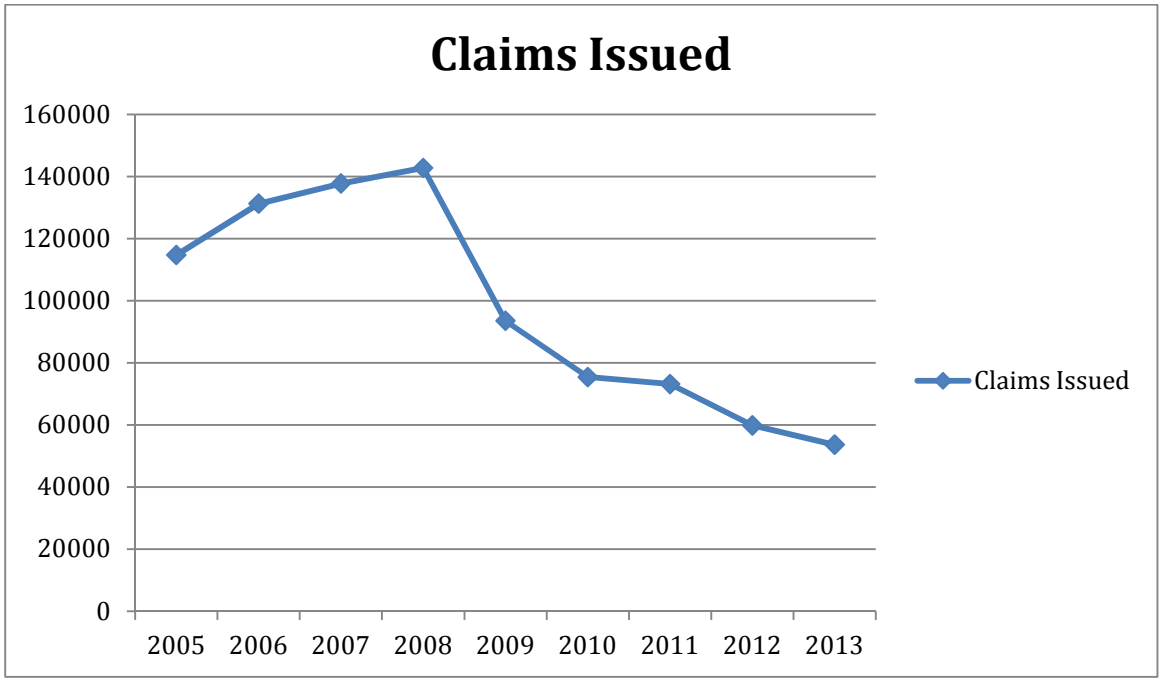


Source: Ministry of Justice, *Mortgage and landlord possession - statistical tables - quarter 4 - 2013* (Excel), Table 5 (n 21).

Similarly, statistics on the number of possession claims initiated by lenders suggest that MPAP had a significant impact. Mortgage possession claims fell from 142,741 in 2008 to 53,659 in 2013 as illustrated below.

[61] AdviceUK, Citizens Advice and Shelter, 'Mortgage and Secured Loans Arrears: Adviser and Borrower Surveys April 2009', 6, available at <http://perma.cc/LX5R-E8Y5>.

Table 2.2 Possession Claims Issued: Mortgage Cases 2005-2013



Source: Ministry of Justice, *Mortgage and landlord possession - statistical tables - quarter 4 - 2013* (Excel), Table 1 (n 21).

The extent to which the falls in the number of possession claims can be attributed to the introduction of the Protocols is not clear. Possession claims by social landlords had already begun to fall before October 2006. In the case of mortgage claims, the MoJ and others have been cautious in heralding MPAP as the only factor:

> [t]he fall in the number of mortgage possession actions since 2008 coincides with lower interest rates, a proactive approach from lenders in managing consumers in financial difficulties and other interventions from the government, such as the Mortgage Rescue Scheme.[62]

Research by Wallace and Ford, suggests that this reticence on the part of the MoJ is well founded:

> Important as the protocol undoubtedly is … [interviews with mortgagees] confirmed that the proportion of arrears cases that were being progressed through to litigation teams was lower because lenders had shifted their focus to early arrears and pre-litigation teams, where, increasingly, alternative forbearance agreements were being made.[63]

There was, however, inconsistent application of the Protocols by judges. Citizens Advice found inconsistent implementation of RPAP by district judges, noting that

[62] Ministry of Justice, *Mortgage and Landlord Possession Statistics Quarterly* (n 2), 3.
[63] A Wallace and J Ford, 'Limiting Possessions? Managing Mortgage Arrears in a New Era', (2010) 10 (2) *International Journal of Housing Policy* 133–154, 141.

> overall, there appeared to be considerable variation in how judges were applying the protocol, even between judges within the same court.[64]

It would appear also that MPAP was applied inconsistently by the courts, with some being 'scrupulous about implementing the recommendations,'[65] while in other cases 'the protocol is being ignored not only by the courts, but also by the lenders bringing the actions'.[66] Joint research by AdviceUK, Citizens Advice Bureau and Shelter, however, found that 74% of the 382 advisers who responded to their survey agreed that district judges were asking more questions about pre-action communication between the lender and borrower.[67] Having said that, they found also that in a third of the 300 repossession cases they examined in July 2009, the lender had not complied with the Protocol but in only six cases were sanctions applied for non-compliance.[68]

Our Findings in relation to the Protocols

Our research provides further support for these findings, and we use the following broad headings to shape our discussion: the impact of the protocols on the practices of many landlords and lenders, the impact on the number of possession claims, and the manner in which the protocols affect the court hearing. In the HPCDS survey we asked two questions. The first asked whether the protocols had made a difference to the work of the HPCDS or the process of possession. In response to that question, 80% of HPCDS respondents indicated that it had.[69] Respondents were encouraged to explain their answer to this question and the comments they provided expressed a range of opinions which are examined further below. The second survey question asked whether the protocol is followed by mortgagees and social landlords and in both categories most respondents said that it is in the majority of cases. There were no questions relating to the Protocols in the DMQ as their use and impact would not be within the knowledge of DMs. We also explored the impact of the Protocols with our interviewees and relevant responses are referred to at points below.

The Impact on Claimant Behaviour

The mortgage lenders interviewed indicated that, for them, MPAP had not made much difference to their behaviour as they were already largely compliant with it,

> [...] in all honesty I think we complied with most of MPAP anyway before it came in. (Lender 1)

[64] 'Unfinished Business' (Citizens Advice, May 2008), n 59.
[65] T Marshall, 'Anger in Court' (n 54), 28.
[66] T Marshall, 'Anger in Court' (n 54), 28. See also House of Commons Treasury Committee, 'Mortgage Arrears and Access to Mortgage Finance' HC (2008-09) 767, para 62 and T Marshall, 'Under the Heel: Loophole Leaves Courts Powerless to Help Borrowers in Arrears' (May/June 2010) *Roof* 19.
[67] AdviceUK, Citizens Advice and Shelter, 'Mortgage and Secured Loans Arrears: Adviser and Borrower Surveys April 2009' (n 61), 3.
[68] Ibid, 12.
[69] This question did not distinguish between the RPAP and the MPAP. Seven respondents skipped this question.

Another of the lenders interviewed expressed a degree of frustration with the relationship between MPAP and the manner in which judges exercise discretion in these cases. This lender considered that the requirement set out in MPAP that court action should only be undertaken as a last resort was not taken on board by district judges. In essence, this lender considered that if they come to court they do so because all other options have been exhausted and so they should get the order they are asking for:

> [I]f we go to court and we ask for an order for outright possession, or an order suspended on terms, it's because there's no other option, and we don't believe that any other option is effectively going to be sustainable or enable the customer to come out the other end, because it is what we all want, what the customer wants, and clearly what we want, because the one thing you can guarantee is a repossession means we've lost money. (Lender 3)

While such an approach may be justified in relation to lenders who comply with MPAP, there was evidence to suggest that not all lenders are so compliant, as one judge pointed out in relation to MPAP:

> [T]hey've helped to concentrate minds, and they've helped to explain to lenders what their responsibilities are. But we still end up with some lenders who aren't really fulfilling responsibilities; some of the secondary lenders. (DJ1)

Some of the responses provided by the representatives of HPCDS who thought that the Protocols had made a difference mentioned that the Protocols have led to more engagement before the hearing and cases being better prepared:

> [In relation to RPAP], more prior engagement with clients from social landlord. (HPCDSQ 3)

> Cases are more carefully prepared and documented. (HPCDSQ 29)

> The rent PAP has made a significant difference, both in terms of concentrating the minds of claimants (particularly larger, social landlords) about the steps to take prior to and following the issue of a claim. (HPCDSQ 9)

During one of our interviews, a representative of a HPCDS noted that RPAP, in particular, afforded the adviser greater opportunities to negotiate with the claimant and thereby defer the possession claim,

> It gives you a bit more to go at as well, because there's a very clear description as to what they should be doing. And that can be very useful in court and outside court; because if you're asking lots of questions about what steps they've taken prior to issue of proceedings that may well be a good reason for them to adjourn if they know actually they've been a bit hasty. (DDS3)

Similar views were expressed in the responses provided by HPCDS representatives. One in five did not consider that the protocols had made a difference but the comments made by these respondents suggest that their doubts relate primarily to the MPAP:

> In mortgage cases, the pre-action protocol seems to be like a tick box for the claimants, whether it is correct or not, it doesn't seem to make a difference to the order made. (HPCDSQ 4)

> In mortgage cases it is just a paper exercise. With sub-prime lenders they send a so-called advisor who invariably does nothing but charges the defendant a sum which is added to the balance. This advisor is not independent but employed by the claimant. (HPCDSQ 24)

> The mortgage pre-action protocol has made little difference as in our experience the forms are completed by the mortgage company too far in advance of the hearing, contain inaccurate information about what contact they have had with the borrowers and are very rarely served upon the Defendant. (HPCDSQ 27)

This view, that in practice the MPAP has become a box-ticking exercise rather than promoting meaningful engagement, was not confined to mortgage cases. One respondent noted that while the RPAP had been integrated into the arrears management systems of most social landlords:

> [T]his can lead to a 'box-ticking' exercise by some housing officers/legal representatives and their ability to adhere to the protocol sometimes does not stand up to scrutiny. (HPCDSQ 9)

A similar view was expressed by another respondent:

> [S]ometimes social landlords are of the view that because they had visited and put letters through the door, they had complied with pre-action protocol. (HPCDSQ 6)

Impact on the Number of Cases

All respondents who mentioned the impact the protocols have had on the number of cases reaching court suggested they have led to fewer hearings. While this may be in the interests of the occupier in terms of avoiding possession, there is some evidence to suggest that, in mortgage cases, the lender's decision to delay a claim for possession may simply be 'storing up' problems. Wallace and Ford, for example, have argued that lenders are bringing fewer possession claims, not because of the MPAP alone but because of a range of issues including a stagnant housing market and 'memories of the last recession and the fallout from the US sub-prime crisis'.[70] There is, therefore, 'a distinct possibility that, depending on housing market improvement, possessions have merely been postponed rather than avoided'.[71] It may well be the case, therefore, that numerous borrowers are avoiding possession for the time being but in the meantime, are accumulating significant arrears. As one respondent commented, although there are fewer hearings:

> [A]rrears are now higher by the time case gets to Court - delaying the inevitable in some cases. (HPCDSQ 3)

[70] See Wallace and Ford (n 63).
[71] Ibid, 148.

Impact on Court Hearings

As noted earlier, unlike the MPAP, sanctions for non-compliance with the RPAP are made clear within it and may include an order for costs and the adjournment of the case. One respondent commented that the fact that documents are prepared in line with the Protocols means that fewer cases are adjourned. However, a number of respondents indicated that if there are signs of non-compliance then cases may well be adjourned, regardless of whether they fall under the RPAP or the MPAP:

> Occasionally helpful in mortgage cases in obtaining an adjournment, or resisting costs. (HPCDSQ 1)
>
> Failure to adhere to the RPAP has directly or in part led to a large number of adjournments and dismissals, particularly when the claimant is seen to be well-resourced and therefore capable of implementing the RPAP as part of their routine policy framework. (HPCDSQ 9)
>
> Mortgage lenders use the checklist, and claims have been either adjourned and or dismissed when this has not been done. (HPCDSQ 20)

Interviews with judges supported the view that non-compliance will have an impact even in mortgage cases:

> I had one where I caught them [the lender] out where the Protocol… plainly hadn't been complied with. So I listed it for a hearing, for them to produce, as a witness, the person who was handling this account. Out of the blue, this claim was settled. They withdrew the whole action. (DJ5)

Another judge, initially commenting that the pre-action protocols had impacted upon the possession process and the exercise of judicial discretion 'hardly at all' went on to comment that if the protocols have not been followed, then: 'In theory we'd adjourn.' (DJ6)

Evidence from one of our court observations likewise indicates that district judges will adjourn cases where there is no evidence to demonstrate that the protocol has been complied with. In one particular case, a Housing Association representative had sought a suspended possession order on payment terms but seemed unaware of the RPAP. As there was no evidence of contact with the occupier, the judge adjourned for 14 days to give the association time to show evidence of compliance with RPAP.

The Protocols deal with the action that the parties must take before seeking a court order. The following sections describe the process that the claimant follows once they have decided to initiate court action.

Commencing a Possession Action

In both the private sector and the public sector the landlord must serve a 'notice seeking possession' (NSP) before bringing a possession claim. This must be in a prescribed form stating the ground(s) for possession. There must also be a delay

between serving the notice and commencing proceedings, but the extent of notice required varies according to the ground of recovery (from at least 2 weeks to at least 2 months, although immediate action is possible in local authority cases involving nuisance and anti-social behaviour).

This chapter and Chapter 3 look at what is sometimes referred to as the 'standard procedure' for possession, used if a landlord or mortgage lender (the 'claimant') brings legal proceedings for possession in arrears cases. There is a separate method of possession for tenanted property that is available against assured shorthold tenants; this is known as the accelerated possession procedure and is discussed in Chapter 6.

Claimants must follow the procedures set out in the Civil Procedure Rules (CPR).[72] Possession claims are usually issued in the local county court.

PCOL (Possession Claims On-Line)

Around 80% of possession claims based on rent and mortgage arrears are now dealt with on-line by using what is known as PCOL.[73] This can only be used where recovery is sought for rent or mortgage arrears, and not for more complex cases.[74] This allows both claimants and defendants to submit documentation electronically.

PCOL was introduced in October 2006 and is intended to be 'a simple, convenient and secure way of making or responding to certain types of possession claim on the Internet.'[75] The convenience of the PCOL system was referred to by one of the solicitors interviewed:

> [...] we basically get all the documentation, go onto the computer, input all the data that we need, press okay and the court automatically sends us back a hearing date, which is quite a quick way of doing things. (Solicitor 1)

The process begins with the claimant completing an online claim form, including the particulars of claim. Upon receipt, the court issues the claim form by sending the defendant a printed copy of the claim form and defence form[76] which will include a unique customer identification number which allows the defendant to access the claim via the PCOL website. The defendant can then submit online a completed defence form.[77] PCOL will automatically allocate a hearing date and allows users to view the court diary.

The MoJ has indicated that it would like to use more in the way of information technology in order to modernise the court system:

> For a number of years we have provided Money Claim Online (MCOL) and Possession Claim Online (PCOL), which are web-based services, enabling claims to

[72] Part 55 deals with possession claims and is supplemented by Practice Direction 55A and 55B, available at <http://perma.cc/63X7-X4P5>.
[73] Ministry of Justice, Solving disputes in the county courts: creating a simpler, quicker and more proportionate system (n 31), Annex A, 86.
[74] CPR (n 72), Practice Direction 55B, 5.1 (possession claims online).
[75] See <http://perma.cc/S4HH-BWG5>.
[76] CPR (n 72), Practice Direction 55B, 6.7.
[77] Ibid, 7.1.

> be issued over the internet. We want to encourage more actions to be commenced electronically, since it is both cheaper and more efficient. We also want to modernise the way that services are provided through public counters in the county courts, maintaining a face-to-face service for those that need it, but increasingly making use of online facilities and telephone appointments.[78]

Views on PCOL

Our DM survey suggests that if greater reliance is going to be placed on the use of information technology then improvements will have to be made. Our questionnaire included an open ended question as to how the procedure of housing possession might be improved. A number of respondents noted problems with PCOL, amongst which were that it is 'unreliable and cumbersome', 'very rigid and not accessible to all courts [leading to] regular duplication of work' and that it 'has many flaws including the speed at which it runs.'

It was noted also during one of our observations that those representing claimants, rather than having all of their cases heard in succession, had to keep returning to the hearing room at different times throughout the session. The reason for this is that PCOL lists cases according to date of issue. Listing cases according to claimant or those representing them could save time and money by allowing representatives to spend less time at court. However, there is also the potential for this to be seen as favouring the claimant, particularly if they remain in the room while the defendants come and go suggesting a level of familiarity between the claimant and the judge, and with court processes.

PCOL only allows for initial claims to be made online. It is not possible to send court forms or other attachments using PCOL, and only a limited messaging service is available through PCOL.[79] If the case is adjourned the claimant has to seek a relisting of the case via hard copy forms, which can lead to significant delays:

> [...] it's only the initial claim that you can start on PCOL, so if it gets adjourned generally and we just want to relist and get a new hearing date you have to do it on paper because there's not a facility to do it online... and it's normally a good few working days before they actually will action it, and depending on the court, we've waited three months for a relisted hearing date before. One came in this morning for the end of September and it was relisted in May. (Solicitor 1)

Non-PCOL claims

It is not compulsory to issue claims in arrears cases by using PCOL but the cost of issuing a claim is now £250 using PCOL and £280 using written forms.[80] As mentioned above, the majority of claims for possession based on arrears are made using PCOL.

[78] Ministry of Justice, 'Solving disputes in the county courts: creating a simpler, quicker and more proportionate system' Consultation Paper CP61 2011, paras 15-16.
[79] CPR (n 72), Practice Direction 55B, 10.2, 10.3.
[80] Prior to 22 April 2014 it was only £100 using PCOL. See the Civil Proceedings Fees (Amendment) Order 2014, SI 2014 No 874.

Information provided in Possession Claims

The form for the particulars of claim requires the claimant to give the reasons for seeking possession, details of persons in possession of the property, the rent or mortgage payment history and amounts due, and details of previous steps taken to cover arrears. There is also an open box to provide 'information known about the defendants circumstances'. The guidance notes that accompany this form state that this should give details of financial and other circumstances, especially if housing benefit is being paid. The steer is towards the provision of financial information and non-financial circumstances are not prominent.

Our interviews suggest that the information required by the claim forms tends to be fairly minimal. As one solicitor noted:

> You just need to put in a minimum of information and the computer says here's the hearing date. But we do find that when we actually do get to court the agent is really important and if there's any issues that we feel that need to be highlighted they will be made fully aware of it prior to the hearing. And so if the defendants do turn up, and also we can let the judge know of these particular circumstances. But as far as the actual process is concerned, you put in X, Y, Z and you get the hearing date through. (Solicitor 1)

It is at this stage that a degree of 'system failure' becomes apparent within this process. There are some lenders and landlords that go to great lengths to communicate with occupiers so as to agree the repayment of arrears and thereby avoid possession. These practices are consistent with the Protocols and the lender/landlord may well be aware of the occupiers' personal and financial circumstances. There appears, however, little opportunity for these claimants to divulge this information to the court.

> So what the court gets, and what the advocate gets, is a copy of the pre-action protocol, and a potted history, and what that potted history gives the advocate are details of previous broken plans, amount of engagement, contact that we've had, arrangements we've come to, and that will also include any, obviously mirror what's in the MPAP, if there's any particularly sensitive aspects. (Lender 3)

While the information supplied on the claim form may be relatively minimal, it must be assumed that it is of relevance to the hearing and the judge's ability to make an informed decision. It is of concern, therefore, that two of the district judges interviewed suggested that this information might not be seen by the judge hearing the case:

> Let us say, I've got a very full housing possession list, which is effectively 45 cases, I will go and start looking at those cases. I probably allow myself two hours. What do I see? Not very much to be blunt. I'll open up the file, and there will be a claim form. I may well see a particulars of claim, probably more often than not, but it's not usual, because now that we have possessions issued online through PCOL, we have to cope with the administration, the limitations of the administration. So even if a particulars of claim may have been filed somewhere, even online, it doesn't mean to say it will be reproduced to my file and I may only get a claim form, which doesn't help me at all. (DJ8)

Another district judge stated that,

> [...] if I'm lucky somebody downstairs will have printed it off, but it's only here in electronic form until somebody does that, there's no hard file, there's just a blue folder which has got the claim form in it. And somebody will hopefully have remembered to print off the particulars of claim. (DJ6)

After the claim is issued

The court sets a date for the hearing, which will be not less than 28 days from the date of issue of the claim form.[81] In PCOL cases the date is allocated automatically. The claim form and the particulars of claim are sent to the defendant not less than 21 days before the hearing date.[82] Included with this information will be a defence form which constitutes the defendant's opportunity to submit details to the court relating to their case. Each type of case has a specific defence form associated with it and these are discussed in Chapter 3.

Notifying the Occupier

In relation to mortgage claims (not tenancy cases), the CPR require that within five days of receiving notification of the hearing the lender must send a notice, setting out the details of the hearing, to the property (addressed to 'the tenant or the occupier'), the housing department of the local authority and any registered proprietor.[83]

Summary

Evidence from our surveys and interviews suggests that both RPAP and MPAP have had a beneficial impact on possession cases but that more could be done to ensure that they do not serve simply as a box ticking exercise for claimants. It seems apparent also that despite the Protocols encouraging greater communication between the parties, the legal process does not encourage the claimant to divulge any information that may have been shared with them by the occupier regarding personal circumstances or the reasons for the arrears. Whether this deficit is remedied in the later stages of the possession process forms the subject of the next chapter.

[81] CPR (n 72), 55.5 (3)(a).
[82] Ibid, 55 (3)(c).
[83] Ibid, 55 (10).

Chapter 3: What Opportunities Does the Defendant Have to Tell their Story to the Judge?

This chapter explains how important it is for the defendant to supply information to the court, not only about his or her financial situation but also about other personal circumstances. It also describes the opportunities that the defendant has to do this once a possession claim has been commenced, and reports on how frequently defendants use these opportunities.

Chapters 4 and 5 build on this theme by examining the importance of advice and support being available to defendants during this process and the role that Housing Possession Court Duty Schemes play in supporting defendants.

The Importance of Providing Information to the Court

Previous research shows that the outcome of a case is affected by what is known by the judge about the defendant's personal circumstances. An important study by Hunter and others in 2005 explored the ways in which judges exercise discretion in cases where social landlords seek possession on the ground of rent arrears (the 2005 Hunter study).[84] One of the key research questions was to discover the factors that influence the orders which judges make in housing possession cases. As part of the research methods used they presented different scenarios to judges to see what order they would make in each scenario and what explanations judges gave for making that order. Those research findings revealed that the personal circumstances of tenants - such as problems caused by age, mental infirmity, dependant children, and an inability to understand the proceedings – may have a very high impact on the outcome of the case. Our interviews also confirmed how important knowledge of the defendant's personal circumstances is to judges, one judge stating:

> I think they're absolutely essential... it goes to the issue of reasonableness at the end of the day, what somebody's personal circumstances are, if they've had an awful situation with one of their kids being taken into care, or they've got problems that one of their children has mental health issues. I mean, mental health issues are a big issue because then it's very difficult for people to manage their affairs at all. So yes, I think they are very important. (DJ2)

The issue of mental health was a recurrent theme within our data. Mortgage lenders in particular noted the prevalence of mental health issues in arrears cases and the steps they are taking to address the challenges they pose.

[84] C Hunter et al, *The Exercise of Judicial Discretion in Rent Arrears Cases* (DCA, London 2005), see especially Ch 6.

> Mental health and vulnerable customers is a key issue at the moment, and those customers where there clearly are emotional/mental issues, we're on to that straight away in terms of 'Can somebody represent you? Have you got somebody there next to you that I can talk to you, with you giving your authority for us to speak to them? Is there somebody that we can talk to on your behalf to prevent you having to deal with it?'... So if the person's financial circumstances affect their ability to pay, the checklist, the MPAP checklist has to document what action we've taken to mitigate the impact of the particular health issues the customer has got. (Lender 3)

> Mental health's a difficult one for us... it's difficult, what's the definition of mental health? They say a third of people with financial trouble have a mental health issue. Well you virtually stop doing anything... we're very sensitive to not causing an issue for somebody with mental health, but if we worked on that basis then we wouldn't be touching one third of people with financial difficulties. (Lender 1)

In the Supreme Court case of *Pinnock*, Lord Neuberger noted that the vulnerability of tenants, in relation to which he included mental illness, is a key issue in assessing the proportionality of ordering possession.[85]

Our research focuses on the question of how this kind of information gets before the court. As shown in Chapter 2, the protocols encourage early dialogue between the parties and the claimant may provide some information to the court about the defendant's circumstances in the claim form. In our study we have not examined court files so we do not know for sure how much information is commonly provided with the particulars of claim, but the indications are that it is minimal.

The defendant has two main ways of supplying information about his or her circumstances to the court: the filing of a defence form, and attending the hearing. The occupier's ability to tell his or her story can have a significant beneficial influence on the outcome of the case. A study by Nixon and others in 1996 (the 1996 Nixon study) found that:

> active participation by defendants in the possession process had a significant impact on the initial and long-term outcome of cases. Those who did not attend hearings were at greater risk of eviction than those who were represented or attending hearings in person.[86]

The 1996 Nixon study found that it was attending the hearing that had the greatest impact on the outcome.[87] Indeed, in mortgage cases they concluded that written submissions alone did not assist borrowers in defending their home from repossession. It must be noted, however, that the court forms that are used have changed since that study, guidance notes have been issued, and the protocols discussed in Chapter 2 have been introduced.

In the HPCDS survey we asked respondents if they thought that judges receive information sufficient to allow them to exercise their discretion in a fully informed manner. Of those answering this question, the majority thought that they did but 1 in

[85] *Manchester City Council v Pinnock & Ors* [2010] UKSC 45, [64].
[86] J Nixon, C Hunter, Y Smith, and B Wishart, 'Housing Cases in County Courts' (n 12), vi.
[87] 1996 Nixon Study (n 86), 41.

4 did not think so.[88] Those who said that judges did not have sufficient information were asked how the situation might be improved. Some responses set the context for themes explored in this and the following two chapters:

> Often defendants do not complete defence forms - how this can be changed I don't know. (HPCDSQ 26)

> In very many cases, the defendant's background is complex and a superficial 'rushed' job on the morning does not do them justice, even if a HPCDS representative does assist them. (HPCSQ 1)

> Cases should be allocated more time. (HPCDSQ 5)

The Defence Form

The introduction to the 1996 Nixon study states that a consequence of a review of civil justice in 1988 was to change forms of reply

> to ensure that even where defendants do not attend hearings the court has comprehensive details of any alleged debt and information about defendants' circumstances.[89]

In this section we consider whether that has been achieved.

Following the receipt of the particulars of claim, defendants have fourteen days to complete a defence form.[90] If the defendant does not submit the defence form within this time frame then they

> may take part in any hearing but the court may take his failure to do so into account when deciding what order to make about costs.[91]

Different versions of the form are available depending on the type of action being bought, and the kind of defences that might be available in law. The defence form for mortgaged residential premises (N11M) and that used for rented residential premises (N11R) are similar. The defence forms enable the defendant to dispute the reasons for the claim (for example, whether the defendant agrees that any notice referred to in the claim form was served) but the focus of both forms is upon the financial situation of the defendant.

Completing the Defence Form

Accompanying the forms is a set of explanatory notes.[92] These notes are similar for rent and mortgage cases and the following comments are based on N11M.[93]

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[88] Five respondents skipped this question.
[89] 1996 Nixon Study (n 86), 1.
[90] CPR (n 72), 15 (4) (1)(a).
[91] CPR (n 72), 55 (7) (3).
[92] Form N7 'Notes for the Defendant – Mortgage Residential Premises' and Form N7A 'Notes for the Defendant – Rented Residential Premises'.
[93] Available at <http://perma.cc/A48S-T5GN>.

The notes advise the defendant to seek advice, complete the defence form and return it within 14 days of receipt, and attend the hearing. They explain that the judge will take account of any information provided, 'such as details of your personal and financial circumstances, any proposal you have made to pay off any arrears, and any dispute you have about the amount owing.'[94] The note also explains the type of orders the judge can make and reiterates the importance of obtaining legal advice and completing the defence form.

The 1996 Nixon study found that defendants were often intimidated by the forms and found them overly complex. [95] In the 2002 Blandy study black and minority ethnic focus groups were presented with a set of fictitious court papers including a possession summons, a particulars of claim and a reply form and were asked what action they would take if they received this information. The overall sense was that recipients would be fearful and anxious, many finding the forms hard to comprehend, and only one participant was able carefully to consider and read through the forms.[96] When asked if they would complete and return the form 'virtually all stated they thought it was important to fill the form in but would find it difficult'.[97] Both of these earlier studies were conducted at the time that the old style 'Right of Reply Forms' were used, and there were no guidance notes. In our study we did not contact defendants and so cannot comment on whether the forms now used are easier to comprehend and respond to, but as we will see below, response rates still do not appear to be high.

Information and advice on the legal process of possession and how to complete the necessary court forms, including examples of what might qualify as 'exceptional hardship', is provided by agencies such as Citizens Advice[98] and Shelter.[99] Court desks can also provide a source of help for defendants, but as will be seen in Chapter 5 the opening hours of court desks is limited and some operate on an appointments only basis.

Some questions on the form are not straightforward. For example, N11M (for mortgages) states that certain questions are relevant only 'if the loan secured by the mortgage (or part of it) is a regulated consumer credit agreement'.[100] The question arises as to whether defendants would be able to understand this language or would know whether their loan qualifies as a regulated consumer credit agreement. Certainly, in response to a very wide and open question about reform, some DMs suggested that forms could be simplified so that they are easier for defendants to understand. However, one judge thought that although the information supplied was not really of the right quality, this was not due to the form:

[94] Form N7 (n 92), 1.
[95] 1996 Nixon Study (n 86), 20-21.
[96] 2002 Blandy Study (n 7), 34-35.
[97] Ibid, 42.
[98] 'Adviceguide: You are taken to court for rent arrears' (Citizens Advice), available at <http://perma.cc/M529-BL6G> and 'Adviceguide: What happens when your mortgage lender takes you to court' (Citizens Advice), available at <http://perma.cc/7EK2-79KX>.
[99] 'Rent Arrears in Social Housing' (Shelter), available at <http://perma.cc/4J7U-H7NW> and 'Seven Steps in Repossessing a Home' (Shelter), available at <http://perma.cc/XN6Y-MCC9>.
[100] Form N11M (n 93), 2.

> [...] that's not the fault of the defence form, I don't think, I think it's the fault of the people who are completing it on the whole. Sometimes you get a great long story as to why they haven't paid rent or the mortgage and on the whole you speed read that. I mean literally. I mean most of the time it's not terribly relevant. Sad but not relevant. (DJ7)

Others consider that the forms could be clearer:

> [...] in a way it would be almost better if it was a kind of statement of needs, with at the end of it: do you wish to stay in your property; do you wish to make an offer; anything else you wish to take into account. It could almost be a little bit more taking people through it in more of a natural way. It's not a very intuitive form. (DJ1)

Financial Information

Both forms ask about any agreements reached with the landlord/lender in relation to repayment of arrears. There are also questions that ask for a detailed account of the defendant's financial situation: earned income, benefit payments, saving accounts, loan or credit debts, regular expenses and for information about dependants. There is also a wide question that asks for information about any circumstances that have led to the arrears including divorce, redundancy, and illness.[101]

This information will be necessary for a judge who has to decide if the occupier is likely to pay any arrears.

Although the defence forms ask whether any agreements have been reached with the claimant about payment of the arrears, neither form refers to the relevant Protocol. The forms could, for example, direct the defendants to the protocols and ask the defendant to explain whether the claimant has made attempts to discuss the cause of arrears and reach agreement. If protocol compliance check-lists were required to be supplied with the claim form, the defendant could be asked to confirm if the details given are correct. As noted in Chapter 2, the MPAP checklist is provided on the day of the hearing itself but there is no regulatory requirement for a RPAP checklist to be used at all, although individual courts and judges sometimes require them in practice.

Information about housing options

Both forms ask also for details of other (non-dependant) people living at the premises.

There is a question asking whether the defendant would have somewhere else to live if a possession order were made, and when they would be able to move in. In rental cases, if possession is ordered it will normally be no later than fourteen days after the making of the order, unless it appears to the court that exceptional hardship would be caused by requiring possession to be given up by that date. If there would be exceptional hardship possession can deferred to a date no later than six weeks after

[101] Form N11M (n 93), question 27. See also Form N11R, question 29, available at <http://perma.cc/5Y76-WQA5>.

the making of the order.[102] In mortgage cases if possession is ordered the typical date for possession is 14 or 28 days after the hearing. Both forms ask whether the defendant would suffer exceptional hardship by being ordered to leave the property immediately and, if so, why.

Non-financial information: mortgage cases

The mortgage defence form (N11M) provides no opportunity for the defendant to provide any other information about his or her personal situation, save in so far as it is covered by the question asking about circumstances leading to the arrears. Section 36 of the Administration of Justice Act 1970 confers a jurisdiction upon the judge to adjourn the proceedings or to stay, suspend or postpone a judgement or possession order provided that:

> [I]f it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.

By statute, therefore, the judge is required to take account (only) of the mortgagor's financial situation. As one judge noted:

> Because section 36 doesn't say I must take into account … the difficulties that the defendant has or the negligent lending of the lender or anything like that. It says you've got to pay your mortgage.... So the statutory framework doesn't give me a discretion to say, "I can't believe they're owed all that money" or "I'm so sorry your marriage is at an end" but the marriage being at an end doesn't mean that you don't have to pay your mortgage. It's a separate contractual issue. (DJ3)

This is reflected in the questions within N11M which are focused only on financial issues.

It is unclear, yet, whether Article 8 of the European Convention of Human Rights also applies in such a way that the mortgagor should be able to raise the issue of whether possession is proportionate. As mentioned in Chapter 1, it is not yet clear whether Article 8 can be relied on as a defence when the claimant is not a public authority. There is, however, a mounting body of law and comment to the effect that Article 8 can be raised as a defence in any court action for possession.[103] If Article 8 is applicable in mortgage cases, Form N11M should be amended to invite non-financial information to be supplied if this would affect the proportionality of possession.

Non-financial information: rented residential cases

Although the defence form for rented residential cases (N11R) is similar to the mortgage defence form there is space for information about non-financial

[102] Housing Act 1980, s 89.
[103] See, for example, J Luba, 'The role of article 8 in residential possession claims made by individuals and companies' (2013) 17 (5) *Landlord and Tenant Review* 170. For comment specifically on application to mortgages see B McFarlane, N Hopkins and S Nield, *Land Law Text, Cases, and Materials* (OUP, 2nd edn, 2012) 1154-5.

circumstances to be included. It is, however, hidden within the question relating to reasons for the arrears:

> Give details of any events or circumstances which have led to your being in arrears of rent (for example divorce, separation, redundancy, bereavement, illness, bankruptcy) *or any other particular circumstances affecting your case*. If there are any reasons why the date any possession order takes effect should be delayed, give them here. (q 29, emphasis added)

There are many contexts in which a judge should have regard to more than purely financial circumstances with rented property. This is the case, for example, if a local authority is seeking to end a tenancy because 'rent lawfully due from the tenant has not been paid'. The court can order possession only if it considers it reasonable.[104] Reasonableness confers a wide discretion on the trial judge.[105] Lord Greene MR said in *Cumming v Danson*:

> In considering reasonableness... it is… perfectly clear that the duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing. That he must do in what I venture to call a broad, common-sense way as a man of the world, and come to his conclusion giving such weight as he thinks right to the various factors in the situation.[106]

This means that where reasonableness is in issue, the court must look at the case as a whole, including matters not directly to do with the grounds for eviction. This will include, for example, giving 'proper weight' to the impact that mental disability may have upon the tenant and whether it is susceptible to treatment.[107]

It is questionable whether the defence form for rented property is presented in such a way that the defendant is likely to provide information about 'all relevant circumstances'.

Further, Article 8 can be raised as a defence whenever a public authority is seeking possession. This will include recovery by a local authority and, usually, recovery by other social landlords. According to *Pinnock,* Article 8 need only be considered by the court if it is raised by or on behalf of the defendant.[108] If raised, the court should normally consider it briefly and, unless it is seriously arguable that an Article 8 claim might succeed, it should be dismissed. Given that it is only question 29 of form N11R that is open enough to include non-financial matters, and yet it contains only opaque reference to such matters, the defence form is unlikely to be effective means of enabling or supporting defendants who should be raising Article 8 as a defence.

In *Pinnock*, Lord Neuberger said that vulnerable people represent a group for whom proportionality is especially likely to be a relevant issue.[109] This includes those vulnerable as a result of mental illness, physical or learning disability, poor health or frailty. For this group, it may be that defence forms are unlikely to be completed at all,

[104] Housing Act 1985, Sch 2, Ground 1.
[105] *Bell London and Provincial Properties Ltd v Reuben* [1946] 2 All ER 547 (CA).
[106] [1942] 2 All ER 653 (CA) 655.
[107] *Croydon LBC v Moody* (1998) 31 HLR 738 (CA).
[108] *Pinnock* (n 15), [61].
[109] Ibid, [64].

but if they are it is notable that there is no specific reference to vulnerability as something to be mentioned.

Few Defence Forms are Returned to the Court

Earlier studies have all found low proportions of defence forms being returned to the court. The 1996 Nixon study found that only 22% of defendants (borrowers and tenants in arrears cases) used the Right of Reply Form, and a further 14% made other written submissions[110] (that is, an overall of 36% of defendants were providing some information to the court). Although the 2002 Blandy study appears to have had a much higher rate of return (as 20 out of 38 interviewees completed and returned the reply form)[111] this was a highly selected group: Appendix 2 of that study shows that it was difficult to obtain access to defendants for interview purposes. Both of these studies pre-date the new style of form and the introduction of protocols. The 2005 Hunter Study reports that 3% used *only* written submissions as their form of participation; a further 8% used a written response in addition to attending.[112]

Our DMQ survey sought to find out what proportions of defendants typically file defence forms, and within what time scale. This information is not recorded centrally by HMCTS.[113] No question about defence forms was included in the HPCDS questionnaire as duty desk respondents would not be expected to have this information.

The majority of courts do not appear to record this data and so the DM responses were largely from personal estimate.[114] The majority of respondents to this question thought that fewer than half of defendants file a defence form. An overwhelming majority of respondents thought that fewer than 1 in 4 defendants file a defence form within the 14 day period, and, indeed, more than half of these respondents thought that fewer than 1 in 10 did so.

It is surprising that there is often no systematised method of recording whether defence forms are filed, and within what time frames.[115]

[110] 1996 Nixon Study (n 86), 20. The sub-sample that was used for the 1996 research was selected from a larger sample, selection being partly on the basis that the sub-sample included all cases where the defendant attended or was legally represented (72) (and, perhaps, one might therefore expect overall response rates to be higher than average).
[111] 2002 Blandy Study (n 7), 42.
[112] 2005 Hunter Study (n 84), 17. Table 4 appears to draw this figure from the Department for Constitutional Affairs, 'Judicial Statistics' (2004) but the published form Judicial statistics England and Wales for the year 2004 (Cm. 6565) does not give this information.
[113] Confirmed by email correspondence between the researchers and HMCTS.
[114] It is possible that the form of our question partially explains this in that the question did not simply ask whether defence forms were filed but asked what proportion of defendants file a defence within: the specified 14 day period, after the 14 day period but before the hearing, at the hearing, or never.
[115] CPR (n 72), Practice Direction 55B, 7.5 states: 'A defence is filed when the online defence form is received by the court's computer system. The court will keep a record, by electronic or other means of when online defence forms are received.' In light of this it is surprising that so few respondents stated that they had recorded data in the form we requested. We were informed by HMCTS in email correspondence that court staff would be able to use the BMS system to state the volume of cases in which a defence form is received prior to the hearing but there would be no record of forms handed to the judge on the day of the hearing.

One DM noted that out of the 685 possession claims listed during a three month period, they received only 69 completed defence forms (around 10%). Another said that on average 80-90 possession claims per week are listed and an average of 6 reply forms are received each day: this would suggest a response rate of around 30%. Another stated simply: 'we do receive a very low % of defences'. Of the DMs who said that this question was answered on the basis of recorded data, most (five out of seven) said that fewer than 50% of defendants file a defence form, with two from this group saying that less than 25% file a defence form.

When we asked judges about the proportion of defendants filing defence forms they had the impression that only a small number of forms were filed: '10%' (DJ1); 'mostly not filed' (DJ4); '5% but the information is useful' (DJ6). One mentioned:

> [...] it is rare to actually get the defence form on the file… Sometimes they will come along on the day of the hearing and bring the defence form with them. That's quite common. (DJ9).

One noted that even if forms are returned, they do not necessarily make it to the judge's file. (DJ8)

Our study cannot be used to provide accurate figures on the proportion of defendants who file defence forms, in part because of the apparent absence of recorded, or at least retrievable, data. It is clear, however, that responses remain low, possibly very low, and there are no signs of any significant improvement in rates of return with the replacement of the old Right of Reply Form with the current N11 forms.

The Day in Court: How Cases are Listed

Earlier studies that have reported on the way in which cases are listed reveal that court schedules are typically very crowded, and that this impacts on judicial decision making. The 2005 Hunter study states:

> One of the most important determining factors is the very short amount of time available to judges to hear evidence and make a decision. The listing practices used in county courts mean that on average judges have fewer than five minutes to arrive at a decision in housing possession cases. The speed with which cases are heard combined with the need to deal efficiently with a large list are reflected in the summary decisions made in response to the case study scenarios.[116]

In our surveys we asked a number of questions designed to learn about how cases are listed, and to see how much time is typically allocated per case.

Block Lists

Courts usually hear cases together in a possession list, and the cases will be heard by a district judge or deputy district judge. Each court has its own listing policy. The pattern for listing is decided by the judges but it is common for rent cases to be blocked together and mortgage cases dealt with in a separate list. The 2005 Hunter

[116] 2005 Hunter Study (n 84), 105.

Study found, however, that most district judges felt that they were ruled by the court administrators on the question of listing.[117]

The findings of our research suggest that there is a big variation in the number of possession lists scheduled each week in each court. The following table shows that although almost 60% of DM respondents said that 1-2 possession lists are scheduled each week, there was considerable variation.[118]

Table 3.1 Number of possession lists per week according to DMQ respondents

No. of lists per week	1-2	3-4	5-6	More than 6	Other
DM Respondents	58%	10%	1%	4%	26%

Amongst those who answered 'other' there remained variation but the most common response was that possession lists were scheduled twice a month (10 respondents).

Most courts list cases of a similar type together (90% of respondents to this question), typically with mortgage lists being separate from rental lists and some rental lists distinguished according to landlord type (social or private).

Cases in each list tend to be 'block listed'. This means that if, for example, there are to be 20 cases heard in a morning session running from 10.30-12.30 the 'case list' will simply list the names of the parties in each of the 20 cases. The list may be broken down into hourly, or half hourly chunks, but any individual party will not know the precise time that their case will be heard. It may be, therefore, that defendants who turn up for a 10.30 hearing will be surprised to find themselves still waiting for their case to be heard some time later. If it is not being explained to defendants that they might be seen at any time between, say, 10.30 and 12.30 their expectations are not being managed and they are more likely to become frustrated at having to wait for so long. Unsurprisingly, the uncertainty and delay can be distressing:

> Many defendants waited between 2 to 3 hours for their hearing, as one described: 'I got to be there for quarter to ten, I actually got seen at about five to one'. Waiting for such long periods of time caused considerable anxiety for defendants, who were then surprised when their hearing lasted only a short time: 'all this waiting, nervous for five minutes, you know and in that five minutes they make you feel like you are nobody.'[119]

A majority of the DM respondents to the question about listing practice stated that cases are listed according to the chronology of the issue of the claims (59%), and 20% said that listing takes account of the importance or priority of the case (for

[117] 2005 Hunter Study (n 84), 30.
[118] 69 DMs answered this question, 17 skipped it.
[119] BME Study (n 7), 77.

example, warrants for eviction are dealt with first). As mentioned in Chapter 2, the majority of possession claims based on arrears are issued using PCOL which automatically allocates the time of the hearing within the parameters set by the court (for example, the court may require all mortgage cases to be on a particular day).

Comments indicate that some judges will re-order the list, for example if a claimant is involved in several cases or to deal first with cases for which the defendant is attending. As one judge explained:

> Well every half hour I find out who's representing them. And then I find out if the defendants are there. If the defendants are there then I'll hear those cases that have the defendant, and hopefully try and juggle the representative for the claimant so whoever it is doesn't have to wait too long. So that's my routine, to find out who is representing who so that they spend the least amount of time hanging around. So very often the defendant doesn't come, so I will leave those cases to the end of the half hour period. (DJ4)

Time Allocated to Each Case

As with earlier studies, our research shows that 5-6 minutes is usually allocated to each case. There is a degree of variation between type of case, but also between courts. The following tables illustrate this.

The table below shows the responses given in relation to five courts: giving the number of possession lists per week, and the average time allocated to different types of case according to our survey respondents.

Table 3.2 Time allocated to the case in relation to five courts

	Court A, North East		**Court B, South East**		**Court C, Midlands**		**Court D, South West**		**Court E, North West**	
Number of housing possession lists scheduled each week	1-2		1-2		3-4		More than 6		Other: once/month	
Average time allocated per case type (in minutes)	**DM**	**HPCDS**	**DM**	**HPCDS**	**DM**	**HPCDS**	**DM**	**HPCDS**	**DM**	**HPCDS**
Mortgages	5-6	5-9	5-6	5-9	5	10-14	10	10-14	5	5-9
Private Landlords	15	15-19	10	5-9	15	10-14	15	10-14	5	5-9
LA and Other Social Landlords	5-6	5-9	5-6	5-9	5	5-9	10	10-14	5	Other social: 5-9*

*(no response given for LA landlords).

As can be seen, one of the courts (Court D) was considered by both DMQ and HPCDSQ respondents to list mortgage and social landlord cases for nearly twice the amount of time than other courts. This may explain the larger number of possession lists held each week by Court D, the assumption being that the greater time devoted to these cases results in more lists having to be held each week.

Table 3.3 Average time per case according to all DMQ respondents to this question.

Average time allocated by type of case (to nearest 0.5), according to DMQ respondents				
	Mortgagees	**Other Social Landlord**	**Local Authority Landlord**	**Private Landlord**
Minutes	6	6	5.5	8
Range	4-10	3-15	3-10	4-15

As the table indicates, the amount of time devoted to housing possession cases ranged from three to fifteen minutes. The responses to the DMQ indicated, for example, that there were six courts that typically spent less than four minutes on local authority landlord cases. One consistent theme apparent from the data, however, is that private landlord cases are typically allocated more time than mortgagee and social landlord cases, and we consider why this might be in Chapter 6.

The 2005 Hunter study (which looked at social landlord cases involving rent arrears) found that in 'some' courts up to 30 possession cases were listed each hour (which would be 2 minutes per case).[120] The results of our surveys suggest that there is not as much pressure on the number of cases in a housing list as was found in earlier studies, and our interviews confirmed this impression. It is, however, to be noted that the picture may have changed since our surveys. HPCDS respondents were contacted in January 2014 and invited to comment whether there had been recent changes. One respondent explained that court lists seem to be a lot busier.

The consequence of time pressures is, according to one judge, that it promotes a 'production line approach' (DJ9). There was also concern expressed that it is much more difficult for less experienced judges to manage cases in the time available. This was mentioned in both solicitor and judge interviews:

> I know some judges, maybe some deputies with less experience, or limited experience, sometimes get bogged down (DJ8)

> I think they should be listed with more time, because, apart from anything else, a deputy might be doing this, that is somebody who might have no experience of housing whatsoever; who may never have done that list before; it's absolutely impossible, they're going to do whatever is easiest for them to get through the list, because they're going to feel under considerable pressure to do that, so I think they should be listed more generously. (DJ2)

Further, as will be seen below, defendants frequently fail to attend the hearing. If

[120] 2005 Hunter Study (n 84), 29.

there were higher attendance rates then current listing practices would be under further strain:

> […] it would be great if everyone attended; but I would need to change my listing; I'd need to give more time. The listing at the moment assumes that some people will not attend. (DJ1)

How does time allocated affect decision making?

The 2005 Hunter study noted that, as a result of the relatively short amount of time available for possession hearings:

> […] some judges employed strategies to gain more time for decision-making. These strategies most commonly involved the use of adjournments in order to obtain further evidence.[121]

This suggests that judges employ strategies to help them manage busy lists. Our study also found that if, for example, an issue that was out of the ordinary is raised during the hearing then the case will usually be adjourned as the time constraints of the listed cases meant that it could not be dealt with.

> I mean you can't hear a defended possession action in five minutes, it's an impossibility. (DJ8)

Some judges, however, did not find the time allocated constrained their judicial powers:

> […] quite used to dealing with time pressures and absorbing information and being as fair as you can in any circumstances. …. So no, I don't think time pressures prevent me from exercising my discretion, I really don't. (DJ7)

On the other hand, several HPCDS respondents commented that cases should be longer and noted that particularly with if Article 8 points are raised it would be difficult to deal with in a short hearing.

What can defendants expect

Housing possession cases form the bread and butter of what County Courts do. They are, from a legal and procedural point of view, relatively straightforward and yet, much of what goes on during these court hearings remains a mystery to many occupiers. It seems unlikely, for example, that most occupiers will be aware of the amount of time likely to be allocated to the case in which the decision as to whether they will or will not keep their home will be taken.

As one judge said:

[121] 2005 Hunter Study (n 84), 105.

> There should be a stamp that goes on every claim form for a possession list that says five minute hearing. (DJ8) [The context of this was that previously such a stamp had indeed been used].

Historically most hearings concerning rent cases were held in open court.[122] The 1996 Nixon study found that tenants found the system to be 'degrading and embarrassing as their personal and financial affairs were aired in public'.[123] One judge in the 1996 Nixon study noted that this could make tenants reluctant to discuss their personal circumstances.[124] Today, in cases where arrears are involved, procedural rules require that the hearing is held in private and that only parties connected with the case may attend.[125]

Most possession hearings are also no longer heard in formal court surroundings such as a court room but rather in a 'hearing room' or what used to be known as the judge's chambers. These are small private meeting rooms with the judge sat behind a desk. Our DM survey found that the majority of possession cases are heard in hearing rooms.

Turning up in Court

Attendance by defendants is very important in terms of how information gets before the court. We have already seen that the opportunities to present information on the defence form are constrained and that there is a low return rate of defence forms.

Evidence from previous studies shows that attendance is likely to lead to a more favourable outcome for the defendant.[126] The 2005 Hunter study explored why this might be and concluded that the *mere fact of attending* did not necessarily result in a more favourable outcome, but the fact of attending gives the judge the opportunity to be aware of factors, such as the personal circumstances of the occupier, and these factors could have a significant impact on the decision making process.[127]

The qualitative data from our project shows that attendance is hugely important

> […] you do have to be careful when you enquire about personal circumstances. We don't get much, as I say, other than what we elicit by our own questioning really, the documents aren't going to help us. (DJ6)

In addition, attendance is very likely to affect the court order. It is much less likely that an outright possession order will be made, and if a suspended possession order is made, the terms will be more realistic:

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[122] 1996 Nixon Study (n 86), 21.
[123] Ibid, 21.
[124] Ibid, 22.
[125] Practice Direction 39A states: 'The hearings set out below shall in the first instance be listed by the court as hearings in private under rule 39.2(3)(c), namely: (1)a claim by a mortgagee against one or more individuals for an order for possession of land, (2) a claim by a landlord against one or more tenants or former tenants for the repossession of a dwelling house based on the non-payment of rent…' CPR 39.2(3)(c) provides that a hearing may be in private if it involves confidential information.
[126] See 1996 Nixon Study (n 86), 41 (borrowers) and 47 (tenants); 2005 Hunter Study (n 84), generally and especially 56. Chapter 6 of that study explores the reasons for the impact of attendance by the tenant in depth.
[127] 2005 Hunter Study (n 84), Executive Summary, iii.

> And to what extent, if any, does their attendance affect the case? I would say their attendance helps the case. If they don't come the chances are that you'll make an order for possession. (DJ7)

> And then we get to the hearing itself and depending on what we've been instructed by the lender depends on the outcome, or if the defendants turn up, you know, it's no black and white scenario. If they don't turn up we're likely to get our order as granted. If they do it could be a different story. (Solicitor 1)

> [I]f people don't attend there's an order going to be made and that's going to be a possession order, so they're going to have an outright order. Whereas, if they attend and there's something wrong with it then you may be able to get it struck out or you might be able to get an adjournment or you might be able to get a suspended order on reasonable terms or you can look into all other issues. If they don't then it's black and white and there's going to be an order. (DDS2)

The importance of turning up at court is illustrated by the response one judge made to our open ended question as to whether there any other issues or comments that they would like to raise. The answer:

> I think if the message could get out there that it is worth turning up and if you do turn up you might be very surprised at the sympathetic way in which you're dealt with. (DJ6)

Attendance Rates

Notwithstanding how important attendance is, very little is known about attendance rates. There are no recorded statistics on this. The preliminary report for the Jackson review described the proportion of tenants attending possession hearings as 'depressingly low'.[128] In 2011, the MoJ noted that

> [T]he defendant is often absent on the day of the hearing: evidence from recent court visits suggests that only 50% of tenants attend rent arrears hearings and just 30% of borrowers attend mortgage arrears hearings. Consequently, the majority of cases are decided without any defence being presented.[129]

We were unable to ask DMs how many defendants attend the hearing as HMCTS advised us that this information is not recorded.

Although our findings support the view that attendance rates are low, there were enormous variations in perceptions of both actual numbers and trends.

Respondents to the HPCDS survey were asked what proportion of defendants they thought attend court. Responses suggest that between 30% and 45% attend, with mortgagee attendance rates highest; however, there was a large variation in the responses given.

[128] Review of Civil Litigation Costs, Preliminary Report, Vol 1, May 2009, ch 31 para. 2.12.
[129] Ministry of Justice, 'Solving disputes in the county courts: creating a simpler, quicker and more proportionate system' (n 78), para 98. For other studies reporting attendance rates, see 2005 Hunter Study (n 84), and references therein pp 16-17 and pp 24-25.

In our interviews no-one stated that more than 50% attend. Subject to that, there was a wide variation in views:

> There are more people attending now than used to, which is good. We'll sometimes get up to 50% and we can do far more for people if they attend. [DJ1]

> I guess you don't see that many attending court to be fair. (Lender 1)

> [Defendants attend in] about 50% of the cases (DJ7)

> The incidence of turning up now is far, far higher. The engagement's much higher. (DJ3)

> The difficulty is that so few people come to the hearings anyway. You know, seven out of a list of 24 isn't, you know, an awful lot… (DDS1)

> […] there is a vast number that just don't attend. (DDS2)

> [...] about 20% [turn up]. Maybe a bit more, maybe a bit more than that. (DJ6)

Why do defendants not attend?

We asked HPCDS respondents what they considered to be the barriers to court attendance. For this question we suggested categories that were drawn up in an earlier study of HPCDS (the Myers-Wilson study) which included: general apathy; the belief that there was little point in attending as nothing could be done; the acceptance of what is perceived as an unfair system; the burying of heads in the sand; and a fear or misunderstanding of the legal system.[130] All categories were still seen as significant and were rated in the following order:

1. burying of heads in the sand,
2. little point attending as nothing could be done,
3. landlords and housing officers told defendants there was no need to attend,
4. fear or misunderstanding of the legal system,
5. the cost and difficult of attending,
6. general apathy, and
7. the acceptance of what is perceived as an unfair system.

Other reasons also featured strongly, particularly where agreements had been reached with the claimant in the past, and mortgage companies discouraging defendants from attending court. As one HPCDS representative noted,

> [I]n mortgage cases, particular mortgage lenders appear to mis-advise clients and state for example, if they cannot clear there arrears within a year, they will lose their home and that is another reason defendants don't attend court.

It became apparent from our interview data that this type of advice was not restricted to mortgage lenders:

[130] Myers-Wilson study: Legal Services Commission, Improving access to advice in the Community Legal Service, Report on Evaluation Research on Alternative Methods of Delivery, July 2004, 43.

> [T]he housing officers visit everybody the week before the court hearing and say "Well, if you reach agreement with me that you'll pay the current rent plus a fiver a week off the arrears you don't have to go to court. We'll tell the court it's all agreed." Now they may very carefully explain the consequences of reaching a possession order but I doubt it… it is stark and it's noticeable how nobody comes from [this local authority] … Sometimes you get the odd one but they tend to be particularly bolshie people who should never have been taken to court in the first place, you know. (DDS1)

Other reasons for non-attendance were offered by some of the interviewees including some that give further support to the view that, for some occupiers, fear of the court process is a real deterrent:

> The people I see are very embarrassed about it and I think they probably don't know what to expect at court. They think it's upstairs in the big courts where really it's in a room no bigger than this. If people come to see me I always say 'look, have you ever been to court before? I don't know what you're expecting but this is what it's like; it's private, it's just going to be me and you and whoever's representing the other side and a judge in a suit.' (DDS2)

> […] because they can't afford to take time off work (DJ2)

> But people are maybe slightly afraid of court... They may also, foolhardily, go to work and bury their head – if they've got a job they think is more important. (DJ1)

Summary

In Chapter 3, we considered the potential for claimants to discover and present to the court the personal circumstances of the defendant. As a result of the Protocols, it may well be the case that occupiers will have spoken at length to their landlord or lender about their circumstances and yet our findings suggest that it is unlikely that such information will be relayed to the court via the claim forms. The onus is therefore placed on the occupier to re-tell their story to the court through the defence forms or through attendance at the hearing.

An examination of the opportunities available to occupiers to divulge information to the court about their personal (and financial) circumstances, however, suggests that those opportunities are both limited and under-utilised. The defence forms do not encourage the provision of such information and few are returned in any case. This leaves attendance at the hearing by the occupier as the only remaining chance for them to share information with the judge. In assessing the levels of attendance at possession hearings, our research was hampered by a lack of centrally recorded data (a theme that recurred throughout our research).

While the MoJ produces statistics on the number and type of possession claims, data regarding a number of issues is not published. It is impossible to know, for example, the actual time devoted to possession hearings or how many cases are relisted for a full hearing (e.g. if the defendant raises a credible Article 8 defence). The number of defence forms returned or the number of defendants who attend and whether they

are represented is also not available. This makes it difficult to evaluate the extent to which the provision of written information or attendance by the defendant impacts on the outcome of the case. We would call therefore for HMCTS and the MOJ to collate and publish such information.

While exact figures are not available, it seems that attendance has improved over recent years but remains relatively low. This information deficit within the process of possession is significant for several reasons. First, some defendants might not be accessing the full range of protective measures available to them. An Article 8 defence on the grounds of lack of proportionality, for example, must be pleaded and sufficiently particularised to show that it reaches the high threshold of being seriously arguably.[131] None of the court forms make reference to Article 8 or factors that might be significant in relation to it. Defendants are not therefore being encouraged to provide information that might give rise to an Article 8 defence. Add to this the fact that many defendants will not have sought legal advice prior to the hearing and it seems highly unlikely that they will be aware of the defence.

Secondly, this lack of 'joined up thinking' within the system extends to the Protocols which are not referred to in the defence forms. If specific questions were asked of the occupier regarding the behaviour of their lender/landlord then that would put the judge on notice that a potential breach of the Protocols has occurred.

Thirdly, the time allocated to these cases reinforces the importance of providing in an efficient manner the information needed for the judge to consider all relevant circumstances. Housing possession cases, however, do not tend to involve particularly complex legal provisions or processes. The question typically boils down to whether the defendant can repay the arrears or whether the lender/landlord has complied with the necessary procedures. This may explain why such cases are allocated only a few minutes of court time. If the judge has no information regarding the defendant's circumstances then they have little discretion other than to order possession and the matter can be dealt with in a matter of seconds. If the defendant does attend, the hearing may last a few minutes and in that time, the home may be lost. What this listing practice fails to recognise is the importance that the occupier may attach to their home and the impact that this decision can have on them and their family. The disparity in the time allocated to cases of little value compared with that of housing possession cases was noted by one of the judges interviewed:

> Now, you know, small claims okay it could be important to the people involved but, you know, not someone's home, not someone's children. And we devote probably a good two hours plus to each case even if it's for £35 eBay charges. Now there's something a bit wrong there. (DJ4)

Those who attend court may also become frustrated at the practice of 'block listing', which can result in them having to wait unexpectedly for lengthy periods before their case is heard. This practice may reinforce yet again the apparent lack of concern demonstrated by the court towards those anxious to tell their story and defend their home.

[131] *Thurrock Borough Council v West* [2012] EWCA Civ 1435.

Finally, and perhaps most significantly, it seems apparent that the judge having knowledge of the defendant's personal circumstances, particularly if combined with attendance by the defendant at court, can have a beneficial impact on the outcome of the hearing. This may be due, to some extent, to the ability of those who attend court to access free emergency legal advice and representation. The next two chapters explore the important role played by legal advice and representation for both claimants and defendants.

Chapter 4: Advice and Representation: Litigants in Person

Although there is no precise data on this, the overwhelming majority of defendants who do attend a possession hearing turn up without legal representation. This also appears to be true in relation to some claimants, particularly private landlords. This chapter looks at two issues arising from this. The first is to explain why it is important for litigants to be supported through the possession process and to be given the opportunity to have someone represent them. The second considers the impact that unrepresented litigants have on the court and court resources. The next chapter looks at the opportunities that are available in court on the day of the possession hearing for a defendant to be given support and advice.

Litigants in Person (LiP)

'Individuals who exercise their right to conduct legal proceedings on their own behalf' are known as litigants in person[132] according to Practice Guidance issued by the Master of the Rolls in March 2013. This wording suggests that being a LiP maybe a personal choice. Of course, although some individuals may, indeed, prefer to conduct their own proceedings, many will do so through absence of practical and realistic alternatives. Another way of putting it is to say that the term 'self-represented litigant'[133] or 'litigant in person' denotes an individual who is not in receipt of representation or advocacy from a legally qualified agent.[134]

There is some ambiguity about how the phrase LiP might be understood. One ambiguity relates to unrepresented claimants, in particular local authorities and housing associations. These institutions tend to use in-house staff, such as housing officers, to represent them in court. Although these come within the formal definition of LiPs, Moorhead and Sefton's report argues that institutional litigants are conceptually different, being more like represented litigants in terms of expertise and experience.[135] The next section explores claimant representation further.

There are no official statistics relating to the number of LiPs.[136] Moorhead and Sefton collected data from four first instance courts during 2002 and 2003. They found that 92% of defendants in mortgage arrears cases were unrepresented and 97% in rent

[132] According to the Practice Guidance issued by the Master of the Rolls on 11 March 2013, 'Terminology for Litigants in Person'. Following a report from the Civil Justice Council in November 2011 an alternative phrase, the self-represented litigant, had gained some currency and the Practice Guidance was issued to ensure that the sole term Litigant in Person would be used.
[133] The term preferred by the Working Group responsible for the Civil Justice Council's report, 'Access to Justice for Litigants in Person (or Self-Represented Litigants)', November 2011.
[134] R Moorhead and M Sefton, 'Litigants in Person: Unrepresented Litigants in First Instance Proceedings', *Department for Constitutional Affairs Research Series* 2/05, March 2005, 4.
[135] Ibid 5.
[136] The Judicial Working Paper notes an acute lack of data on current numbers of litigants in person: para 2.3

arrears cases.[137]

A further ambiguity relates to whether the person who receives help on the day from the duty adviser is really a LiP. As will be discussed in Chapter 5, many county courts have HPCDS operating in them. This means that a litigant who arrives at court unrepresented may have the opportunity to be represented by a housing adviser who is present on the day; we look at how many take up this opportunity in Chapter 5. Not all housing advisers will be able to 'represent' the defendant: some advisers are volunteers without legal qualifications, and therefore have no right of audience. In our surveys and interviews we did not explain what we intended by the term LiP.[138] Although some respondents and interviewees may have understood the term in a narrow sense and considered it only as applying to those who either are not offered representation by a housing adviser on the day, or turn down the offer, we suspect that most understood it more expansively as covering any litigant who arrived at court without representation.

Claimants and Representation

There are different patterns in relation to representation of claimants depending on the type of case.

Mortgagees

Mortgagees are usually represented at a possession hearing.[139] A typical pattern will be for the mortgagee to instruct solicitors who employ agents to represent the mortgagee in court (although some lenders litigate in-house). As one lender noted during our interview,

> [W]e don't attend court ourselves, I mean some lenders will litigate in-house, with their own in-house employ teams, we use external lawyers who will undertake litigation process on our behalf, and they will then employ an advocate to attend court, with the full case notes. (Lender 3)

This is because possession cases occur in county courts throughout England and Wales and so an agent is often instructed who is local to that court. This means that the case file is handed through to the agent a few days before the hearing. Generally, it appears that the information that they have is adequate, although not always:

> I think often they don't have quite the level of instructions that perhaps they should have, so if you ask anything, about pattern of payments, or statement of payments, they won't have it up to date, there will be a bit of a problem. (DJ2)

[137] Moorhead and Sefton, 'Litigants in Person...' (n 134), 36.
[138] Even though Moorhead and Sefton carefully define their methodology and definition of LiP (pp 4-11) it is not evident how a defendant in a possession case who is represented by a housing adviser would be classified in their report: the answer turns on whether the representative would be entered on the court record.
[139] Moorhead and Sefton, 'Litigants in Person...' (n 134),19.

The agent is likely to have instructions which allow them some discretion to reach agreement with the borrower on the day of the hearing but it does appear that sometimes the agent is not able to reach agreement or consent to proposals because they do not have instructions on this:

> [A]gents representing mortgagees often have their hands tied and can't make decision themselves. (DDS5)

In the past, there were serious concerns raised about the quality of some of the agents. We were made aware, for example, of stories regarding unqualified individuals attempting to act as agents. One judge noted that on one such occasion,

> I decided he didn't have a right to appear... so I asked him to leave and he was fairly rude. (DJ3)

Since then the Legal Services Act 2007 has come into force (in January 2010) which regulates those persons who are able to exercise rights of audience. It is a criminal offence to represent a claimant in the court other than in accordance with this statute, and effectively this means that the individual must be legally qualified or acting under the instruction and supervision of a solicitor.[140] The agent may be legally qualified but most are training to be lawyers (perhaps awaiting a training contract or pupillage):

> All the people that we use are... they want to be barristers or solicitors. (Solicitor 2)

It appears that there has been a significant improvement in the quality of representation by agents in recent years, albeit with some variation remaining:

> I've noticed a significant improvement …there are two issues; one is the improvement of the quality of the agents and second is the…and this is significant, which is the ability to negotiate and so instead of just saying, "Well I'm instructed to…" they come with a power to negotiate a deal without having to ring up and negotiate through a third party. So that's certainly improved the process. (DJ3)

> The quality of the agents in the last five years, certainly the last two, has gone through the roof… I think you'll get the odd firm and the odd agent dotted who is, well, rubbish. But if you go to a couple of the main ones the actual quality is really, really good. Even though they might not be solicitors, but they've gone through so much training to get to that point. (Solicitor 1)

> The solicitors' agents who attend these hearings range from the recently qualified who have been unable to gain a pupillage or a training contract to very experienced lawyers. We know they are given a script from their principal with all the authorities to quote to us, most of which we have heard 20 times over. Amongst the more inexperienced advocates especially in mortgage possession hearings, they often forget that this is not a claim just about money but about evicting someone from their home. To be fair to them they usually with experience stop making such mistakes. (DJ5)[141]

[140] For discussion of rights of audience and agents see DJ Hill, 'Right of audience' (The Law Society Gazette, 23 September 2010), available at<http://perma.cc/5GDH-RET3>.
[141] The presentation of the quote was changed slightly at the pre-publication stage at the request of the interviewee.

Social Landlords

There is less consistency of practice amongst social landlords: some, particularly local authorities, will send along someone from their in-house legal department, others may instruct solicitors, and some use housing officers who are not legally qualified. Moorhead and Seftons' report stated that:

> Housing associations were reported as using non-lawyers by one judge and the standard of representation was generally felt to be very good, although technical legal questions were not usually involved.[142]

The quality of housing association officers was described by our interviewees as 'variable' (DJ5) and 'patchy' (DJ8). Similar to Moorhead and Sefton, one housing adviser commented that housing officers were not always able to deal with trickier points that were argued.

Private Landlords

Several concerns were raised in our research concerning the conduct of litigation by private landlords, including in relation to representation or rather, the lack of it. These are discussed in Chapter 6.

Absence of advice and support for the defendant: the impact on individuals

A review of literature on LiPs in 2011 found that LiPs faced a number of difficulties, including explaining the details of their cases, understanding what is happening, and feeling overwhelmed by the nature of the proceedings.[143] This sense of not understanding what was happening was referred to in the HPCDS responses:

> Most defendants that attend the court do not have a clue as to how the court works and as a result do not know how to present their case in court and cannot afford to engage the service of a solicitor or they leave it too late and not seek help with their case. (HPCDSQ 6)

In the earlier BME study defendants explained just how much worse they would have felt had they not had advice and support:

> Attenders who were represented by Duty Desk advisers felt that the outcome of the hearing was affected by the presence of the adviser and the support and advice they provided to the defendant, in addition to the representation:
>
> "Oh, I think they'd have ate me. I think it'd have been a hell of a lot worse, really bad, definitely, if it weren't for [name of duty adviser] because I hadn't got a clue and the way they were talking, saying those big posh words. I'm not, I'm not thick myself, you know, but just some of the words, you know, it's just like, 'Why don't you just say what you've got to say in English'" (Attender 10, white female)

[142] Moorhead and Sefton, 'Litigants in Person...' (n 134), 58.
[143] LiP Lit rev 5. This review was not confined to looking at housing cases.

> Duty desk advisers were viewed positively by all of the defendants who had received advice and/or been represented by an adviser. Advisers were described as 'angels sent from heaven', and 'a God send'. Defendants also stated that they did not know what would have happened without the involvement of an adviser and that they might have lost their homes without their involvement.[144]

However, for some representation meant that they felt overlooked by the judge:

> This meant that for those who had an adviser they often did not have the opportunity to put their story across or ask questions.[145]

Absence of Advice and representation: the impact on case outcomes

The LiP lit review reports that the weight of evidence indicates that lack of representation generally had a negative effect on case outcomes. In Chapter 5 we look at the impact that the advice and representation available through HPCDS has on case outcomes.

Unrepresented litigants and the impact on court resources

The LiP Lit Review noted that studies had found that LiPs create an extra burden for court staff and judges, and led to ethical challenges (treading a fine line between giving appropriate assistance and giving legal advice).[146] They are perceived as raising particular issues and challenges for the court system, including placing an increased burden on advice providers[147] and increasing the length of some hearings.[148]

DMs noted an increase in LiPs and those for whom English is not a first language, with a consequent increase in requests for support and assistance from the court desk. As will be seen in Chapter 5, court desk hours have now been reduced, which suggests that LiPs will find it more difficult to access help. It may be that the number of LiPs in relation to housing cases has not increased significantly: defendants in possession cases have always tended to be unrepresented, and, although our survey was in the specific context of possession cases, the question relating to LiPs was not so confined (and thus we cannot know whether the answer was specific or general). Some DMs did note, however, that the issue of LiPs is directly relevant to housing possession cases, particularly as regards private landlords:

> They increase the amount of time required for the hearing. (DMQ 13)

> Judges suggest that private landlord cases require more time to deal with them and therefore should have at least 15 minutes per case. (DMQ 12)

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[144] BME Study (n 7), 94.
[145] BME Study (n 7), 78.
[146] LiP Lit rev, 5.
[147] Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1995), Chapter 17, para. 20.
[148] Civil Justice Council, 'Access to Justice for Litigants in Person (or Self-Represented Litigants)', November 2011, p. 17, fn. 21.

We look more specifically at private landlords in Chapter 6.

Summary

The issue of LiPs has been of concern for some time and has been addressed in detail elsewhere.[149] In relation to housing possession cases, it is common for defendants to attend court without having first obtained legal advice and without representation at the hearing. This is often not the case for claimants (except for private landlords), leading to the potential for defendants to be placed at a disadvantage as 'one-shotters' defending themselves against 'repeat players'.[150] The key issue in these cases, however, is not the ability of defendants to compete with claimants in complex legal argument but, rather, to present the reason for the arrears and their personal circumstances to the court. While this may appear relatively straightforward, the prospect of presenting in front of a judge is daunting for many occupiers. Also, unfamiliarity with the law and its requirements means that they may not provide the court with the specific information needed to allow the judge to exercise discretion, particularly in the very short time devoted to these cases. Representation is therefore likely to help defendants in communicating the key information needed to allow the judge to make an informed decision. The following chapter explores this proposition in more detail.

[149] See, for example, J Baldwin, 'Monitoring the Rise of the Small Claims Limit: Litigants' Experiences of Different Forms of Adjudication', (Lord Chancellor's Department: London,1997); J Baldwin, 'Lay and Judicial Perspectives on the Expansion of the Small Claims Regime', *Lord Chancellor's Department Research Series* 8/02, 2002; and H Genn, *Paths to Justice: What Do People Think About Going to Law*, (Hart Publishing: Oxford, 1999).

[150] M Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95-169.

Chapter 5: Opportunities for Advice and Representation

This chapter looks at the support that is available to litigants on arrival at the court. It looks both at support available from the court itself and at the opportunities available to access advice and representation through HPCDS. The chapter also shows the impact that HPCDS have both on case outcomes and on court resources.

Support from the Court

Lord Woolf's interim report on Access to Justice emphasised the important role played by court staff, including receptionists and ushers, given that they tend to be the first port of call for court users. It stated that court assistance should be 'an invariable obligation of the courts.'[151] This view has been reiterated by the Civil Justice Council (CJC) who note that 'it is hard to overstate the importance of the role of ushers, counter staff and clerks when self-represented litigants are involved.'[152] Research by CJC found that 'face-to-face contact at court counters was highlighted as crucial, from the help that can be given in completing court forms to understanding the procedure to knowing from where advice might be obtained.'[153]

The hours of opening of court counters/desks have been reduced in many courts following a pilot scheme run by HMCTS. From September 2013 most courts operate 10.00-14.00 hours whilst others run on an appointments only basis. Our DM Survey was sent out during the period in which these reduced hours were being piloted. 75% of respondents indicated that the court counter was piloting new opening hours of 10:00-14:00 (with some offering emergency provision outside of these times), which for several represented a reduction from their previous opening times of 10:00-16:00. Commenting on these responses, HMCTS indicated to us that all courts had been given guidance that they should offer counter provision for urgent matters until at least 16:00 and should be offering emergency provision outside of those hours if a member of staff is available (as before the counters were changed). Our survey found that a few had a reception desk manned by an usher outside these hours. Others indicated that the counter worked on an appointments only system between the hours of 10:00-16:00. While the court counters are open during these times, some DMs made it clear that the pilot scheme allowed them to deal only with urgent matters (e.g. to stay evictions). HMCTS, however, made it clear to us in response to this finding that if someone cannot use alternative methods or requires assistance then they should also be seen at the counter or given an appointment. For those with an appointment, the support offered by the majority of court counters includes

[151] Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1995), Chapter 17, para. 16.
[152] Civil Justice Council, 'Access to Justice for Litigants in Person (or Self-Represented Litigants)' (n 148), para 105.
[153] Ibid, para 107(8).

directing them to advice and support services, providing them with relevant court forms and informing them of the court process.

Non-urgent matters were dealt with via correspondence or telephone, with occupiers directed to online services in order to obtain court forms. In response to this, HMCTS noted that courts should be making hard copies of the most common court forms and leaflets available outside of the counter and they should provide a hard copy if customers cannot use online services.

Four DMs stated that there was no counter/reception desk.

These changes form part of the general cuts that have had to be made within HMCTS. As the Judicial Working Paper notes that there is:

> [...] ongoing pressure on the resources of courts' and tribunals', which will affect the capacity of staff to provide litigants in person with administrative services.[154]

The services offered by the court desk apply equally to both claimants and defendants but our focus here is on how defendants access advice and representation on the day of the hearing. As mentioned below, we invited HPCDS respondents to provide an update on their responses. One respondent commented that the shorter opening times of court offices means that things are proving more difficult for clients. The assumption must be that the reduction in assistance provided by the court will have to met by other providers, of which HPCDS seem to be the most obvious.

HPCD Schemes

A brief history

There is variation in how HPCDS operate, but the norm is that a solicitor or adviser will be on duty at court on those days when housing possession cases are listed. The provision of 'free at the point of use' emergency legal advice and representation for housing possession cases has been available in some courts since the late 1980s. The 1996 Nixon Study noted the rapid growth in what were then referred to as 'duty desk schemes', from 30 in 1991 to approximately 60 in 1994, meaning that one in four courts had such schemes. In 1994 not all schemes provided advice for both mortgagors and tenants; there were half as many for tenants. More than 70% of these schemes had no funding to provide the service, and of those that were funded only one in three had substantial funding.[155]

It was Lord Woolf's call in 1999 for better access to advice for unrepresented litigants that led to increased support from government for such schemes.[156] This included the selection of thirteen HPCDS in 2001 as part of a pilot scheme on alternative ways

[154] The Judicial Working Paper (n 136), para 2.4.
[155] 1996 Nixon Study (n 86), 26.
[156] 1999 Access to Justice report.

of delivering legal services overseen by the Legal Services Commission (LSC)[157] (five schemes were newly established for this pilot, the remainder being existing schemes, some of which were expanded). The piloted duty schemes provided a quality service and received very favourable feedback from the courts:

> The pilot has demonstrated that Duty Schemes can have a positive impact on local supply, not just in terms of providing an additional emergency resource but by improving referral relationships between local agencies, sharing casework experience and joint-working on social policy issues. Feedback from the courts has suggested that Duty Schemes are beneficial not only to defendants, but also to the running of the court itself.[158]

Following this pilot there was an expansion in the number of schemes running.

Current Schemes

It is not possible to be sure how many schemes are currently running. There is no central database, no umbrella organisation for such schemes and no central administrative body to undertake strategic oversight, quality assurance or shared knowledge and training. The Legal Aid Agency (LAA), which funds the majority of the schemes, published a list in January 2014 showing 115 LAA funded schemes.[159] We had considerable difficulty in obtaining contact details for schemes in order to conduct the survey. The LSC informed us, in response to a Freedom of Information Act request, that they do not possess such a list, and we created our own database from contacting courts as well as through other referrals. In the end, we obtained contact details for 47 schemes, to whom our HPCDS survey was sent.

It is difficult, therefore, to obtain centrally recorded data about HPCDS and consequently to assess their performance. We asked DMs if legal advice, such as a HPCDS was available at the court: 15% of courts did not have a scheme providing legal advice (or, perhaps, the DM was simply not aware of such a scheme).[160] At the time of obtaining contact details for our surveys there appeared to be 189 courts in England and Wales,[161] assuming that the 15% is representative (which we cannot know), this would mean that there would be 28 courts which provide no opportunity for emergency legal support for those facing the loss of their home. On the other hand, Shelter state that HPCDS operate in 200 county courts in England and Wales.[162]

Of those who were aware of a HPCDS in their court, 15% suggested that it was not made available on every possession day. In particular, one DM stated that no advice was available for private tenants or mortgagors.

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[157] Replaced in April 2013 by the Legal Aid Agency.
[158] 2004 Myers-Wilson Study (n 130), 5.
[159] Available at <http://perma.cc/CZ48-3ZMH>.
[160] One DM claimed that they did not have a HPCDS whereas we received a response from a HPCDS representative from the same court.
[161] This was found by using the Court Finder tool, but on enquiry several had closed. In April 2014, HMCTS informed us that there are 172 county courts.
[162] 'Help for struggling homeowners' (Shelter), available at <http://perma.cc/VH2S-LD6R> (Shelter's source is not provided). It should be noted that HMCTS state that there are only 172 County Courts.

The lack of information and co-ordination of advice schemes was also noted in the report by Moorhead and Sefton:

> Another interesting phenomenon was that some court staff seemed unsure about whether duty schemes existed and so would be unlikely to refer litigants to them or be able to use the existence of duty schemes as an encouragement for litigants to attend their hearings.[163]

And by one of the judges we interviewed,

> […] don't know how it works in other, bigger courts, I suppose some of these big courts have a permanent CAB office in the court building don't they, whereas here it's all a bit hit and miss. We don't know who's turning up and then some weeks nobody turns up at all. (DJ6)

Funding and Support for Schemes

The majority of schemes are funded under the legal aid system, but not all.[164] 80% of our HPCDS respondents were funded by the LSC, 13% by the local authority and 7% by the Department for Communities and Local Government. One scheme had no funding and all participants were volunteers. Under current funding arrangements,[165] HPCDS funded by the LAA are established initially through invitations to tender.[166] The successful applicant organisation must operate the scheme (although agents can be used to assist in its delivery) and employ a 'Housing and Debt Supervisor' to oversee it. Once operational, the HPCDS must offer advice and advocacy immediately prior to and during the hearing as well as post hearing assistance and referrals to other advice agencies to anyone threatened with the immediate loss of their home because of possession proceedings.[167] The service is not means tested but HPCDS do assess whether clients would have been eligible for legal aid.

HPCDS tend to be run by either a local firm of solicitors or by an independent not for profit (NfP) agency such as Law Centres, members of AdviceUK, Citizens Advice Bureaux or Shelter.[168] Most of the schemes who responded to the survey were set up between 2002 and 2010 which corresponds with the new funding offered by the LSC for such schemes following its pilot in 2002/3. Of the 45 DMs who gave the contact details of the HPCDS in their court, 36% were operated by a firm or rota of solicitors, 26% by CAB, 22% by a law centre or independent advice service and 16% by Shelter. Most (around 80%) are run on a single agency basis. Those run on a multi-agency basis were constituted by a mix of solicitors' firms, law centres, CAB, Shelter and the local authority. Of these, 33% were led by a solicitors' firm, 27% by a CAB, 20% by a law centre, and 20% by Shelter.

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[163] Moorhead and Sefton, 'Litigants in Person...' (n 134), 56.
[164] According to the Legal Aid Agency, independent schemes operate in Reigate, Exeter, Chelmsford, Ipswich, Reading, Milton Keynes, Willesden and Wigan. No scheme of any kind operates in Mayor's and City of London County Court as a result of the small number of possession claims. See Legal Aid Agency, 'Housing Possession Court Duty Scheme: Guidance for Service Providers', April 2013, 11.
[165] See the 2013 Standard Civil Contract Specification.
[166] See the Ministry of Justice website at <http://perma.cc/PE3Q-JNMN>.
[167] 2013 Standard Civil Contract Specification, para. 10.36.
[168] 'Geography of Advice: An Overview of the Challenges Facing the Community Legal Service' (Citizens Advice: London, 2004), paras. 2.22 and 2.23.

The majority of HPCDS representatives (77%) had been working for the scheme for more than two years, with 47% working there for more than five years.

In terms of the support offered to the HPCDS by the court in which it operates, the majority of DMs and HPCDS representatives indicated that court staff were willing to direct occupiers to the advice service. Nearly all courts also provided HPCDS with a private room, but a few did not. The majority also supplied case lists to the HPCDS, although fewer DM respondents thought this was the case than HPCDS respondents. Other resources (such as storage space, phones and IT facilities) were much less frequently supplied. The importance of these latter resources was noted in the qualitative responses, with one HPCDS representative noting that, "access to a phone is often essential...". Overall, about 75% of the HPCDS representatives considered the services and support offered by the court to be adequate. Communication between the court and HPCDS is achieved mainly through correspondence, with 90% of DMs indicating that they communicate via letter or email. Some courts communicated face-to-face on possession days when necessary, while others also invited the HPCDS to the bi-annual court users meeting.

In terms of promoting the service, the most common method was through the court sending information to occupiers (77%) and through local advice agencies (73%) as well as leaflets distributed locally (27%) and articles written in the local media (23%). The question arises as to whether receipt of information from the court about an independent advice service is appropriate. In particular, it may lead to occupiers ignoring such information or considering it to be part of the legal process rather than a form of assistance independent of the court. One housing adviser we interviewed suggested that the low defendant attendance rate may be linked to the absence of funding for publicity about legal advice:

> […] we used to get a publicity budget and with the publicity budget we actually created leaflets that were, sort of, locally specific that we sent out to libraries and GP practices and everything, that were aimed at making people less afraid of coming to court … Since there's been a, sort of, national scheme, all of that is … looked after centrally, which tends to mean that there are posters in court buildings and when possession claims online issue the proceedings with a particular sort of claim comes out a list of voluntary agencies in the area, and I've taken it up with the court saying "Why…why do they do this? Why are they telling people to go to people who can't help them?" You know, the people with LSC housing contracts are the ones that should be on the list because if you go to them they can actually do something about it… (DDS1)

Client Support

Figures regarding the number defendants receiving advice and representation from HPCDS are not available through any formal centralised source.

From responses to our HPCDS survey, the majority of schemes see 5-9 defendants during a typical possession list. There was a wide variation as to the percentage of clients that typically fell within different housing categories, with some schemes seeing more tenants than mortgagees, and vice versa. What was almost always the

case, however, was that they advised fewer private tenants than other defendant types. One scheme stated that it did not cover mortgages.

Most schemes (80%) indicated that in the majority of cases (75%) they spend time negotiating with the claimant (e.g. the mortgage lender, landlord, etc.) and that the agreement they reach tends to be reflected in the order made by the judge (in over 75% of such cases).

The majority of defendants that consult the scheme are offered representation at the hearing.[169] Perhaps surprisingly, some occupiers refuse the offer of representation. The reasons given include lack of knowledge of the legal process, a preference for self-representation and a belief that it might prolong the proceedings. The most common reason, however, was that an agreement had already been reached with the claimant. As will be explored further below, this is of concern for the reason that some occupiers might agree to repayment schemes that they cannot really afford.

Our survey showed that the most common amount of time spent advising clients was 10-14 minutes but there is considerable variation:

> That's a bit like asking me how long a piece of string is because it depends on how busy the court is. If it's a really quiet day and a lot of people don't turn up then you could get 10 minutes with them. If it's really, really busy then you'd get five if you were lucky. You just have to quickly assess what you need to know. (DDS2)

This was not always considered adequate:

> It really is very quick-fire stuff and you're trying to get to another issue extremely quickly. (DDS3)

> Discretion tends to be exercised benignly, wisely or harshly according to the judge's outlook. If the judge is of a harsh disposition, a detailed and well prepared case is imperative, and this requires more work than can be given in the heat of a busy morning with multiple clients and, often, little in the way of privacy in which to discuss confidential personal matters. (HPCDSQ 1)

> I've taken instructions walking down the corridor before because sometimes that would depend on the judge as well. Sometimes the judge is prepared to give you more time and some of them are not so keen. (DDS2)

The impact of HPCDS involvement on Case Outcomes

Earlier reports have found HPCDS to provide a 'valuable emergency service' for occupiers but they also brought benefits to courts and functioned as gateways to other legal resources.[170] In particular, the report found that outright possession orders were granted in only 8% of cases that were assisted by the HPCDS, while Shelter suggest that HPCDS have been able to prevent immediate repossession in

[169] One respondent made it clear that it is not technically 'representation' but rather the advisor putting forward the occupier's case if they are not able to themselves.
[170] 2004 Myers-Wilson Study (n 130),5.

up to 85% of cases.[171] On a more local level, it was claimed that 2,500 households in the East Midlands avoided losing their homes in 2009 as a result of the HPCDS.[172]

All of the representatives of HPCDS who responded to the survey question whether representation affects the outcome of the case stated that it did. In particular, it was frequently stated that it can ensure that better results are achieved for the defendant. As one housing adviser put it:

> Representation nearly always produces a positive outcome for the clients. (HPCDSQ Update 5)

Many respondents commented on the fact that defendants will arrive at court without prior legal representation and under enormous stress. Unaware of what issues are important and relevant to their case defendants are likely to agree to unaffordable and unrealistic arrangements:

> [L]egal knowledge and expertise is crucial in matters of possession. Without this knowledge, clients could find themselves being pressured into agreeing to something they cannot afford or don't understand. (HPCDSQ 18)

> [...] in mortgage cases, the defendants are usually willing to offer more than they can afford to try and keep their home but, after input from the solicitor, we are usually able to negotiate a more realistic amount that the client can really afford. (HPCDSQ 27)

One reported that in more than 75% of cases the client either retains the accommodation or homelessness is delayed, and that in a significant number of both mortgage and local authority cases the figure for repayment of arrears was reduced to affordable levels. Others also mentioned that outright possession is less likely, with adjournment or suspension on (better) terms resulting. Two respondents commented that whereas mortgage lenders may press for payment over a relatively short period, the adviser is able to argue for the remaining term of the mortgage (the '*Norgan* principle') to be followed, giving a longer time for payment.

It was made clear in the responses to the HPCDSQ that where a HPCDS representative is able to negotiate a repayment scheme with the claimant prior to entering the hearing room, it is extremely likely that the judge will implement that agreement (90% of HPCDSQ respondents indicated that a negotiated agreement will be reflected in the order made by the judge in over 75% of cases).

One of the housing advisers that we interviewed stressed the impact that attending and seeking legal advice has:

> I think more should be done to encourage people to come…because, if you don't go and your landlord asks for a possession order, your landlord will get a possession order. If you do go and you see the duty advisor and the landlord asks for a possession order then nine times out of ten they won't get one, not then anyway… (DDS1)

[171] 'Help for struggling homeowners' (Shelter), n 162.
[172] 'Free legal aid helped 2,500 keep their homes' (Nottingham Post, 22 April 2009), available at<http://perma.cc/RZ3S-WUNW>.

There was also judicial support for the positive impact of representation on outcomes:

> The duty solicitor scheme is valuable, certainly. I would not want to see that diminish, although it has, inevitably, because of the funding elements that go with it, because it is valuable, and the defendant will take benefit from it. If the defendant has an advocate, be it a duty solicitor or whatever, probably has a greater chance of having the discretion of the court in its favour rather than not, because you're hearing, in a logical form, relevant information which you can easily analyse. (DJ8)

> You have the benefit of the duty solicitors, which I think does impact on how people exercise their discretion as well. (DJ2)

It was also said that HPCDS representatives can communicate more effectively because of their specialist knowledge of the law as well as personal or local knowledge about judges. A HPCDS advisor is likely to have knowledge of the particular preferences of individual judges. As one HPCDS representative noted,

> [M]ost judges have preferences and these can be taken account of when making submissions. Specialist knowledge, quick access to resources and training all enable advisors to make effective submissions. (HPCDSQ 17)

Having knowledge of the preferences of particular judges is important given evidence which suggests that different judges approach these cases in different ways. The 2005 Hunter Study, for example, found that:

> [...] the particular personal characteristics and responses of judges combined with individuals' decision-making goals were found to be influential in the decision-making process and indicate the importance of individual agency in the exercise of discretion.[173]

This proposition was supported by the responses to the HPCDSQ with 71% of respondents indicating that the outcome of the case may be affected by the judge who hears it. Respondents suggested that judges vary in their leniency and in their willingness to hear evidence, and that some of this variation is based on judges' levels of experience.

> Certain judges are well known for being less defendant-friendly. The outcome is likely to be less positive/harsher on the defendant if a case is heard by those particular judges. (HPCDSQ 30)

> Some judges are more sympathetic towards the tenant and vice versa. (HPCDSQ 5)

> Judges with more experience are likely to make more considered decisions based on their experience in matters. (HPCDSQ 31)

One noted that if a judge is of a harsh disposition, a well prepared case is essential but that this requires more work than is possible during a busy morning with lots of clients and little privacy to discussion confidential personal matters.

This finding was supported by our interview data with one lender noting that:

[173] 2005 Hunter Study (n 84), 105.

> I suppose in any group there are mavericks, sometimes the maverickness applies to a complete court, on other occasions it will be individual district judges within a particular court... the first thing the advocates do when they turn up is look at the court list, to see who is hearing their case, and they will either be encouraged, or they'll shrug their shoulders and know that they're not going to get an order regardless. (Lender 3)

The significance of this was made clear by one of the respondents:

> Each judge has his/her own view on how his/her discretion should be exercised and in our view this leads to inconsistency between judges. (HPCDSQ 8).

Courts appreciation of HPCDS

Our research supports the earlier findings of the Myers-Wilson study of HPCDS pilot schemes that these schemes add significant value both to those threatened with the loss of their home and to the court system more generally.

Evidence to support this proposition was offered by the DMs who responded to the survey. While some were not aware of the quality of the service offered by the HPCDS, over 40% considered it to be excellent with a further 23% considering it to be better than average. None rated it as poor. Several DMs noted that advice services have a crucial role to play in ameliorating the impact of LiPs. As one DM stated:

> [I]t is crucial for Shelter/CAB to be present at the court enabling cases to progress more smoothly. (DMQ 19)

Judges also considered the schemes to be valuable:

> It does make a difference. I personally haven't been in a court where there is not a good duty advice scheme, so I can only imagine what that would be like. (DJ2)

> We have an excellent duty adviser scheme at this court. We do rely upon them when a defendant attends to explore the full circumstances of the Defendant and to then present the cogent issues to us for consideration. Most duty advisers are experienced housing lawyers so we are fortunate to receive such a good service from them. (DJ5)[174]

> They are considered by the judges to be a great advantage and certainly are for the defendants. (DJ9)

While it seems undeniable that HPCDS are of great benefit to both occupiers and the courts, there is the potential for such schemes to be used by government as a 'fig leaf' to hide the lack of more substantial and expensive legal advice and representation. In particular, it would seem that, following the changes made recently to legal aid, specialist housing and debt advice is dwindling, leaving HPCDS as the last and only source of advice for occupiers.

[174] The presentation of the quote was changed slightly at the pre-publication stage at the request of the interviewee.

Since the Legal Aid Reforms of April 2013

In April 2013, significant cuts were made to the availability of legal aid. It does, however, remain available for those at risk of losing their home[175] and has not had a *direct* impact on the funding of HPCDS. The welfare changes mentioned in Chapter 2 have, however, had an impact on the work of HPCDS. We invited those who responded to the survey to comment on whether structural and legal changes since the survey had affected their work. Before we report on some of their responses it is worth noting the context in which they work. Housing possession is often one amongst many problems facing defendants. This is referred to in the Myers-Wilson study:

> […] at least 57% of all clients seen under the pilot had other legal problems. The most frequently occurring problem, in 28% of cases, related to welfare benefits. When this was discussed with the pilot Schemes they reported that in the majority of cases Housing Benefit was the issue. All schemes have reported repeated situations of clients facing possession proceedings primarily on account of problems with obtaining Housing Benefit from the local council.[176]

One of our HPCDS respondents expressed it thus:

> HPCDS are only effective if they operate as part of a well-resourced network of advice and support services. (HPCDSQ Update 3)

One of the effects of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) is that welfare benefits, debt and employment advice are effectively removed from the scope of legal aid. This has an impact on HPCDS. As one housing adviser reports: 'there are very few specialist advisers to refer clients to' (HPCDSQ Update 2). Another states:

> [I]t is now very difficult to make referrals from HPCDS to agencies with the specialist expertise to resolve debt and benefit issues in particular, meaning that it is less likely that a long-term solution can be found to the presenting housing problem. Also, as contracted housing advice providers can no longer tackle housing benefit problems the capacity of the sector to provide an effective response to our clients' multi-faceted legal problems has been significantly reduced. The legal aid scheme is now focussed on emergency and complex housing issues. We have almost entirely lost the ability to do 'preventative' work by resolving the legal issues that lead to housing crises. This undermines the ability of HPCDSs to act both as a safety net and as a gateway to specialist advice services. (HPCDSQ Update 3)

There is also less help available elsewhere within the system:

> [T]he court lists going ahead seem to be a lot busier and we are seeing more people at the schemes over the past 12 months, it's very frustrating that there are people with complex problems who cannot find specialist advice and are dealing with volunteers who are giving it their best efforts but lack the experience and knowledge of the law to deal with them more comprehensively. (HPCDSQ Update 2)

This may lead to more case adjournments, with consequent resource implications:

[175] LASPO, Sch. 1, Part 1, para. 33(1).
[176] 2004 Myers-Wilson Study (n 130), 42.

> Many housing advice providers can, through legal aid or other funding, help to raise a defence to a possession claim, but they do not have the resources to resolve the underlying problems. Some judges are therefore becoming frustrated by repeat adjournments, by an increase in litigants in person, and by the inability of defendants to access help before they attend court. (HPCDSQ Update 3)

Lists are busier: one housing adviser reports a 'sharp increase in demand' (HPCDSQ Update 3) (projected HPCDS figures suggest a rise in one court from 561 cases in 2011/12 to 776 in 2013/2014, and in another court a rise from 1025 in 2011/12 to 1666 in 2013/2014). On the other hand, another respondent stated that an anticipated increase in possession claims due to the welfare benefit advice restrictions in relation to legal aid had not materialised, although there were more cases involving the bedroom tax (HPCDSQ Update 5).

Summary

While we do not have data regarding the impact of recent welfare and legal aid reforms on the number of possession cases, the assumption must be that an inability to access debt and other advice may well lead to more occupiers falling into arrears and being threatened with possession. These occupiers will receive court forms that direct them to advice providers but, as we have suggested above, this blurs the lines between the legal process and the provision of independent advice. This may well discourage some occupiers from seeking advice prior to attending the court. For many occupiers, therefore, the HPCDS will prove to be the only source of advice they are able to access but for some this may be too late in this process. For others, our findings suggest that they may arrive at court to discover that there is no HPCDS available to them. The inconsistent provision of HPCDS is of particular concern given that representation by a duty solicitor can have a significant and beneficial impact on the outcome of their case. The reason for this is not simply as a result of convincing the judge that possession ought to be delayed but through negotiation with the claimant prior to entering the hearing room.

This ability to reach a realistic and affordable agreement with the claimant suggests that court action could have been avoided in these cases. Some may argue that it is only the threat of a court order that compels some occupiers to lift their heads out of the sand but it seems that efforts made by claimants under the Protocols to reach agreement are not as effective as they might be. This may be due to the fact that occupiers feel unable to negotiate with these institutions, particularly without the support provided by agencies such as the HPCDS. It suggests also that had the defendant sought advice earlier in the process, then such an agreement could have been secured without the need for court proceedings. It is possible to argue, therefore, that one possible means of reducing the burden on court resources is to increase the availability of specialist housing advice prior to court action. To this end, the cuts in legal aid and reduction in court resources are counterproductive given that they seem likely only to increase the number of possession cases.

Chapter 6: Private Landlords

It became apparent during the research that private landlord cases raised unique challenges for the courts. For that reason, we are devoting this chapter to possession claims brought by private landlords.

Bringing Possession Claims

Private landlords can bring possession claims using either the standard procedure or the accelerated possession procedure. In 2013, there were 23,196 possession claims brought by private landlords using the standard procedure, and 34,080 claims using the accelerated procedure (the latter figures include both private and social landlords).[177]

The process involved with the standard procedure is set out in Chapter 2. In the context of private landlord claims the most likely ground to seek possession under the standard procedure is Ground 8, which gives a mandatory ground for possession provided that there are at least 8 weeks of rent arrears.[178]

The Accelerated Possession Procedure

The accelerated possession procedure can be used to recover possession of an 'assured shorthold' tenancy provided that there was a written tenancy agreement and two months' notice was given and has expired. In outline, the court 'shall' make an order for possession under section 21 of the Housing Act 1988 if it is an assured shorthold tenancy and it is satisfied that the correct notice was given. There is no need for any tenant default or rent arrears. The notice provisions are complex, as mentioned further below. The order cannot take effect within six months of the beginning of the tenancy, and if the tenancy was a fixed term tenancy the contractual term must have ended. Possession is automatic provided that the process is followed correctly and the requirements are met. The claim form used for the accelerated procedure is Form N5B, which requires a copy of the notice stating that possession is required to be attached, together with proof of service.

The accelerated possession procedure was introduced in 1993, enabling a private landlord to obtain an order for possession by paper without the parties having to attend court and have a hearing. It can only be used to recover possession and not, for example, also to recover rent arrears. In practice many landlords appear to use the accelerated possession procedure even when there are rent arrears, recognising

[177] Ministry of Justice, *Mortgage and landlord possession - statistical tables - quarter 4 - 2013* (Excel), Table 5 (n 21).
[178] Housing Act 1988, Sch 2. The length of time for which unpaid rent is required under G8 depends on the rent payment period; it is 8 weeks for rent paid weekly or fortnightly, and two months for rent paid monthly.

that it is unlikely that the arrears will be paid and that this is the quickest way to cut their losses.[179] This was confirmed in our interviews:

> There aren't many private landlords who actually issue on fault grounds nowadays, even if they're owed money because they know the quickest way is to use the accelerated procedure. (DDS1)

The accelerated possession procedure can be used by private landlords and by social landlords. Many housing association tenancies will be assured tenancies, and the accelerated possession procedure cannot be used for these but some housing association tenants do have assured shortholds, for example, as starter tenancies for the first year or as demoted tenancies. We do not know what proportion of accelerated possession claims are brought by social landlords but Shelter claims that 'this procedure is almost exclusively used in the private rented sector, although a small proportion of social tenancies may also be dealt with in this way.'[180]

The form of section 21 notice required depends upon whether the tenancy began as a fixed term or a periodic tenancy. For fixed term tenancies, the notice requirements are in s 21(1)(b) and state that the tenant must be given not less than two months' notice stating that the landlord requires possession. The section 21 notice procedure has proven particularly troublesome in relation to periodic tenancies. This is because of the wording used in s 21(4) which requires that the notice must state the date on which possession is required which must be after 'a date specified in the notice, being the last day of a period of the tenancy and not earlier than two months after the date the notice was given'. This has been strictly interpreted by the courts, so that, for example, in the case of *Fernandez v McDonald* a notice that gave as the date for possession the day *after* the last day of the tenancy was held invalid because s 21(4) requires the date specified to be *the last day of a period of the tenancy*.[181] Until recently, it was generally understood that the section 21(4) form of notice also had to be used for a tenancy that began as a fixed term tenancy but has become a periodic tenancy (as occurs frequently). However, a recent Court of Appeal case, *Spencer v Taylor*, enables the more straightforward notice provisions of section 21(1)(b) to be used where the tenancy commenced as a fixed term letting, even if it is, at the time of serving notice, a periodic tenancy.[182] But over the years, many possession claims have been dismissed because of the section 21(4) 'trap', and the problem still remains for tenancies that began as period tenancies.

Claimants must follow the procedures set out in the Civil Procedure Rules, Part 55, II. The claim form (N5B) contains a statement for the defendant:

> [...] that the court will decide whether or not you have to leave the premises and, if so, when. There will not normally be a court hearing. You must act immediately

When the claim form is issued, the claimant is given a 'notice of issue of application' (Form N206A).

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[179] D Levison, J Barelli and G Lawton, 'The Accelerated Possession Procedure: the Experience of Landlords and Tenants' (DETR, 1998).
[180] Shelter, *Eviction Risk Monitor*, December 2012, 5. Available at<http://perma.cc/HD3Y-9ER7>.
[181] [2003] EWCA Civ 1219, [2004] 1 WLR 1027.
[182] [2013] EWCA Civ 1600.

The Defendant who wishes to defend the claim must file a defence form N11B within 14 days after service of the claim form.[183] Much of Form N11B is concerned with whether the defendant agrees with the information provided by the claimant on the particulars of claim form. Towards the end of the defence form, however, the defendant is asked whether there is some reason why the claimant is not entitled to possession[184] and, if a possession order were to be made, whether the defendant would suffer exceptional hardship if made to leave the premises within 14 days.[185] The defendant is then invited to indicate how long they wish to remain in the premises (with a limit of 42 days after the order is made).

If the defendant does not reply within the 14 day deadline then the claimant can send the tear off slip at the bottom of Form N206A which requests that an order for possession and costs be made by the court.[186]

Provided that the judge is satisfied that the claim form was served and that the claimant has established that an entitlement to recover possession under the section, the judge will make an order for possession without requiring the attendance of the parties.[187] If possession is ordered, the defendant is sent Form N26A which informs them of the order for possession and the date by which they have to leave the premises.

Court time

Despite the apparent saving made in terms of court time by the accelerated procedure, our findings indicate that cases involving private landlords take up a disproportionate amount of court time and resources. In our survey and interview questions, no distinction was made between cases involving the standard procedure and accelerated possession cases but it was apparent that even in relation to the latter, a court hearing was sometimes necessary.

As shown in Chapter 3, the time spent per case is on average longer for private landlords than for other tenancy cases and for mortgage cases. Possible explanations for this are illustrated in the following quotes, and are closely linked to the fact that private landlords are often LiPs and do not understand the process:

> […] everything, unless I say otherwise, gets six minutes, so ten in an hour, five slots in a day. Private landlords get ten minutes because they're always wrong. (DJ4)

> I will always try and spend some time with them to explain what the situation is. For example, on an accelerated case that has originally come in as an accelerated possession but hasn't been granted for some reason because there's a problem and it's been listed for a hearing, sometimes when it comes to me before the hearing the flaw is fatal and there's nothing that can be done. Generally it's because it is a claim which is based on an incorrect or totally invalid notice. It is important therefore to spend time with the landlord to explain why you are dismissing the claim. You are saying "Well, you've got to go back to square one and start all over again." (DJ9)

[183] CPR (n 72), 55.14.
[184] Form N11B, question 9. Available at <http://perma.cc/SW2C-MZAV>.
[185] Ibid, question 10.
[186] CPR (n 72), 55, 55.15, 2 (possession claims).
[187] Ibid, 55.17.

> Private landlord cases are never block listed. They are always given a specific time estimate, whether it is 15 minutes or otherwise, so that you can devote more time to them because generally they are in person and they don't always understand the technicalities of the rules, legislation or the requirements. (DJ9)

Similar views were expressed by the majority of DMs who said that LiPs, including private landlords, present particular challenges to the court. The nature of those challenges is reflected in the some of the statements provided by DMs:

> Hearings tend to take longer to be heard which has an impact on the number of cases heard overall and waiting times can therefore increase. Litigants in person are often unprepared and have unrealistic expectations. They are sometimes unable to communicate and articulate what they want either due to lack of knowledge or through nerves or frustration and they can be very emotional. (DMQ 4)

Failure to follow the right procedures

It is evident that private landlord cases are perceived as problematic by judges. Whereas institutional claimants will normally be familiar with the possession process as 'repeat players', this is much less likely to be true of private landlords. Most of the issues raised relate to the fact that private landlords often do not understand the process. The report by Moorhead and Sefton similarly found that judges reported on real problems with private landlord cases.[188]

Some of these problems relate to a lack of preparedness on the part of private landlords. Unlike in the mortgage and social landlord sectors, there is no pre-action protocol in place and hence, no requirement on the part of the parties to communicate with each other,

> Social landlords are much better prepared, both in the way they prepare the cases, and talk to the defendants; whereas with the private rental cases there's been very little exchange in information, and they are apt to get it wrong. (DJ1)

Despite the obvious benefits associated with the accelerated procedure, some private landlords seem unaware of it or fail to use the paper based process when it is suitable:

> They use the standard procedure instead of going for accelerated possession, which is a complete waste of money. I said to one representative, I know he was an agent, I said, "Well why do you keep coming to these hearings?" "Well the solicitor says we need to." I said, "But you could do accelerated possession." "What's that?" (DJ3)

> They are unsure how to proceed i.e. normal possession or accelerated. They do not know whether to claim for rent arrears as well as possession. Insufficient notice given to the tenants, incorrect documentation sent with the claim form to court. (DMQ 37)[189]

[188] Moorhead and Sefton, 'Litigants in Person...' (n 134), 59.
[189] This was in response to a question about challenges presented by LiPs (generally) but the comments appear to relate to private landlord claimants.

And when the accelerated procedure is used, there are frequently failures to comply with its requirements:

> And you say you really need to go and seek legal advice, and they get legal advice, and the advice is wrong. I think the main problem is, the main reason you have private landlords possession cases being heard is the accelerated procedure, they haven't complied with it properly, they haven't fulfilled the criteria, so it's referred to a hearing. (DJ2)

In cases involving a hearing there were many comments made to us that private landlords have not filled in forms correctly or supplied the correct information:

> There are some private landlords, who come in, and it's a claim under Ground 8, and you say to them, "Where's the rent statement?" "Oh." "Well what were the rent arrears, at the date of service of notice?" "Oh, I don't know." They haven't got a clue. (DJ2)

> Shambolic. Don't know what they're doing. They can't fill in the claim forms, they don't plead the grounds, their notices are all wrong. They haven't served the notice, they haven't got a schedule of arrears. It's all hopeless. (DJ4)

In respect of the reasons for this inability to follow the correct procedure, a number of respondents indicated that it was due to the lack of or poor quality of advice available to private landlords:

> Solicitors, there are very poor solicitors doing this. Even the companies which are set up to assist landlords sometimes get it wrong. They serve by post when there's nothing in the tenancy agreement allowing them to serve by post. (DJ4)

One DM noted that this was due, in part, to the complexity of the court forms:

> [A]s litigants in person often send incorrect information to the court, give insufficient notice to tenants etc then perhaps the notes for guidance need simplifying. Simple fact sheets for litigants in person. Court forms are too lengthy and should be simplified. (DMQ 37)

Representation

Some private landlords are represented by solicitors, but it appears that many are LiPs or have letting agents acting on their behalf. The problem with letting agents acting is that they have no rights of audience, and this was referred to on several occasions:[190]

> [Letting agents are not allowed to represent landlords]… no right of audience. Yes we do get letting agents issuing and signing possession proceedings and if we see them we strike them out because they've no right to do that, the agents. (DJ3)

Similar comments were made by DJ2 in relation to agents attempting to represent landlords, but also signing forms on the landlord's behalf. Another judge described the quality of representation for private landlords as 'hopeless' (DJ4).

[190] A problem also noted by Moorhead and Sefton, 'Litigants in Person...' (n 134), 59.

It is easy to see how these kinds of mistakes are made, however. For example, Form N5B is required to be signed by the claimant, or a person duly authorised by the claimant. Following the signature for the latter there are these options presented:

> (Claimant) (Litigation friend (where claimant is a child or a protected party)) (Claimant's solicitor)

It is not at all obvious whether a letting agent can be 'duly authorised' for these purposes.

Section 21

It may be that the recent Court of Appeal case (*Spencer v Taylor*)[191] will reduce some of the problems with section 21 but it is unlikely to remove them. Many interviewees and respondents mentioned the problems caused by section 21 prior to the Court of Appeal case:

> So Section 21 (4) is … a notice that doesn't work. That landlords get it wrong time after time after time. And it just creates a mountain of debt as a consequence. So if they reform that … that would save money on a grandiose scale. (DJ5)

Following the decision, the same judge had this to say:

> Section 21(4) has been a nightmare piece of legislation. It has probably accounted for more hearings than another other section on the statute book. *Spencer v Taylor* has made the landlord's position much easier so that we have noticed that the failure rate of claims under the accelerated procedure has dropped by about 2/3rds. Typically if a claim fails under the accelerated procedure then a landlord may be required to serve a fresh notice and then recommence his claim for possession. If a tenant has decided not to pay rent then a failed claim could result in an escalating arrears figure that can easily reach £10,000. An efficient accelerated procedure undoubtedly helps the return of housing stock to the market for new tenants and will of course encourage landlords to let if they know possession can be recovered quickly in appropriate circumstances. (DJ5)

Summary

It is impossible to know how many private landlord cases proceed smoothly under the accelerated process but our findings suggest that it is not uncommon for the process to fall short of its objective of avoiding the need for a court hearing. This may be due to a number of reasons including the landlord's failure to comply with its requirements or failure to use it in the first place.

Whether it is the accelerated or standard procedure that has been used, the comments made by respondents suggest that private landlords who do have to attend a court hearing often present with little if any knowledge of the legal requirements or court processes. Many of the judges interviewed were sympathetic to the landlord's plight, taking the time to explain to them where they had gone

[191] [2013] EWCA Civ 1600.

wrong, one assumes in the hope that they will get it right next time and save court time in the future. In recognition of the regularity of this occurrence, many courts list private landlord cases for longer than other possession hearings, sometimes up to three times longer.

While it appears that private landlord cases requiring a hearing are less numerous than others (approximately 23,000 cases under the standard procedure as opposed to 53,000 mortgage cases and 113,000 social landlord standard possession cases in 2013),[192] there is clear evidence in our findings that many of these cases are taking up a disproportionate amount of court time. It would seem, therefore, that there is potential for significant savings in terms of court resources. Agreement on how to achieve that, however, may not be straightforward.

The need for a review of the private rented sector has been recognised by the government. Following a report by the House of Commons Communities and Local Government Committee, the government has established a working party,

> to examine proposals to speed up the process of evicting during a tenancy tenants who do not pay rent promptly or fail to meet other contractual obligations. The ability to secure eviction more quickly for non payment of rent will encourage landlords to make properties available on longer tenancies.[193]

The focus for this working party, however, appears to be on making possession easier for private landlords following evidence presented to the committee which suggested that it can take several months to evict 'bad tenants'.[194] The findings of this report, however, suggest that the working party might also like to investigate the accelerated process of possession and the inability of landlords to use it effectively. This appears to be due to a lack of accessible and high quality advice. Rather than seeking to reform the law, the working party should perhaps focus on how to educate private landlords in making use of existing procedures.

[192] Ministry of Justice, *Mortgage and Landlord Possession Statistics Quarterly*(n 2).
[193] House of Commons Communities and Local Government Committee, 'The Private Rented Sector', First Report of Session 2013-14, para. 97.
[194] Ibid, para. 95.

Chapter 7: Key Findings and Issues for Review

The Civil Justice Council (CJC) states that basic principles for achieving effective access to justice include the availability of objective advice, and the demystification of the legal process, noting that technology and written materials are no substitute for personal support.[195] It is of concern, therefore, that the findings of this research reveal that aspects of the housing possession process fall short in attaining these principles. These findings are set out below and we identify also a number of areas that require further research or review.

Key findings

The Position Prior to the Court Hearing

- The legal process does not encourage claimants (lenders or landlords) to share any information they may have concerning the personal circumstances of occupiers. Some lenders and landlords go to great lengths to communicate with occupiers so as to agree the repayment of arrears and thereby avoid possession. If the occupier engages with them then they will have a significant amount of information regarding the occupier's circumstances, both personal and financial. Neither the claim forms nor the protocols encourage the dissemination of this information despite its potential significance to the case (for example, in relation to possible Article 8 issues).

- Our findings suggest that both the Pre-Action Protocol for Possession Claims Based on Rent Arrears (RPAP) and the Pre-Action Protocol for Possession Claims Based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property (MPAP) have had a beneficial impact on the possession process, encouraging greater communication between the parties and better preparedness on the part of claimants.

- There is evidence of some claimants, however, failing to adhere to the spirit of the Protocols, leading to them becoming little more than a 'box ticking' exercise.

- Court forms do not encourage occupiers to provide information relating to anything other than financial matters and, in any event, few defence forms are filed.

- The information deficit apparent within the legal process is significant for a number of reasons including the potential for some defendants to miss out on the opportunity to raise a substantive defence to possession (e.g. an Article 8

[195] Civil Justice Council, 'Access to Justice for Litigants in Person (or Self-Represented Litigants)' (n 148), para. 20.

defence). Given that many defendants do not seek legal advice prior to court action, they are unlikely to be aware of matters such as Article 8 and they are not encouraged to provide information relevant to it by the court forms.

- Lenders raised particular concerns about how to deal with issues surrounding mental health.

- There is a lack of 'joined up thinking' within the legal process with the result that information that could assist decision making is not always available. In addition to the lack of reference to factors relevant to the Article 8 defence, court forms also fail to refer to the Protocols. If questions were asked of the occupier in respect of the lender/landlord's behaviour prior to court action then the judge may be put on notice that a breach of the Protocol may have occurred.

The Court Hearing

- Housing possession cases are block listed so that each case is scheduled to last for only a few minutes. Block listing can cause frustration on the part of occupiers who attend court expecting to have their case heard at the beginning of the period notified to them but who may end up waiting for over an hour before being called in.

- The amount of time devoted to these cases (on average, 5-6 minutes for mortgage and social landlord cases) fails to recognise the importance that occupiers attach to the prospect of losing their home, as well as the wider social and economic implications of eviction.

- Occupiers have an opportunity to tell their stories to the judge in court, but attendance rates appear to be low (exact numbers are not available).

- Some claimants routinely discourage occupiers from attending the court hearing.

- If attendance rates were to increase this would put a tremendous strain on court resources. Current listing practices depend upon poor levels of attendance.

- Knowledge by the judge of the defendant's circumstances, particularly if coupled with attendance, can have a beneficial impact on the outcome of the hearing. It is of concern therefore that few defence forms are filed and attendance levels are disappointingly low.

- There is evidence to suggest that information submitted by both claimants and defendants does not always make it into the judge's file.

- Cases appear to be often adjourned, but no statistics are available that specify what proportion of cases are adjourned and how many occasions the same case gets adjourned.

- There is a relationship between attendance by the defendant and better outcomes for the defendant. However, further research needs to be conducted to investigate the explanation for this and the extent to which this effect is attributable to the ability to access free legal advice and representation.

The Impact of Legal Advice and Representation

- The majority of occupiers who attend court have not sought legal advice prior to the court hearing. This is despite being advised to do so by the court forms.
- Court reception desks are able to offer limited assistance to court users.
- Opening hours of many court reception desks were reduced during 2013, and some courts do not have desks.
- Many occupiers find attending court and presenting in front of a judge to be a daunting prospect. They are also unlikely to be aware of the law and the requirements of the process. This can lead to an inability to relay to the judge the information needed to enable an informed decision to be made, especially given the short time devoted to these cases. It seems therefore, that being represented by someone familiar with both the legal issues and the preferences of the particular judge can assist defendants in communicating key information
- HPCDS representatives are often able to negotiate repayment agreements with the claimant at court prior to the hearing. This suggests that earlier dialogue could remove the need for court action. Some claimants, however, may well argue that without the threat of court action, many occupiers will refuse to engage with them.
- The provision of free at the point of use emergency legal advice is not available to all occupiers at all courts. Given the significant role that HPCDS play in assisting some occupiers to avoid losing their homes, it is of concern that some occupiers will not have access to such assistance.

Issues Specific to Private Landlords

- Private landlords pose a particular challenge to court resources. It is not uncommon for private landlords to fail to comply with procedural requirements.
- Hearings involving private landlords are scheduled in many courts for twice the amount of time devoted to other possession cases. This is due to the lack of knowledge of the law and associated processes by private landlords.
- Lack of knowledge and representation leads private landlords, like other Litigants in Person, to seek assistance from the court. This is becoming increasingly difficult given that court resources are being reduced.

Lack of Centrally Recorded Data

- The MoJ produces statistics on the number and type of possession claims but there is no data available on other issues important to access to justice. In particular, there are no statistics kept in relation to attendance by defendants or whether they are represented at the hearing. This makes it difficult to evaluate the extent to which the provision of written information or attendance by the defendant impacts on the outcome of the case.

- There is no co-ordination of HPCDS nationally and no central database of schemes.

Key Areas for Improvement

Court Forms

- Forms need to be reassessed so as to ensure that they are user friendly and encourage both claimants and defendants to provide relevant information.

- Forms should take account of legal developments, such as Article 8 and the pre-action protocols, so as to ensure a more systematic approach to possession cases.

- Advice and guidance on completing the forms should be easily obtainable and accessible including through online resources.

- The measures described above, however, are of little use if the information supplied on these forms does not come before the judge. In relation to the omission of some files from the judge's papers, more research is needed to discover how common this is, the reasons for it and how it might be avoided.

Defendant Attendance

- Further research should be undertaken in order to assess how best to increase levels of attendance by occupiers.

- Clear and concise information concerning the legal process and the importance of seeking legal advice should be made available to occupiers as early as possible. This could be achieved through a number of means including information supplied by the court (separate from the court forms), by advice providers and generally through information leaflets and posters displayed in public spaces such as libraries and health centres.

- Higher levels of defendant attendance would have a significant impact on court resources. As things stand, cases are listed on the assumption that a large proportion of defendants will not attend. If the proportion attending was to increase, the clear implication is that more time would have to be devoted to these cases in what is already a busy court schedule. This would possibly require the appointment of more judges to handle the extra time spent on these lists.

- Consideration should be given to whether the adoption of a less formal process would improve attendance rates whilst reducing demands on the judiciary.

- Adopting a less formal possession process might alleviate pressures on court resources. A similar proposal has been considered in detail by the Law Commission.[196] Perhaps now is an opportune time to revisit those proposals.

The Protocols

- Mortgage lenders are required to provide a checklist on Protocol compliance but social landlords are not so required. Checklists should be required in both cases.

- To enhance the regulatory impact of the Protocols, defendants should be asked to comment on the pre-action behaviour of the lender/landlord. This could be achieved by including the Protocol checklist in the papers sent out by the court.

- The Protocols could be further used to reduce the burden currently placed on court resources by requiring lenders and social landlords to produce evidence of compliance with the relevant Protocol at the time of issuing a possession claim. An administrator could check for compliance and if compliance cannot be proved then a claim cannot be issued.

Independent Legal Advice and Representation

- Access to independent advice and representation at an early stage can ensure that occupiers address the reasons for the arrears, which frequently include dealing with problems with benefit payments, and communicate with the lender/landlord. This may lead to realistic repayment agreements being reached that avoid the need for court action. One possible means of reducing the burden on court resources, therefore, is to increase the availability of specialist housing advice prior to court action. To this end, the recent cuts in legal aid and reduction in court resources may be counterproductive given that they seem likely only to increase the number of possession cases.

- For those who are subject to court action, our findings suggest that the availability of a HPCDS can play a significant role in achieving a beneficial outcome. It is important therefore that funding for such schemes continues and is extended to ensure that all courts are able to offer emergency advice and representation to all occupiers threatened with the loss of a home.

- A central administrative body should be established to undertake strategic oversight, quality assurance or shared knowledge and training of HPCDS.

[196] The Law Commission, *Housing: Proportionate Dispute Resolution (*Law Com No 309, 2008).

Private Landlords

- The challenges posed to the court system by private landlords appear to arise largely out of a lack of understanding of how the legal process works. It seems evident therefore that the provision of clear and targeted advice could reduce the number of cases that result in a hearing under the accelerated possession process and reduce the amount of time spent where a hearing is required.

- Consideration should be given to establishing a telephone help line or web-based help to deal with queries from private landlords.

- We would encourage the DCLG working party on the private rented sector to focus on the provision of information and advice to private landlords to ensure that they are compliant with the requirements set out under the accelerated possession process.

Information Gaps

- Claim forms should request that both claimants and defendants provide information regarding the defendant's personal and financial circumstances.

- Research should be conducted on how to support defendants with mental health problems.

- HMCTS and the MOJ should collate and publish information on the number of defence forms filed, defendant attendance and representation and its impact on outcomes, the number of cases referred to a full hearing and the reasons for doing so, etc. This will assist court users and researchers to understand better the legal process of possession and assist in evaluating its effectiveness.

Annex 1: Methodology

This annex explains the methodology used in this project.

Research Governance and Accountability

The research project is overseen by a steering group comprising the Principal Investigators (Professor Susan Bright, Oxford University, and Dr Lisa Whitehouse, Hull University), District Judge Tim Jenkins (the Hon Secretary of the Association of HM District Judges), and Mrs Janet Bettle (barrister, formerly East Anglian Chambers, now Trinity Chambers). The Principal Investigators (PIs) were assisted with the research by two Research Assistants (RAs): Amanda Fitzgerald and Sophia House (the Research Team).

The project received ethics clearance through the University of Oxford Central University Research Ethics Committee. Judicial Office consent was given for the interview of district judges, court observations and the questionnaire to delivery managers. The Delivery Manager Questionnaire was also approved by HMCTS (Her Majesty's Court & Tribunal Service).

Acknowledgements

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Interviews and Observations

During the first phase of the project, we gathered information about the housing possession process and how it worked in practice. Between May-September 2012 we interviewed 23 elite actors involved in the process (9 district judges, 3 mortgage lenders, 2 letting agents, 4 HPCDS representatives, 2 benchmarking companies, 1 trade association representing lenders and 2 solicitors). We also observed housing possession cases at 2 courts and a HPCDS representative at work in their local court.

In our report we refer to interviewees in an anonymous form, by 'actor type' and by number. The codes are:

District judges – DJ (1-9)

HPCDS representatives – DDS (1-4)

Letting agents – LA (1-2)

Lenders – Lender (1-3)

Trade Association (Lenders)

Solicitors – Solicitor (1-2)

The majority of the interviews were conducted at the respondent's place of work, the exception being the 2 benchmarking companies which took place over the telephone. Each category of interviewee was asked a series of questions covering the practical operation of the housing possession process, their role within it, how they gathered information about each case and how that information influenced their decision-making or the outcome of the case. A list of questions was sent to each interviewee prior to the interview and the interviewee was encouraged to discuss issues not covered by the fixed list of questions if they wished to do so.

In recruiting interviewees we sought as wide a sample as possible within our limited resources. In relation to district judges, we identified possible contacts using a range of resources including the recommendations of members of the steering group, participants from previous research projects and the online court finder service. As a result of this process, we approached 13 judges from all court regions in England except for the North West region. This was not an intentional omission but, given our limited resources, it was considered acceptable to approach judges from all regions except one. Of these, 9 agreed to be interviewed and 4 did not reply. We interviewed 4 based in the London region, 2 in the North East region, 2 in the South East region and 1 in the Midlands region. No regional differences were identified in the data provided by the judges and so we have chosen not to indicate the region in which they serve. All of the judges we interviewed were district judges; we did not interview any deputy district judges. The judges we interviewed have significant judicial experience: with one exception all had more than 10 years judicial experience (and several had around 20 years experience). The one exception had more than 5 years judicial experience. Four have (or have had) involvement with judicial training. The interviews lasted a minimum of 50 minutes and a maximum of 79 minutes.

We also observed four housing possession hearings at two courts in May 2012: the first in the London region (social rented cases) and three at a court in the North East region (mortgage cases, local authority cases, and housing association and private landlord cases). We also interviewed a HPCDS representative during these observations but this interview was noted and not recorded and is referred to in this report as DDS5.

In relation to mortgage lenders we approached both larger building societies and banks and a sample of medium and small sized lenders, including sub-prime lenders. Of the 9 approaches made, 3 agreed to be interviewed (2 large high street lenders and one small local lender) and 1 offered answers in writing to our list of questions.

In this report, Lenders 1 and 3 are national high street lenders while Lender 2 operates on a small regional basis. We did not manage to secure any interviews with sub-prime lenders. The interviews took place between April and May 2012 at the lender's offices and lasted a minimum of 44 minutes and a maximum of 98 minutes.

In an effort to obtain information regarding the experience of private landlords we considered that approaching them directly would prove difficult (in terms of obtaining contact details and finding willing participants) and time consuming given our limited resources. We decided therefore that an appropriate alternative would be to approach letting agents who represented private landlords. We wrote to 20 such agents requesting an interview of which 16 did not reply, 2 thought that they could not help and 2 agreed to be interviewed. The 2 interviews took place in April and May 2012, with one in Hull and the other in Leeds. Both interviews lasted approximately 50 minutes.

Due to practical and ethical difficulties with interviewing defendants, we instead approached those who represent occupiers during the court hearing, i.e. HPCDS representatives. We obtained the contact details of 4 HPCDS, all of whom agreed to be interviewed. The interviews were conducted between May and July 2012 at the office of the HPCDS and lasted a minimum of 44 minutes and a maximum of 70 minutes.

We also observed work of one of these HPCDS at court. The observation was conducted in July 2012 and involved both mortgage and rent arrears cases. Two HPCDS representatives (one for the morning mortgage session and one for the afternoon social rented session) were 'shadowed' by a member of the research team, giving us access to the representatives' meetings with defendants, negotiations with claimants and the court hearing itself (with the permission of the judge hearing the case).

We also interviewed two solicitors who worked in the field of housing possessions in London and each lasted approximately 65 minutes.

Surveys

Delivery Manager Questionnaire

Design

The Delivery Manager Questionnaire (DMQ) was drafted by the Research Team with the support of the wider steering group. The questionnaire was converted into an electronic survey using SurveyMonkey.

Three Court Managers were approached to test the survey and provide feedback. Amendments were made to the survey on the basis of the comments arising from the pilot and in discussion with HMCTS as part of the research approval process.

Recruitment and Collection

The DMQ was distributed electronically by HMCTS on behalf of the Research Team to delivery managers representing all 172 county courts throughout England and Wales. The DMQ was sent to 140 delivery managers and responses were collected from 14 January 2013 to 21 February 2013. The total number of respondents was 86, giving a response rate of 61%.

Housing Possession Court Duty Scheme Questionnaire

Design

The housing possession court duty scheme questionnaire (HPCDSQ) was drafted by the steering group and sent to two court duty scheme advisers for comment. The questionnaire was amended in the light of the feedback and was converted into an electronic survey using SurveyMonkey.

Recruitment and Collection

There is no publicly available database from which to source HPCDS contacts. Obtaining contact details was very difficult and it was not possible to survey all HPCDS. The Legal Services Commission informed the Research Team that a list of contact details existed for these schemes but following a Freedom of Information Act request it emerged that they do not hold such a list. A database was therefore constructed by the research assistant by contacting county courts using the CourtFinder tool. This initial search yielded 189 courts and they were asked for contact details of any court duty scheme available at that court. Several of the courts were, however, closed; and many others could not supply specific contact details for

the HPCDS, or could not be reached by email. Further contacts were provided by the Central London Law Centre and by the housing charity, Shelter.

The survey was distributed electronically to the 47 schemes in England for whom contact information could be obtained. In an effort to obtain as many responses as possible, no sampling method was used. Responses were collected between September and December 2012. In total, 32 surveys were completed, resulting in a sample size of n=32 and a response rate of 68%.

Analysis

Data from both surveys was anonymised and analysed at the aggregate level. In very few instances, extreme outliers and incomplete responses were eliminated as necessary. All of the interviews (apart from those conducted via telephone) were recorded and transcribed to intelligent verbatim/semi-verbatim standard by a professional transcribing firm and under a confidentiality agreement. Responses were thematically coded. Analysis of the findings of the surveys was conducted with the use of SurveyMonkey and interviews were analysed using Dedoose.

Annex 2: Delivery Manager Questionnaire (DMQ)

This annex summarises the responses to the Delivery Manager Questionnaire. A total of 86 responses were collected in January and February 2013 from Delivery Managers or similar court officials in England and Wales. The survey was distributed to 140 representatives in total, with an overall response rate of 61%. Respondents were asked about a variety of subjects related to housing possession procedures, including details of their responsibilities and the courts they managed; possession claims and defence forms; legal advice services at the court; and practices for hearings and listings. In some cases, questions were skipped. Response rates are presented for each question, along with written or visual representation of the aggregate responses given.

1. Role of respondent

If you are not the principal Delivery Manager, please state your role below:

Response Rate: 69/86

The majority of those who responded with a role other than that of Delivery Manager were team leaders.

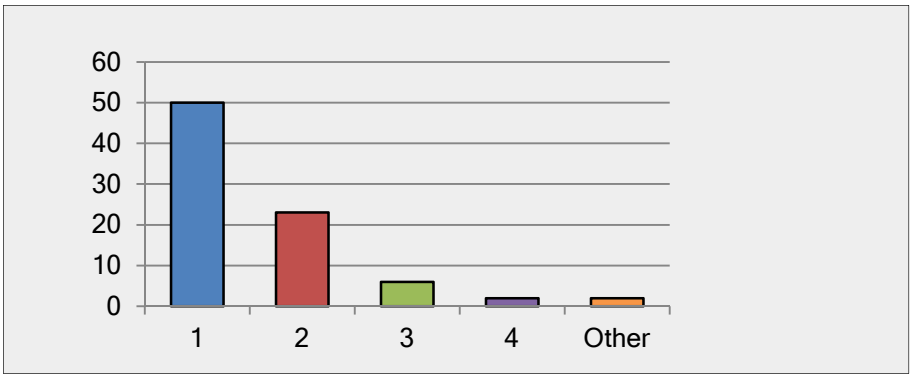
For how many months/years have you been in your current role?

Response Rate: 85/86

Thirty-six respondents (42%) had been in their current role for six to 12 months (inclusive). This was the most frequent response, followed by two to six months (19%) and five to eight years (13%). Responses to this question may have been affected by the fact that the specific role of Delivery Manager was only created in April 2012.

How many courts do you manage?

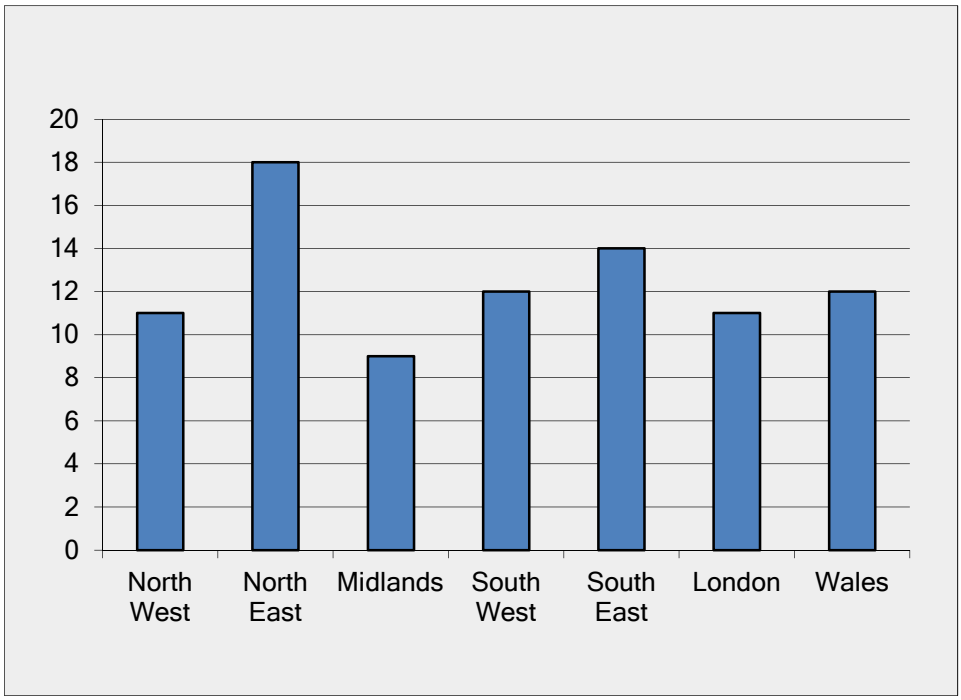
Response Rate: 83/86



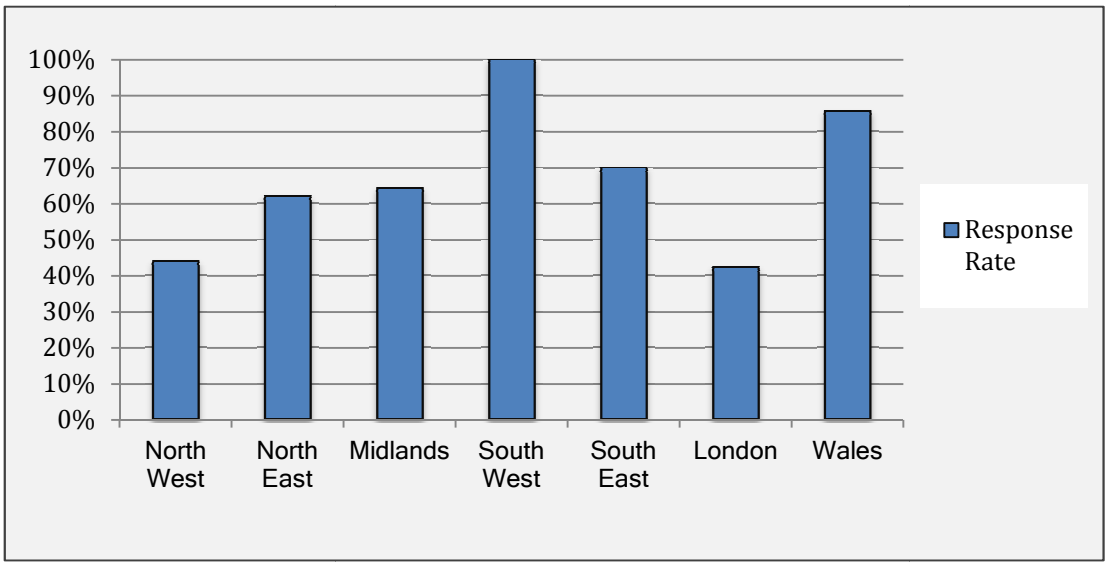
2. Court details

Please indicate the regional location of the court:

Response Rate: 86/86



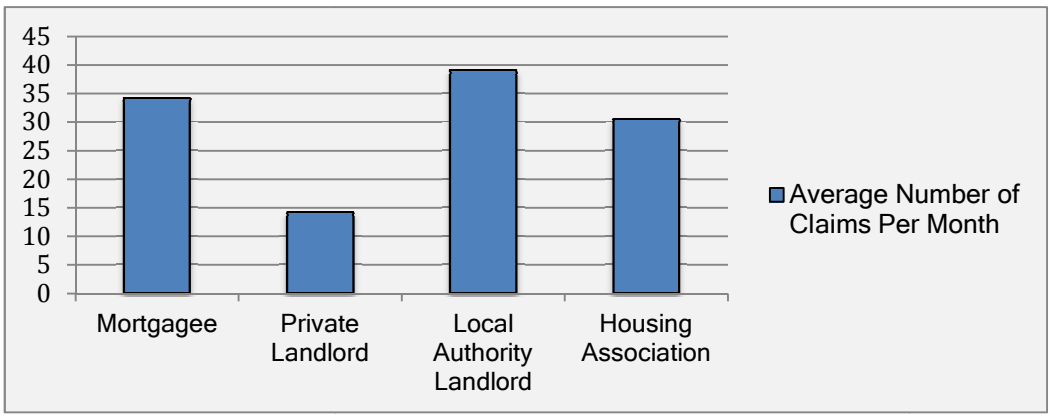
These figures can be compared with the number of questionnaires sent to each region and the following chart shows the regional response rates. The South West and Wales had the highest response rates, while London and the North West had the lowest.



3. Claims and defence forms

How many residential housing possession claims do you receive each month (on average) in each of the following categories? Please provide an estimate based on a sample of possession lists.

Response Rate: 67/86

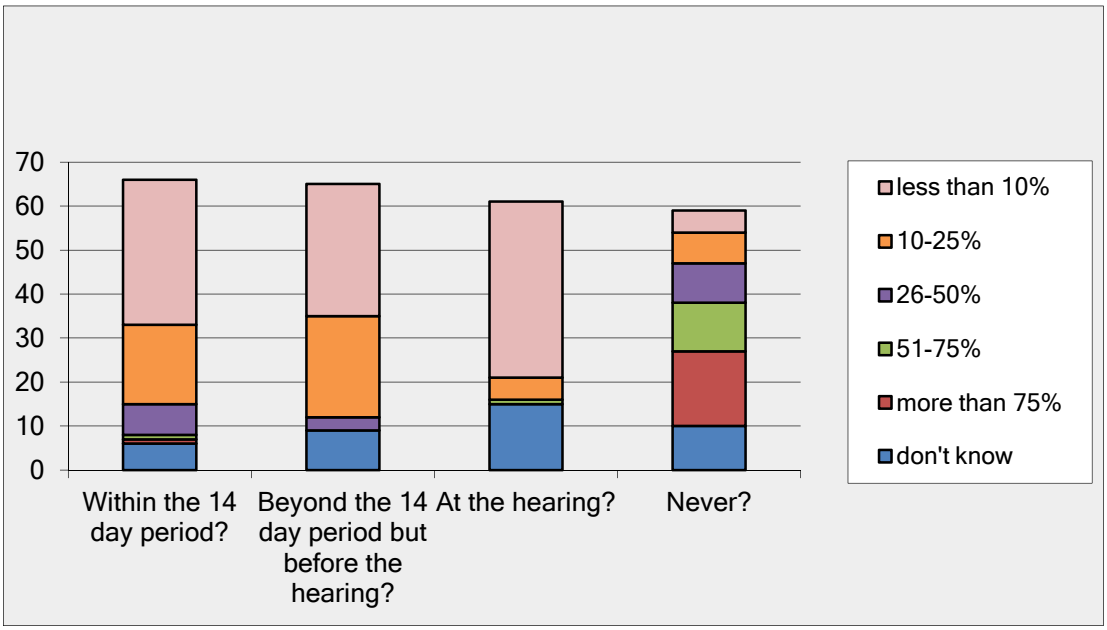


This chart is not an accurate guide. There is a mix of approaches to recording data, but it is clear from responses that many courts do not collect this data. Several responses are based on information supplied from PCOL combined with personal estimates (one respondent states that PCOL does not break down issues into different categories). One respondent included all social landlord claims within the local authority figure. Overall, forty respondents (58%) indicated that the answers provided above were based on recorded data, 22% reported that they were based on personal opinion, and 20% indicated that they were based on 'a combination of both.' In the last category, several respondents indicated that they used lists as a guideline and consulted with court staff, or that they were basing their estimates on lists that did not specify different categories of claims.

Response Rate:69/86

In relation to all housing possession claims, on average, what proportion of defendants file a defence form:

Response Rate: 67/86

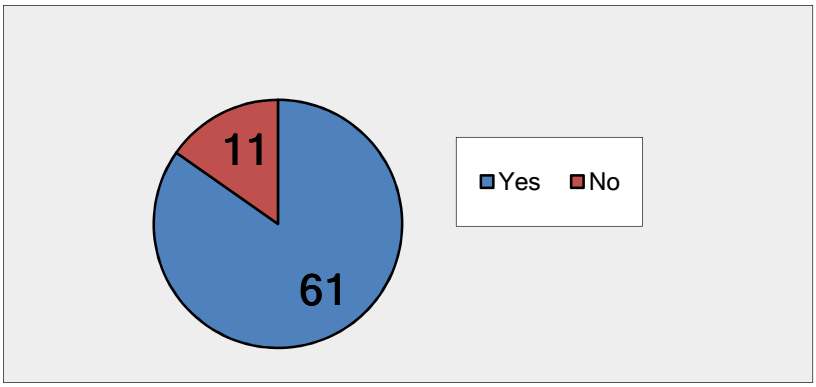


In 66% of cases, the responses to this question were reported as being based on personal estimate; in 11%, they were based on recorded data, and in 23%, a combination of both.

4. Legal advice service(s) at the court

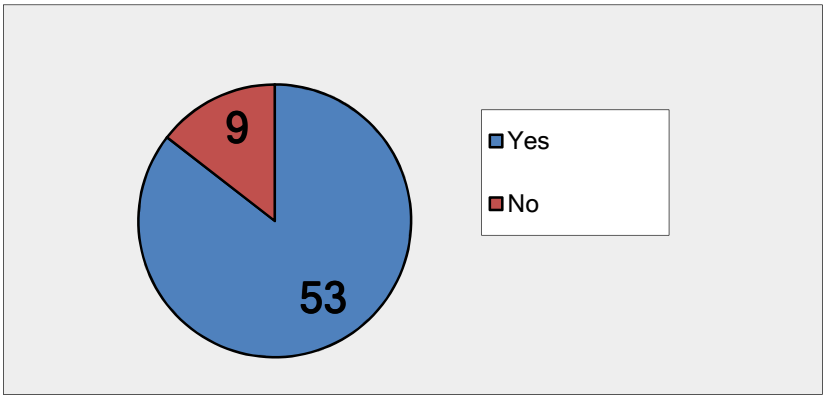
Is legal advice, such as a Housing Possession Court Duty Scheme, made available to defendants who attend the court?

Response Rate: 72/86



Is the advice service made available to defendants on every possession day?

Response Rate: 62/86



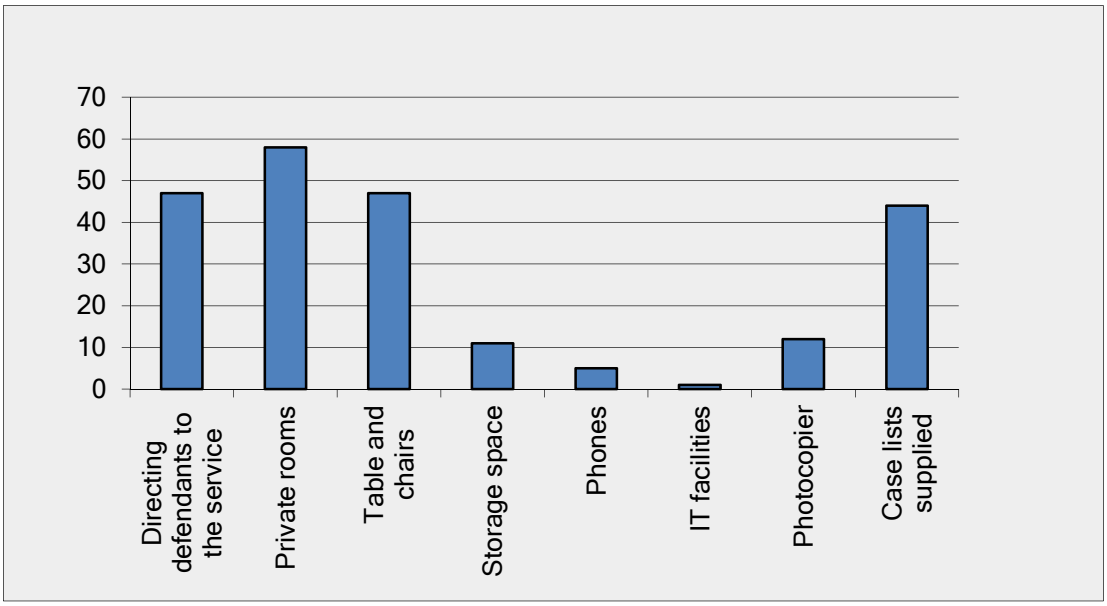
Please specify when the advice service is in operation:

Response Rate: 28/86

Of the 28 respondents who answered this question, most indicated that the advice service was in operation between one and three days per week, or whenever possession claims are listed.

What support does the court provide to the HPCDS or other similar legal advice service? Please tick as appropriate:

Response Rate: 60/86



How does the court communicate with the scheme?

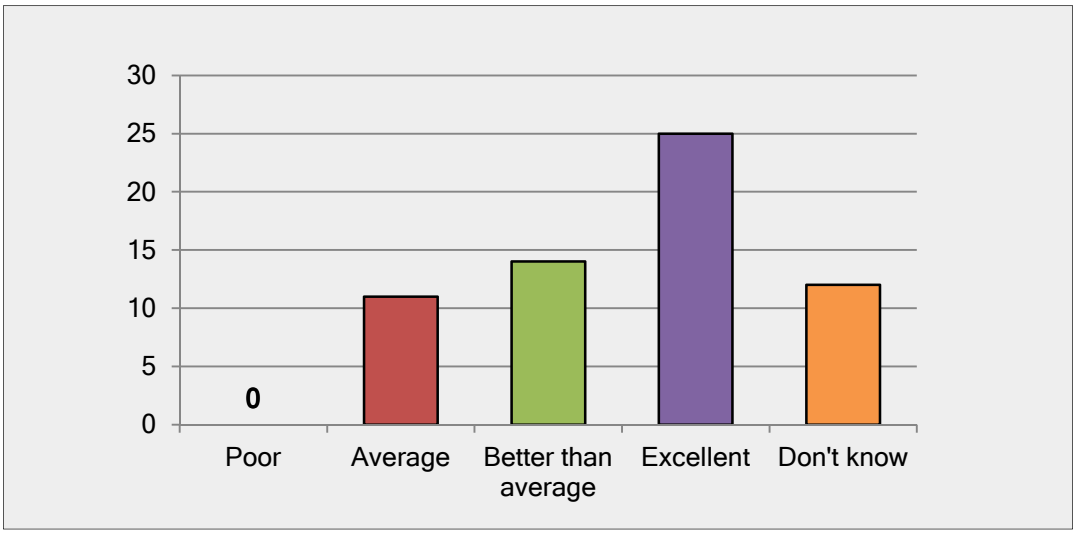
Response Rate: 50/86

Answer	Response Percent	Response Count
Correspondence	90%	45
with lead agency only	42%	21
with all advisers	12%	6
Meetings	28%	14
weekly meetings	8%	4
fortnightly meetings	2%	1
Monthly meetings	4%	2
Other	56%	28

Respondents who answered ‘other’ indicated, in several instances, that the court communicates with the scheme as and when required as opposed to on a regular schedule.

How would the court rate the quality of the service provided by the legal advice scheme?

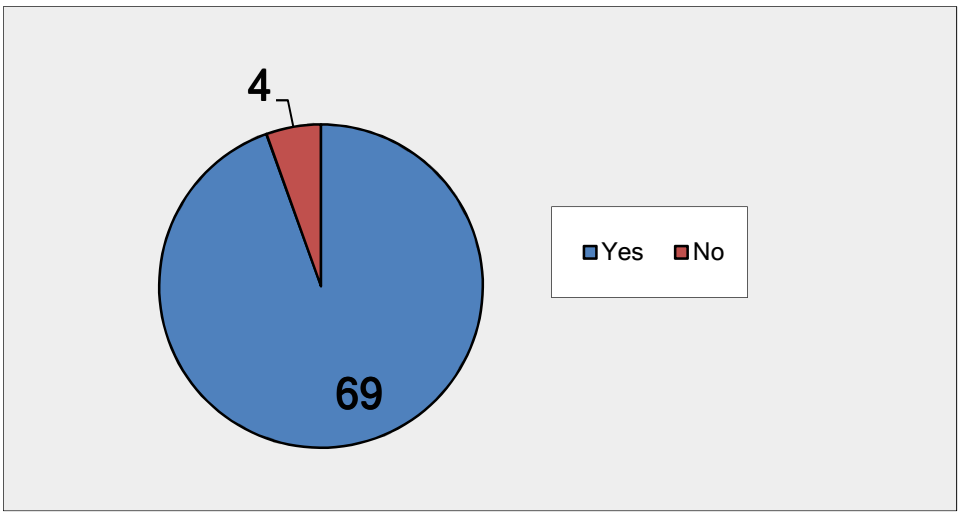
Response Rate: 62/86



5. Court facilities

Does the court have a counter/reception desk:

Response Rate: 73/86



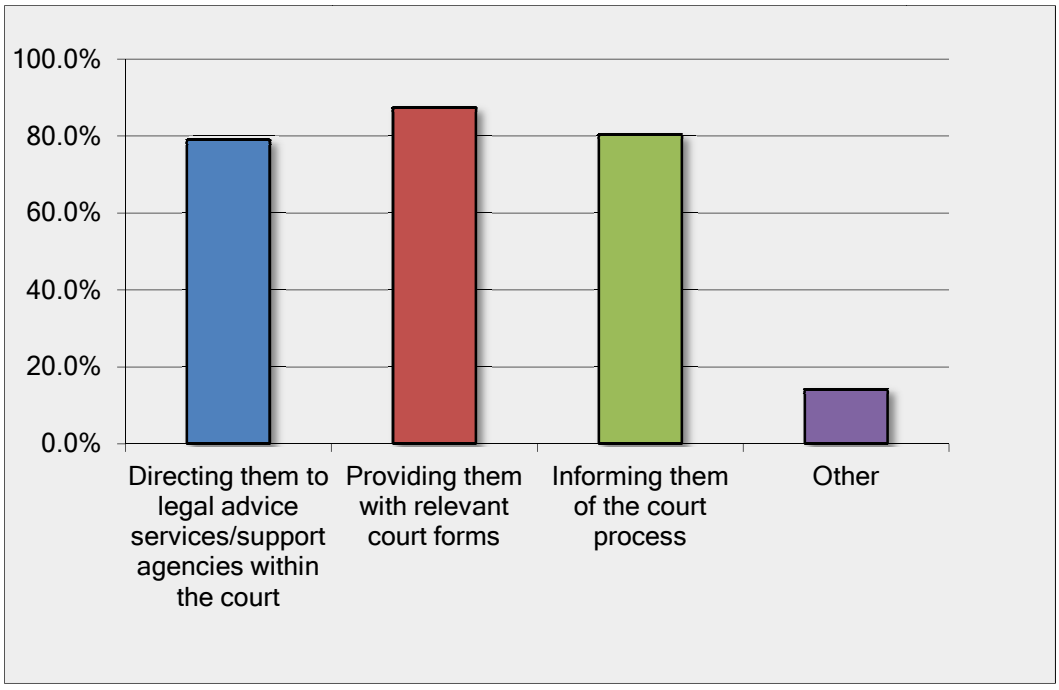
What are the opening hours of the counter/reception desk?

Response Rate: 67/86

Nearly 75% of those who responded indicated that the counter at their court was open from 10:00-14:00. In many cases, this was because the court was running a pilot scheme. Reception hours were generally reported as 9:00-17:00, with a margin of thirty minutes on each end.

What support can it provide to defendants?

Response Rate: 71/86

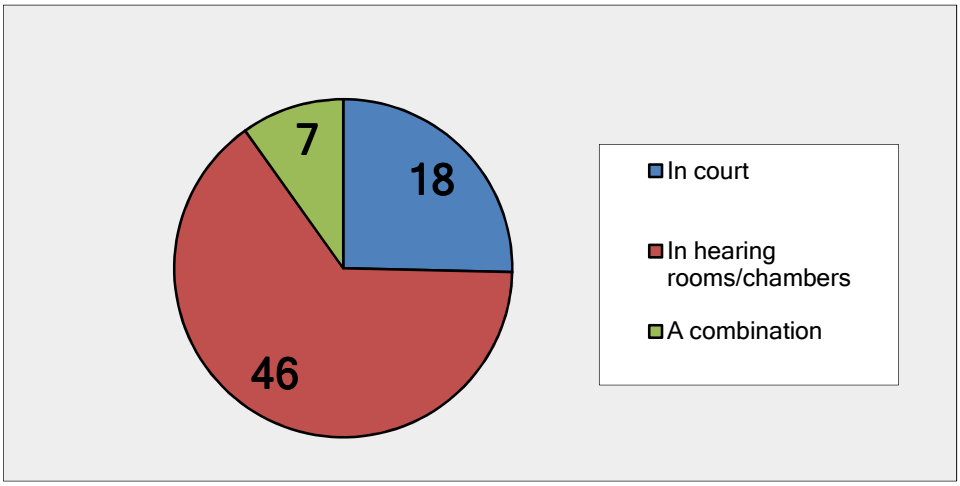


Respondents who answered ‘other’ elaborated that the court may also provide support by checking forms and documents; referring them to external advice services, such as CAB or Internet services; and handling urgent applications.

6. Hearings

Where are housing possession cases heard?

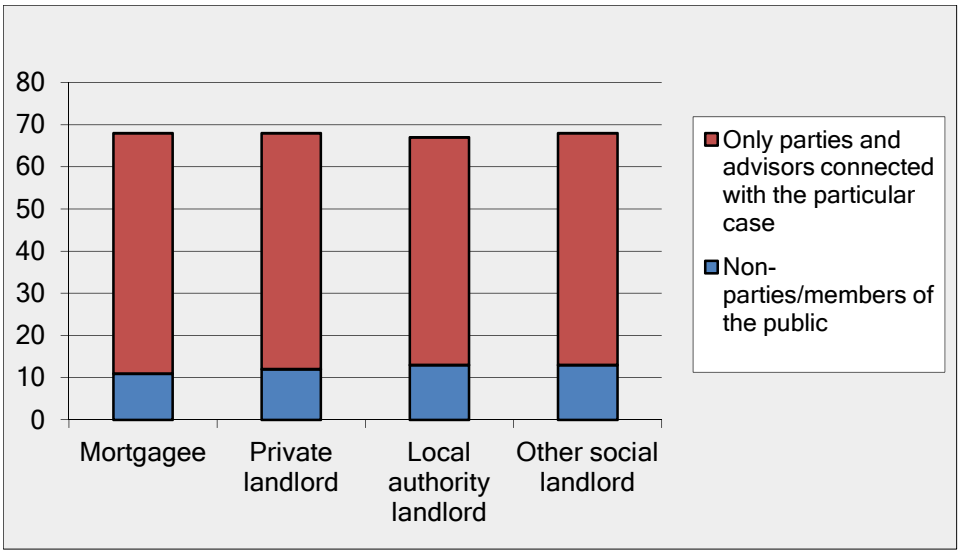
Response Rate: 71/86



Those who answered ‘a combination of both’ indicated that whether a hearing takes place in chambers/hearing rooms or in a court may depend on the type of claim or on who is presiding over the case. Security concerns may also lead to a hearing being held in court.

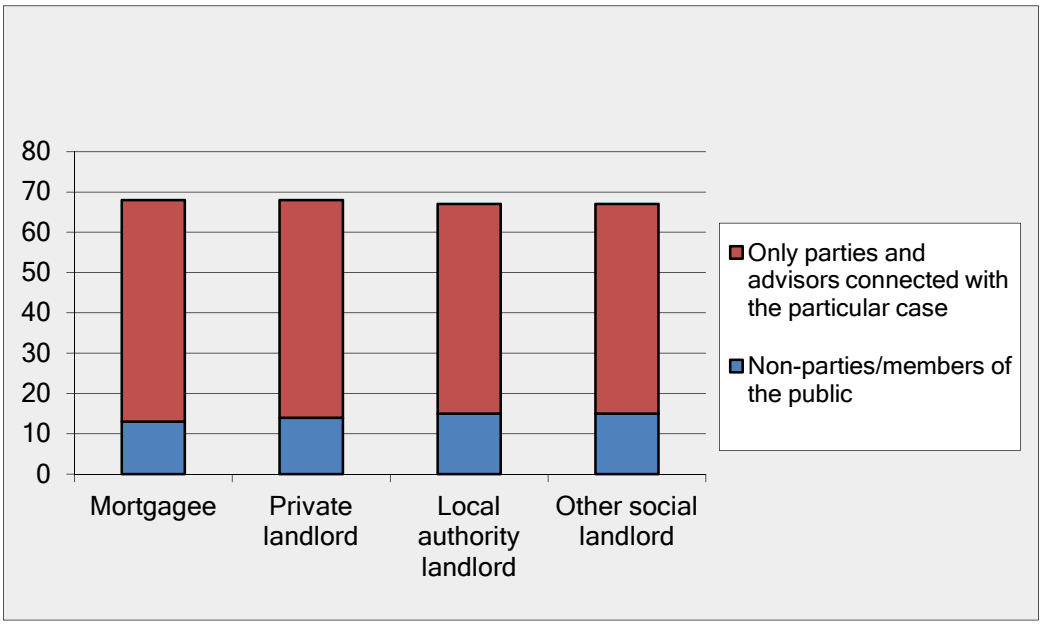
Who may attend hearings in respect of each of the following possession cases where arrears are involved?

Response Rate: 68/86



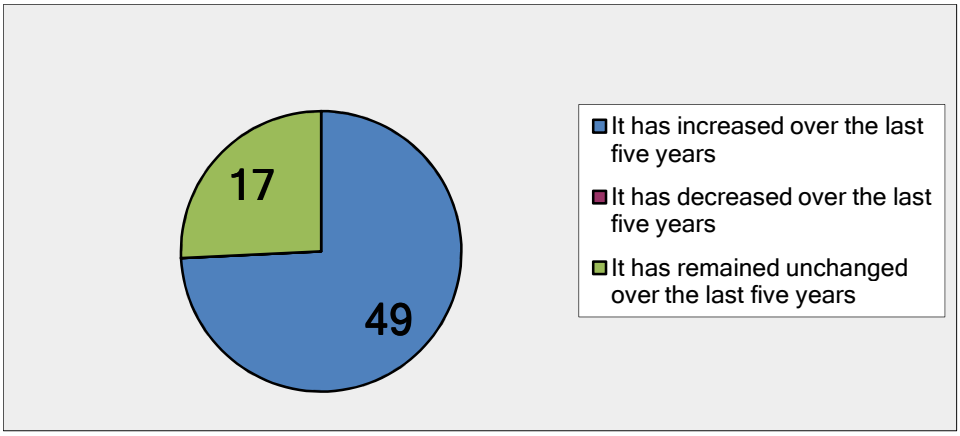
Who may attend hearings in respect of each of the following possession cases where arrears are NOT involved?

Response Rate: 68/86



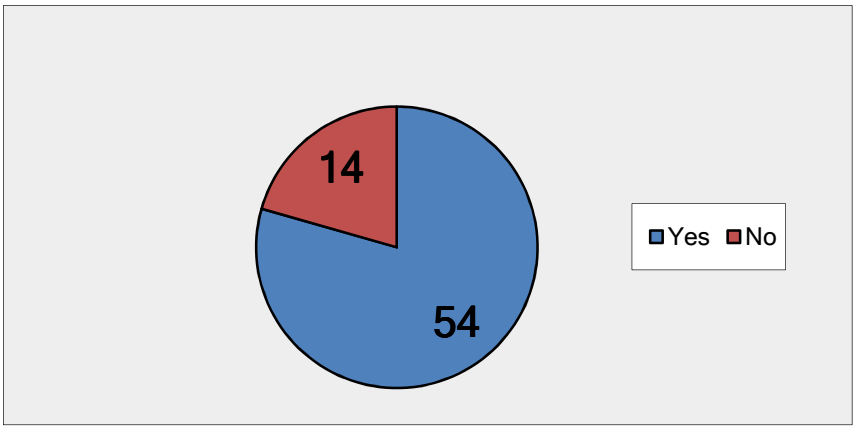
In your experience, to what extent has the number of litigants in person changed over the last five years?

Response Rate: 66/86



Do litigants in person present particular challenges to the court?

Response Rate: 68/86

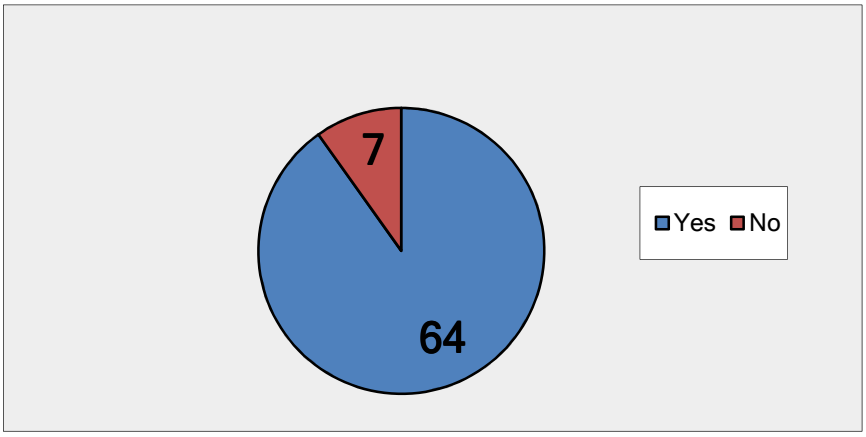


The most commonly reported challenges posed by litigants in person were the additional time and resources needed to accommodate them, resulting in longer hearings. Language difficulties and security risks were also cited.

7. Listing practice

Are similar housing possession claims listed together (e.g. all mortgage claims are listed on one day)?

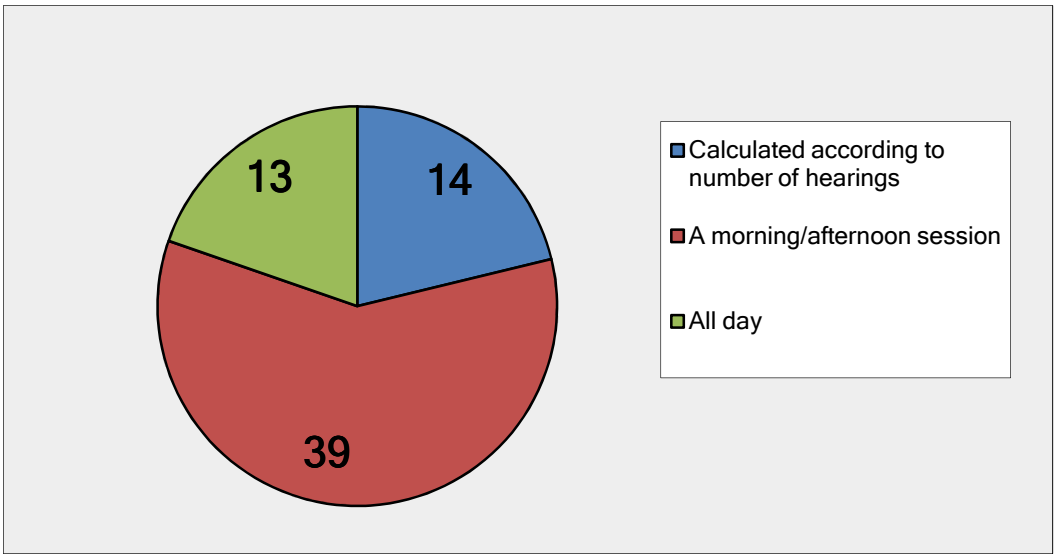
Response Rate: 71/86



Among those respondents who answered 'no,' most (four out of five) specified that possession claims were block listed without distinction as to the type of case.

How much time is allocated to each list?

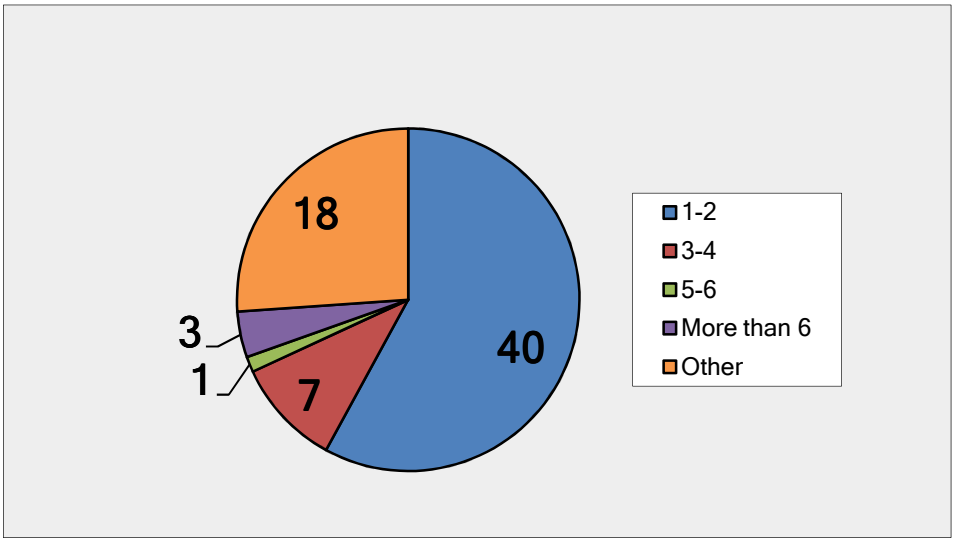
Response Rate: 66/86



Twelve respondents indicated that the amount of time allocated depends on the type of case involved. Some of these indicated that different types of cases are listed at different times of day. Four respondents reported that mortgage cases are allocated less time than rental cases.

How many housing possession lists are scheduled each week?

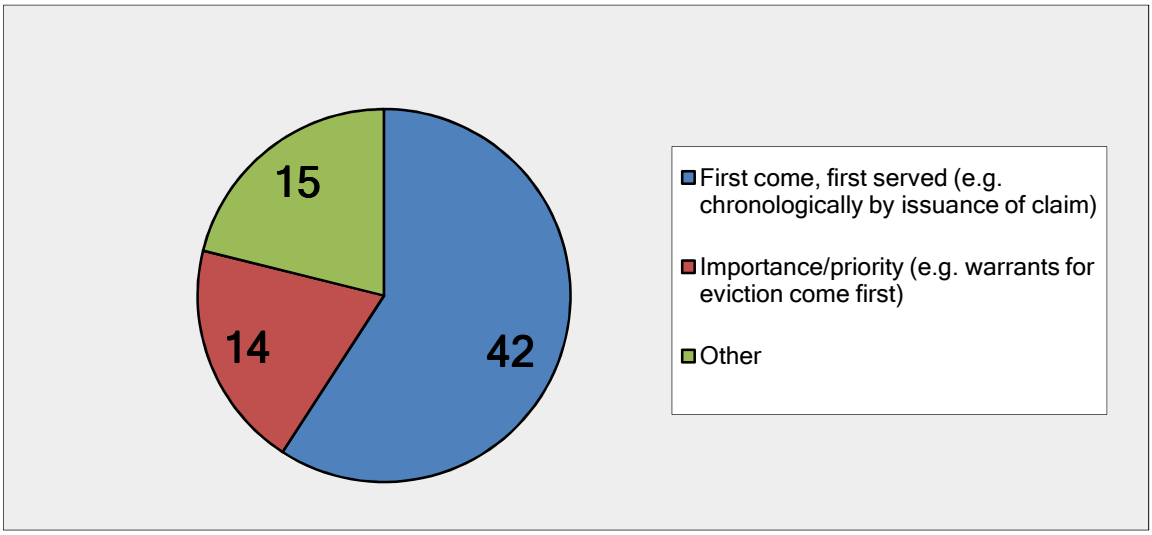
Response Rate: 69/86



More than half of the respondents who answered ‘other’ responded that cases were listed twice per month, or every other week. Some others (16%) indicated that one housing possession list is scheduled per month.

How are cases listed within these housing possession lists?

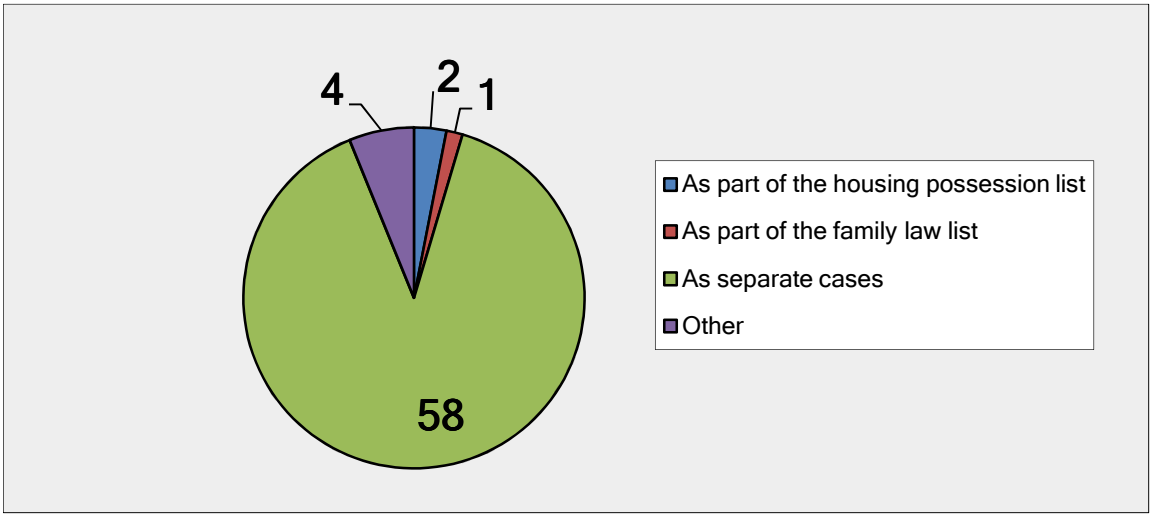
Response Rate: 71/86



Most of the respondents answering 'other' indicated that cases were listed chronologically, but with discretion; evictions may take priority over other types of cases.

How are cases involving the Trusts of Land and Appointment of Trustees Act 1996 listed?

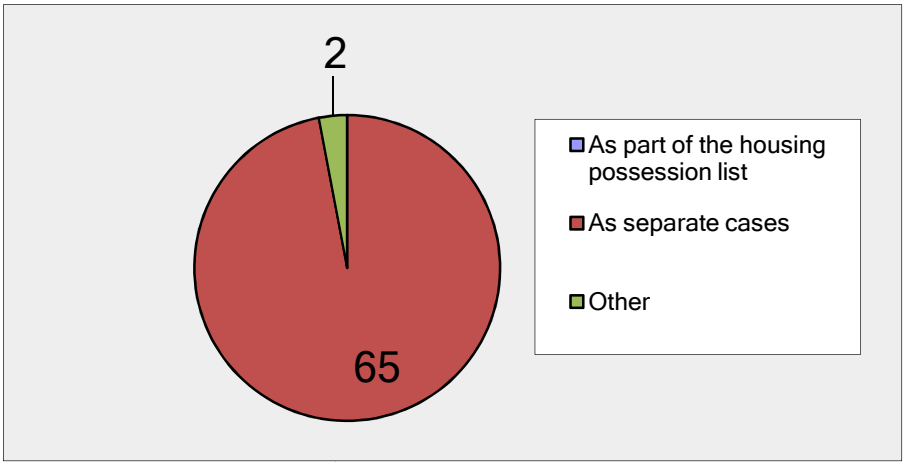
Response Rate: 65/86



Respondents indicated that the cases may be listed whenever convenient, by judicial decision, or before a Chancery Judge.

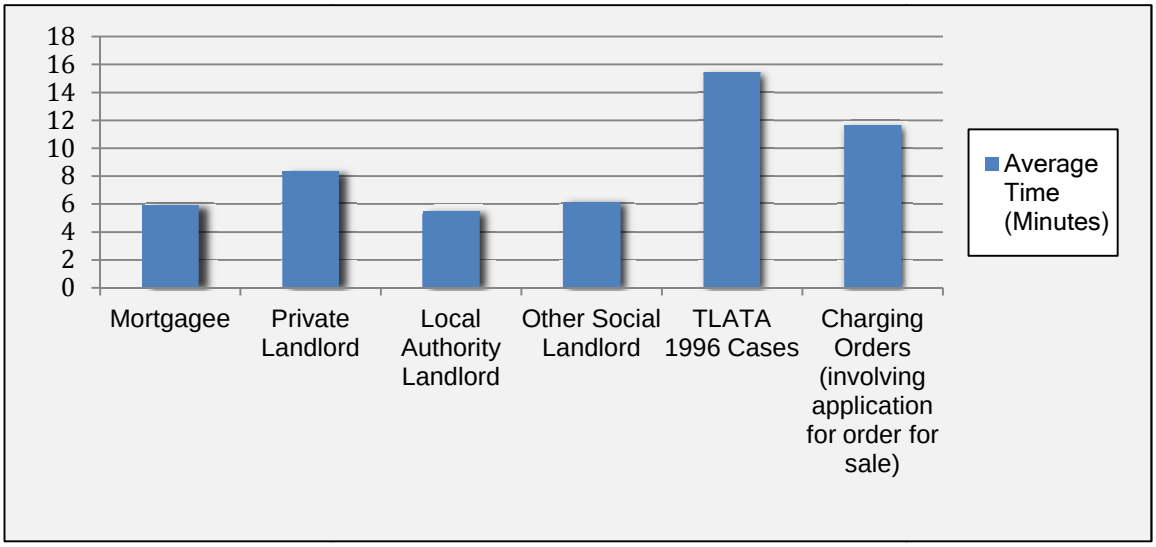
How are orders for sale (where an order for sale is the result of enforcing a charging order) listed?

Response Rate: 67/86



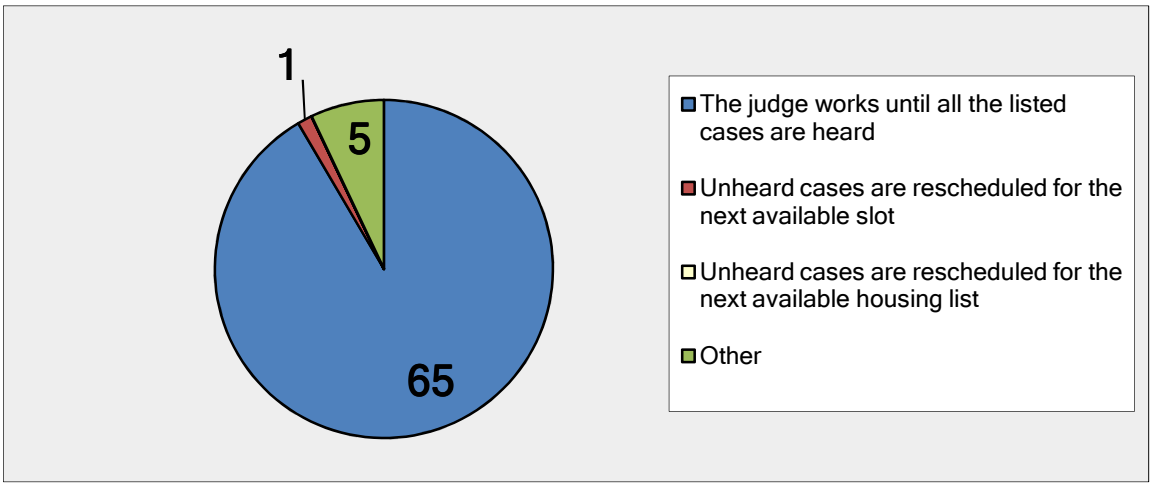
Typically, what is the average time allocated for each of the following cases (in minutes)?

Response Rate: 68/86



If the listing timetable is not adhered to, what happens?

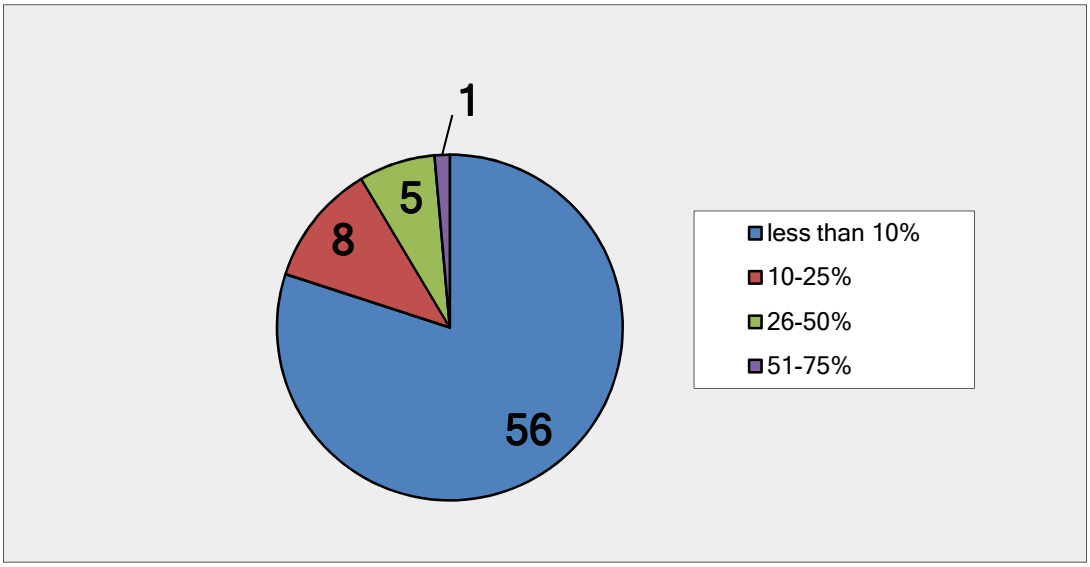
Response Rate: 71/86



Several respondents indicated that it was very rare for the timetable to be overlisted or not adhered to; some reported that this has never happened.

What percentage of housing possession cases are relisted for a full hearing? Please tick one box:

Response Rate: 70/86



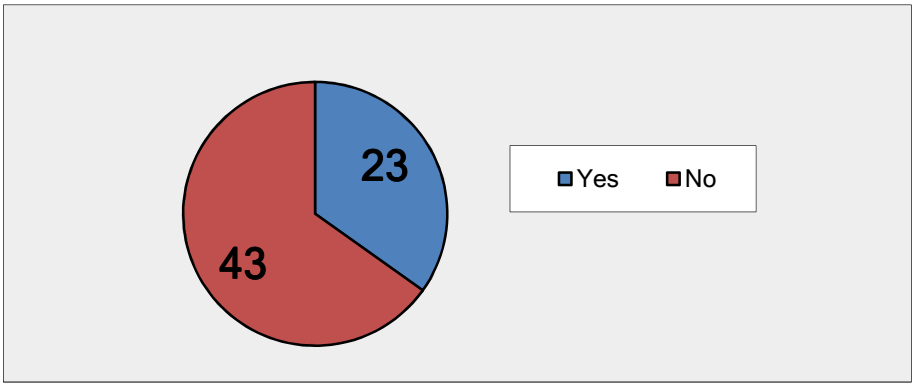
Among the respondents who answered this question, 77% indicated that their responses were based on personal estimate. Approximately 13% indicated that they based their responses on recorded data, and 10% on a combination of both.

Response Rate:70/86

8. Reform

Could the procedure of housing possession cases be improved?

Response Rate: 66/86



Please specify how it might be improved (e.g. technological changes, revision to court forms, etc.):

Response Rate: 22/86

Many suggestions were made for improvements.

Several respondents expressed the need for improvement of PCOL, reporting that it is unreliable, rigid, cumbersome, slow, and not accessible to all courts. It was suggested that PCOL should be available for all types of possession cases.

There were also several suggestions that the information available to parties before Court attendance could be improved and the steps involved simplified. Forms could be made shorter and easier for defendants to understand. It was mentioned that the majority of defendants in nuisance based possession claims have mental health issues but the judiciary is unable to assist these persons.

A variety of views were expressed on hearings. It was suggested that longer hearings would reduce the need for adjournments or reviews. It was also suggested that cases could be dealt with on paper if a defendant did not respond to a claim, thus saving judicial time. Another respondent suggested that there could be more mediation and efforts made before coming to court to try to help defendants with their debts so that only the serious cases end up in court. It was also suggested that more judicial resources should be available for the listing of possession cases and more bailiffs so that delays in providing evictions is reduced. One respondent said that the enforcement process could be reviewed: applications to suspend evictions are often filed very late which puts pressure on the courts resources; administrative staff and the Judiciary.

One respondent suggested that duty advisor facilities should be increased and it should be possible to book appointments prior to hearings. This option could be included in the defence form which would both encourage filing of defence forms and early bookings.

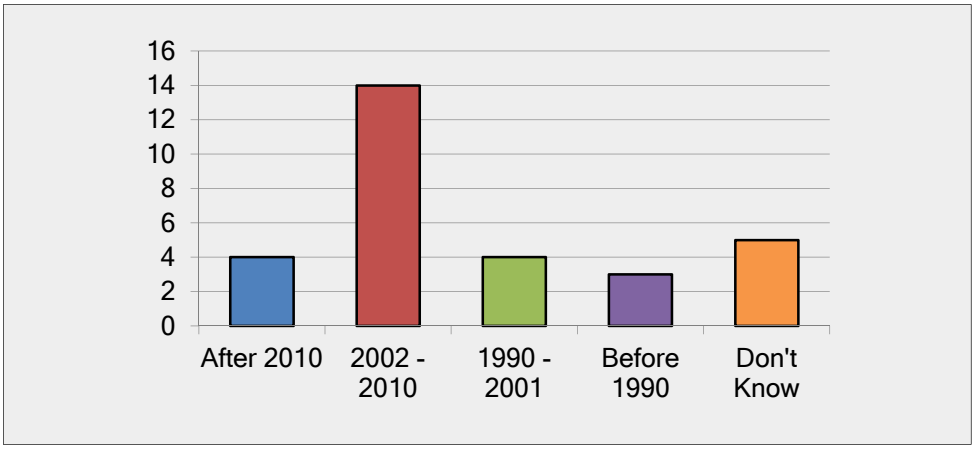
Annex 3: Housing Possession Court Duty Scheme (HPCDS) Questionnaire

This annex summarises the responses to the Housing Possession Court Duty Scheme Questionnaire. A total of 32 responses were collected in the last quarter of 2012 from representatives based at Housing Possession Court Duty Schemes in England. The survey was distributed to 47 representatives in total, with an overall response rate of 68%. Respondents were asked about a variety of subjects related to housing possession procedures, including structural issues relating to the scheme, information about defendant participation in the possession process, the impact of HPCDS support, and the role of human rights arguments in housing possession cases. In some cases, questions were skipped. Response rates are presented for each question, along with written or visual representation of the aggregate responses given.

1. Information on the scheme

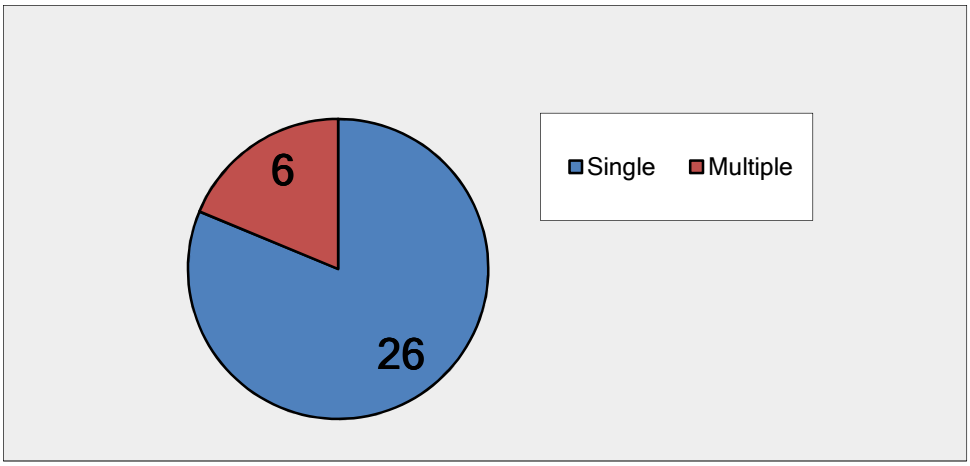
When was this Housing Possession Court Duty Scheme (HPCDS) set up?

Response Rate: 30/32



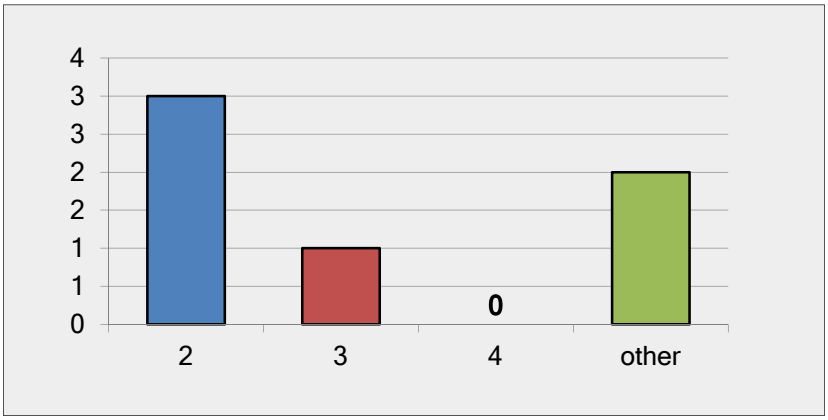
Is this HPCDS a single agency scheme (one organisation is involved) or multiple agency scheme (several organisations are involved)?

Response Rate: 32/32



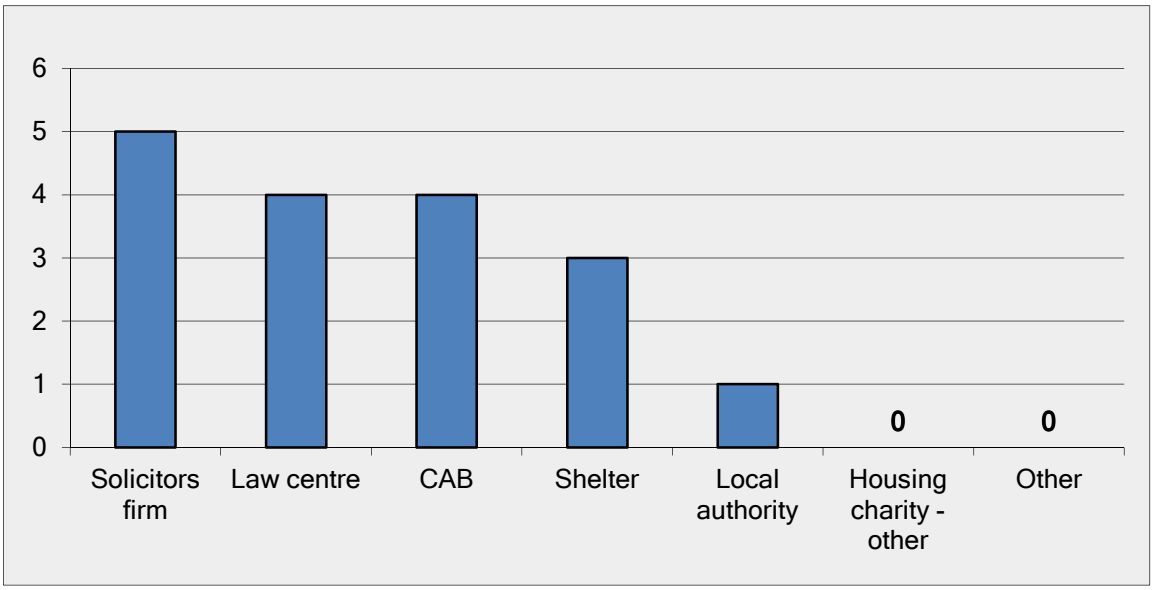
If multiple agency, how many agencies are involved?

Response Rate: 6/32 (6/6 answering "Multiple" to question above)



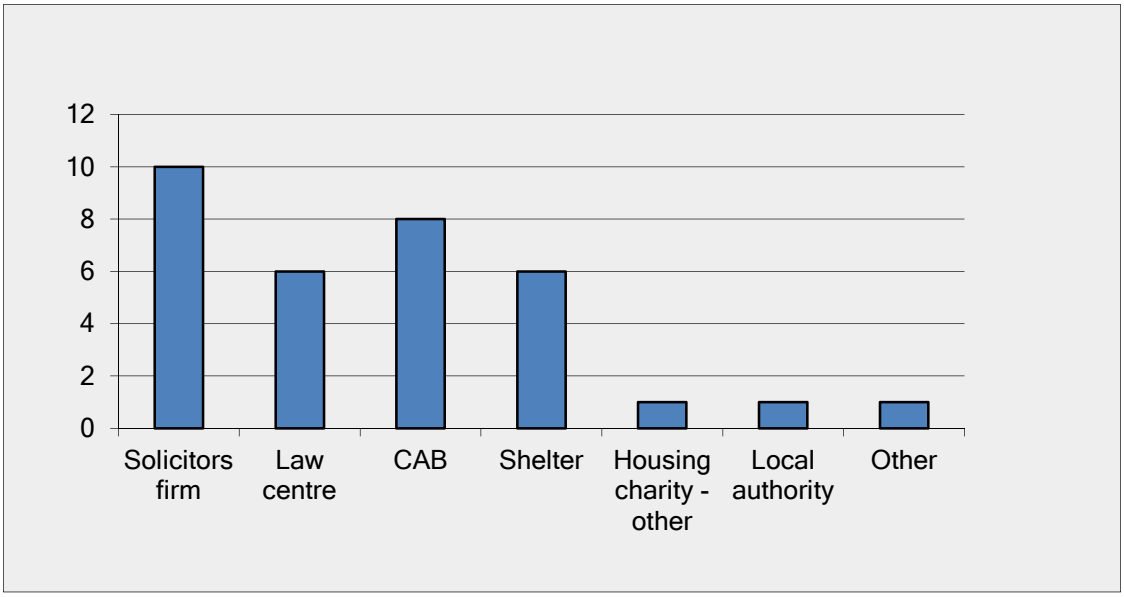
Please tick all relevant categories of agency involved in the multiple agency scheme:

Response Rate: 7/32



What type of agency is the single or lead/primary (if multiple) agency?

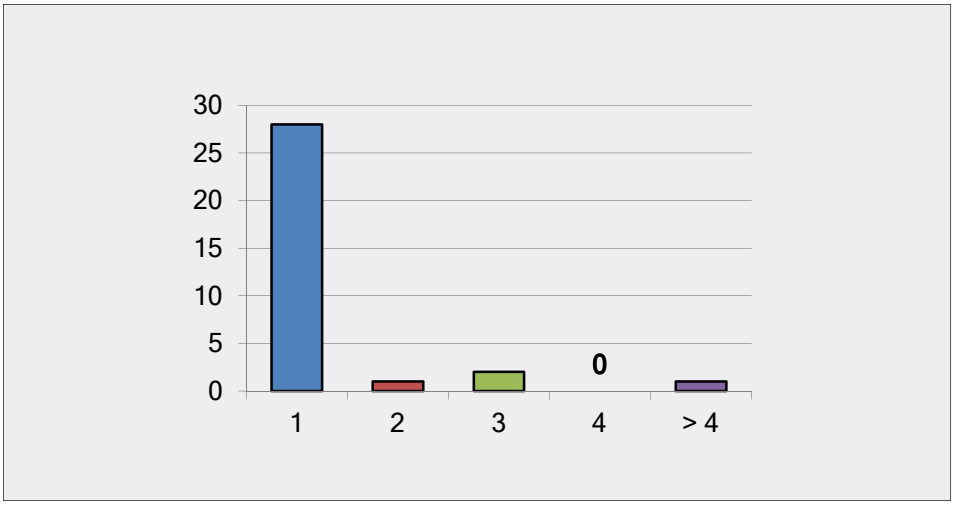
Response Rate: 32/32



2. HPCDS coverage

How many courts does this HPCDS cover?

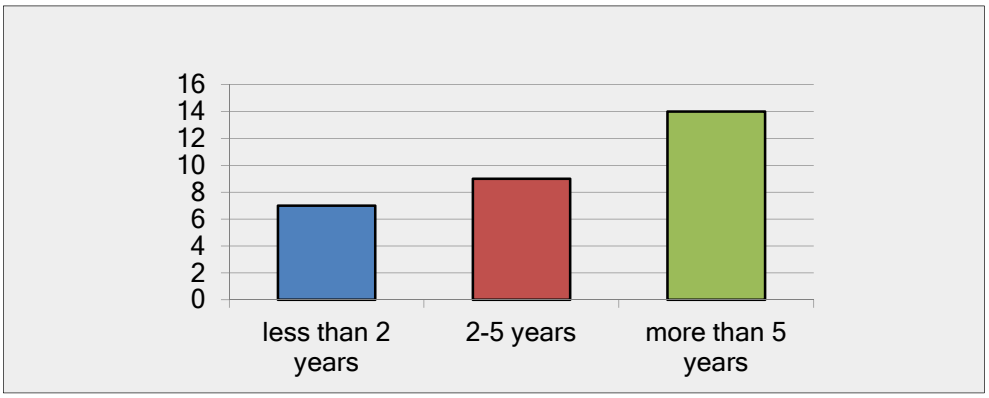
Response Rate: 32/32



3. Workings of the scheme

How long have you been working for the scheme?

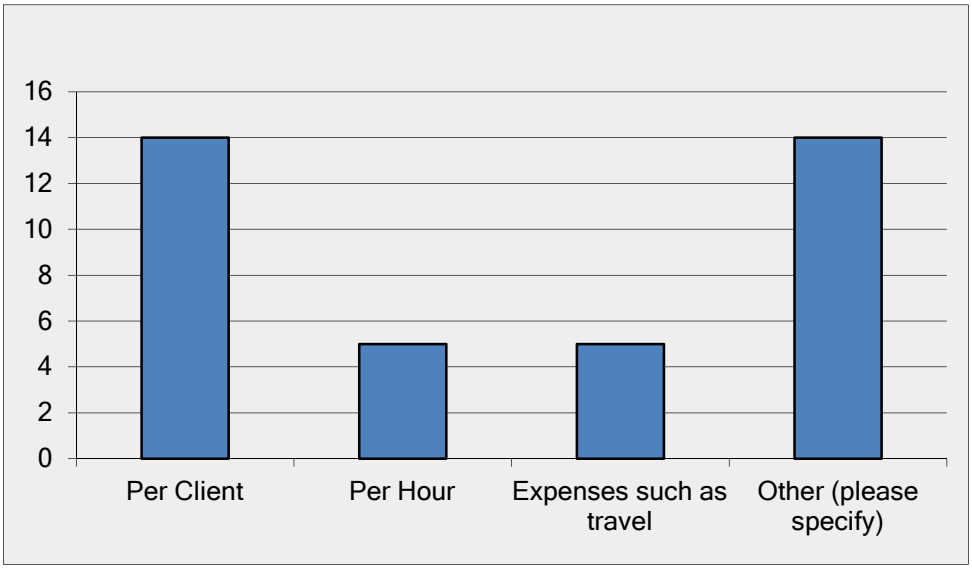
Response Rate: 30/32



Respondents' roles were varied and included duty and principal solicitors, nominated litigators, housing supervisors, scheme coordinators, as well as deputy managers and executives. Responsibilities ranged from providing advice and representation for borrowers and tenants to supervising and managing staff, preparing and circulating schedules, and liaising with courts.

How much are duty desk staff paid and on what basis, e.g. per case, per morning, etc.? Please specify amount (£) next to all relevant options:

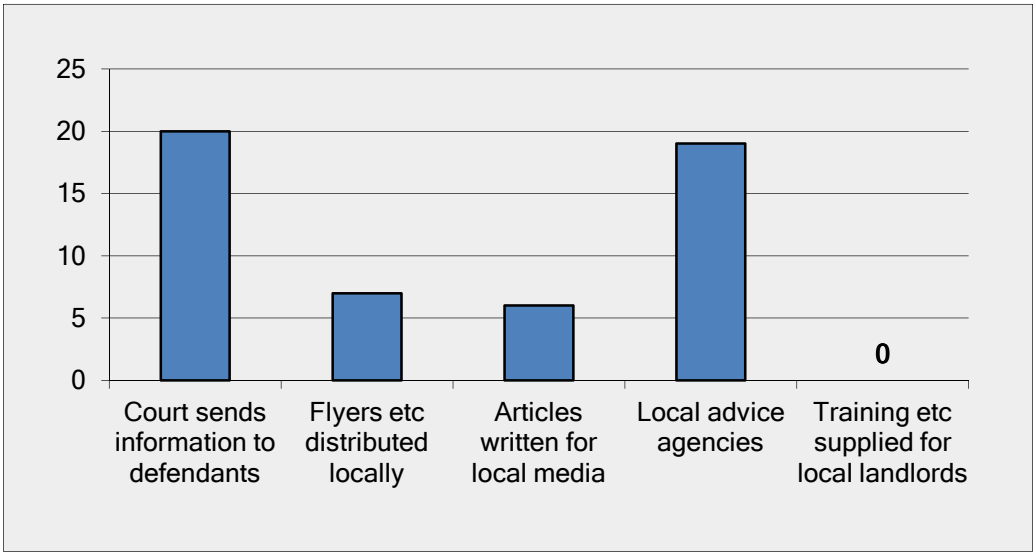
Response Rate: 28/32



Most respondents indicate that duty desk staff are paid per client. The amount most frequently cited was £71.55, with a range from £67.60 to £150. Three respondents reported reimbursement for travel. The majority of "other" responses referred to annual salaries, reported in the range of £24,000 to £30,470.

What, if any, methods are used to promote the service? Please tick all used.

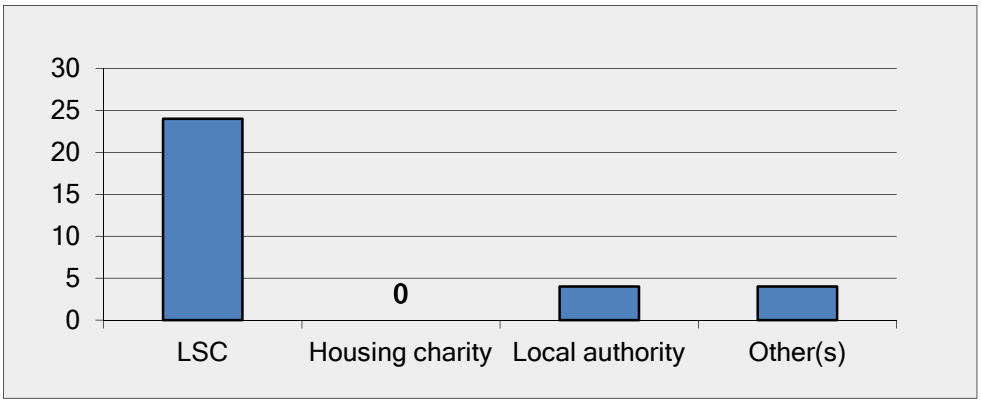
Response Rate: 26/32



4. Funding

Which of the following organisations fund the HPCDS? Please tick all relevant.

Response Rate: 32/32



Other sources of funding mentioned were CLG (one stated: 'additional service with CAB funded by CLG'). One received 20% of its funding as grant funding to support the training of advocates. One scheme reported that it was not funded and that all

participants were volunteers (this was a multiple agency supported by a solicitors firm, law centre and the CAB, with the law centre as lead agency).

Please indicate what proportion of your funding each funder provides? (please use approximate proportions if precise figures are not known):

Response Rate: 29/32

The majority of schemes were fully funded by the LSC.

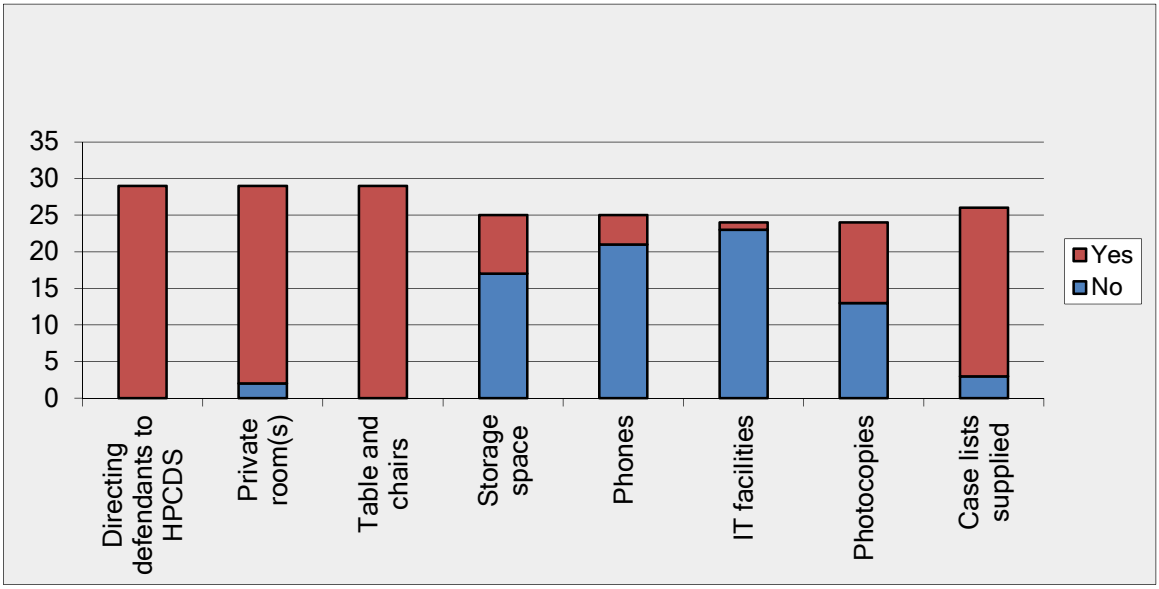
Around 66% of those responding to this question received all of their funding from the LSC. In relation to those part funded by the LSC: one received 60% from the LSC, and 40% from the local authority; one received 80% of funding from the LSC and 20% from grant funding to support the training of advocates; one received 33% of funding from the LSC and the remainder from the local authority. One stated that it was 100% funded by the LSC, less the salary paid to adviser.

Four schemes were fully funded by the local authority (two were part funded by the local authority, as shown above).

5. Support from the court

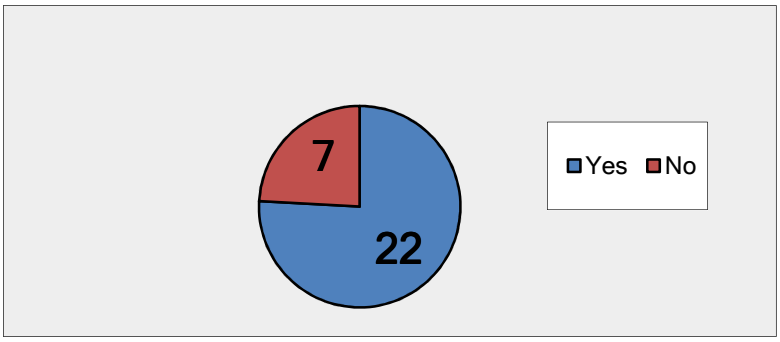
What services or support does the court provide to the HPCDS? Please tick as appropriate:

Response Rate: 30/32



Are the services and support provided by the court adequate?

Response Rate: 29/32



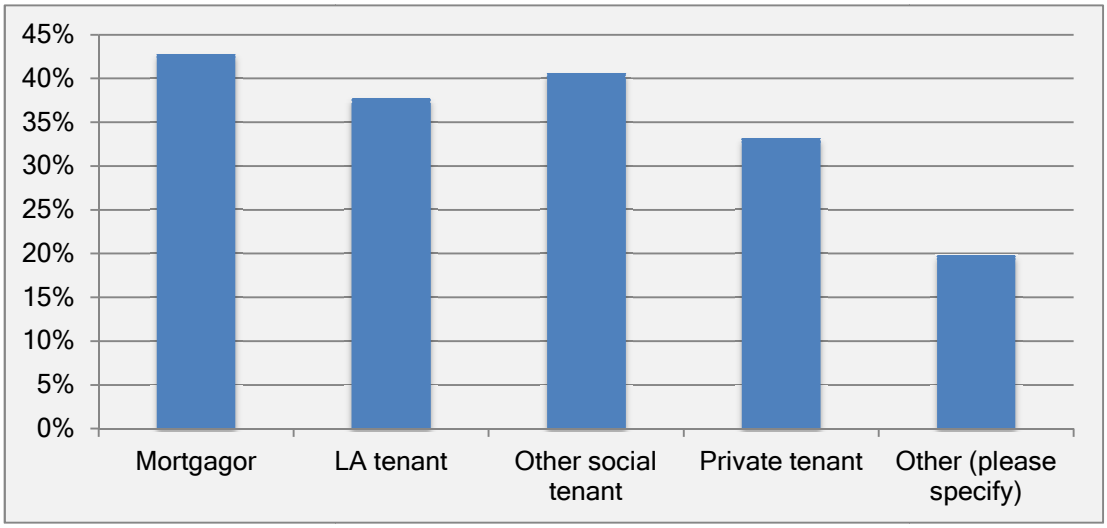
Respondents commented on a number of ways in which further support could be provided, most frequently referring to the usefulness of a designated interview room, a phone, and IT facilities.

6. Defendant attendance at court

Based on your experiences, what proportion of defendants would you say attend court?

Response Rate: 28/32

Responses varied widely. The table below gives the average estimated attendance reported for each type of client, but given the manner in which data was recorded by the survey it is difficult to draw generalisable conclusions about defendants' court attendance from the responses.



Previous studies have identified the following as barriers to court attendance. Please indicate how significant you consider each to be, from your experience (0 = not at all significant; 4 = extremely significant):

Response Rate: 28/32

The following table presents the average significance respondents assigned to each factor.

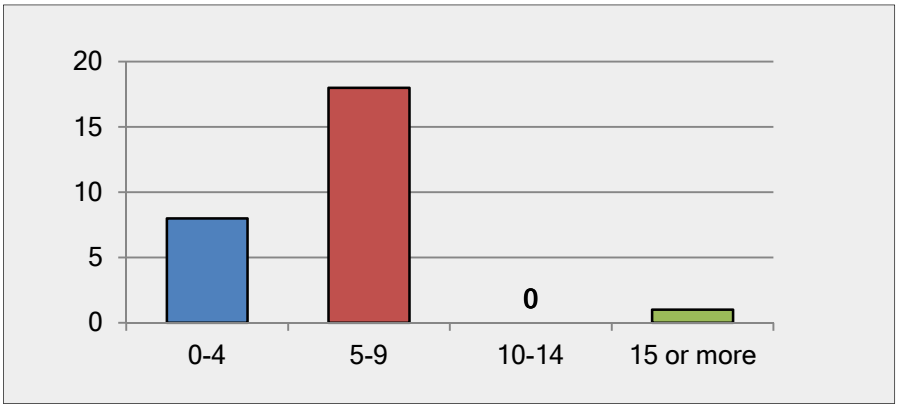
Barrier	Significance, as rated by respondents
Other	3.75
The burying of heads in the sand	3.28
The belief that there was little point in attending as nothing could be done	3.00
Landlords and housing officers telling defendants that there is no need to attend	2.97
A fear or misunderstanding of the legal system	2.76
The cost and difficulty of attending	2.41
General apathy	2.36
The acceptance of what is perceived as an unfair system	1.86

The other factors enumerated were agreements having been reached in advance; mortgage companies discouraging defendants from attending court; and language or cultural barriers.

7. HPCDS clients

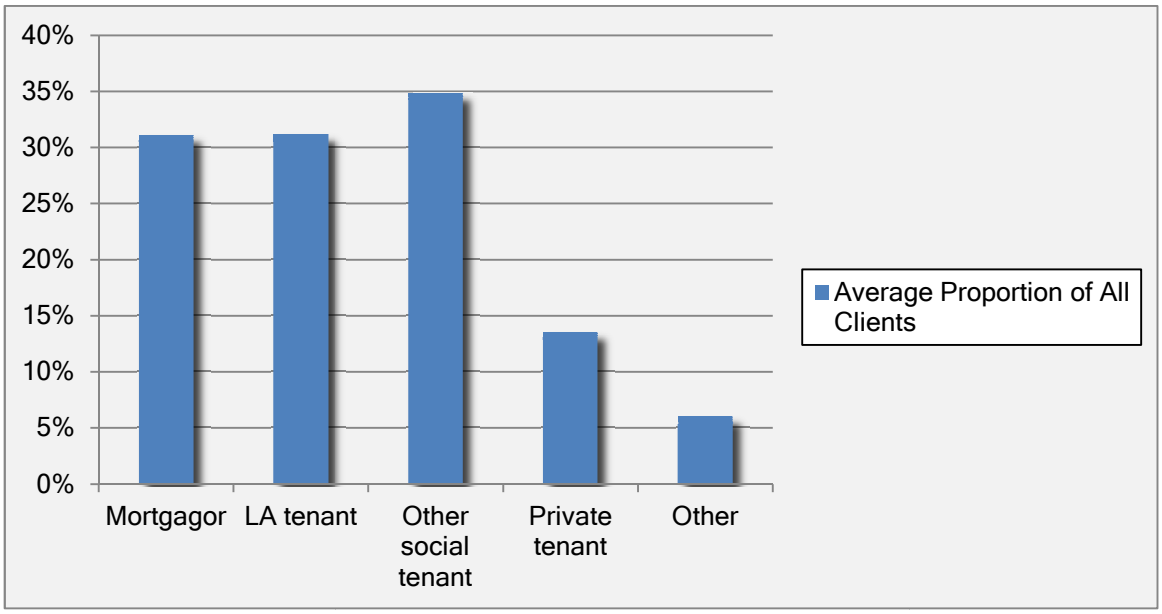
How many defendants do you see during a typical possession list? If there is no such thing as a 'typical' possession list please estimate the average.

Response Rate: 27/32



What percentage of clients fall into the different housing categories?
Please indicate whether the figures are based on recorded data or your own personal perception.

Response Rate: 27/32[197]



Around 75% of these responses were based on personal perception rather than recorded data.

Have the figures in the question above changed over the years of the HPCDS?

Response Rate: 26/32

Responses to this question were evenly divided: whereas half of respondents indicated that the percentages of clients falling into different housing categories had changed, the other half indicated that they had not.

Among those who answered "yes," responses were varied. Four respondents reported increases in mortgage cases, while three reported fewer mortgage cases

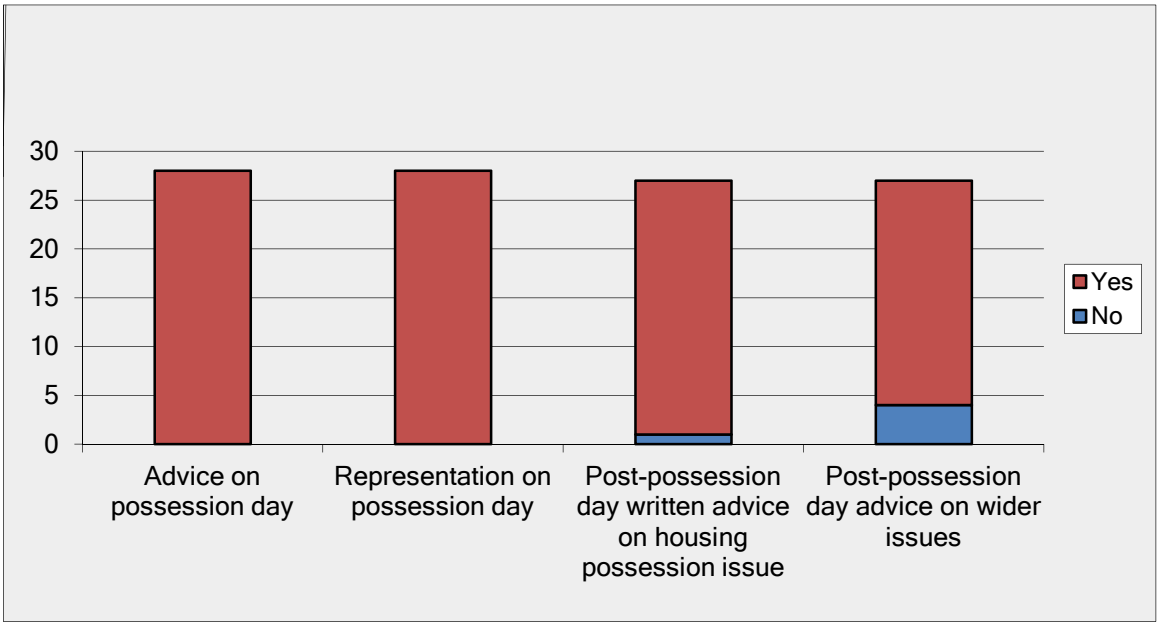
[197] One outlier was removed from this question, in which a respondent indicated a distribution respondents that summed to >200% rather than ~100%.

overall and two reported a decline in mortgages as a percentage of all cases. One respondent reported a lower percentage of local authority tenants, while another reported the opposite and two others reported more LA tenants overall.

8. Client support

Which of the services and assistance can you provide to defendants who approach you through the HPCDS? (please tick as appropriate)

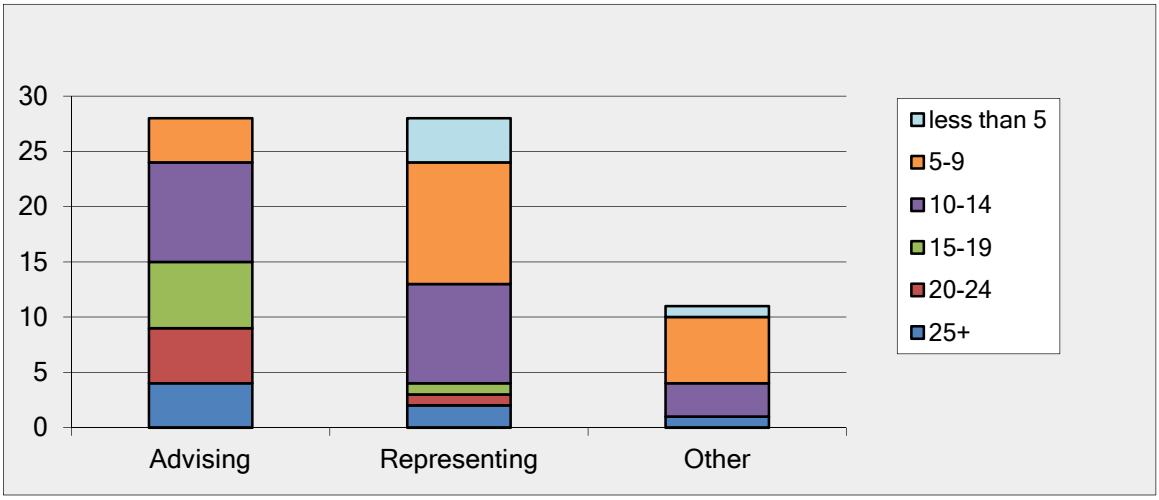
Response Rate: 28/32



Some respondents explained that post possession day they continued to provide work under public funding certificates where appropriate.

How much time do you typically spend with a client at court (in minutes)?

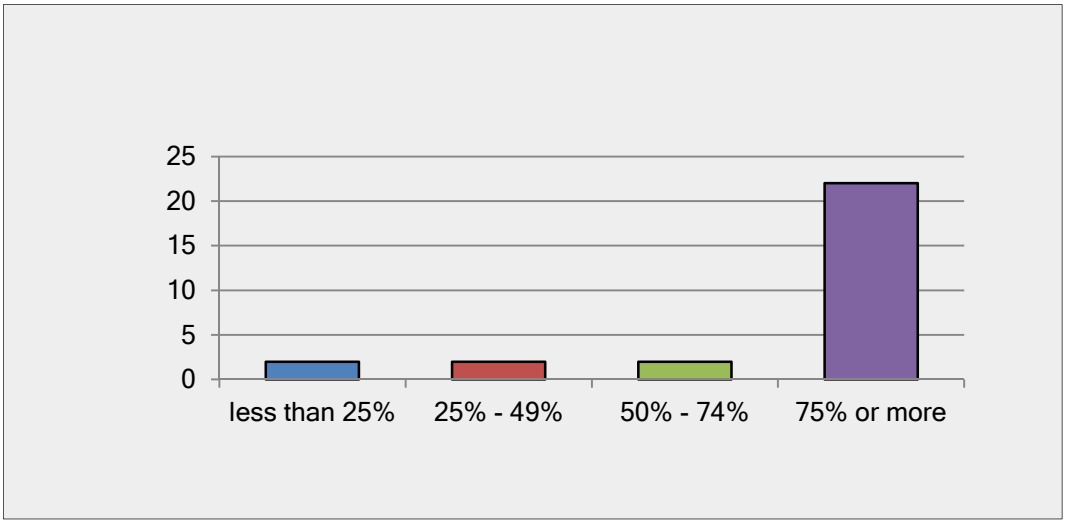
Response Rate: 28/32



The main other activities mentioned were negotiating with the claimant, and post-hearing discussion and advice.

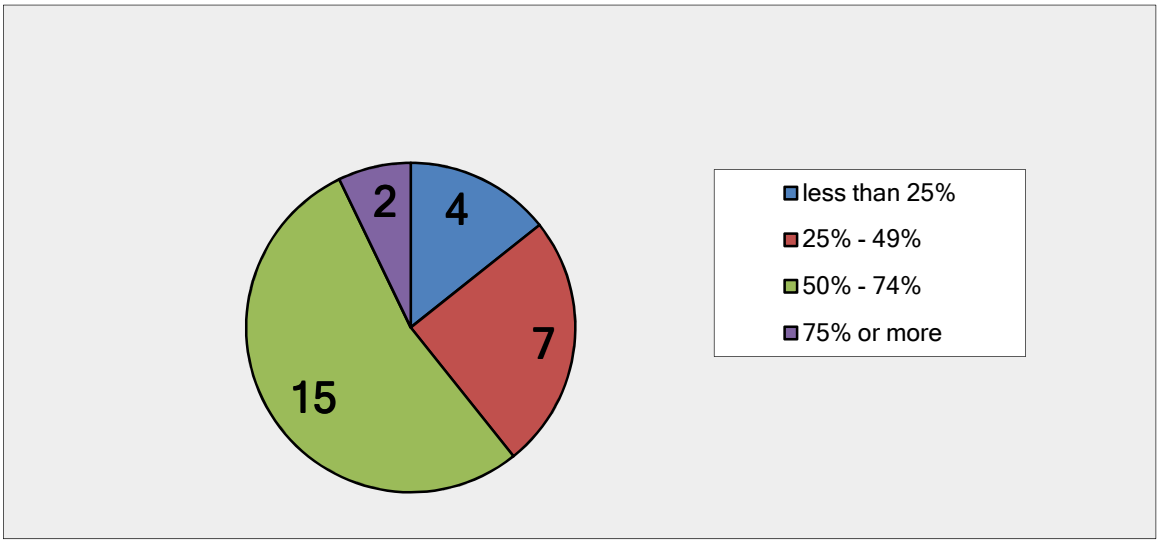
In your experience, in what approximate percentage of cases does the desk attempt to negotiate arrangements on behalf of the defendant with the claimant's representative prior to the hearing (whether or not an agreement is reached)?

Response Rate: 28/32



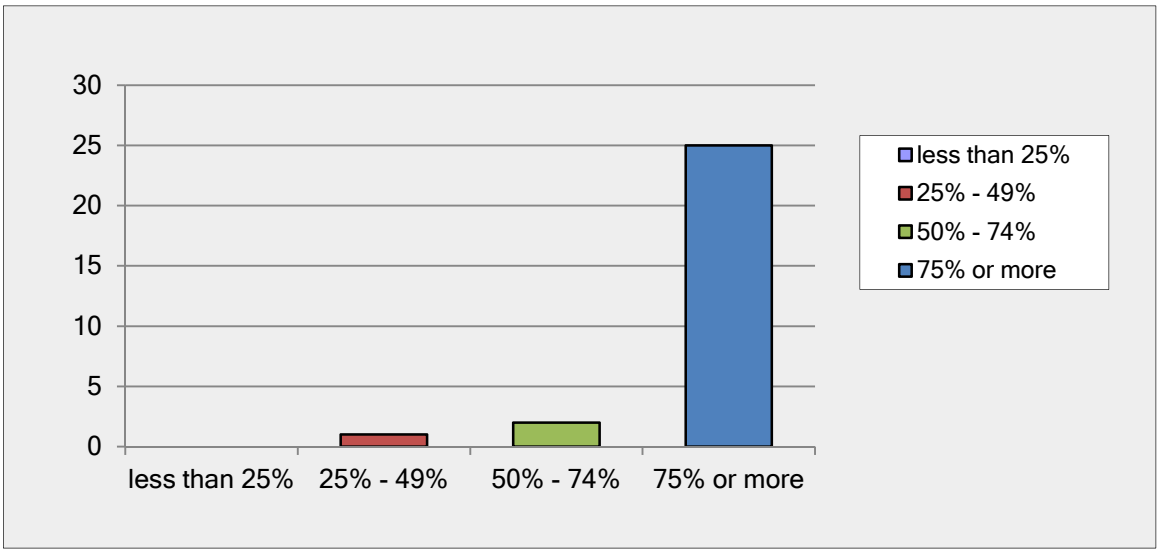
In your experience, in what approximate percentage of cases does the desk reach agreements on behalf of the defendant with the claimant's representative prior to the hearing?

Response Rate: 28/32



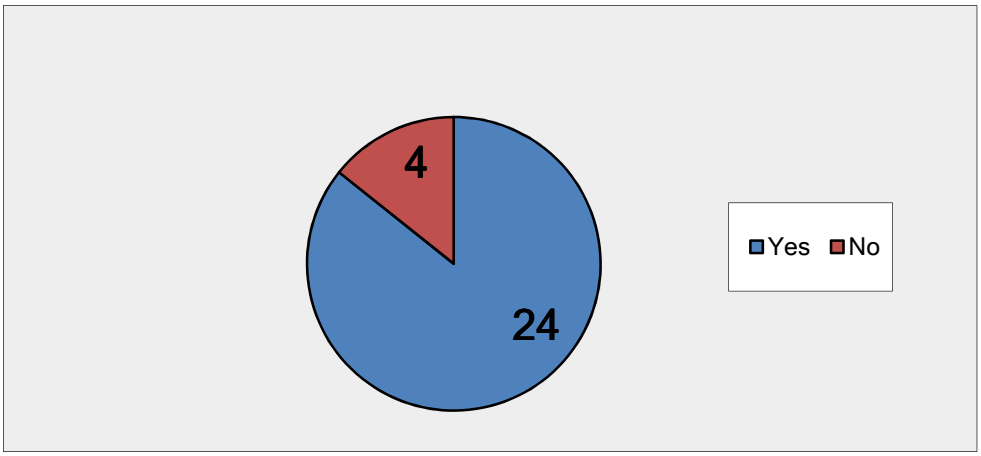
In your experience, where an agreement is reached in what approximate percentage of the agreed cases does the judge's order reflect this agreement?

Response Rate: 28/32



Are all defendants that consult the scheme offered HPCDS representation at the hearing?

Response Rate: 28/32

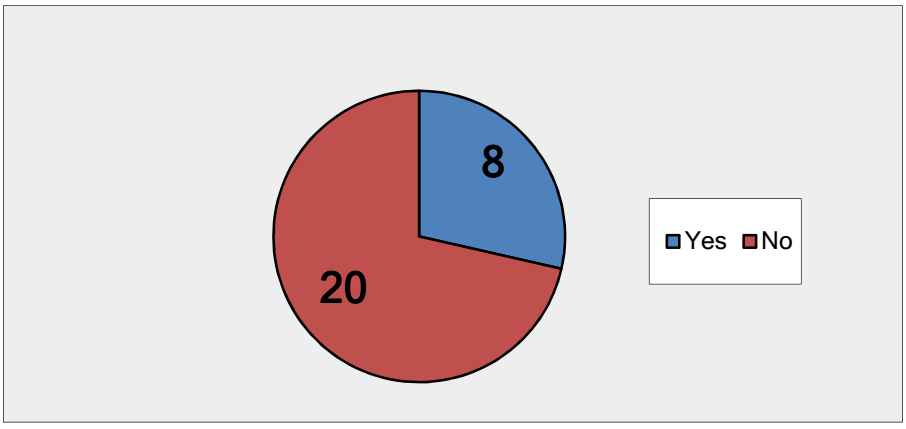


A number of comments were made. It was noted that clients may not be eligible for assistance if, for instance, their homes are not at risk (buy to let) or if they have ongoing cases with other agencies. It may be also that if there is no legal defence the client would likely do better if they were self-represented. One noted that in the presence of time constraints, clients for whom an agreement has not been reached have priority over those for whom an agreement has been reached.

One respondent (at a CAB scheme) commented that it is not, strictly, 'representation' but the adviser does put the defendant's case if they are not able to themselves.

Do all defendants offered HPCDS representation accept that offer?

Response Rate: 28/32



If 'No', approximately how many decline it and why do you think they refuse it?

Most comments suggest that fewer than 10% (perhaps only 1-2%) decline representation. Respondents reported that defendants may decline representation if a previous agreement has been reached, or if they don't believe they need advice, don't like the advice given, or want to represent themselves.

Do you think that having HPCDS representation affects the outcome of the case?

Response Rate: 28/32

All respondents answering this question indicated that they believed having HPCDS representation affects the outcome of a case.

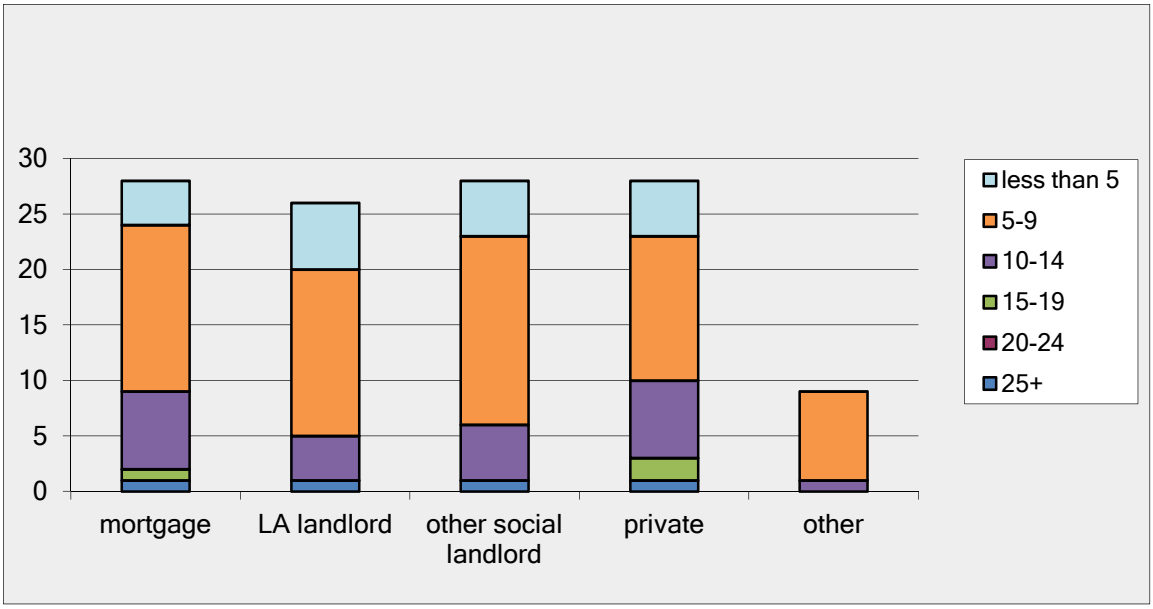
If so, please give some comment as to how:

Many respondents commented on the fact that defendants will arrive at court without prior legal representation and under enormous stress. Unaware of what issues are important and relevant to their case they are likely to agree to unaffordable and unrealistic arrangements. One respondent reported that in 78% of cases the client either retains the accommodation or homelessness is delayed, and that in a significant number of both mortgage and local authority cases the figure for repayment of arrears has been reduced to affordable levels. Others also mentioned that outright possession is less likely, with adjournment of suspension on (better) terms resulting. Two respondents commented that whereas mortgage lenders may press for payment over a relatively short period, the adviser is able to argue for the *Norgan* principles to be followed giving a longer time for payment. It was also pointed out that advisers are often able to detect procedural errors that have occurred. Furthermore, it was also said that HPCDS representatives can communicate more effectively because of their specialist knowledge of the law as well as personal or local knowledge about judges.

9. Hearings

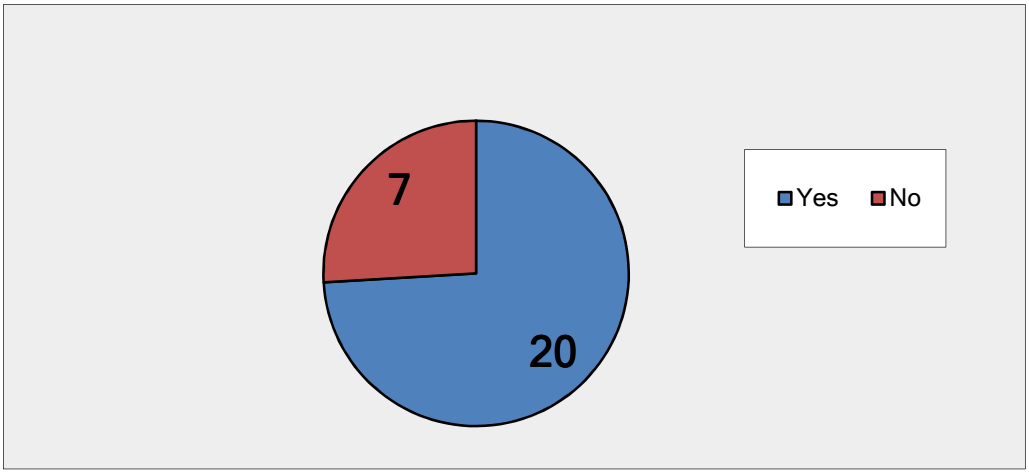
How much time is allocated, usually, by the court in each type of case (in minutes)?

Response Rate: 28/32



Do you think that judges receive information sufficient to allow them to exercise their discretion in a fully informed manner?

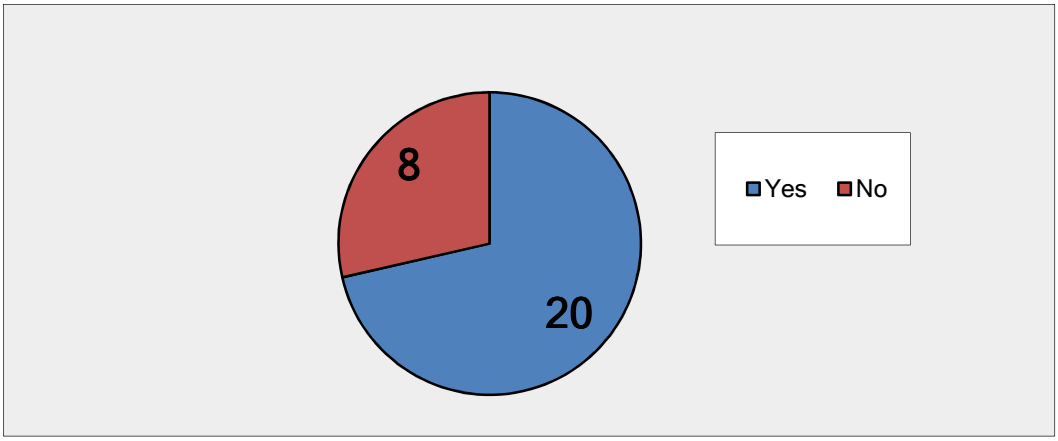
Response Rate: 27/32



Among respondents answering “no,” limiting factors were found to be insufficient time and defendants’ not completing defence forms. One respondent commented that the complexity of the defendant’s background is such that a rushed job does not do them justice, even with HPCDS help. It was suggested that more should be done to inform defendant’s of the scheme before the hearing so that they may seek advice earlier or, at least, should be advised to turn up at the hearing with relevant information. Another commented that there is a great disparity between different judges as to the weight given to almost identical circumstances. It was suggested that greater guidance could help to counteract inconsistency between judges.

In your opinion, is the outcome of a case affected by which judge hears it?

Response Rate: 28/32



Respondents suggested that judges vary in their leniency and in their willingness to hear evidence, and that some of this variation is based on judges’ levels of experience. Several mentioned that certain judges are known to be more lenient than others. One noted that if a judge is of a harsh disposition, a well prepared case is essential but that this requires more work than is possible during a busy morning with lots of clients and little privacy to discussion confidential personal matters. One respondent said that most judges are up to date with the law, but not necessarily deputies.

10. Non-financial information

Do HPCDS staff ask the client for information relating to non-financial considerations such as illness, bereavement, the reason for the arrears, how important this home is, etc?

Response Rate: 28/32

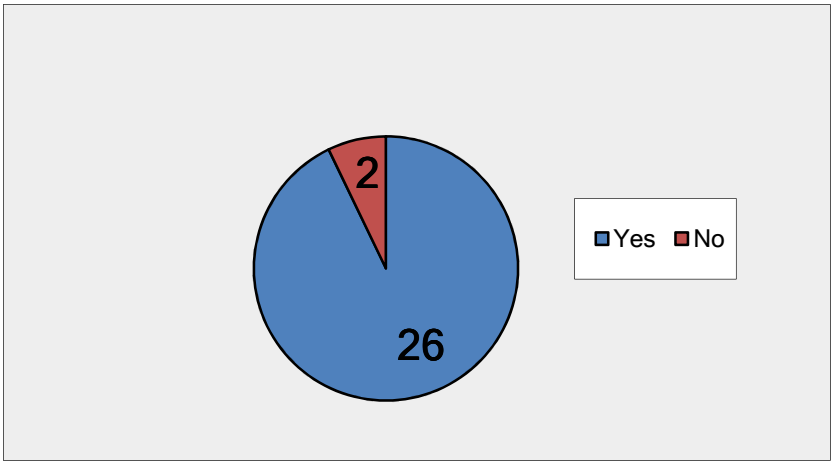
All respondents to this question answered “yes,” indicating that clients are asked for information relating to non-financial considerations.

If 'yes', how would you seek to present this information to the claimant’s representative or the judge?

Most respondents stressed how important this information was. Many indicated that they would first seek clients’ permission to present information to the judge. This information may be presented alongside financial information or as background information, and was important in explaining how arrears have arisen, whether there are children, and how their health will be affected by eviction. Some indicated that non-financial information may be critical to the exercise of judicial discretion in relation to reasonableness. It was noted, however, that often a defendant has not brought any evidence with them and so only oral communications can occur. It was also noted that there is little time to obtain proper detail.

Do you think such information is taken into account by the claimant’s representative or the judge?

Response Rate: 28/32

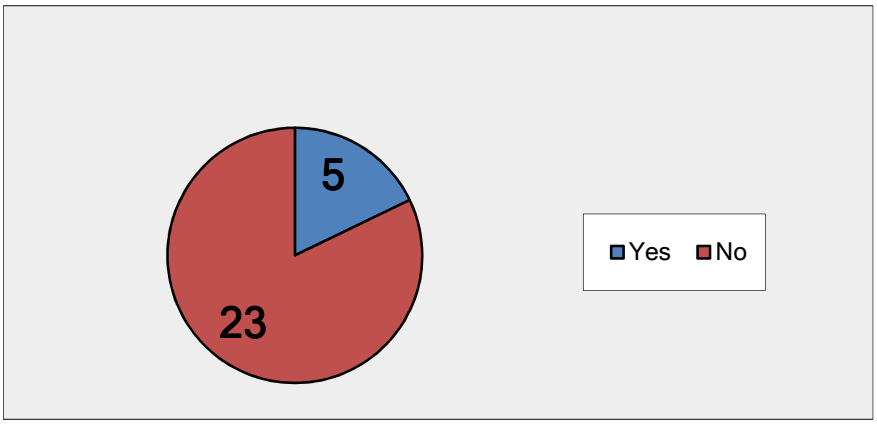


Many responses again indicated that such information may be hugely important in cases where a judge has discretion. Some respondents indicated that such information is taken into account more often by judges than by claimants' representatives, perhaps because the claimant's representative only has instructions to agree financial settlements (especially in mortgage cases). It was, however, also noted that the claimant's representative may then take further instructions. A comment was again made that there is often no evidence and some judges are reluctant to give time to produce documents.

11. TLATA 1996

Do you have experience at the HPCDS of the Trusts of Land and Appointment of Trustees Act 1996, e.g. one occupier asking for sale against the wishes of their partner?

Response Rate: 28/32

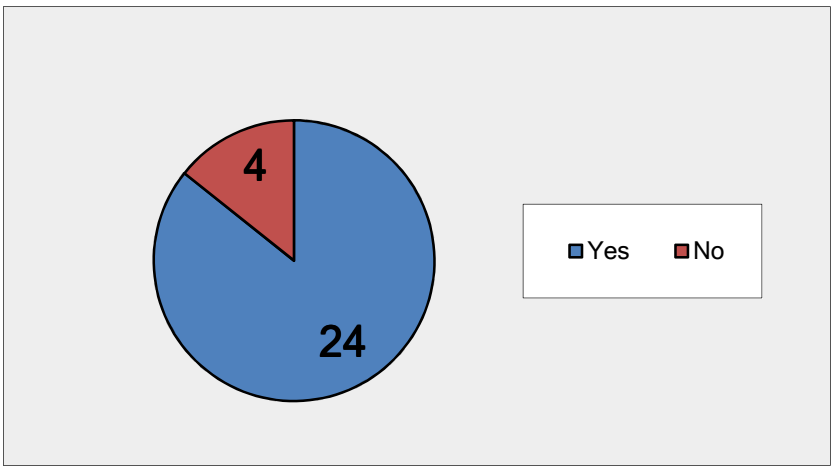


Some of those respondents who replied yes added a comment, and all comments were to the effect that these cases would be very rare (the most frequent suggested was 2 or 3 cases per month, whereas one said it would be 1-3 per year).

12. Human Rights

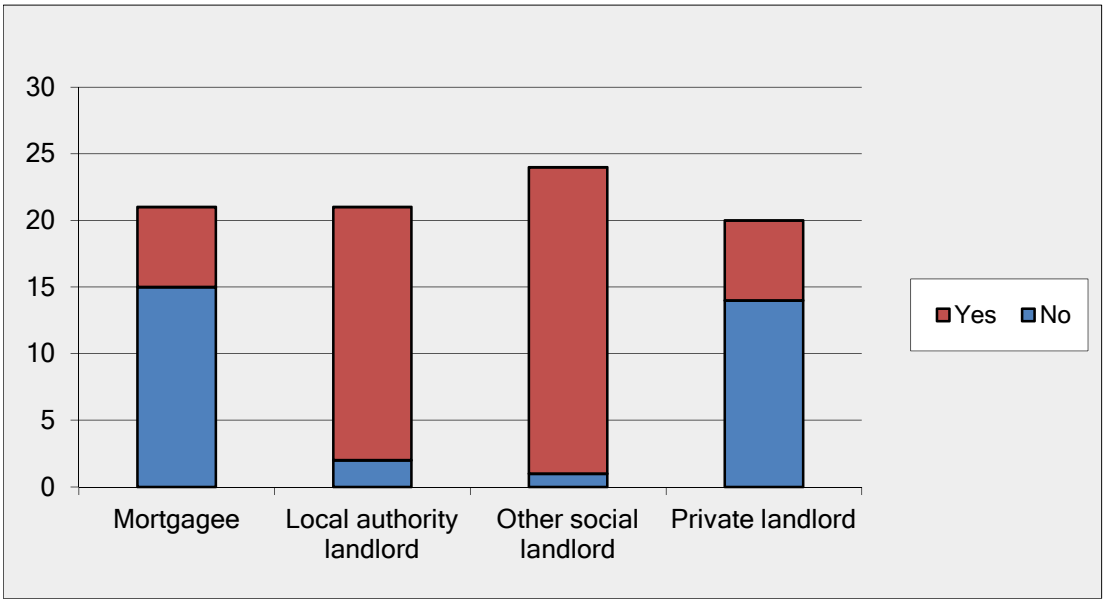
Do you have experience of cases raising issues under the Human Rights Act?

Response Rate: 28/32



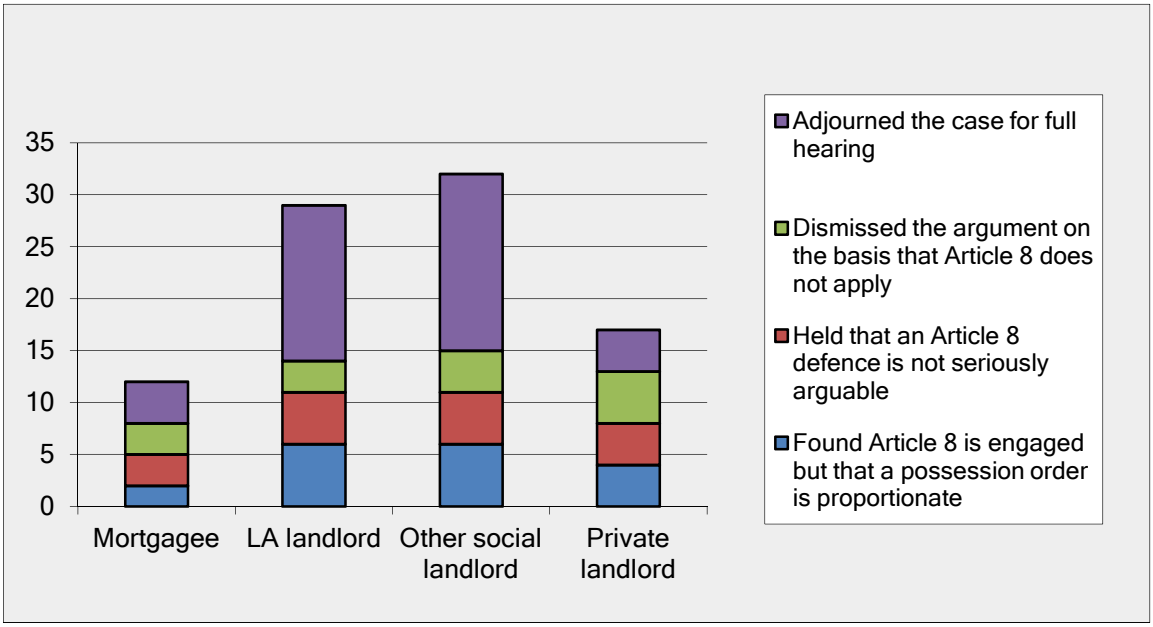
If you answered 'yes' above, have you had experience of human rights issues being raised in cases involving the following types of claimant:

Response Rate: 24/32



In your experience, when Article 8 issues are raised by each type of claimant have you ever found that the judge has done one of the following (please select all that apply):

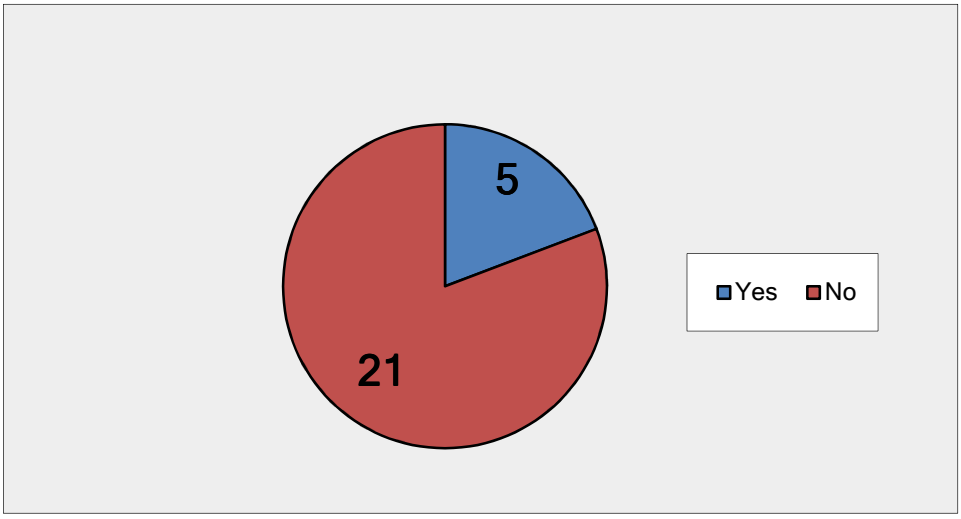
Response Rate: 23/32



Among the elaborated responses it was noted that Article 8 has become increasingly relevant in recent years. It was also observed that Article 8 claims may be difficult to address within the time constraints of a shorter hearing. One respondent observed that Article 8 arguments are taken seriously and, in that adviser's experience, always led to adjournment for a defence to be filed (this respondent had experience of Article 8 being raised in mortgagee, local authority and other social landlord cases).

Do you have experience of other Convention rights being raised?

Response Rate: 26/32

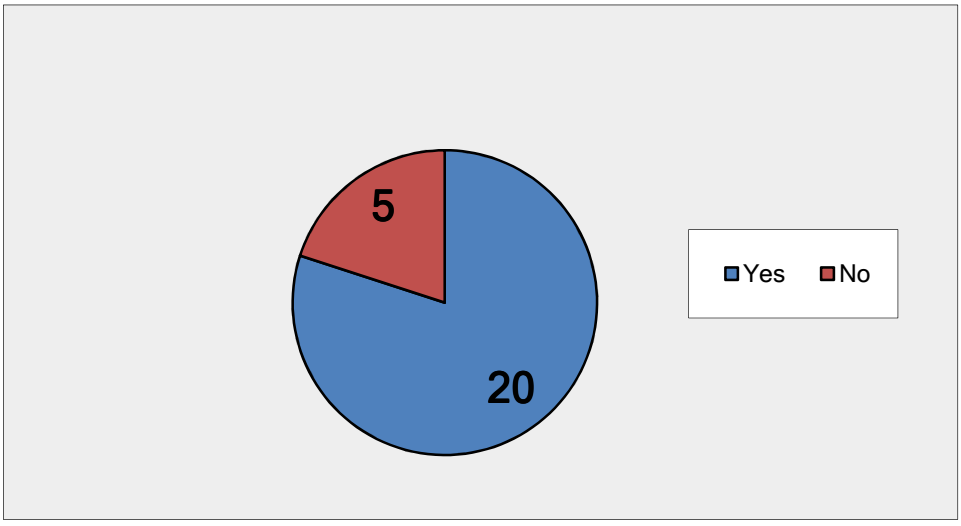


Respondents reported experiences with Article 6 and the right to a fair hearing.

13. Recent changes and further reform

Have the rent and mortgage pre-action protocols made any difference to the work of the HPCDS or the process of possession?

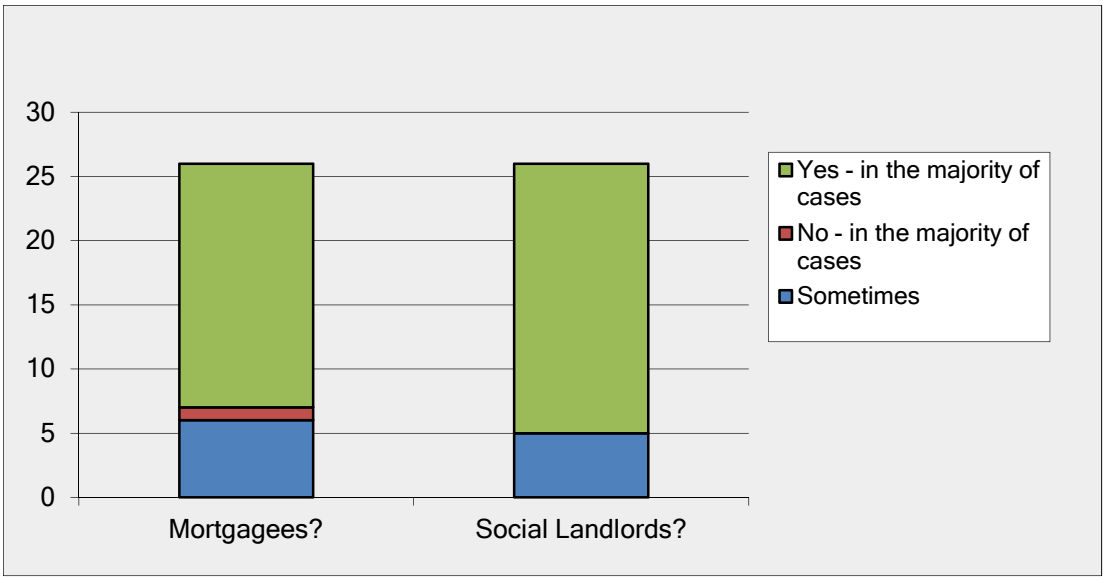
Response Rate: 25/32



Most of the elaborated responses referred to the MPAP. Respondents indicated that in some instances the protocols may reduce the number of cases brought to court; may cause documentation to be prepared more carefully; and may make it easier to identify non-compliance and bring about adjournment. However, opinions were mixed regarding the significance of the protocols' impact but overall there was a sense that the MPAP had less impact that the RPAP.

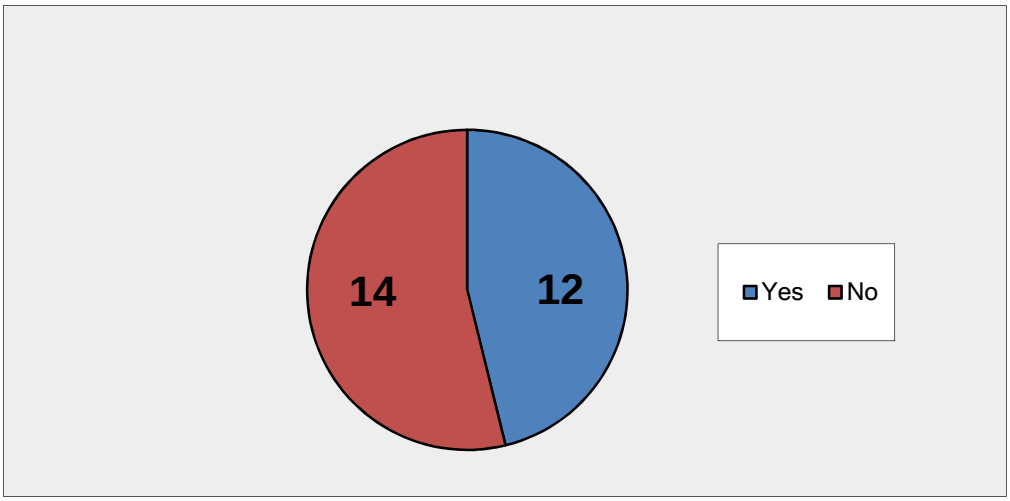
In your experience, is the protocol followed by:

Response Rate: 26/32



On the basis of your experience at the HPCDS, do you consider that the law and/or process in respect of housing possession cases is in need of reform?

Response Rate: 26/32



A number of suggestions were made in relation to tenancy law reform, such as, restricting the use of ground 8 by social landlords, having more secure tenancies in the private sector, and simplification of tenancy law (suggestions included: the introduction of a standard tenancy, reform to section 21).

Comments were also made relating to possession. Social landlords do not always take sufficient account of the problems created by the benefit system. Cases should be listed for longer. Claimants should encourage clients to get legal advice at an earlier stage, and mortgagees should not give false advice about the period over which arrears can be paid.