TLIC Recommendations for the PRS

May 2022

Section 1: Loss of section 21 and changes to section 8 grounds

APPENDIX 1

This section we will go through the current and proposed grounds in greater detail and suggest where things work and where there is room for improvement. All suggestions are made with consideration for the loss of section 21. I.e. there may not be many ground 1 notices currently used, but this would reasonable be expected to change when section 21 is removed.

Ground 1

This is the "owner occupier" ground, it is included to encourage home owners not requiring the property for a period of time, to allow it to be rented in the PRS. It has two limbs, the first is someone who has lived in the property as their only or principal home and the second is where a home was purchased for future use (something like a retirement property). It is important to retain the confidence that the landlord can get their property back or they may simply not put it on the lettings market at all, reducing supply and driving up cost.

The first suggestion is that the landlord should be allowed to want the property back for themselves, or a family member. Family member could be defined as in section 258 of the Housing Act 2004 HMO legislation https://www.legislation.gov.uk/ukpga/2004/34/section/258.

Secondly a property may not have been purchased to live in but a change in personal circumstances might create the need/plan to use it, be that divorce, serious accident that needed the use of a bungalow, change in financial circumstances etc. This ground should be edited to allow the need for personal or family use, regardless of if that was the intention at purchase.

These changes would make prior notice difficult (after all anyone's circumstances might change) and would likely just start the trend of everyone serving the notice as standard, devaluing the information as the tenant would not then know if this was intent or precaution. It was suggested that prior notice has the advantage of catching out poor landlords but this seems an inappropriate way to regard the law. Serving it on every tenant would simply create insecurity in many tenants, quite unnecessarily.

Evidence could be provided of intention to sell such as a letter from the solicitor/conveyancer instructed to act confirming KYC checks had been completed. Sanctions could be attached to prevent abuse of the ground, for example not allowing it to be returned to the private rental market for a period of, say, six months.

Ground 2
This is where the mortgage lender has repossessed and wants to sell with vacant possession. It requires the mortgage to have been in existence before the tenancy and for the property to qualify for ground one as described above.

If there is a new ground for possession based on the sale of the property this ground could conceivably be removed, or changed into that more general sale ground as, once the lender has repossessed, they would simply be the landlord and entitled to the rights of the landlord, including the right to sell.

Fundamental to the changes for this ground are that the link to ground one should be severed (as this dis-applies this ground for investors, who are often the long term landlords). Secondly the grounds should allow the mortgage to be set up after the tenancy. This is because, as it is written, it forces landlords to evict the tenant in order to sell, when they may sell to a new investor who only wants to rent the property, but the majority will need a mortgage. It is actually bad for tenants. Also it limits the landlord's ability to re-mortgage, something that might allow him to keep the payments affordable and therefore avoid the need to dispose of the property. Even practices like getting the tenant to move out for 24 hours while the re-mortgage is undertaken and a new lease granted are simply an inconvenience to the tenant and are totally unnecessary with a simple edit.

Ground 3
This is the out of season holiday let ground where holiday accommodation is let over the winter.

As there may not be six months between the last and first holiday lets in the two seasons it allows for a shorter letting. This provides accommodation that may be suitable for people who need major works done, or are moving house, to take a let for a few months. If they can use the short term property it leaves the longer term property for those who want longer term letting and could even mean fewer families have to be in temporary accommodation while they wait for a private let to become available.

Important for this market is fast access to possession. These landlords have holiday makers lined up to take the property from fixed dates and any system to encourage them to rent will need to assure them that they can fulfil their contractual obligations there too. As with all these things it is easy to change the rights of the parties, but each change may have consequences for others which need to be considered. This ground warrants the prior notice status and that prior notice could be the trigger for the swift possession on expiry. Evidence of prior use for a holiday should be easy via bookings etc. Anti-avoidance measures by not allowing it back on the PRS would be easy and appropriate.

Ground 4
This allows further education establishments to use their accommodation out of term time for short lets (much like the holiday lets above). It is not available to the PRS, but realistically there is little reason it should not be extended to the PRS. Currently much student accommodation in the RPS is empty over the summer when, like with holiday lets, people could be using the accommodation if they were between moves or had had a fire etc. freeing up other longer term accommodation. There would be council tax implications but this would

be for the landlord to factor into the letting. It may save students money, as they are often paying to leave the property empty currently. Like the holiday letting in ground three, certainty of a swift and efficient way of removing the tenants once the contract ended in order to allow the students to return for their studies would be important. This ground warrants the prior notice status and that prior notice could be the trigger for the swift possession on expiry. The student use would be easy to prove through council tax exemption for the previous year. Anti-avoidance measures by not allowing it back on the PRS, other than the student letting arranged, would be easy and appropriate.

Ground 5

We feel this encourages the good use of properties to help those in need of accommodation and should be retained. We wondered if the definition of "minister of religion" should be reviewed to ensure it is suitably wide in a multi-cultural society. Like grounds 3 and 4 above it is important that an effective expeditious possession action is available. This ground warrants the prior notice status and that prior notice could be the trigger for the swift possession on expiry. Evidence of the need for a minister of religion would be easy from an "offer letter" or similar. Anti-avoidance measures by not allowing it back on the PRS would be easy and appropriate.

Ground 6

This ground allows for possession where major works are to be done. Many PRS properties may need substantial works and there seems little point in the landlord not being able to do the works due to not getting possession. This may be even more pertinent as works are required to meet increasing energy efficiency standards. As the reasons for demolition or renovation may not be known at the outset, prior notice is not appropriate (perhaps a serious fire).

As with ground one, this ground could have restrictions associated to prevent a landlord using it to evict without cause. For example, should the landlord have to have got any drawings and permissions in place before they start (planning or building control)? Should there be a period in which the landlord could not re-let (say, till completion of the works or minimum 3 months)? All to prevent this becoming a section 21 notice by the back door due to not getting permission or a claimed "change of plans".

Although possession may be mandatory, the landlord would still have to prove it was necessary to evict the tenant in order for the works to be completed before it became mandatory to give a judgement.

Ground 7

This is the death of the tenant where the tenancy has transferred under the will or intestacy of a deceased tenant. In general this ground does not need substantial reform. However, the timescale for its use is too short and does not take into account the increasing length of the probate process. Currently this ground can only be used for 12 months after death but the transfer of tenancy might not have occurred during that period and so a landlord might still be uncertain as to who is actually going to be taking on the tenancy. The period of use should therefore be lengthened to 24 months from the date of transfer.

Ground 7A

This is the first of two anti-social behaviour grounds. There is a line of argument that this amounts to double jeopardy for a tenant who has been convicted of one of the offences and if they were a home owner that would be the end of it. However, as a tenant, they then could suffer a second penalty of losing their home. Having said that, some of the offences could have a significant negative effect on the locality and it may be inappropriate that the individual remains in the area (perhaps threatening neighbours). To be honest the most effective solution would be if the case for the original conviction included consideration of possession as A) it would avoid another court hearing and B) the overall penalty awarded, potentially including eviction, could be considered all together. Eviction would only be appropriate if the offence had some connection to the locality. As this ground stands it is not used as the fixed term of any tenancy will have ended and a landlord will use s21.

Ground 7B

Right to rent breach where one or more tenants do have a right to rent. This is dealing with the situation created by the tenancy not being divisible, so the landlord has to seek possession from all. The lawful tenants can apply for the tenancy to be transferred into their name, though this would leave them liable for 100% of the rent and this may not be affordable, potentially creating arrears. Though the court “must” make a judgement, as this is a mandatory ground, they do not have to evict those with a lawful right to rent. They only have to evict those without a lawful right. This seems a fair balanced ground.

Ground 8

This is the serious rent arrears ground, the amount of arrears varies based on the frequency of rent payments. Missing from the list are, for example 4 weekly rents, and this has been known to cause problems. Perhaps the ground should give specific examples (like weekly and monthly) but then include a formula for other payment options (for example, the equivalent to at least two ~~payments~~ months’ rent is at least one month overdue. have been missed and the oldest missed payment is a least one month overdue). This would only apply where the specific rent payments frequency is not mentioned in the ground. Other options would be to have it as “weekly or a multiple of weeks” for the rent payment.

There are arguments to be made that the arrears may not be the fault of the tenant and so it should only be at the discretion of the court. However, this is more an argument in favour of ensuring things like benefit payments are suitably prompt. If it was not mandatory, it would simply be ground 10, any rent arrears. If tenants have a genuine counterclaim then the judge can, if they agree, award the counterclaim eliminating the rent arrears and leaving the tenant in situ.

Without section 21 you are moving from a “no blame” eviction to an eviction based on blame (not paying the rent in this case). This makes it much harder to maintain the relationship and so for the serious rent arrears grounds a short notice and swift action in the court are appropriate. If tenants do not pay the rent it can cause hardship for the landlord, who may have the property repossessed or choose to use a sale ground instead of rent arrears, in both cases losing the property from the rental market adding to the shortage of available property to rent.

Unpaid court ordered rent arrears, from either ground, should 'automatically' become a CCJ to ensure people are encouraged to fulfil their court ordered obligations. Obviously the creditor would need to notify the court the money was not paid but it needs to be simpler than at present.

One suggestion was that the judgement could be more flexible. The only option for the judge at the moment would be to award outright possession. If the judge could order suspended possession then this could include paying the current rent plus an amount off arrears (somewhat like debt respite orders, where ongoing costs have to be affordable to avoid putting the debtor in a worse position than they are currently. It could be that this was time limited (i.e. the reason for suspension would have to "happen" within the time a normal order would take effect. This would allow someone due money imminently (perhaps an employer paying late or benefits being paid) to have up to the order date, not the hearing date, in order to try and resolve the situation. Landlords do not want to evict tenants, it costs them money in re-letting and loses them revenue with voids so they will normally only evict as a last resort. If the tenant can pay the current rent and keep to the court awarded arrears plan, this gives no re-letting or void costs and gives the landlord the greatest chance of getting paid, whilst trying to keep the tenant in the property, where this is affordable. If they do not keep to the current rent or arrears, then possession should be effected without further hearing (or delaying appeals with reasons why they did not pay, this could be done by the order not being variable once issued, outside the normal route of appeal within, say, the first 7 days) on the scheduled date (or as soon as they breach the order). This would give the tenant more time to resolve things but equally maintain certainty for the landlord when the money was not forthcoming.

Many landlords insure the risk of rent arrears and any delay in getting possession will mean premiums rise (as the longer it takes to get possession the higher the cost to the insurer) and this could result in landlords being more selective in which tenants they take or wanting to increase rents to cover their increased costs.

The TLIC survey[4] on the use of section 21 notices showed that out of 90,000 responses 22% of section 21 notices were due to rent arrears. It is reasonable to therefore presume that there would be a significant increase in rent arrears court cases with the loss of section 21. If grounds are not mandatory it is even more likely that cases will end up in court due to the uncertainty.

All the grounds to this point are "mandatory". It is important to understand this means that the landlord must prove the facts, and the judge is only obliged to give a court order if they agree the facts are met. It is not that the landlord can serve notice in any circumstance and is guaranteed a court order. Essentially all grounds are "conditional" on the judge agreeing the tests are met.

Ground 9

This is where suitable alternative accommodation is offered. In many cases the landlord may use the sale ground or the redevelopment ground. However, there may be situations where

neither sale nor redevelopment are planned (for example changing the use of a property from general needs accommodation to special needs accommodation). No changes proposed.

Ground 10

This is the discretionary “any rent arrears” ground. The principle of this being discretionary and available is supported, however, the two dates should be aligned with the Ground 8 rent arrears, ideally at the court application date for both. This would reduce confusion.

Ground 11

This is persistent late payment. There is currently no guidance about what persistent means. A recent case (Khan v Mahmood in Birmingham County Court) decided that after a tenant had been in the property for 10 years to have been late with three payments some two years before the case, did not, in the scale of time the tenant had been there, amount to persistent late payment. Perhaps the notice should have to be served within three months of the most recent late payment and some guidance should be provided about what is persistent late payment (for example, more than three months or 50% of the payments due) This would help landlords know when they should use the ground and reduce the wasted court time, and the stress to the tenant, of the notice being served when it will definitely fail. It was suggested a formula similar to the “Bradford Factor”[5] which is used for employment absence cases could add clarity and give structure decisions.

Ground 12

This is any breach of tenancy other than one relating to the payment of rent. It was considered that if, intentionally or as a result of an unintended effect of a surrender and re-grant by operation of law, there was no written agreement perhaps the presumption should be that the government model agreement is applied and ground 12 would be assessed against those obligations. This would create some certainty and reduce wasted court time and stress for tenants.

Ground 13

This is the deterioration of the dwelling due to the neglect of the tenant. Consideration was given to removing this ground and simply using ground 12, however this would require there to be an agreement in place (hence the discussion of the model agreement by default). However, on consideration, this includes common part that are not conveyed under the agreement so offers wider protection and helps protect others in the building. Additionally by spelling out the responsibility it is easier to work out rather than having to go through the agreement and see if there is a breach.

Ground 14

This is the second anti-social behaviour ground. It has three sub sections. a) and aa) are likely to be the most effective and utilised. The problem with b) is that you have to wait for the legal process to run its course to achieve a conviction. If you find a tenant dealing cannabis from the property you don’t want to wait months for a conviction and then start another court action. The previous comments about double jeopardy could also apply here

and the recommended solution (integrate possession with the main conviction) would ensure that the issue of double jeopardy was addressed.

A really big issue around anti-social behaviour is it is typically perpetrated by the minority and the majority suffer. Therefore, fair but effective solutions are required. In practice, if you have one tenant living in a bedsit property dealing drugs and otherwise being anti-social, your main witnesses, the other residents, may not be happy to give testimony, making possession much harder. After all, a typical 28 day judgement will see the perpetrator and victim return to live in the same property and share facilities till the order is effective.

To resolve this, consideration should be given to how other evidence could be strengthened and used. For example, if there was a “pre action protocol” about what the landlord or agent had to do before they could seek possession, then their evidence would be accepted without the need to engage the victims who will generally be much more vulnerable. This is not unusual for local authorities to supply the evidence and not need the victims to put themselves at risk.

Another possibility might be an injunction preventing them from returning to the property, other than an accompanied visit to collect belongings. This could be provided where there was a risk of threats or harm to others in the locality.

Generally landlords in the PRS use the section 21 notice for this ground and the loss of the section 21 will see an increase in the use of this ground increasing demand for court time and greater costs due to not being able to use accelerated possession.

PRS landlords have few tools to deal with ASB once negotiation has run its course other than eviction. Some cases, the perpetrator is simply not suited to the lower levels of support available in the PRS.

Ground 14ZA

This again looks like double jeopardy and generally any riots will not be directly associated with the locality, even if they happen to have occurred in close proximity to the property. This was brought in in response to a specific set of circumstances and it would be interesting to see evidence of when or even if, this has been used. Any rioting in the locality of the property would still retain ground 14 and if unrelated to the property is simply seems like an additional penalty the tenant has to pay that the home owner does not.

Ground 14A

This ground is one for domestic violence. Currently the ground is only available to “social landlords”. There is no real reason why this ground should not be extended to the PRS to deal with the same evil in that market. Perhaps consideration should also be given to allowing all landlords to take action to evict the perpetrator before the victim gets forced out. It could work something like ground 7B where the victim could apply to have the tenancy transferred solely into their name (a choice not mandatory). Much domestic violence can be associated with controlling behaviour and handing control to the other party may in some cases help moderate the perpetrator’s behaviour and allow the victim quicker “eviction” of the perpetrator (as a resident landlord, no court order would be needed). If the victim can then stay in the property they are more likely to be near support networks, children’s schools etc.

Ground 15
This is deterioration of the furniture due to the neglect of the tenant. The comments made about ground 13 apply here. No other suggestions.

Ground 16
This is the former employee ground. This ground covers a wide range of situations, some of which may justify a mandatory ground and others where perhaps there is no real need to give possession. Clearly, if the property is needed to house a replacement employee, there is stronger justification for possession in order that the business element can continue with the full complement of staff. This is even more true where you are considering rural properties where there may not be another property for many miles. Structure in the decision making would, again, help here. For example if the employee has been dismissed, lawfully, for fraud against the landlord, it seems unreasonable to block accommodation the landlord may need for the replacement employee. Alternatively if the employee is being made redundant, then their role is no longer required and, as a very minimum, it would be reasonable to give them a longer possession date as the post is not being replaced. This could all be part of the advice for the judges' discretion in apply this ground. For example if there is a replacement employee it could be mandatory but discretionary with a longer possession date if redundancy is the reason.

Ground 17
This is the "false statement" ground. If the tenant provides false information in order to induce the landlord to provide accommodation then it is reasonable the landlord should be able to be restored to the situation where they would have been had the real facts been disclosed.

The area that does not work, and there is some doubt it has been used as an effective possession tool, is the point of the false information coming from a third party. The problem with this part of the ground is that you have to prove the "tenant's instigation" and as any communication is generally private and outside the scope of the landlord's knowledge it carries almost no value. Someone providing information on behalf of the tenant will generally be a referee or similar. Perhaps if the information was provided by someone "provided" by the tenant then it is reasonable to presume the tenant will only provide people likely to support their application and any colouring of the information is likely to be in the tenant's favour. Any information provided by someone engaged by the landlord or agent (for example referencing companies) should be clearly outside the scope of this ground as clearly they would not be "at the instigation" of the tenant and any false information would be more likely to be a breach of contract claim (i.e. the referencing company failed to provide accurate information) and not the tenant's fault.

Other grounds

Sale

One of the proposed grounds for inclusion, not currently in Schedule 2, is that the landlord wants to sell the property. Obviously this ground has the potential to be used as a section 21 notice by the back door and so safeguards should be included.

Firstly this should not be a prior notice ground as the notice will simply become "the norm" and have little value. Landlords don't know what might happen in 5, 10 or 20 years after they let the property. Including the notice might simply cause insecurity for tenants where this does not happen. It is a common problem in the market that lobbying on behalf of tenants can actually create insecurity. Take retaliatory eviction, if you look at the English Housing Survey 2011-13 (just before retaliatory evictions were introduced) you can see what percentage MIGHT have been retaliatory. 81% chose to leave for a range of reasons, 10% left by mutual agreement. Only 7% were asked to leave by the landlord (this includes section 21 notices, rent arrears, anti-social behaviour etc.).

Of the 7% who were asked to leave 57.4% were because the landlord wanted to sell with a further 10.1% of those asked to leave due to rent arrears. In the survey years this amounted to 12,675 households a year (out of 4 million in the demographic and attitudinal characteristics). If half of these were retaliatory it would be 0.16% of the PRS households, and there is no evidence the real figure is even as high as half.

However, even a small percentage of a large number of rented properties are a large number of people affected. Whilst it may still be appropriate to legislate, it does create the impression in tenants' minds that, in the case of retaliatory evictions, they should not ask for repairs as their landlord will evict them. In reality this is simply not true in the vast majority of cases. Making this a prior notice (and other grounds) could create the situation where the tenant decides not to settle because "the landlord might want to sell". This would be such a shame for all the times this is not true.

Secondly the system should be effective. It would be a shame if the landlord had to serve notice well in advance of any potential sale to make sure they had vacant possession. This could leave a precious resource empty and it might even be that the landlord finds an investor who wants to buy who would have been happy to keep the tenant (see also comments on ground 2). Ideally, you want the landlord to have found a buyer (so you know if it is an investor or homeowner) before serving notice. One suggestion is that the landlord might serve a "prior notice" (notice prior to section 8 but not prior to the tenancy) at the point they want to put the property on the market. This would put the tenant on notice of what is about to happen. Some more resourceful tenants might then find their own alternative accommodation. Once a buyer is found and ideally contracts are exchanged, a section 8 notice on this new ground would be served. If the prior notice had been served the section 8 could be shorter in length to avoid disrupting the sale. If the purchaser was an investor no section 8 notice would be needed. Provided an efficient process was available, a slightly longer exchange to completion time might be needed but it should aim to fit within this slot. A longer notice would be more appropriate if no "prior notice" was given at the point of putting it on the market to sell. In reality with most sales, the tenant knows anyway as the estate agent will take photos etc.

Thirdly strong anti-avoidance measures should deter using this ground falsely. This could include the same landlord not being able to re-let the property to a different tenant for a period of 6 months after serving the section 8 notice on this ground (regardless of if a court order was obtained or not). This would mean that if the landlord achieved possession they would need to be serious about leaving it on the market for a good length of time before it could be taken off and re-let. Any such provision would not affect any new landlord provided they were not a connected person (as per retaliatory eviction sales perhaps.)

End of lease

The current rules give no opportunity for a landlord to seek possession because their lease is ending. This would be common in the rent to rent market. Anti-avoidance could include not allowing that immediate landlord to re-let the property. It could all work similar to the sales ground.

Landlord tenant relationship breakdown.

The new CEO of Grosvenor took over in Feb 2020 and said Grosvenor was no longer going to be a "landlord"[6]. This bold statement was because he wanted to move away from a historical view that the landlord tenant relationship was adversarial.

Many laws and lobbying groups reinforce this position. His view was that Grosvenor were going to be partners of the occupiers of their buildings. This idea is really important for positive future relations in the PRS too. One ground that should be included is landlord tenant relationship breakdown.

Ironically divorce proceeding are now moving away from the need to "blame" the other party as the legal action based on blame was far more inflammatory. Ironically, in the PRS we are about to do the opposite. A discretionary ground should be included where the landlord can seek possession on the basis of relationship breakdown. The notice could be lengthy (up to say 6 months) and the tenant could have a right to leave any time during that notice period following a short, say 2 week, notice if they find alternative accommodation. Like ground 6 and 9 the landlord would pay the court awarded "reasonable costs" of the tenant. Being a good landlord is a relationship and things will not go well if two parties where the relationship has broken down cannot move to dissolving that relationship. The risk is that the property is put up for sale and is lost to the market, helping no one. Although it would attract the claim it is section 21 by the back door it is not for a number of reasons.

Firstly, a reason would have to be given. People often complain about section 21 being a "no fault" eviction, but there are a number of grounds within Schedule 2 of the Housing Act 1988 where there is no fault on the part of the tenant. In this case there would be a reason.

Secondly the ground would be discretionary meaning that the landlord would not only have to prove the facts are true but would have to show it was reasonable that the tenant had to lose their home, something the courts do not take lightly.

Thirdly, by offering the long notice, the ability for the tenant to leave during the notice and have reasonable costs paid, you give the tenant the best chance of find a home in a locality they want, within reach of their support networks and schools for any children etc. It gives more control to the tenant, but the landlord still get the property back. The landlord having a route to possession helps defuse what can otherwise be a tense situation if the parties can

see no way out. It should be remembered that the tenant might be just as unhappy with their landlord but cannot choose to leave without be intentionally homeless which can have serious implications for those least able to help themselves.

Other points

Grounds 2, 3, 4 and 5 should all be easy to prove from the papers and so a form of accelerated possession could be re-introduced as the facts are provable on the evidence and if not proven the judge always has the power to change to a hearing.

Summary

When talking about possession it is easy to focus on a few minority situations where, in different ways, things have gone wrong. Indeed for a landlord any possession action is "something has gone wrong" as they generally want tenants in their properties paying the rent. For a vibrant PRS, that attracts landlords to offer quality properties long term to stable reliable tenants, the needs of both parties need to be considered. Landlords don't have to be landlords, and if the rules are not considered attractive, they may choose to invest elsewhere, losing potentially good stock from the market. Sadly those most affected in the way will be the conscientious landlords, as the criminal landlords don't currently follow the laws and there is no reason to think that writing more laws will change this, though it may be off putting to good landlords. Criminal landlords need more enforcement, not more laws.

A recent report for the independent think tank the Social Market Foundation reported[7]that over 80% of private sector tenants were happy with their property and 85% happy with their landlord. In considering change the majority need to be considered as well as the minority where there are problems. These suggestions seek to recognise the importance of a home for tenants and help good landlords have fair and reasonable access to manage their assets.

Notes

1 https://www.generationrent.org/no_fault_evictions_drive_up_homelessness

2 TLIC research provided to DLUHC on the reason 95,000 section 21 notices were issues by agents.

3 https://www.gov.uk/government/statistical-data-sets/tenure-trends-and-cross-tenure-analysis FT1101 Trends in tenure

4 TLIC survey results submitted to MHCLG as part of the section 21 consultation process. Further copies available.

5 For example https://www.bradfordfactorcalculator.com/ or https://en.wikipedia.org/wiki/Bradford_Factor

6 Estates Gazette 5 March 2022 page 23

7 https://www.smf.co.uk/publications/private-rented-sector/