

## ROTHERHAM BOROUGH COUNCIL – REPORT TO MEMBERS

1.	Meeting:	Cabinet Member for Safe and Attractive Neighbourhoods
2.	Date:	31 October 2011
3.	Title:	Consultation on a New Mandatory Power of Possession for Anti-Social Behaviour
4.	Programme Area:	Neighbourhoods and Adult Services

### 5. Summary

This report provides detail of the Government's draft proposals for streamlining the legal process for landlords to gain possession if their tenant has been found guilty of causing anti-social behaviour. A draft response to the consultation is provided.

The deadline for response to the consultation is Monday 7 November 2011.

Following consideration at the Overview and Scrutiny Management Board, views expressed will be made available to the Cabinet Member for Safe and Attractive Neighbourhoods on the 31 October 2011 to enable an informed decision on agreeing the Council's response.

In line with corporate reporting protocols on Government consultations this consultation requires Cabinet Member and associated Scrutiny consideration. Accordingly the report has been referred for consideration at the Overview and Scrutiny Management Board to be held on the 21<sup>st</sup> October 2011.

### 6. Recommendations

**It is recommended that, subject to feedback from the Overview and Scrutiny Management Board, Cabinet Member for Safe and Attractive Neighbourhoods agrees the submission of the draft consultation response as detailed within the report**

## **7. Proposals and Details**

The Government has been increasingly concerned regarding the time and expense of Anti-Social Behaviour cases dealt with by the County Court. In August 2011, the Department of Communities and Local Government produced a consultation paper 'A new mandatory power of possession for anti-social behaviour'. (Appendix 'A').

As part of a wide spread consultation the Council is being asked for its views on the detail and practicalities of a new mandatory power of possession which will enable swifter action to evict anti-social tenants.

The Government's intention is that the necessary legislation be introduced alongside the Home Office's planned legislative changes in reforming tools and powers to tackle anti-social behaviour.

### **7.1 Current Legislative Framework**

In terms of current legislation, Ground 2 of Schedule 2 to the Housing Act 1985 and Ground 14 of Schedule 2 to the Housing Act 1988 provide for secure tenancies that the Court may grant possession where:-

The tenant or a person residing in or visiting the dwelling-house:-

- (a) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality, or
- (b) has been convicted of:-
  - (i) using the dwelling-house or allowing it to be used for immoral or illegal purposes, or
  - (ii) an indictable offence committed in, or in the locality of the dwelling-house.

In order to grant possession the Court must be satisfied that it is reasonable to do so.

The Government propose that this discretionary ground for possession for anti-social behaviour and criminality should remain available in all circumstances, including where a mandatory power is available.

The Council's Tenancy Agreement reinforces the legal requirement and examples of its relevance to ASB are provided at Appendix B.

### **7.2 Proposed New Power**

The Government consider, however, that, in practice, the distinction with the existing discretionary ground would be insufficiently clear. As a result the Government propose to introduce a new, clearly defined route to possession for serious, housing-related anti-social behaviour which has already been proven by another court, which they have termed a 'mandatory power'.

The process would still require the Council to serve a notice of proceedings on the tenant, setting out the reasons why they are seeking possession, and advise the tenant of the date after which possession proceedings may be begun. The court would have to grant (hence mandatory) an order for possession on application by the Council provided the correct procedure had been followed.

The Government believes this provides a robust process for a mandatory power of possession for anti-social behaviour. Recent Supreme Court judgments in *Pinnock* and *Powell, Hall & Frisby* confirm that a human rights defence, based on the proportionality of the landlord's decision, is available in proceedings brought by a public authority under the current statutory provisions on which we propose to model the mandatory power.

The Government propose that local authority tenants should have a statutory right to request a review of the Council's decision to seek possession under the mandatory power, by a more senior officer not involved in the original decision. Making this review procedure available to the tenant, prior to the Council seeking a possession order provides a further safeguard for the tenant.

The Government propose that the discretion of the court to suspend a possession order would be limited. The giving up of possession could not be postponed to a date later than fourteen days after the making of the order, unless it appeared to the court that exceptional hardship would be caused by requiring possession to be given up by that date; and could not in any event be postponed to a date later than six weeks after the making of the order.

In light of recent rioting and looting, a number of social housing landlords consider it would be helpful to extend the current scope of the discretionary ground, so that serious anti-social behaviour and criminality beyond the immediate neighbourhood of the property can clearly be taken into account.

### **7.3 Human Rights**

The Supreme Court judgments referred to above make reference to human rights defence and proportionality. The relevant human rights argument can be found under article 8 (Right to Respect for Private and Family Life) which in summary states:

*(a) Everyone has the right to respect for his private and family life, his home and his correspondence;*

*(b) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'*

Article 8 protects a person's right in four areas: their private life, their family life, their home and their correspondence. It is a qualified right, which means that their right to respect in these areas can be infringed in certain circumstances. Where the infringement is deemed to be justified there will be no breach of the article.

Article 8 also refers to the right to respect and so in protecting a person's rights from interference by a public authority, it imposes a positive obligation on public authorities to actively protect a person's rights in certain circumstances. This can include taking action to secure respect for their rights even where the interference is being caused by a private individual. In order to determine whether such a positive obligation exists, consideration must be given to the fair balance that has to be struck between the general community interest and the interests of the individual.

#### **7.4 Consultation Questions & Response**

**Question 1: Do you agree that we should extend the scope of the current discretionary ground for possession for anti-social behaviour and criminality in this way?**

The Government believe that a mandatory power, properly defined and closely linked to the new streamlined suite of anti-social behaviour powers that will be available to landlords, provides a route to significantly reduce the length of the possession process for serious anti-social behaviour and provide faster relief for victims and witnesses.

Tenants faced with losing their home must be provided with a proper opportunity to defend themselves. However, the Government feel that where the same facts have already been considered by another court, the anti-social behaviour should not have to be proved a second time. Thus creating a mandatory power that carries over the earlier court decision into the possession proceedings, would provide the opportunity to shortcut that process.

Instead of a potentially lengthy trial, perhaps, following adjournments, many months after an initial directions hearing, a mandatory power should significantly increase the chance that the case can be determined quickly in a single hearing. The court will only need to establish that the criteria for awarding possession are met rather than needing to reconsider all the facts of the case.

#### **Draft Response:**

Yes, this council does support the extended scope of the current discretionary powers.

Whilst agreeing that there is a need to expedite action in serious ASB related cases through the court process, such action should only be taken following assessment of article 8 of the Human Rights Convention. Furthermore the Council would have to rigorously implement procedures that showed consideration of proportionality and the opportunity for officer decisions to be reviewed internally. The Council agree that facts of a case should not have to be proven by two courts and if the housing related ASB is serious enough to warrant possession then the burden falls on the landlord to apply for such.

**Question 2: Do you agree that we should construct a new mandatory power of possession in this way?**

**Draft Response:**

Yes (see response to question 1)

**Question 3 - Are these the right principles which should underpin a mandatory power of possession for anti-social behaviour?**

To ensure as far as possible that possession proceedings brought under the new mandatory power can be dealt with and resolved expeditiously by the courts, the Government propose that that the mandatory power is underpinned by two key principles.

1. That the landlord seeking possession can easily demonstrate to the court that the criteria for awarding possession are met. The mandatory power needs as far as possible to be based on a clear test which can be readily established.
2. That where that test is met, it can be simply established that the antisocial behaviour is serious and housing related. Unless the court is in a position to quickly dismiss arguments that the landlord's action is not proportionate, a full facts based review is likely to be required and the practical advantages of seeking possession through a mandatory power rather than on discretionary grounds are likely to be lost.

**Draft Response:**

The Council's ASB policy and procedures would have to be amended to comply with the "triggers" the government suggests and implement these accordingly. Conviction for a housing related offence or injunction for ASB may not alone be enough to instigate possession proceedings. It is clear that "locality" will have a huge impact in all cases. We can see the mandatory ground being applied in some cases where drugs are being used and dealt from a property. In such instances it would be appropriate to ensure that the possession process was commenced and completed before any closure order that had been granted expired.

**Question 4 - Have we defined the basis for the new mandatory power correctly? If not, how could we improve the definition?**

In addition to the current discretionary powers, the Government propose that landlords will be able to apply for possession for anti-social behaviour under the Court's mandatory power, where anti-social behaviour or criminal behaviour has already been proven by another court. The Government will further define the 'triggers' for seeking possession under a mandatory power in the light of final Home Office proposals on new tools and powers to be published in due course. However in broad terms they propose these as follows:-

- **Conviction for a serious housing related offence** – to apply to offences committed by tenants, members of their household or regular visitors which take place in the locality of the property or between neighbours away from it. The type of offences we propose to capture include violence against neighbours; serious criminal damage with violence; drug dealing or cultivation in the property; murder; and rape. We think that ‘indictable only’ offences should broadly capture these.

- **Breach of an injunction for anti-social behaviour** - given the persistent and/or serious nature of anti-social behaviour which is likely to lead to a court granting an injunction we think it is appropriate that a breach by a tenant, member of their household or regular visitor should provide a trigger for a mandatory power of possession. We propose, to ensure that the anti-social behaviour is housing related, that the mandatory power should only be available where a social landlord has either obtained or is party to the injunction.

- **Closure of premises under a closure order** - we think that where a court has determined that activity taking place within a property is so serious to merit its closure, it is appropriate that a landlord can seek possession against the tenant using a mandatory power.

This does not mean that the Council should always seek possession in these circumstances. The Government would expect, for example, the Council to focus on re-housing a vulnerable tenant whose property had been taken over by a drug gang and in consequence been subject to a premises closure order.

Nor does it mean that, even when these conditions are met, the Council should always seek possession using the Court’s mandatory power rather than discretionary grounds. Whilst the Government think these ‘triggers’ as far as possible ring-fence the mandatory power to serious, housing-related anti-social behaviour, and should create a strong presumption in favour of possession, the Council will still need to consider whether proportionality is easily demonstrated in each case.

It is likely, for example, that if the Council were to seek possession under the new mandatory power on the basis that a regular visitor to the property had a conviction for a serious offence in the neighbourhood from several years previously, a more detailed consideration of proportionality would be needed.

#### **Draft Response:**

Introducing this mandatory power will offer the District Judges no discretion; however, there will still be a requirement to consider human rights and proportionality. There will also be a requirement for social landlords such as the Council to prove that they have considered all the facts, offered the opportunity to appeal and review a decision to take possession proceedings. This will all take time and additional resource.

**Question 5 - As a landlord, would you anticipate seeking possession using the mandatory power in some or all of the instances where this would be available?**

The Government anticipate that introducing a mandatory power of possession for anti-social behaviour will reduce pressure on court resources, lower landlord costs and most importantly bring faster relief for communities. The extent of that impact though will depend on how widely landlords make use of this new flexibility.

In linking a mandatory power of possession to breach of an injunction, the Government intend both to place eviction at the end of a continuum of interventions of increasing severity and provide a clearer line of sight to the threat of eviction, as an effective driver of improved behaviour at an earlier stage. The Government hope that this should in both regards help reduce the number of evictions that actually occur.

**Draft Response:**

As a landlord we cannot see any new mandatory power being used very often, other than in exceptional cases as mentioned in response to question 3.

**Question 6 - Are there other issues related to the introduction of a mandatory power for possession for anti-social behaviour that we should consider?**

**Draft Response:**

We acknowledge that in some circumstances where other tools and powers have proved ineffective possession is the correct course of action and this can and is pursued through the discretionary powers currently available. We do believe however that this power, either discretionary or mandatory, should only ever be pursued as a last resort when other methods have failed and should be considered on a case by case basis to ensure that it is proportionate to the behaviour and the offenders circumstances. Whilst eviction can provide respite for the immediate neighbourhood, it may not deal with the ASB problem as a whole or its underlying causes and may displace the problem elsewhere. In addition it is a case of homelessness, and because tenants evicted for ASB are likely to be considered 'intentionally homeless' they may struggle to secure permanent accommodation. This would have a negative impact on children and siblings of the person responsible for the ASB and would place additional burden on housing teams.

There would be a requirement for sharing information between landlords and police and existing information sharing agreements and protocols would need to be considered to ensure that they remain fit for purpose. There can sometimes be delays in obtaining a court hearing date, a fast track process for mandatory possession cases would assist.

**8. Finance**

If possession orders become mandatory in certain cases, the work required for drafting extensive witness statements and external legal costs of long trials will be significantly reduced.

## 9. Risks and Uncertainties

No significant issues arise as a result of the consultation exercise. If the legislation is introduced, then a review of the risks will need to be undertaken.

The main areas of risk envisaged at this time centre on possible poor public image and confidence in the Council if they were not to take firm action in dealing with ASB in council housing. However, equally the Council could receive negative publicity if it were to instigate action that was not proportionate and which breached tenant's human rights. Even when a mandatory ground becomes available in any given case, the Council will still have to ensure that it can evidence that the facts, a tenant's personal circumstances and proportionality have been considered before making a decision to seek eviction through the mandatory grounds. Procedures will need to be in place to ensure that these judgments are made before cases are sent off to Senior Managers for authority to litigate. If this cannot be done then we run the risk of a 'proportionality' challenge in the courts and therefore losing much if not all of the time saved by having this new process.

## 10. Policy and Performance Agenda Implications

If the Government implement the proposals in the Consultation it is likely to affect the level of fear of crime by reducing the level of crime and anti-social behaviour by adding a further deterrent (in that illegal and anti-social behaviour acts may result in a greater risk of loss of a Council / Social Landlord tenancy).

There is clear linkage between how, as a partnership, Rotherham tackles ASB and the objectives within the RMBC Corporate Plan – Helping to create safe and healthy communities, People feel safe where they live, Anti-social behaviour and crime is reduced, People from different backgrounds get on well together. Improving the environment, Clean streets.

## 11. Background Papers and Consultation

'A New Mandatory Power of Possession for Anti-Social Behaviour' Department for Communities & Local Government. August 2011.

### Consultees:

- Strategic Housing Partnership
- RMBC Community Protection
- RMBC Area Partnerships
- RMBC Neighbourhood Investment Team
- RMBC Housing Managers/Champions
- RMBC Anti-Social Behaviour Team/Specialists
- Victim Support – Rotherham
- RMBC Legal Services
- RMBC 'Key Choices'
- Safer Rotherham Partnership

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### Terms of current Tenancy Agreement

The Council's tenancy agreement already includes a number of terms in respect of anti-social behaviour by which the tenant and or members of their household must comply. A few examples taken from the tenancy agreement are outlined below:-

As a tenant:-

- You are responsible for the behaviour of every person living in or visiting your home. This includes your children. You are responsible for their behaviour in your home, on surrounding land, in communal areas (stairs, lifts, landings, entrance halls, paving, shared gardens, parking areas) and in the neighbourhood around your home.
- You, other residents of your home or your visitors must not behave in a way that causes or is likely to cause a nuisance, annoyance or disturbance to any other person in the locality of your home.
- If you or any member of your family unilaterally withdraws from a Family Intervention Project we will treat such withdrawal as evidence of anti-social behaviour.
- You, other residents of your home or your visitors must not harass any other person in the locality of your home.
- You, other residents of your home or your visitors must not use your home, any communal areas, or the locality, to carry out any illegal activity. 'Illegal' means any activity that the law prohibits and makes a criminal offence.
- You, other residents of your home or visitors must not cause any damage to our property or write graffiti on our property. You will be charged the cost of repair or replacement.
- You, other residents of your home or your visitors must not be violent or threaten violence against any other person, whether they are living with you or in another property. You must not harass, use mental, emotional, physical or sexual abuse to make anyone who lives with you to leave the home. If a person leaves the home because of domestic violence we may take action to end the tenancy.
- You, other residents of your home or your visitors must not use abusive or threatening language or act in a violent, aggressive or abusive manner towards the council's members, officers or agents.