EXPLANATORY MEMORANDUM TO

THE HOUSING (REPLACEMENT OF TERMINATED TENANCIES) (SUCCESSOR LANDLORDS) (ENGLAND) ORDER 2009

[2009] No. [XXXX]

1. This explanatory memorandum has been prepared by the Department for Communities and Local Government and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

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

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This is the first exercise of the power in paragraph 24(1) of Schedule 11 to the Housing and Regeneration Act 2008 ("the 2008 Act").

4. Legislative Context

4.1 The immediate legislative context for this Order is provision in the 2008 Act to remedy the "tolerated trespasser" status which is estimated to affect at least 250,000 to 300,000 residential occupants of social housing. The phrase "tolerated trespasser" was coined by the courts to describe a residential occupant, formerly a tenant, whose tenancy has ended as a result of the court granting the landlord a possession order.

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

4.3 Protection of residential tenants through legislation since 1915 was developed largely through a series of Rent Acts, and then further developed through the Housing Acts of the 1980s. A scheme of regulated tenancies under the Rent Act 1977 was replaced by the secure tenancy scheme under the Housing Act 1985 ("the 1985 Act"), which in turn was supplemented and replaced (so far as housing associations were concerned) by the assured tenancy scheme under the Housing Act 1988 ("the 1988 Act"). The secure and assured schemes are mutually exclusive. Once the 1988 Act was in force, most local authority tenants received secure tenancies, most housing association tenants received assured tenancies, and private landlords generally used assured shorthold tenancies.

4.4 Subsequent Acts, particularly the Housing Act 1996 ("the 1996 Act") and the Housing Act 2004, and most recently the 2008 Act, have added to and amended the secure and assured tenancy schemes. The 1985 and 1988 Acts are currently the principal Acts in respect of the schemes protecting residential tenants, but the wording of many of the provisions in them relevant to the tolerated trespasser problem can be traced back through their predecessor Acts.

4.5 The 1996 Act also introduced registration of housing associations which satisfy specified criteria. Virtually all housing associations are now registered social landlords ("RSL"s) under that Act.

4.6 The types of tenancy created by the 1985, 1988 and 1996 Acts, and which are affected by the tolerated trespasser reforms in Schedule 11, are –

- secure periodic tenancies under the 1985 Act (held by most local authority tenants and – from before 1988 – about 10% of housing association tenants);
- fixed term secure tenancies of 21 years or less under the 1985 Act (rarely used);
- local authority introductory tenancies which will become secure tenancies after a year if all goes well (introduced by the 1996 Act);
- demoted tenancies – these are created by a court making a demotion order against a local authority secure tenant, or a secure or assured tenant of an RSL (housing associations which are not RSLs cannot apply for a demotion order); provisions are in the 1985, 1988 and 1996 Acts; a demoted tenancy will revert to the previous secure or assured tenancy after a year if all goes well (but not if a possession order has been granted in the meantime);
- full assured periodic tenancies under the 1988 Act (held by most RSL tenants);
- fixed term assured tenancies under the 1988 Act (held by many shared ownership leaseholders);
- assured shorthold tenancies – these may be periodic or fixed term, and are used by some RSLs as "starter" tenancies; RSL demoted tenancies are also assured shortholds; and virtually all private tenants have assured shorthold tenancies.

4.7 The problems caused by the legal consequences – or in some cases by uncertainty as to the consequences – where ex-tenants continue to live in their homes, have been an unintended result of the protection of tenants under the 1985 and 1988 Acts. Secure and assured (non-shorthold) periodic tenants have substantial protection due to two factors. The first is that the landlord cannot end the tenancy simply by giving notice, but may only seek possession on one of the grounds listed in the relevant Act, and for all the 1985 Act grounds and most of the 1988 Act grounds the court must agree that making a possession order is reasonable or/and that suitable alternative accommodation is available. The second is that, except in relation to the few 1988 Act mandatory grounds, the court has wide discretionary powers: in summary these are that it may adjourn the proceedings or defer eviction of the tenant on conditions (e.g. payment of arrears of rent), and discharge the possession order where conditions are complied with. The court's discretionary powers are contained in section 85 of the 1985 Act and section 9 of the 1988 Act.

4.8 It is possible for the court to make an outright and immediate order for possession, but it will usually only do so where it is satisfied the tenant has already left the property. More usually, exercise by the court of its discretionary powers may enable the tenant to continue in residence for many years, subject to the terms in the possession order or in subsequent orders suspending warrants of eviction. If a tenant remains in the property, the landlord can only regain possession by enforcing the order – i.e. by obtaining a warrant for eviction and having it executed by the court bailiff. In the great majority of cases, the court will make an order which the landlord cannot in any case enforce within 28 days, and thereafter cannot enforce so long as the tenant obeys specified terms – in rent arrears cases, usually the payment of £x per week in addition to the current rent, plus payment of the landlord's costs. Such orders are generally known as "suspended" possession orders. In 2006 an alternative "postponed" form of possession order was introduced, which avoids ending the tenancy by not specifying a date for possession. Under this

form of order the tenant will not become a tolerated trespasser until, as a result of breach of the terms of the order, the court sets a possession date at the landlord's request.

4.9 The protection afforded by the landlord needing to prove a ground for possession does not in practice apply to assured shorthold tenants – i.e. mainly those of private landlords – because the landlord can also end such a tenancy by giving the correct notice, without having to give a reason, after an initial protected period (a minimum of 6 months). Where this is done, if a possession order by the court is necessary to evict the tenant, the court has no discretion but must make the order. Similarly, a social landlord correctly observing the procedural requirements will be able to evict an introductory or demoted tenant without the court having discretionary powers to defer execution of the possession order.

4.10 With regard to secure tenancies, the key statutory provision on when the tenancy ends is section 82(2) of the 1985 Act:

> "Where the landlord obtains an order for the possession of the dwelling-house, the tenancy ends on the date on which the tenant is to give up possession in pursuance of the order."

4.11 Exactly when that date is taken to be has partly depended from case to case on the wording of the order – and the wording of suspended orders on the basis of rent arrears (which the vast majority of possession orders are) has usually followed a template recommended by what is now the Ministry of Justice (MoJ), with the recommended template wording changing from time to time. Since 2006 the MoJ has also recommended a postponed order template.

4.12 There are consequences for both tenant and landlord when a tenant becomes a tolerated trespasser. These consequences have been confirmed in a number of appeal court decisions. The first important case was *Thompson v Elmbridge BC* in 1987, where it was held that the secure tenancy ended when the tenant breached the terms of the order regarding payment of rent and arrears. Two cases in 1996 – *Greenwich LBC v Regan* (Court of Appeal) and *Burrows v Brent LBC* (House of Lords) – led to the widespread adoption of the phrase "tolerated trespasser" to explain the occupier's status. The phrase sums up the contradictions which have caused many of the difficulties. In the very recent House of Lords judgment of *Knowsley Housing Trust v White*, Lord Neuberger refers to tolerated trespasser status as "conceptually peculiar, even oxymoronic".

4.13 Further appeal court decisions after the leading House of Lords judgment in *Burrows* in 1996 established various rules about tolerated trespassers. Of particular relevance to the reforms in Part 2 of Schedule 11 are that –

- Once the tenant becomes a tolerated trespasser, the relationship of landlord and tenant no longer exists, and neither the ex-tenant nor the ex-landlord may rely on the terms of the tenancy agreement or on the provisions of the 1985 Act. Thus, for instance, the landlord's entitlement to increases in rent becomes doubtful, and the ex-tenant has no right to exchange, nor can a family member or spouse succeed to the tenancy after his or her death. The ex-tenant is also not entitled to compensation for disrepair.

- The ex-tenant may retrospectively regain tenancy status if the court exercises its discretion and varies the original order in such a way that the terms reflect the payments the tenant has made (so that, retrospectively, no breach has occurred) and/or the date for possession is changed to a future date. This has been held to have the effect that the entire period as a tolerated trespasser ceases to have existed – the newly restored tenant will have been a tenant continuously throughout the duration of the possession order (though with the potential to become a tolerated trespasser again in the future). One effect of the court making such an order is that the newly-restored tenant is able to claim damages for disrepair during the period which was previously the tolerated trespasser period.

4.14 Until 2006, the tenant's loss of status as such and transformation into a tolerated trespasser was held to be the result of failure to obey the terms of the suspended possession order. In *Harlow DC v Hall* in January 2006, however, the Court of Appeal held that on analysis of the form of order used in that case, which had been the recommended wording since 2001, the tenant became a tolerated trespasser on the date specified in the order, regardless of whether the tenant obeyed the terms on which it was suspended or not. This judgment applied directly only to tolerated trespassers who had previously been secure tenants. It theoretically increased retrospectively the number of such tolerated trespassers to include those who were obeying the terms of their orders. In practice however it probably made little difference to numbers, since the vast majority of tenants tend to breach the terms of suspended (or, since 2006, postponed) orders – frequently without any fault on their part if benefit payments are involved.

4.15 Until recently, it was uncertain whether an assured periodic tenant subject to a possession order also becomes a tolerated trespasser. The provisions of the 1988 Act regarding periodic assured tenancies – that is, the type of tenancy predominantly used by RSLs – do not include an equivalent to the wording in section 82(2) of the 1985 Act. In May 2007 the Court of Appeal concluded, in *Knowsley,* that they did become tolerated trespassers. The decision in this case has now been reversed by the House of Lords, who handed down judgment in early December 2008. During the period when the Court of Appeal judgment stated the law, the inclusion as tolerated trespassers of ex-assured tenants – almost all of whom would have RSL landlords – greatly increased the number of those affected. The Government introduced the reform of tolerated trespasser law in the 2008 Act during this period.

4.16 Since the House of Lords judgment in *Knowsley*, the position is that a secure tenancy ends on the date for possession specified by the court, with the tenant becoming a tolerated trespasser, but an assured tenancy subject to a possession order does not end until the tenant is actually evicted under the possession proceedings (or quits voluntarily). The judgment is based on a "fair and practical reading" of the 1988 Act, and the history of statutory protection of residential tenants.

4.17 Schedule 11 includes provision with regard to assured shorthold, introductory and demoted tenancies on the basis that it is theoretically possible that after obtaining a possession order with regard to a tenancy of any of these descriptions, the landlord might allow the tenant to remain in the property. There is no case law on whether an assured shorthold, introductory or demoted tenant becomes a tolerated trespasser in such a situation, but the Government has proceeded on the basis that the same analysis would logically apply. The 2008 Act ensures that any such tolerated trespassers receive replacement tenancies (where the landlord has not changed).

4.18 Other legal matters which are relevant to the Order are the details of what happens on transfer from one landlord to another. So far as liabilities and duties to tenants are concerned, those which will be taken over by the new landlord will usually be recorded in the transfer agreement. Thus, for instance, the benefit of the debt constituted by arrears of rent will usually be transferred to the new landlord (and will be taken into account in determining the transfer price). Liability for default by the original landlord, such as failure to repair the property, will frequently be transferred to the new landlord. This means that if the tenant after transfer wishes to claim compensation for disrepair, the claim need only be against the new landlord rather than against both. Again, the transfer price is likely to reflect the new landlord's assessment of any outstanding repair problems in the transferred properties.

4.19 With regard to transferred tolerated trespassers, the transferee landlord will need to take into account the possibility that tenancy status may be restored by the court, thus bringing rights and liabilities back into relevance. However at present there is no appeal court authority directly on the question whether the court can exercise discretion within the possession proceedings to restore a tolerated trespasser under the original landlord to a new type of tenancy under the new landlord.

4.20 So far as the possession proceedings are concerned, a new landlord who wishes to take further steps in the proceedings must apply to the court to be added as a party (usually instead of rather than as well as the original landlord). It is standard procedure for the courts to grant such applications, and the possession proceedings then continue with the new landlord as the claimant – and as the defendant to any counterclaim by the tenant (for instance for disrepair).

5. Territorial Extent and Application

5.1 This instrument applies to England.

5.2 With regard to commencement of provisions in England and Wales, the intention is that separate Orders in England and Wales together with the Schedule 11 provisions will come into force at the same time, so that the whole package of tolerated trespasser law reform in England and Wales is commenced at the same time. To achieve this, it is intended that –

- a parallel draft Order to the same effect will be laid in the National Assembly of Wales at the same time as this Order is laid, subject also to an affirmative procedure, and

- the Secretary of State will make a Commencement Order which will bring section 299 and the remainder of Schedule 11 (with some exceptions in Part 1 of the Schedule which are not relevant to this Order) into force at the same time as the Orders in relation to both England and Wales, subject to approval of the draft Orders in England and Wales.

6. European Convention on Human Rights

6.1 The Parliamentary Under-Secretary of State, Iain Wright, has made the following statement regarding Human Rights:

> In my view the provisions of the Housing (Replacement of Terminated Tenancies) (Successor Landlords) (England) Order 2009 are compatible with the Convention rights.

7. Policy background

7.1 The Government's policy is to remove the problems created by the existence of tolerated trespassers (see section 4 of this memorandum) by (a) ensuring that no tolerated trespassers are created in future, and (b) resolving the problem for existing tolerated trespassers, including those in successor landlord cases.

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

7.3 Extending provision to successor landlord cases ensures equal treatment of all tolerated trespassers regardless of whether their landlord has changed. In every large-scale transfer of local authority or RSL properties, there are very likely to be some occupants of transferred properties who at the date of transfer are ex-tenants, having become tolerated trespassers as a result of

possession proceedings. Failure to extend Schedule 11 to such ex-tenants would mean that the question of whether or not they are offered a new tenancy, and if so what type of tenancy they are offered, would continue to be under the control of the successor landlord. The Government takes the view, supported by consultation, that it is unfair for a change of landlord, which is outside tolerated trespassers' control, to determine whether they have their status as a tenant restored or not. There is also a very real risk that if the situation for transferring ex-tenants is not remedied, it could lead to litigation, once the provisions in Schedule 11 are brought into force (a risk mentioned in some consultation responses).

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

7.5 Where a landlord changes, occupants who are already tolerated trespassers probably remain so unless the new landlord grants a new tenancy (there is no binding judicial decision directly on this point). There may be various reasons why a new tenancy is not granted. This may be deliberate on the part of the landlord, usually reflecting the occupant's failure to comply with the terms of the possession order, and may be accompanied by an intention to request eviction by the court. In some instances, however, the ex-tenant may have failed to respond to the offer of a new tenancy.

7.6 No data are available on the total number of transferring ex-tenants who are not subsequently granted a new tenancy. However, CLG estimates that there could be as many as 70,000 – 80,000 people in this position (see the Impact Assessment attached to this memorandum).

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

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

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

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

- Where the property transfers between RSLs and the original tenancy was a full assured tenancy, the new tenancy will also be a full assured tenancy.

- Where the property transfers between RSLs and the original tenancy was an assured shorthold tenancy, the replacement tenancy will also be an assured shorthold tenancy.

- Where the original tenancy was a secure tenancy (mostly given by local authorities), the replacement tenancy will be a secure tenancy, if the new landlord is a local

authority, and a full assured tenancy, if the new landlord is an RSL (since RSLs cannot now grant secure tenancies).

- Where the original tenancy was a local authority introductory tenancy, the replacement tenancy will be an introductory tenancy, if the new landlord is a local authority, unless the local authority does not operate an introductory tenancy regime. In that case, the replacement tenancy will be a secure tenancy. If the new landlord is an RSL, the replacement tenancy will be an assured shorthold tenancy. This is because neither RSLs nor local authorities which do not operate an introductory tenancy regime can grant introductory tenancies.

- Where the original tenancy was a demoted tenancy, the replacement tenancy will usually also be a demoted tenancy. This will be the case even where the property has transferred from a local authority to an RSL, although different statutory provisions will apply to the new demoted tenancy.

- In exceptional circumstances, although the original tenancy was a demoted tenancy the new landlord will not be one which is able to apply for a demoted tenancy – for example, where a property has been transferred to a housing association which is not an RSL, or to a landlord which can grant secure tenancies but cannot apply for demotion orders. The new tenancy will be an assured shorthold in the first case, and a secure tenancy in the second case.

- The modified paragraph 17 also covers a change of landlord from an RSL to a local authority. The government is not aware of any cases of such transfers, but has included provision as a precaution. An original full assured tenancy under the RSL will become a secure tenancy under the local authority; a "starter" assured shorthold under the RSL will become an introductory tenancy if the local authority runs an introductory tenancy regime, or a secure tenancy if it does not; and a demoted tenancy under the RSL will become a demoted tenancy under the local authority, though subject to the different appropriate statutory provisions.

7.10 These provisions include reference to assured tenancies. In *Knowsley* the House of Lords considered the question of when the tenancy ends in relation to the appellant, Ms White, who was an assured periodic tenant. However, the term "assured tenant" in the 1988 Act includes other types of tenancy (see paragraph 4.6). The Government has therefore decided that all types of original tenancy should be catered for in the Order.

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

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

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

to the original tenancy, but only where rights and obligations in relation to the original tenancy have transferred to the new landlord.

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

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

8. Consultation outcome

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

8.2 CLG previously consulted generally in August 2007 on remedying problems caused by the existence of tolerated trespassers. Over 80 responses were received. Landlords and other housing professionals who responded to that consultation strongly supported remedying the situation for both future and existing tolerated trespassers, and on the basis of this response the provisions in Schedule 11 were included in the 2008 Act. However, the earlier consultation exercise did not seek views specifically on the issue of tolerated trespassers in successor landlord cases.

8.3 Respondents to the successor landlord cases consultation were unanimously in favour of restoring tenancy status to existing tolerated trespassers whose landlord has changed, citing fairness, consistency and certainty, as the main rationales. A few respondents referred to the potential costs to landlords if they were required to continue to administer a separate system for tolerated trespassers; while others referred to the potential for challenges under the Human Rights legislation. A few respondents felt that to allow tolerated trespassers to continue to exist in any circumstances would be contrary to the House of Lords judgment in *Knowsley*. However few respondents mentioned this decision, since it was handed down shortly before the end of the 3-month consultation period.

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

8.5 All respondents who expressed a view agreed that for tolerated trespassers who transfer from one RSL to another, or one local authority to another, the replacement tenancy should where possible be of the same type as the original tenancy. Where this would result in the occupant receiving an assured shorthold on "starter" terms, a few respondents expressed the view that the new tenancy should contain a term that the tenancy would become a full assured tenancy once the starter period had ended (which is what the Order achieves, since the terms of the new tenancy must repeat as far as possible those of the original tenancy). The exception to the like-for-like rule was where the original tenancy was an introductory tenancy and the new landlord does not operate an introductory tenancy regime. In this case, it was agreed that the replacement tenancy should be secure.

8.6 In the case of a change of landlord from local authority to RSL, there was general (though not unanimous) agreement that the new tenancy should be as near an equivalent as possible to the original. All agreed that, where the original tenancy was a demoted tenancy, the replacement tenancy should also be a demoted tenancy. Nearly all respondents on this point (12 out of 14) considered that, where the original tenancy had been an introductory tenancy, the new tenancy should be an assured shorthold tenancy. A few respondents said that the new assured shorthold tenancy should contain a right to review if the landlord wished to seek possession, reflecting the right to review in the statutory provisions governing introductory tenancies. All respondents but one to this point (12 out of 13) agreed that, where the original had been a secure tenancy, the new tenancy should be a full assured tenancy (with one respondent making the point that, if the transfer had taken place after the provisions in Part 1 of Schedule 11 came into force, this is what the occupant would have been given).

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

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

8.9 It was agreed (9 out of 10) that the tolerated trespasser period should count towards qualification for the preserved right to buy, which was considered to be in line with the House of Lords judgment in *Honeygan-Green v LB Islington*; and that both new and old landlords should be protected against any challenge arising out of any consultation process.

8.10 Most respondents (11 out of 12) agreed that the court should be given discretion to order that the old and new tenancy are the same and continuous for the purposes of a claim involving either the new or old landlord. All those who responded (12) also considered that any orders in the possession proceedings should apply to the new tenancy, although most (6 out of 9) thought this should only apply where the new landlord had been made party to the proceedings.

8.11 The consultation paper sought views on the existing practice of RSL landlords in granting tenancies to tolerated trespassers transferring from local authorities. There were only two substantive responses; with one landlord saying that it would grant assured shortholds, and the other full assured tenancies. In answer to the question about when they would not grant a new tenancy, both said that they would not do so if the tenant was in arrears. Where respondents expressed a view, they considered that there were likely to be very few, if any, tolerated trespassers in the private rented sector.

8.12 Where respondents commented on the draft Impact Assessment, it was generally felt that it correctly identified the costs and benefits. It was not felt that any of the options considered in the consultation paper would discriminate on equality grounds.

8.13 A response was received from the Housing Law Practitioners Association (HLPA) which was critical of the method used by the Government to restore tenancy status to existing tolerated trespassers, but which accepted the proposed content of the Order as being consistent with the primary legislation. The Government has responded to HLPA with regard to its general comments on the approach taken in Part 2 of Schedule 11.

9. Guidance

9.1 CLG intends to issue guidance to landlords to assist them in implementing the provisions in Schedule 11 and the provisions of this Order. The guidance has no statutory basis but will suggest good practice. It will be available on the CLG website at www.communities.gov.uk if and when the Order comes into force.

10. Impact

10.1 The Order reduces the impact on businesses or charities of persons applying to the courts to restore their tenancy status. Some RSLs are also charities. It also removes the serious risk of litigation to appeal level, with associated costs to landlords, if the Government does nothing to remedy the situation for tolerated trespassers in successor landlord cases. However, there may be some disbenefits to landlords from removing the existing discretion to decide whether to grant a new tenancy to transferring ex-tenants and what type of tenancy to grant.

10.2 It is expected that The Order will reduce the impact on the voluntary sector (eg Citizens Advice Bureaux and Legal Advice Centres) of providing advice to occupants of transferred rented properties on issues arising out of their status as tolerated trespassers, including representation in court proceedings.

10.3 The impact on the public sector is the same as for Registered Social Landlords.

10.4 An Impact Assessment is attached to this memorandum.

11. Regulating small business

The legislation does not apply to small business.

12. Monitoring & review

12.1 The main aims are to remove the problems which the existence of tolerated trespasser have caused to landlords and tenants by restoring tenancy status to people who have transferred as a tolerated trespasser to a different landlord but have not been given a new tenancy by the successor landlord; and to prevent any further litigation concerning tolerated trespassers. There should also be cost savings to landlords, tenants, and the court service arising from removal of the need to apply to the court to restore tenancy status, estimated at between £ 8,600 and £31,500 per annum.

12.2 The effect of the changes will be subject to internal review after 3 years.

13. Contact

Frances Walker at the Department for Communities and Local Government – Tel: 020 7944 3666 or email: frances.walker@communities.gsi.gov.uk – can answer any queries regarding the instrument.

Summary: Intervention & Options

Department /Agency:	Title:	
Communities and Local Government	**Impact Assessment of Tolerated Trespassers: Successor Landlord Cases**	
Stage: Final	**Version:** Final	**Date: 1 February 2008**
Related Publications: Consultation Paper on Tolerated Trespassers: Successor Landlord Cases, Housing and Regeneration Act 2008		

Available to view or download at:

http://www.communities.gsi.gov.uk/housing/publications/consultations

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The continued existence of "tolerated trespassers" (occupants of rented housing who have lost tenancy status following a possession order) following change of landlord - causing serious problems for tenants (eg loss of rights around succession) and landlords (issues around entitlement to rent, including rent increases). Housing and Regeneration Act 2008 (2008 Act) remedies the situation for all existing tolerated trespassers, except for those whose landlord has changed. Use of power in 2008 Act to extend legislation to these cases by Order is needed to deal effectively with the issues.

Main policy objective to remove the problems which the tolerated trespasser doctrine has caused for landlords and tenants by restoring tenancy status to people who have transferred as tolerated trespassers to a different landlord and who have not been given a new tenancy by the new landlord.

In addition to prevent any further litigation arising out of the tolerated trespasser doctrine.

What policy options have been considered? Please justify any preferred option.

(A) Do nothing, ie not use power in Part 2 of Sch 11 to 2008 Act.

(B) Modify Part 2 to give like for like tenancies, except in case of LA/RSL transfer where for former secure and introductory give full assured tenancy

(C) As for (B), except for former secure and introductory give assured shorthold (AST)

(D) As for (B), except for former secure give full assured, and for former introductory give AST

Following consultation, Option D is the option to be implemented.

N/A



Summary: Analysis & Evidence

Policy Option: B	Description: Like for like tenancies, except in case of LA/RSL transfer give secure and introductory tenants full assured tenancies

COSTS

ANNUAL COSTS

One-off (Transition) **Yrs**

£ None

Average Annual Cost (excluding one-off)

£ None

Description and scale of **key monetised costs** by 'main affected groups'

Total Cost (PV) **£ None**

Other **key non-monetised costs** by 'main affected groups' Removal of RSL discretion and risk of challenge to Order by RSLs. Loss of opportunity to charge higher rent. Training for landlord staff to operate new provisions, but already require training re: tolerated trespassers. Not like for like tenancies/in line with Sch 11 - risk that Order could be challenged by RSLs.

BENEFITS

ANNUAL BENEFITS

One-off **Yrs**

£ None

Average Annual Benefit (excluding one-off)

£ 20,000

Description and scale of **key monetised benefits** by 'main affected groups' Cost avoided of court action to restore tenancy or declaration that new tenancy arisen: LA costs £300-£500 per case; RSL costs £300-£500 per case; Court Service costs £72-£200 per case; tenants £35-£65 unrepresented and £500-£800 per case with representation. But court appearances remain necessary for disrepair.

Total Benefit (PV) **£ 190,000**

Other **key non-monetised benefits** by 'main affected groups' Restoration of tenancy status and rights to existing tolerated trespassers. Simplified management systems for landlords. Removal of challenge to voting rights for local authority landlords.

Aim to ensure that landlord and tenant are in the same position as they would have been had the tenant not become a tolerated trespasser, and that neither is disadvantaged by changes and that changes as close as possible to provisions in part 2 of Schedule 11.

Price Base Year 2009	Time Period Years 10	**Net Benefit Range** (NPV) **£ 80,000 - 293,000**	**NET BENEFIT** (NPV Best estimate) **£ 190,000**

	England
	April 2009
	N/A
What is the total annual cost of enforcement for these organisations?	£ N/A
	Yes
	No
What is the value of the proposed offsetting measure per year?	£ N/A
What is the value of changes in greenhouse gas emissions?	£ N/A
	No

Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
	No	No		

0.0	0.0	0.0

Key: **Annual costs and benefits:** **(Net) Present**

Summary: Analysis & Evidence

Policy Option: C	Description: Like for like tenancies except in case of LA/RSL transfers, give former secure and introductory tenants

COSTS

ANNUAL COSTS

One-off (Transition) **Yrs**

£ None

Average Annual Cost (excluding one-off)

£ None

Description and scale of **key monetised costs** by 'main affected groups'

Total Cost (PV) **£ None**

Other **key non-monetised costs** by 'main affected groups' Removal of RSL discretion and risk of challenge to Order by RSLs. Loss of opportunity to charge higher rent. Training for landlord staff to operate new provisions, but already require training re: tolerated trespassers. Not like for like tenancies/in line with Sch 11 - risk that Order could be challenged by tenants.

BENEFITS

ANNUAL BENEFITS

One-off **Yrs**

£ None

Average Annual Benefit (excluding one-off)

£ 20,000

Description and scale of **key monetised benefits** by 'main affected groups' Costs avoided of court action to restore tenancy or declaration that new tenancy arisen: LA costs £300-£500 per case; RSL costs £300-£500 per case; Court Service costs £72-£200 per case; tenants £35-£65 unrepresented and £500-£800 per case with representation. But court appearances remain necessary for disrepair.

Total Benefit (PV) **£ 190,000**

Other **key non-monetised benefits** by 'main affected groups' Restoration of tenancy status and rights to existing tolerated trespassers. Simplified management systems for landlords. Removal of challenge to voting rights for local authority landlords.

Aim to ensure that landlord and tenant are in the same position as they would have been had the tenant not become a tolerated trespasser, and that neither is disadvantaged by changes and that changes as close as possible to provisions in part 2 of Schedule 11.

Price Base Year 2009	Time Period Years 10	**Net Benefit Range** (NPV) **£ 80,000 - 293,000**	**NET BENEFIT** (NPV Best estimate) **£ 190,000**

	England
	April 2009
	N/A
What is the total annual cost of enforcement for these organisations?	£ N/A
	Yes
	No
What is the value of the proposed offsetting measure per year?	£ N/A
What is the value of changes in greenhouse gas emissions?	£ N/A
	No

Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
	No	No		

0.0	0.0	0.0

Key: **Annual costs and benefits: Constant Prices**

Summary: Analysis & Evidenc	
Policy Option: D	**Description: Like for like tenancies, includi transfer, ie introductory get assured short full assured**

COSTS

ANNUAL COSTS

One-off (Transition) **Yrs**

£ None

Average Annual Cost (excluding one-off)

£ None

Description and scale of **key monetised costs** by 'main affected groups'

Total Cost (PV) **£ None**

Other **key non-monetised costs** by 'main affected groups' Removal of RSL discretion and risk of challenge to Order by RSLs. Loss of opportunity to charge higher rent. Training for landlord staff to operate new provisions, but already require training re: tolerated trespassers.

BENEFITS

ANNUAL BENEFITS

One-off **Yrs**

£ None

Average Annual Benefit (excluding one-off)

£ 20,000

Description and scale of **key monetised benefits** by 'main affected groups' Cost avoided of court action to restore tenancy or declaration that new tenancy arisen: LA costs £300-£500 per case; RSL costs £300-£500 per case; Court Service costs £72-£200 per case; tenants £35-£65 unrepresented and £500-£800 per case with representation. But court appearances remain necessary for disrepair.

Total Benefit (PV) **£ 190,000**

Other **key non-monetised benefits** by 'main affected groups' Restoration of tenancy status and rights to existing tolerated trespassers. Simplified management systems for landlords. Removal of challenge to voting rights for local authority landlords.

Aim to ensure that landlord and tenant are in the same position as they would have been had the tenant not become a tolerated trespasser, and that neither is disadvantaged by changes and that changes as close as possible to provisions in part 2 of Schedule 11.

Price Base Year 2009	Time Period Years 10	**Net Benefit Range** (NPV) **£ 80,000 - 293,000**	**NET BENEFIT** (NPV Best estimate) **£ 190,000**

	England
	April 2009
	N/A
What is the total annual cost of enforcement for these organisations?	£ N/A
	Yes
	No
What is the value of the proposed offsetting measure per year?	£ N/A
What is the value of changes in greenhouse gas emissions?	£ N/A
	No

Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
	No	No		

0.0	0.0	0.0

Key: Annual costs and benefits: Constant Prices (Net) Present Value

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

Background

1. A tolerated trespasser is an occupant of a rented property who has lost the status of a tenant after the court has granted the landlord a possession order, but whom the landlord or the court is allowing to remain in the property. This will usually be on terms such as payment of current rent and a weekly sum towards arrears of rent. Even if the occupant complies with the terms, in many cases this does not in itself alter the fact that he or she has become a tolerated trespasser. The problems caused by the creation of tolerated trespassers are largely confined to tenants of social landlords, i.e. housing associations, most of which are Registered Social Landlords (RSLs), and local authorities.

2. A tolerated trespasser has no rights under the former tenancy agreement or the relevant Housing Acts[1] (although the Protection from Eviction Act 1977 continues to apply). He or she remains in the property for as long as the landlord or the court permits. A landlord who is no longer willing to tolerate the continued occupation may apply to the court for a warrant to enforce the possession order, leading potentially to eviction by the court bailiff. However, even then many tolerated trespassers will in practice continue to occupy properties following the suspension of the warrant by the court, where the court has discretion to do this. It is not uncommon for tolerated trespassers to continue living in their homes for years, frequently without realising that they are no longer technically tenants.

Legislative Framework

3. The concept of the tolerated trespasser was developed by the courts, with a leading judgment given by the House of Lords in the 1996 case of *Burrows v Brent*. The concept arises from the combination of the wording of section 82(2) of the Housing Act 1985 ("the 1985 Act", which repeated wording in the Housing Act 1980) and the fact that under the 1985 Act courts have powers to postpone the date of possession or stay or suspend execution of the possession order. Section 82(2) states that, where the landlord obtains an order for possession, the secure tenancy ends on the date specified in the order for the tenant to give up possession.

4. Until early 2006 it was thought that the tenant only became a tolerated trespasser upon breach of the terms of the order after the possession date. However, in February 2006, the Court of Appeal held in *Harlow v Hall* that the standard wording for such orders meant that the secure tenancy would end on the date specified in the order as the date the landlord was entitled to possession, regardless of whether the tenant complied with the terms of the order or not. *Harlow v Hall* thus gave rise to a new category of (relatively) blameless occupiers - those who have fallen into rent arrears and whose landlord has been granted a suspended possession order, but who have lost security of tenure even where they have complied with the terms of the order.

5. Until recently, it was uncertain whether an assured periodic tenant – the type of tenancy predominantly used by RSLs - subject to a possession order also becomes a tolerated

[1] The Housing Act 1985 in the case of secure tenants; the Housing Act 1988 in the case of assured tenants; the Housing Act 1996 in the case of introductory tenants. All three of these Acts contain provisions about demoted tenants.

trespasser. The provisions of the Housing Act 1988 ("the 1988 Act") regarding periodic assured tenancies do not include an equivalent to the wording in section 82(2) of the 1985 Act. In May 2007 the Court of Appeal concluded, in *Knowsley v White*, that they did become tolerated trespassers. The decision in this case has now been reversed by the House of Lords, who handed down judgment in early December 2008. However, the term "assured tenant" in the 1988 Act includes other types of tenancy than assured periodic tenancies – the type of tenancy held by Ms White – and the Government has therefore decided that all types of original tenancy should be catered for in the Successor Landlord Order (see paragraph 21 below).

6. There is no case law on whether the tolerated trespasser doctrine extends to assured shorthold, introductory or demoted tenancies. It is theoretically possible that, after obtaining a possession order with regard to a tenancy of any of these descriptions, the landlord might allow the tenant to remain in the property. We are working on the assumption that the courts might hold that in these circumstances the former tenant became a tolerated trespasser once the possession date has passed. The problems associated with former secure tenants who have become tolerated trespassers, set out below, would apply equally to former introductory and demoted tenants, except that they do not have the right to exchange.

What happens now when a tolerated trespasser's landlord changes?

7. There could be a number of situations where ownership of the landlord's interest in a tolerated trespasser's home changes. The most usual situation where this happens is transfer from a local authority to an RSL following a large scale voluntary transfer. Other examples are where one RSL merges with or takes over the stock of another, or where one local authority is substituted for another, eg as a result of boundary changes. However, these are likely to be rare.

8. Local authority tenants will normally have a secure tenancy under the 1985Act. After a large scale voluntary transfer, those transferring cannot continue to be secure tenants and must become assured tenants under the 1988 Act, because of the mutually exclusive provisions defining local authority and RSL landlords in the two Acts.

9. Communities and Local Government's Housing Transfer Manual advises that tenants who transfer from a local authority to an RSL in England must be offered an assured tenancy under the 1988 Act. However, the Department does not provide guidance on how tolerated trespassers should be treated on transfer. The RSL landlord must decide in each case how to deal with those who have transferred as tolerated trespassers.

10. CLG has little evidence of what happens in practice in relation to transferring tolerated trespassers in England. However, the very limited response to the Successor Landlord consultation exercise, suggests that there may not be a consistency of approach, with one RSL respondent saying that it had offered its transferring tolerated trespassers an assured shorthold tenancy, and another RSL respondent saying that they had "intended" to offer their transferring tolerated trespassers a full assured but were waiting to see whether the tolerated trespasser issue would be resolved through legislation. Both said that they would not offer a new tenancy to tolerated trespassers in certain circumstances, citing substantial arrears or breaches of tenancy conditions.

11. It is evident, therefore, that there will be some RSLs who have failed to provide a new tenancy, or to do anything else to regularise the position for transferring tolerated trespassers. This could happen for different reasons, including an intention by the landlord to request the court to proceed with an eviction. However as with other existing tolerated trespassers, the

court may in some cases not grant this request, with the result that the occupant would continue to be left in their current anomalous position[2] .

12. Again, CLG has no information about the numbers of transferring tolerated trespassers who are not subsequently granted a new tenancy. However, we think it likely that there could be a significant number of people in this position and this view was reinforced by the responses to consultation.

The tolerated trespasser provisions in the Housing and Regeneration Act 2008

13. The Housing and Regeneration Act 2008 ("the 2008 Act") contains provisions amending the 1985, 1988 and 1996 Housing Acts which, on commencement, will ensure that no tolerated trespassers are created in future (part 1 of Schedule 11).

14. Part 2 of Schedule 11 remedies the situation in respect of existing tolerated trespassers (that is to say, former secure, assured, introductory, and demoted tenants who are tolerated trespassers on the date Schedule 11 comes into force). It does this by creating a new tenancy between the (ex) landlord and (ex) tenant which comes into effect on the commencement date[3].

The Housing and Regeneration Act 2008 and Successor Landlord Cases

15. The existing provisions of Part 2 of Schedule 11 cover situations in which the tolerated trespasser's landlord remains the same, but do not apply where ownership of the property has passed during the termination period to a new landlord and a new tenancy has not been agreed between the landlord and the occupant. This is due to a combination of paragraph 16(1)(a)(ii) and the definition in paragraph 25 of "ex-landlord".

16. The effect of part 2 of Schedule 11 paragraph 16(1)(a) is to create a new tenancy between the existing tolerated trespasser and the landlord, but only provided certain conditions are satisfied. These conditions are that:

- the home condition is met (ie that the dwelling house remains the ex-tenant's only or principal home).
- the ex-landlord is entitled to let the dwelling-house, and
- the ex-landlord and the ex-tenant have not entered into another tenancy after the date on which the original tenancy ended but before the commencement date.

17. In the case of a transferring tolerated trespasser, a new tenancy will not arise under the provisions in the Act because they will not be able to meet the second condition. The ex-landlord in this case would be the original landlord (according to the definition in paragraph 25) who is no longer entitled to let the property.

18. It should be noted that the problem exists only for those tolerated trespassers who have transferred before commencement of the provisions in the 2008 Act. After commencement, where there are large scale transfers the issue will not arise, since no new tolerated trespassers will have been created and existing tolerated trespassers of local authorities will have been rescued by the provisions in Part 2 of Schedule 11.

19. Communities and Local Government consulted generally in August 2007 on remedying problems caused by the tolerated trespasser doctrine. However, we did not consult specifically on the issue of transferring tolerated trespassers.

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[2] It is not entirely clear what the status is of transferred occupants who are not offered a new tenancy. It would probably be correct to continue to refer to them as tolerated trespassers (rather than, for instance, licensees), because as with all tolerated trespassers they continue to enjoy the benefit of the court's discretionary powers within the possession proceedings.

[3] 6 April 2009

20. While the Government could have taken the opportunity offered by the Housing and Regeneration Bill to deal with the issue of transferring tolerated trespasser on the face of the legislation, we took the view that it would not be appropriate to make these changes without first seeking the views of those landlords who would be affected by them.

21. Instead the 2008 Act gives the appropriate national authority (the Secretary of State in England and Welsh Ministers in Wales) the power to provide by Order that part 2 of Schedule 11 applies to successor landlord cases, subject to any modifications specified in the Order. This allowed for full consultation before the power is exercised.

Consultation on Successor Landlord Order

22. In September 2008 CLG published a consultation paper[4] seeking views on options for extending the provisions in Part 2 of Schedule 11 to successor landlord cases. Accompanying the consultation paper was a draft Impact Assessment setting out 4 options which formed the basis for consultation:

Option A: do nothing, ie do not use the power in Part 2 of Schedule 11 to the 2008 Act
Option B: modify Part 2 to give like for like tenancies, except in the case of transfers from local authority to RSL, where for former secure and introductory tenancies give full assured tenancy
Option C: as for B, except for former secure and introductory tenancies, where give assured shorthold tenancy
Option D: as for B, except for former secure where give full assured tenancy, and for former introductory where give assured shorthold tenancy.

Option A: Do nothing

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

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

Options B, C and D

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

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

[4] Tolerated Trespassers: Successor Landlord Cases: A consultation paper, published September 2008, http://www.communities.gov.uk/housing/publications/consultations

conditions as the original tenancy as far as practicable, subject to appropriate modifications necessitated by the change of landlord.

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

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

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

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

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

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

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

(b) a person who had previously held an introductory tenancy would be granted a new introductory tenancy, or a new secure tenancy where the new landlord does not operate the introductory tenancy regime;

(c) a person who had previously held a demoted tenancy would become a demoted tenant of the new landlord.

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

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

33. However, if the original tenancy was either introductory or secure, it cannot become either of these under the successor RSL landlord. In these circumstances, it will be necessary for the Order to specify whether the new tenancy is a full assured tenancy or an assured shorthold. At

present RSLs can decide this for themselves. In specifying this within the Order, it is recognised that this will be removing an element of discretion from RSLs.

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

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

Responses to consultation

35. The consultation document, and accompanying draft impact assessment, were sent to over 500 interested organisations. A total of 18 responses was received. A full analysis of the responses has been made and is available from the CLG website (www.communities.gov.uk).

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

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

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

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

40. Few consultees commented on the draft Impact Assessment. Where they did, it was generally felt that the draft correctly identified the costs and benefits. A few respondents considered that some groups were disproportionately represented amongst tolerated trespassers (for example, minority ethnic tenants, those with poor literacy skills and people who are vulnerable) but that this was not specific to successor landlord cases. It was not felt that any of the options considered in the consultation paper would discriminate on equality grounds.

41. Following consultation, the Government has decided to exercise this power, subject to parliamentary approval, and to provide for the secondary legislation to come into force at the same time as commencement of Schedule 11 to the 2008 Act. In this way, we will ensure that transferring tolerated trespassers are not disadvantaged by the timing of these changes.

Costs and Benefits

Assumptions and 'unknowns'.

42. The preparation of this Impact Assessment is subject to a number of 'unknowns'. We estimate that there are between 250,000 – 300,000 tolerated trespassers in England. This estimate is based on the number of suspended possession orders granted to all social landlords between October 2001 and July 2006 only. We are unsure of the numbers that have occurred since. Postponed possession orders were introduced in July 2006, which are currently probably more widely used than suspended orders. These defer the point at which a tenant becomes a tolerated trespasser to later in the process. The 250,000 – 300,000 figures do not include those tenants who became tolerated trespassers prior to 2001.

43. The 250,000 – 300,000 figures will include tolerated trespassers whose property has been taken over by a new landlord but who have not been granted a new tenancy by the successor landlord. However, the figures which we have on suspended possession orders do not allow us to distinguish successor landlord cases.

44. The large scale voluntary transfers of social housing stock from local authorities to RSLs which have already taken place involve – in England - just over 1.1 million dwellings. If there are 1.1m dwellings affected by voluntary transfer this is **28%** of total social stock in England (LAs and RSLs). Assuming a similar proportion of tolerated trespassers were involved, this means that 28% of 250,000 to 300,000 tolerated trespassers have changed landlord, which is 69,867- 83,841. From this we can now gain an idea of a maximum number of court cases. Of the transferred tolerated trespassers, some will have been granted a new tenancy, either a full assured or assured shorthold tenancy, but a proportion will not have been provided with a new tenancy, for whatever reason, leaving the occupant as a tolerated trespasser. We have no information on the numbers of occupants who transfer as and remain as tolerated trespassers.

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

46. We have only very limited statistics on the number of applications made to courts to vary possession orders. Numbers are very low – during 2006 a total of 53 applications to vary were made and in 2007 there were 98 – and reasons for the application are not specified. However we consider it likely that most applications to vary are for the purposes of restoring tenancy status. We are therefore basing estimates on these figures. We have averaged this to 75.5 cases, and applying this to 28% of social stock get an estimate of 21 cases per year.

47. There are likely to be more applications to vary, in order to restore tenancy status, within other housing court actions such as disrepair claims rather than as free-standing actions. However these are not recorded separately.

Costs and Benefits of Options B, C and D

Costs

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

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

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

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

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

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

Benefits

54. A number of benefits would attach equally to Options B, C and D. These are set out in paragraphs 55 to 62.

55. The options would resolve the problem of tolerated trespasser status for all successor landlord cases and remove the risk that failure to do so could lead to further litigation between landlord and tolerated trespasser. However, there is a risk that Options B and C could result in the Order itself being challenged – see "costs" section above.

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

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

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

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

59. Existing tenants subject to possession orders will no longer need to apply to the courts to restore tenancy status (although court appearances would remain necessary for disrepair claims, for example). Although it is recognised that such applications are likely to be rare – if they happen at all – in successor landlord cases at present, it is possible that heightened awareness of tolerated trespasser issues due to the provisions in the Housing & Regeneration Act 2008, and the perception of unfairness in comparison with existing tolerated trespassers whose landlord has not changed, could lead to an increase. These litigation risks have cost implications for tenants, landlords and the courts, and in some eventualities also for the Government.

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

61. Assuming 21 (see paragraph 39) cases go to court this gives the following costs:

Where tenants and landlords are in agreement:
£6,300 per year

If there are contested hearings:
Cost to landlords: £10,500
Cost to tenant if represented: £735-£1,365
Cost to tenant if unrepresented: £16,800
Cost to Court Service: £1,512-£4,200

62. This would give a range of monetary costs per year from £8,600 to a maximum of £31,500. The midpoint of this is £20,000 (to 2 significant figures).

Way forward

63. Option B would be more favourable to all transferring tolerated trespassers than option C, and more favourable to those who were formerly introductory tenants than option D.

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

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

66. For these reasons, the Government has decided to implement Option D.

Race Equality Impact Assessment

67. Ministry of Justice (MoJ) data on the numbers of suspended possession orders granted to all social landlords cannot be further broken down by race or ethnicity. However CLG collects data on the numbers of social renters who are currently in rent arrears or had been in rent arrears at a previous time during the year of data collection.

68. Data is collected annually and is broken down into various sub groups, as part of the Survey of English Housing (SEH). It is likely that those surveyed would have included a proportion of tenants who are now tolerated trespassers; we are therefore using the SEH data as an indicator of likely numbers. The dataset comprise years 2001/2 to 2004/5, a similar timeline to that covered by the MoJ possession orders data. Please note that households are regarded as in arrears with rent if the payments are two weeks or more behind.

69. SEH data indicates that minority ethnic households are more likely to be in arrears (or to have been in arrears) than white households. As a result it is likely that any restoration of tenancy status will have a positive impact on minority ethnic tolerated trespassers.

Disability Equality Impact Assessment

70. As outlined above, MoJ data on the numbers of suspended possession orders granted to all social landlords cannot be further broken down into sub-groups. Using SEH data as an indicator of likely numbers, figures indicate that households with disabled or seriously ill members are much less likely to be in arrears than households without. It is therefore our view that amending the legislation as proposed will have minimal impact on disabled households.

Gender Equality Impact Assessment

71. Data taken from the SEH indicates that there is little difference in the likelihood of being in arrears by gender. Subsequently we do not anticipate that restoring tenancy status to existing tolerated trespassers will have any disproportionately negative impact across the sexes. In fact as there are a larger number of females as household reference person than males (SEH 2006) in social housing it is likely that females will gain from any changes we make.

72. A table summarising the SEH rent arrears data is attached at Annex A.

Competition Assessment

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

Small Firms Impact Assessment

74. Small Firms will be unaffected by any amendments to legislation as proposed.

Legal Aid

75. Data collected by MoJ does not enable us to determine the amounts of Legal Aid allocated to tenants who have sought to restore tenancy status. However, there is likely to be a saving made here if further cases are prevented in the future.

Sustainable Development

76. We do not anticipate any impact on sustainable development by amending legislation as proposed.

Carbon Assessment

77. Carbon emissions will be unaffected by any amendments to legislation as proposed.

Other Environment

78. We do not anticipate any other environmental impacts.

Health Impact Assessment

79. We do not anticipate any direct impact on health will arise as a result of amending legislation as proposed. However, it is likely that those family members affected by loss of succession rights will have experienced some degree of stress and instability as a consequence of being under threat of eviction and homelessness. Restoring tenancy status will remove any potential impact on health.

Human Rights

80. The right to respect for private and family life etc under Article 8, and the right to protection of property under Article 1 of the First Protocol, are both issues which have been examined in the context of possession proceedings. Until recently the position has been that human rights law cannot be used to challenge possession proceedings, and that a grant of possession in proceedings properly instituted by the landlord in accordance with the statutory provisions will not constitute a breach of Article 8 rights. However it is now recognised by the courts that there may be exceptional circumstances in which Article 8 issues need to be considered in possession proceedings.

89. It is likely that tenants and their families would consider it a significant aspect of property rights that at present where a tolerated trespasser dies there are no succession rights, whereas if an occupant were to remain a tenant until death the succession rules would apply. These rules differ slightly for secure and assured tenants, but for both regimes only one succession to a property is allowed; if the dead tenant was already a successor, no further succession to the tenancy is possible. Family members who would otherwise succeed to tenancies will continue to be deprived of the right to succeed so long as the current state of the law exists; but if the law is reformed landlords will lose the chance to make a fresh allocation to the property on a tolerated trespasser's death. However, it is not considered that this engages Article 1 of the

First Protocol since that relates only to existing possessions not the chance of gaining a possession right.

90. Overall, if any ECHR property issues do arise in respect of the proposed reform, the Government considers that its aims are in the public interest and proportional.

Rural Proofing

91. We do not have any information about the geographical location of existing tolerated trespassers. However, the impact of the proposals should apply across all localities, both rural and urban.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

	Yes	Yes
	Yes	Yes
	Yes	Yes
	Yes	Yes
	Yes	Yes
	Yes	Yes
	Yes	Yes
	Yes	Yes
	Yes	Yes
	Yes	Yes
	Yes	Yes
	Yes	Yes

Annexes

Summary of percentage of social renters currently in rent arrears or previously in rent arrears

Percent of social renters who were either currently in rent arrears or had been in rent arrears at some other time in the past year

SEH	ethnicity of HRP		gender of HRP		Is someone in the h/hold seriously ill or disabled?	
survey yr	minority ethnic	white	male	female	yes	no
2001/2	25.4	13.6	14.2	15.3	11.0	17.9
2002/3	21.2	12.8	12.0	14.9	9.7	16.8
2003/4	18.4	11.5	10.5	13.8	7.1	16.2
2004/5	14.4	9.4	9.2	10.5	8.3	11.4