

Law Commission Consultation on 14th Programme of Law Reform
Response from Propertymark July 2021

Background

1. Propertymark is the UK's leading professional body for estate and letting agents, inventory providers, commercial agents, auctioneers and valuers, comprising nearly 17,500 members. We are member-led with a Board which is made up of practicing agents and we work closely with our members to set professional standards through regulation, accredited and recognised qualifications, an industry-leading training programme and mandatory Continuing Professional Development.

Proposal One: Conveyancing Reform in England and Wales

Question: In general terms, what is the problem that requires reform?

2. Propertymark considers there to be three key elements to the conveyancing process that could be modified to meaningfully improve efficiencies, reduce costs, and boost consumer experience – making it quicker, cheaper, and less stressful. These are: a shift to vendor disclosure and upfront information; digitisation of local land searches; and implementation of digitised property logbooks. A lack of upfront information is at the root of the problem¹, and presents a transactional barrier that could be rectified with relative ease.
3. In 2018, the Government made clear its intention to make the conveyancing process in England and Wales “quicker, cheaper and less stressful”². But three years on, it still takes an average of 20 weeks to buy or sell a property³ and over a third of sales fall through⁴ at a cost of £250 million⁵ to the consumer. This is a significant and unnecessary waste of resources and stems in part from insufficient and or poorly timed information, with purchasers changing their minds accounting for 31% of failed transactions in 2020⁶. A further 11% of sales fell through due to survey findings, and 13% failed due to a perceived lack of progress with the sale⁷. Though 2020 was clearly an atypical year, these figures mirror those in previous years, with 2019 statistics at 34%, 11% and 15%⁸ respectively.
4. Propertymark contends that changes to legislation are required to ensure that the proposed measures for reform are adopted consistently, industry-wide, to ensure transparency and uniformity in the conveyancing process. There is presently only a general framework governing the conveyancing process in England and Wales⁹ which leaves vendors and

¹ Propertymark, February 2021: Cost of Failed Sales Report.

² MHCLG, April 2018: Improving the Home Buying and Selling Process: www.gov.uk/government/consultations/improving-the-home-buying-and-selling-process-call-for-evidence.

³ Conveyancing Panel draft response – original source TBC.

⁴ Quick Move Now, 2021: Fall Through Rate Q2 2021: www.quickmovenow.com/media-centre/property-sale-fall-through-indexes.

⁵ BEIS 2016 calculation.

⁶ Quick Move Now, 2020: Fall Through Rate Annual Round Up 2020: www.quickmovenow.com/media-centre/property-sale-fall-through-indexes.

⁷ Ibid.

⁸ Quick Move Now, 2019: Fall Through Rate Annual Round Up 2019: www.quickmovenow.com/media-centre/property-sale-fall-through-indexes.

⁹ HoC Library, February 2019: Improving the home buying and selling process in England: www.commonslibrary.parliament.uk/research-briefings/sn06980.

purchasers exposed to varying levels of service quality, contributing to making house-moving one of the most stressful life events to navigate¹⁰. Regulation of agents has a role to play¹¹, but the buying and selling process must be fit for purpose to improve efficiencies and service.

Question: Can you give us an example of what happens in practice?

5. The pitfalls of the conveyancing process in England and Wales are well-documented. The paradoxical nature of home buying means that a prospective buyer may know comparatively little about a property they wish to purchase until weeks into the conveyancing journey¹². Approaches vary between solicitor (or conveyancer), with some 'drip feeding' information to clients as and when they receive it, and others aggregating it for delivery in a single report. Neither approach appears optimal, and both result in a protracted, costly process wherein newly arising information must be considered by the buying party before proceeding at best to purchase, and at worst, a failed transaction.
6. In addition to a lack of information, and a further example of inefficiencies within the system, vendors are frequently asked to provide duplicate information. In supporting vendors to complete the property information questionnaire (PIQ) correctly, Propertymark agents can avoid inaccuracies and eliminate some enquiries from the conveyancing process completely. It therefore offers the potential to speed up transactions, reduce fall through rates, and ensure compliance with Consumer Protection from Unfair Trading Regulations 2008 (CPRs), improving the experience for buyers and sellers alike. However, at present, the quantity and accuracy of information gathered by agents varies greatly. Regulation of Property Agents (RoPA) is important in driving up standards in this regard and would engender trust between agents and solicitors who could better rely upon information gathered by agents in the PIQ, rather than request it from the vendor themselves. But ultimately, property logbooks are fundamental to collating and storing information securely so that it is accessible to all who need it.
7. In the second quarter of 2021, 38% of sales fell through¹³ and while this may in part be explained by competitive pressures exacerbated by stamp duty holiday deadlines, the case for more upfront information remains the same: the more informed the buyer, the less likely they are to pull out of the sale. As previously noted, a significant proportion of failed transactions are information or progress related and thus entirely avoidable. The PIQ incorporates elements of the TA6 form to collect as much detail on a property as possible at the commencement of marketing, rather than upon instruction of a solicitor, which is routinely once a sale is agreed. But where this information is not requested, and where over-burdened local councils are solely relied upon to provide local land searches, the resultant delays are considerable. Indeed, the turnaround of local search results is often the single greatest cause

¹⁰ Yopa, April 2019: How Stressful is Moving Home: www.yopa.co.uk/blog/yopas-new-study-how-stressful-is-moving-home/.

¹¹ RoPA Working Group, July 2019: Final Report: www.assets.publishing.service.gov.uk/government/publications/regulation-of-property-agents-working-group-report.

¹² Conveyancing Association, 2017: Report on Mis-selling in the Home Moving Process: www.conveyancingassociation.org.uk/campaigns/report-on-misselling-in-the-home-moving-process/.

¹³ Quick Move Now, 2021: Fall Through Rate Q2 2021: www.quickmovenow.com/media-centre/property-sale-fall-through-indexes.

of delay, and despite the Government's 10-day target, the average in England is 18 working days¹⁴ and the disparity in local searches turnaround is vast¹⁵.

8. The Local Land Charges Programme in England and Wales, brought forward under the Infrastructure Act 2015, was welcome, and Propertymark is hopeful that the remaining 319 registers of local land charges data will be migrated to HM Land Registry as swiftly as possible (though at the present rate, Propertymark notes it will take a further 56 years to complete the process). Whilst CON29 enquiries are still dealt with by individual local authorities, it seems that the removal of LLC1 searches is having an impact on turnaround: in Stratford District Council, historically one of the worst performing councils in this field, turnaround has decreased from 95 working days in October 2018¹⁶ to 20 working days as of mid-June 2021.

Question: To which areas of the law does the problem relate?

9. The problems described relate to property and land law.

Question: Please tell us about any court/tribunal cases, legislation, books or journal articles that relate to this problem.

10. The CPRs have significant bearing over estate agents' business practices and require the disclosure of material information that could influence the average consumer's transactional decision. A shift towards *caveat venditor* would support CPR compliance and has the potential to reduce complaints of misleading or incorrect information, which is the prime reason for complaints to the Property Redress Scheme (PRS), accounting for nearly 19% of complaints received¹⁷. The Property Ombudsman also cites marketing and advertising in its top causes of complaints¹⁸.

Question: Can you give us information about how the problem is approached in other legal systems?

11. In Scotland, though still predicated on *caveat emptor*, the Housing (Scotland) Act 2006 (Prescribed Documents) Regulations 2008 necessitates all pertinent property information to be gathered prior to the marketing of a property in the form of a home report. This report includes a condition and valuation survey, energy performance certificate and property questionnaire, giving prospective purchasers details on the fitness and suitability of a given property at the point of viewing and enabling an informed decisions to be made. Crucially, the system also requires engagement of a solicitor early in the process, either to submit a note of interest or formal offer. Upon the 'conclusion of missives' both parties are legally bound to the terms of the contract, with penalties incurred should either breach it. In recent years, conditions attached to offers have become more prevalent, prolonging the process, but the

¹⁴ SearchFlow data as of 16 June 2021: www.searchflow.co.uk/news-and-events/personal-searches-turnaround-times/.

¹⁵ Ibid: Local searches turnaround varies from 5 working days (IBNLT Bedfordshire County Council; Cheshire County Council; Oxfordshire County Council; Watford Borough Council) to 180 working days (London Borough of Hackney).

¹⁶ MoveiQ, 2018. Cited in Mortgage Finance Gazette, 22 October 2018: Local Authority Lottery for Property Searches: www.mortgagefinancegazette.com/legal-news/conveyancing/local-authority-lottery-property-searches-22-10-2018/.

¹⁷ Property Redress Scheme, 2021: Complaints Stats 2020: www.annualreport.theprs.co.uk/complaint-stats-2020.

¹⁸ The Property Ombudsman, 2020: Annual Report 2019: www.tpos.co.uk/images/documents/annual-reports/2019_TPO_Annual_Report.pdf.

average property sale in Scotland still takes only 6-8 weeks¹⁹ compared with 20 weeks in England²⁰.

Question: Within the UK, does the problem occur in any or all of England, Wales, Scotland or NI?

12. The proposals set out here relate to England and Wales.

Question: What do you think needs to be done to resolve the problem?

13. Propertymark believes there are three things that can be done to resolve the problem. Firstly, more information needs to be available to a purchaser at the start of any potential transaction. This is the crux of the proposed changes and is predicated on a shift away from *caveat emptor* to *caveat venditor*. Secondly, digitisation of local land searches. Thirdly, implementation of digitised property logbooks. We are supportive of the UK Government's recent proposals for tenure, ground rent, service charge (including details of future increases) and lease length to be publicised in any marketing material and across property portals to address information asymmetry, but it is important that this information is captured and securely recorded so that future transactions can benefit.

14. Digitisation provides a clear mechanism for ensuring reliability and availability of information, and the Covid pandemic has arguably acted as a significant catalyst for change in this field. A by-product has been the migration online of property registration, with Registers of Scotland's (RoS) electronic application system, launched in April 2020, "heralded as a better, more secure way of submitting applications."²¹ The creation of a 'digital envelope' to enable the submission of scanned deeds is a small but significant shift towards a fully digitised RoS. The launch a year later of HM Land Registry's Digital Registration Service is also welcome and is anticipated to speed up the registration process in England and Wales and reduce the number of requisitions²².

15. Alongside investment and research into digital identity checks and use of electronic signatures, it is clear that technology can permit efficiencies to be made in virtually every step of the conveyancing process. It is therefore logical that it be extended to the creation of property logbooks tied to a property's Unique Property Reference Number. Not only would these digital logbooks hold the key information required to complete a transaction (including, crucially, leasehold and management packs), they would be accessible at the commencement of marketing, changing hands alongside the property itself. At present, property logbook companies are self-regulated and their use is entirely elective, therefore Propertymark believes that regulation by Government is needed to provide a mandate for industry-wide use, as well as ensure that data is kept securely and in accordance with GDPR.

¹⁹ Law Society of Scotland, July 2021: Buying and Selling a Property: www.lawscot.org.uk/for-the-public/what-a-solicitor-can-do-for-you/buying-and-selling-a-property/.

²⁰ View My Chain, November 2019: How Long Does it Take to Complete a Sale: www.viewmychain.com/blog/how-long-does-it-actually-take-to-complete-a-sale.

²¹ Law Society of Scotland, December 2020: Risk – Conveyancing in the Covid Era and Beyond: www.lawscot.org.uk/members/journal/issues/vol-65-issue-12/risk-conveyancing-in-the-covid-era-and-beyond/.

²² HM Land Registry, 2021: Digital Land Registration – a Vision for the Future of Digital Conveyancing: www.hmlandregistry.blog.gov.uk/2021/07/06/digital-land-registration-a-vision-for-the-future-of-digital-conveyancing.

16. Propertymark believes that digitisation of the conveyancing process offers a more streamlined, efficient, and cost-effective process for home buyers and sellers, as well as for agents. The digital property logbook should include sections on each stage of the transaction, allowing for documentation to be uploaded from the various parties with dates for deadlines and timescales. The logbook should hold information on the property such as the Energy Performance Certificate, which would allow all parties to access information. Property chains can become long and complex, and a missing piece of paperwork can cause delays for all involved. An online filing system would speed up the process and enable documents to be loaded onto a central repository and, crucially, downloaded quickly and easily to produce documents upon request. Furthermore, the conveyancing process requires information to be provided by third parties before contracts can be exchanged. The logbook would help to avoid delays and allow regular contact with the agent and buyer to deal with any arising issues.
17. Presently, though agents are required under the CPRs to inform interested parties of material information pertinent to the purchase, much of what would constitute material information is not made available to the buyer (and mortgage provider) until local search results are provided. Aside from this recent intervention and the short-lived introduction of Home Information Packs (HIPs), successive Governments have tended to take a *laissez faire* approach to home buying and selling, on the assumption that the industry would respond to market pressures. However, in a largely regulated industry where agents' fees are the main factor affecting consumer choice²³ there is little incentive to elevate service quality: legislation and regulation are necessary.
18. Irrespective of information, it is widely accepted that the more protracted the conveyancing process, the more opportunity there is for a buyer or seller's circumstances or motivations to change, resulting in failed transactions and the array of negative ramifications they bring. The provision of information upfront via property logbooks, digitisation of local search mechanisms, and a shift towards vendor disclosure will undoubtedly make prospective buyers better informed, speed up the conveyancing process and reduce the number of failed transactions making it quicker, cheaper and less stressful for all.
19. On the basis that the proposed reforms will address the balance of information asymmetry in the home buying and selling arena, Propertymark is supportive of the trialling of reservation agreements to foster commitment and reduce the number of failed transactions. The UK Government has indicated that this trial is due to commence later this year²⁴, but any such trial is surely dependent upon there being sufficient information available for a prospective buyer to make a binding purchasing decision. It is Propertymark's view that consumers want to see joint commitment to progress once an offer has been accepted. Consequently, once a solicitor has been instructed it is right that there should be a financial penalty for any party who withdraws from the transaction, but reforms to access and provision of information are therefore fundamental to the success of any such scheme.

²³ Home Owners' Alliance, August 2017: What's Important in Choosing an Agent? www.hoa.org.uk/campaigns/publications-2/what-important-choosing-estate-agent/.

²⁴ Secretary of State for Housing, Communities and Local Government, 9 July 2021: www.questions-statements.parliament.uk/written-questions/detail/2021-06-30/24949.

Question: What is the scale of the problem?

20. Around one million residential property transactions take place in England each year²⁵. Despite the requirements of the CPRs to provide material information alongside any invitation to purchase, when surveyed, 98% of homeowners indicated that they had received no information prior to viewing a property²⁶. It is particularly alarming to note that 52% of buyers claim to have either received no information at all regarding the property they were purchasing, or to have received it having moved in²⁷. It is possible that the Covid pandemic has – inadvertently and inconsistently – resulted in more information being provided to prospective buyers before a viewing than pre-pandemic, as viewing practices have shifted in response to health and safety guidance. However, this lack of information is troubling in the context of CPRs, particularly when the reforms proposed could, with relative ease, aid compliance.
21. With regard to leasehold property, the issue of information is perhaps even more concerning, with 62% of leasehold buyers feeling that they had been mis-sold their property, and 93% stating they would not buy a leasehold property in the future²⁸. Propertymark welcomes the Law Commission’s work on leasehold reform and feels that the adoption of digital property logbooks would support its objectives, providing clarity and understanding on leasehold property – as well as new builds more generally – that is clearly lacking at present.

Question: What would be the positive impacts of reform?

22. The proposed reforms would have three positive impacts. Firstly, create more certainty. Secondly, improve efficiency. Thirdly, reduce wasted resources. Whilst fall throughs can never be eliminated entirely, minimising them is clearly beneficial for all. Not only would unnecessary costs be avoided by consumers (the average cost to a consumer of a failed transaction is £1,500²⁹) and agents (who lose over £4,000 per failed transaction³⁰), the unquantified wasted time, effort and stress incurred by all parties could also be avoided. Improved consumer experience is therefore important. We know that when asked what would be most likely to prevent fall throughs, 88% of Propertymark members who responded said more information upfront, enabling the property to be market and sale ready.

Question: If this area of law is reformed, can you identify what the costs or other negative impacts of reform might be?

23. The costs of digitisation represent the biggest barrier to reform. These have not been fully quantified, but in the context of an industry worth nearly £10bn to GDP³¹, they will be relatively small in comparison. Costs to the seller to provide upfront information could also

²⁵ HMRC, July 2021: Residential Property Transactions: www.gov.uk/government/statistics/monthly-property-transactions-completed-in-the-uk-with-value-40000-or-above.

²⁶ Conveyancing Association, 2017: Report on Mis-selling in the Home Moving Process: www.conveyancingassociation.org.uk/campaigns/report-on-misselling-in-the-home-moving-process/.

²⁷ Conveyancing Association, 2017: Report on Mis-selling in the Home Moving Process: www.conveyancingassociation.org.uk/campaigns/report-on-misselling-in-the-home-moving-process/.

²⁸ Propertymark, September 2018: Leasehold – a Life Sentence: www.propertymark.co.uk/resource/leasehold-a-life-sentence.

²⁹ Propertymark, February 2021: Cost of Failed Sales Report.

³⁰ Ibid.

³¹ Knight Frank, 2020: Economic Benefits of Housing Market Activity: www.knightfrank.com/research/report-library/knight-frankhbf-economic-benefits-of-housing-market-activity-2020-7616.

constitute a negative impact, though similar costs do not appear to have been prohibitive in Scotland, where home reports cost an average of £600³². With failed transactions costing vendors an average of nearly £700³³, any costs associated with the provision of upfront information are likely to be lower.

Question: Does the problem adversely impact equality, diversity and inclusion by affecting certain groups in society, or particular areas of the country, more than others?

24. To the contrary, the proposed reforms seek to improve consistency and parity in what is presently an uneven system. If adopted, the suggested changes will mean that, irrespective of location, property price or parties involved, the conveyancing process will be more straightforward to navigate. Arguably, those with the most to gain from the proposed reforms are first time buyers who may have limited funds and knowledge of the conveyancing process. Access to information upfront will enable them to make better judgements on whether a property is affordable and reduce the likelihood incurring disproportionately high expenses through transaction failure.

Question: Why is the independent, non-political Law Commission the appropriate body to undertake this work, as opposed to a Government department, Parliamentary Committee or NGO?

25. Previous attempts to alter the conveyancing process have been politically driven and thus not long-lasting; the independence of the Law Commission makes it the appropriate body to legislate for these reforms. The phased introduction of Home Information Packs (HIPs) by a Labour Government in 2007 was scuppered in part by the unfortunate timing of the economic crash of 2008; their subsequent abolition in 2010 was justified on the basis that they were “stifling a fragile housing market”³⁴. But the lack of condition report undermined HIPs’ efficacy and the implementation itself did nothing to promote trust and uptake, with many seeking loopholes in transitional arrangements to bypass the requirement for a HIP³⁵, illustrating the case for industry-wide, non-partisan change.

Question: Have you been in touch with any part of the Government about this problem? What did they say?

26. Yes. Propertymark responded to the Ministry for Housing, Communities and Local Government’s (MHCLG) call for evidence on improving the home buying and selling process in December 2017 and the ‘plan of action’ set out in their response included the proposals made in our submission – namely regulation of property agents; improved transparency on referral fees; production of ‘How to Buy’ and ‘How to Sell’ guides; provision of guidance on how to select a solicitor; and upfront information capturing. However, in spite of the publication of the ‘plan of action’ the system remains largely unchanged, and the same problems continue to blight the conveyancing process.

³² Shelter Scotland, 2016: Selling your Home – Home Reports:

www.scotland.shelter.org.uk/housing_advice/finding_a_place_to_live/moving_home/selling_your_home.

³³ Department for Communities and Local Government, October 2017: Improving the Home Buying and Selling Process – Call for Evidence: www.assets.publishing.service.gov.uk/government/consultations/improving-the-homes-buying-and-selling-process-call-for-evidence.

³⁴ Lord Pickles, Former Secretary of State for Communities and Local Government, 20 May 2010: www.gov.uk/government/news/pickles-and-shapps-announce-hips-are-history.

³⁵ House of Commons Library, November 2010: Home Information Packs – A short history: www.researchbriefings.files.parliament.uk/documents/RP10-69/RP10-69.pdf

Question: Is any other organisation such as the Government or NGO currently considering this problem? Have they considered it recently? If so, why should the Law Commission also look into the problem?

27. As indicated, MHCLG consulted on the conveyancing process in 2017 and issued a response in April 2018, yet there has been little movement. The UK Government’s response concluded that there was no “silver bullet”³⁶ to solve the system’s flaws, and instead suggested a number of incremental measures including regulation of agents and adoption of reservation agreements. However, the Regulation of Property Agents (RoPA) Working Group’s final report was published in July 2019, and no further progress has been made. As noted, the Secretary of State for Housing, Communities and Local Government has recently indicated that reservation agreements will be trialled later this year. Propertymark welcomes the trial but suggests that it reinforces the need for the reforms proposed, as without access to information prior to an offer being made, the scheme will be simply unworkable in practice.

³⁶ MHCLG, April 2018: Improving the Home Buying and Selling Process – Government Response: www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/697939/Improving_the_home_buying_and_selling_process_response.pdf

Proposal Two: A Dedicated Housing Court in England and Wales

Question: In general terms, what is the problem that requires reform?

28. A dedicated housing court is necessary to overcome issues and to guarantee fair, timely redress for all parties. To this end, three things must be addressed. Firstly, delays in the possession process. Secondly, remove the risk of landlords exiting the market. Thirdly, safeguard a supply of safe and affordable housing in the private rented sector. The present route to possession via the courts for private landlords is slow, complex and costly³⁷. At a time when they may already be in financial difficulty due to rent arrears, landlords are required to submit a claim for possession at a cost of £355³⁸ and wait more than five months³⁹ for a possession order – or far longer should an inaccuracy on a notice result in it being rejected. At the point of repossession, it is feasible for a landlord to have amassed costs of more than £30,000⁴⁰ when lost rent, legal fees and damage is calculated.
29. Delays are reported at every stage of the possession process, and though landlord possession action has been steadily decreasing since 2014⁴¹, the time taken from claim to repossession is increasing, with the median time standing at 21.1 weeks by March 2020⁴². As a result, a fundamental lack of faith in the present court system goes some way to explain the reliance of landlords on Section 21 as a route for possession⁴³. Evidence suggests that landlords are five times more likely⁴⁴ to use a Section 21 notice than a Section 8, even in the presence of rent arrears or anti-social behaviour, as they believe it to be the faster route to possession, which is crucial in minimising overall costs. In the context of the anticipated abolition of Section 21, the increased pressure on the court system is clear, with all cases then requiring a hearing. Indeed, without reform of the courts, removal of Section 21 as a route for possession alone will triple the court caseload⁴⁵. But add to this the impact of the Covid pandemic and broader Renter’s Reform agenda and there is an immediate need for court reform.
30. The ultimate consequence of this failure is that landlords – particularly those owning a single property, accounting for 60% of private rented sector stock⁴⁶ – are likely to leave the sector, making rents less competitive and placing further demands on social housing providers to accommodate more households, or face additional cases of homelessness. This is supported

³⁷ NRLA, July 2019: Possession Reform in the Private Rented Sector: Ensuring Landlord Confidence: www.nrla.org.uk/download?document=1084.

³⁸ HM Courts and Tribunals Service, May 2021: Fees in the Civil and Family Courts: www.gov.uk/government/publications/fees-in-the-civil-and-family-courts-main-fees-ex50.

³⁹ Ministry of Justice, May 2020: Mortgage and Landlord Possession Statistics in England and Wales: www.gov.uk/government/statistics/mortgage-and-landlord-possession-statistics-january-to-march-2020.

⁴⁰ Benham and Reeves, August 2019: The Cost of Evicting a Rogue Tenant: www.benhams.com/press-release/buying/the-cost-of-evicting-a-rogue-tenant-can-set-landlords-back-as-much-as-55k/.

⁴¹ Ministry of Justice, May 2020: Mortgage and Landlord Possession Statistics in England and Wales: www.gov.uk/government/statistics/mortgage-and-landlord-possession-statistics-january-to-march-2020.

⁴² Ibid.

⁴³ NRLA, July 2019: Possession Reform in the Private Rented Sector: Ensuring Landlord Confidence: www.nrla.org.uk/download?document=1084.

⁴⁴ Ibid.

⁴⁵ Lettings Industry Council Section 21 Working Group, October 2020: Beyond Section 21: www.thelettingsindustrycouncil.co.uk/post/beyond-section-21-capturing-the-benefits.

⁴⁶ LSE for Council of Mortgage Lenders, December 2016: Profile of UK Private Landlords: www.lse.ac.uk/business/consulting/assets/The-Profile-of-UK-Private-Landlords.pdf.

by historical evidence on supply pre- and post-enforcement of the Rent Act 1977 and Housing Act 1988 which had varying and significant consequences for the private rented sector. The Housing Act 1988 was introduced in part in response to the difficulties faced by landlords when seeking possession of property in protected or statutory tenancies. The Rent Act 1977 afforded tenants with hereditary rights to tenancies, and thus made private rented sector (PRS) unappealing to landlords who had little power to regain the use of their property. Coupled with restrictions on rent levels, the PRS accounted for just 1.7m households (9%) by the time the Housing Act 1988 was introduced⁴⁷, having dwindled from a post-war peak of 6.5m households (50%) in 1953⁴⁸. The Housing Act 1988 gave landlords more power to reclaim their property via use of Section 8 or Section 21 notices, revitalising the sector's appeal.

31. A dedicated housing court for England and Wales would safeguard a supply of safe and affordable housing in the private rented sector. It would provide faster access to justice for tenants and landlords; consistency in judgements from specialist housing Judges; and legal certainty resulting in increased investment in the private rented sector. Alongside demand-side drivers including changes to higher education policies; the reduction in affordable social rented property; increased availability of credit to potential landlords; and relatively poor returns on other assets, the expansion of landlord possession rights led to an increase in supply of private rental property, which reached a new peak of 20% in 2017⁴⁹. Since then, changes to tax relief for residential landlords and other regulatory reforms have caused PRS stock to decrease again, and findings suggest that abolition of Section 21 without court reform could result in up to 45% of landlords leaving the sector⁵⁰.

Question: Can you give us an example of what happens in practice?

32. In summary, the repossession process under Section 21 – the route preferred by landlords as it is generally quicker and less complex⁵¹ – begins when a landlord serves a notice lasting two months (prior to the enforcement of temporary lockdown measures and assuming notice periods revert to pre-pandemic limits from 1 October 2021 in England). If the tenant does not vacate by the specified date, the landlord must then seek a Court Order which takes an additional two months. If the tenant still refuses to vacate, it takes approximately two more months for the court to permit the use of a bailiff to evict a tenant. Once agreed, it can take yet another two months (where a landlord uses a County Court Bailiff) for the tenant to be evicted⁵². In the eight months that can elapse between notice being served and eventual repossession, arrears, damage, and disturbance can continue. Though not inevitable in every case, the protraction and therefore opportunity for accrual of costs is aggravated by advice given to tenants by Local Authorities to remain in their homes until forcibly evicted, impacting on all parties involved.

⁴⁷ MHCLG, Trends in Tenure: FT1101 (S101): www.gov.uk/government/statistical-data-sets/tenure-trends-and-cross-tenure-analysis.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ NRLA, July 2019: Possession Reform in the Private Rented Sector: Ensuring Landlord Confidence: www.nrla.org.uk/download?document=1084.

⁵¹ Ibid.

⁵² Shelter, May 2021: Section 21 Eviction: www.england.shelter.org.uk/housing_advice/eviction/section_21_eviction/how_long_a_section_21_eviction_takes.

33. Exacerbating this is the fact that the present system of repossession and redress is inefficient and too complicated for many landlords and tenants to access⁵³. Tenants in particular are often unable to enforce their rights due to the system's complexities and cuts to civil legal aid, and the system therefore serves no party well. Propertymark members report that forms to initiate eviction and the procedure by which they are required to be submitted are getting more complex. Indeed, three forms are now required to apply for a court hearing under the Standard Possession Order route⁵⁴ and the Accelerated Possession Order still necessitates two forms (N5B and N215) despite it being determined without a hearing (unless issues with the application result in the County Court calling for one). The process is complicated further in the pursuit of unpaid rent where the procedures differ depending on whether the Standard or Accelerated route is taken.
34. The time taken simply to initiate proceedings is often costly for the claimant. Delays in receiving a first court hearing date and adjournments before hearing evidence mean the process is long and costly from the outset. Where a tenant is persistently defaulting on rent, the longer it takes to repossess the property, the more potential financial difficulty faced by a landlord. This expectation that costs will be incurred mean that many claimants opt to act as litigants in person to limit further expenses. However, poor guidance often results in mistakes and cases taking much longer to proceed through the system. As an example, the UK Government provides Form N5B for Accelerated Possession Orders, but no explanatory notes are available to guide a user through the process of completing the form, which is onerous and legalistic. A similar lack of guidance is available at subsequent stages of the process, leading to yet more delays which frustrate the process of repossession.
35. Delays between hearing and granting of a possession order can be the product of adjournments or actions of the defendant – vexatious or otherwise. In cases where possession is sought on discretionary grounds, a Judge may adjourn the application if a defendant claims hardship and in instances in which a tenant pays their rent and makes regular contributions towards existing arrears, this adjournment can be indefinite or result in another claim for possession being submitted. Where cases are contested or counterclaims are made, despite a protracted process to get there, hearing times are often too short to enable the full details of a case to be heard, and the case is then likely to be postponed again. Again, delays add to costs, particularly at this stage when a claimant may have legal representation.
36. Though it is possible for the process to be expedited via the High Court, this is at the discretion of a County Court Judge, who is generally advised not to do so except in particularly busy County Courts. This inconsistency means that claimants can have very different experiences of the system, and where enforcement is transferred to the High Court many landlords are unaware that they must then apply for a Writ of Possession in order for the High Court to execute the eviction. If not transferred to the High Court, a landlord must wait for a County Court Bailiff to execute the warrant for possession, and as noted previously, this can mean a further two-month delay.

⁵³ Justice, 2020: Solving Housing Disputes: www.justice.org.uk/our-work/civil-justice-system/solving-housing-disputes.

⁵⁴ Propertymark, January 2019: Considering the Case for a Housing Court: www.propertymark.co.uk/resource/considering-the-case-for-a-housing-court.

Question: To which areas of the law does the problem relate?

37. The problems described relate to property and land law.

Question: Please tell us about any court/tribunal cases, legislation, books or journal articles that relate to this problem.

38. Legislation governing the private rented sector has increased by 40% over the past decade⁵⁵ and the volume of regulation means that enforcement is variable. Recent legislation in the form of the Renting Homes (Wales) Act 2016 and Tenant Fees Act 2019 strengthened tenants' rights to retain their homes, prohibiting landlords from serving a Section 21 notice where a fee has been charged unlawfully and not repaid. The Housing and Planning Act 2016 introduced greater powers for local authorities to deal with 'rogue landlords' and to enforce improvements in housing standards. Though temporary, the Coronavirus Act 2020, Public Health (Coronavirus) (Protection from Eviction) (England) Regulations 2021 and Public Health (Protection from Eviction) (No. 2) (Wales) Coronavirus) Regulations 2021 have also increased regulatory powers to prevent landlord repossession. The full impact of these measures is yet to be seen, but as noted, a backlog of cases is anticipated.

Question: Can you give us information about how the problem is approached in other legal systems?

39. The specialist housing court model is to an extent a 'tried and tested' solution to overcome the present inconsistent and complex route to justice. The First Tier Tribunal for Scotland's Housing and Property Chamber was established in 2016 to align with the introduction of Private Residential Tenancies (PRTs), and aims to provide the "benefits of specialism, consistency and improved access to justice for both tenants and landlords in the private rented sector."⁵⁶ Scrutiny of the Scottish model can provide lessons in the establishment of a housing court for England and Wales, particularly around access to legal representation and adoption of digital technology.

40. The Tribunals (Scotland) Act 2014 transferred the powers of the Private Rented Housing Panel, Homeowner Housing Panel and Sheriff Court (in relation to civil cases in the PRS) to the Tribunal, which deals with private rented sector disputes for free in a less formal environment. Formation of the Tribunal has removed barriers to justice and resulted in improved enforcement of landlord and tenant obligations. Proof of this improved access to justice can be evidenced by the immediate increase in the number of cases heard by the Tribunal (with more than 3,500 cases received in 2018 compared with an anticipated 700⁵⁷), the simplified system appealing to both landlords and tenants. However, its success in this realm has led to one of its main criticisms – that the Tribunal's caseload has caused capacity issues and led to long delays in cases being dealt with. However, rather than simply an issue of inadequate resourcing, the delays can to an extent be explained by the Tribunal's "inquisitorial" approach and thorough "sifting", which often demand further information from an applicant before and indeed after a case management discussion, with timeframes then dependent on the speed at which such information is supplied. The average number of days from lodging an eviction

⁵⁵ NRLA, July 2021: Rented Housing Laws Not Fit For Purpose: www.nrla.org.uk/news/rented-housing-laws-not-fit-for-purpose-argue-landlords.

⁵⁶ Scottish Government, 2017: Consultation on the First Tier Tribunal Housing and Property Chamber: www.consult.gov.scot/better-homes-division/procedure-first-tier-tribunal-housing/.

⁵⁷ Scottish Courts and Tribunal Service, 2020: Evidence to the Local Government and Communities Committee: www.archive2021.parliament.scot/parliamentarybusiness/currentcommittees/114744.aspx.

application to the granting of the order was 92⁵⁸ days in the year to March 2020, compared with 147 days in England (Jan-Mar 2020)⁵⁹.

41. An area for development is however, the lack of equality in representation, with some evidence suggesting that up to 92% of tenants had no representation versus just 12% of landlords⁶⁰. Though landlords are undeniably more likely to make use of representation than tenants, recording methods generally do not distinguish the type of representation (solicitor, letting agent, family member etc.), so it is difficult to draw precise conclusions from the statistics. In line with the burden of proof, cases recording the highest levels of representation are eviction, civil and right of entry applications. But while some have pointed to lack of attendance or representation as a determinant of case outcome⁶¹, a causal link is difficult to establish. Nevertheless, any imbalance in access to representation should be addressed, and a specialist court in England and Wales would need to retain legal aid funding commensurate with other courts to prevent such an inequitable scenario and its potential bias on case outcomes.
42. On the use of digital technology, the Tribunal has demonstrated that holding case management discussions and evidential hearings via tele- and videoconferencing during the Covid pandemic is both feasible and beneficial, permitting all parties to participate remotely and maintaining case progression where possible. While it will not be possible to deal with all cases in this way, PropertyMark sees no reason why these methods could not continue to be used alongside traditional in-person hearings and adopted in any new system for England and Wales.
43. The Scottish model may not be perfect, and there have been one or two anomalous decisions⁶² but in its short history, the Tribunal has expanded to become the largest of the six Chambers, accounting for 94% of applications received in the year to March 2020⁶³. The eighteen grounds for eviction (ten of which are mandatory) have enabled enforcement of landlords' rights and simplified the possession process. Without similar reforms in England and Wales, the proposed changes to the eviction process will not be workable: current court processes are fraught with delays and decisions inconsistent. The creation of a specialist housing court is the long-term solution, and the proposals outlined should be incorporated.

Question: Within the UK, does the problem occur in any or all of England, Wales, Scotland or NI?

44. The proposals set out here relate to England and Wales.

⁵⁸ Scottish Tribunals Annual Report, April 2019-March 2020:

www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/scottish-tribunals-publications/annual-report-19-20.pdf.

⁵⁹ Ministry of Justice, May 2020: Landlord Possession Statistics in England and Wales Jan-Mar 2020:

www.gov.uk/government/statistics/mortgage-and-landlord-possession-statistics-january-to-march-2020.

⁶⁰ Shelter Scotland, 2020: Evidence to the Local Government and Communities Committee:

www.archive2021.parliament.scot/parliamentarybusiness/currentcommittees/114744.aspx.

⁶¹ Ibid.

⁶² Lewis-Flannigan & Lewis-Flannigan vs Mill (2019) which was rejected on the grounds that the respondent had been given too much notice in the Notice to Leave.

⁶³ Scottish Tribunals Annual Report, April 2019-March 2020:

www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/scottish-tribunals-publications/annual-report-19-20.pdf.

Question: What do you think needs to be done to resolve the problem?

45. Establishment of a dedicated housing court is a long-term solution to the imbalances of the present system. It requires adequate funding and political commitment, but Propertymark believes that it is warranted by the significance of housing to individuals' health and welfare, as well as the sheer size of the private rented sector – housing 4.4 million households in England alone⁶⁴. Judges with expertise in landlord and tenant law who can guarantee consistency in decision making and bring certainty to the process will benefit tenants and landlords directly, ensuring their interests are protected. Indirect benefits will arise through increased investment in the private rented sector, with a specialist housing court safeguarding the supply and quality of housing via enhanced landlord confidence in the justice system.
46. A specialist housing court with a single cost structure and procedural rules would simplify the route to justice for all. It should be granted the existing powers of both the County Court and First-Tier Tribunal (Property Chamber) to ensure that wherever possible, persons bringing proceedings are able to have their matters dealt with in a single process. Appeals should then go to the Upper Tribunal and on to the Court of Appeal, if necessary. Propertymark believes that a housing court would allow for an easier and more streamlined process for housing claims, which would provide faster justice and make the whole process more cost effective.
47. The creation of a housing court provides the potential for faster enforcement. Where contested cases are not allocated sufficient time in County Court at present, in a specialist housing court, these could be dealt with in one hearing, allowing evidence to be properly heard and counterclaims to be submitted in a timely manner. Improved timeframes would also go some way to overcoming a barrier to justice, wherein claimants are deterred from pursuing their rights due to the sheer length of time involved. They would also encourage landlords to agree to longer tenancies, with the knowledge that, should they need to initiate possession proceedings, they can gain access without unnecessary delay.
48. In addition to the creation of a housing court, Section 8 of the Housing Act 1988 must be amended to include a ground for possession on sale of the property. Support for this legislative change is high, with just under 88% of landlords in favour of reform⁶⁵. As noted, under the Scottish system, grounds for possession have strengthened the enforcement of landlords' rights, and sale of a rented property is a mandatory ground for possession – the caveat being that the property must be marketed for sale within three months of a tenant vacating. In addition, Ground 1 should be broadened to allow possession of a home for the landlord's family member to live in, and there should not be a requirement for the landlord or family to have lived in the property previously. Ground 8 must be tightened so that tenants are not able to 'play the system' by paying off minimal arrears to invalidate a claim. Furthermore, all grounds should be made mandatory, as if grounds for rent arrears and anti-social behaviour remain discretionary, there is little to assure a landlord that access can be regained to a property.

⁶⁴ MHCLG, July 2021: English Housing Survey Private Rented Sector 2019-20:

www.gov.uk/government/statistics/english-housing-survey-2019-to-2020-private-rented-sector.

⁶⁵ NRLA, July 2019: Possession Reform in the Private Rented Sector: Ensuring Landlord Confidence:

www.nrla.org.uk/download?document=1084.

49. Resistance to reform of the courts has primarily focused on access for claimants – both physical and financial. The Covid pandemic and resultant lockdown restrictions have accelerated flexible and digital ways of working, and Propertymark sees no reason why a housing court could not adopt similar measures alongside traditional in-person hearings for possession cases to minimise physical barriers. Indeed, both case management discussions and hearings have been successfully carried out via teleconference by Scotland’s First Tier Tribunal (Housing and Property Chamber) since July 2020. The use of an online claims system and remote hearings would save time, eliminate waste and provide an alternative access route to justice.
50. Propertymark is keen to see the impact of the UK Government’s Rental Mediation Service Pilot to determine whether it can effectively reduce pressure on the court system and prevent the incurrance of unnecessary court fees⁶⁶. Mediation should not replace justice through the courts, but if outcomes from the pilot are favourable, mediation could be a voluntary, first stage in possession proceedings. Consideration should be given as to how mediation can be initiated at an earlier stage in the process, such as prior to the expiry of a possession notice, and engagement in mediation must enable expedition through the court process if a resolution not achieved, to encourage uptake of the service.

Question: What is the scale of the problem?

51. In 2019, landlord possession claims amounted to 110,915⁶⁷. It should be noted that the majority (58%⁶⁸) of these were submitted by social landlords, to an extent countering the assertion that private landlords are actively litigious⁶⁹. Only 27% of these resulted in repossession by a County Court Bailiff, yet as noted, the median time from claim to repossession is around five months. Notably, due to outlying cases, the average time from claim to repossession is nearer ten months⁷⁰ and the impact of the pandemic and eviction moratorium is anticipated to double the claims and corresponding processing times⁷¹. This suggests that the majority of claims made now will not be resolved until at least the second quarter of 2022.
52. The consequence of these delays is that the private rented sector stock is likely to decrease. It has been suggested that abolition of Section 21 could result in the withdrawal of 45% of private landlords from the sector⁷². The same study finds a similar proportion of landlords considering a reduction in their investment in private rented sector if reforms to compensate for the lack of Section 21 are not forthcoming. If the private rented sector diminishes, additional pressure will fall on local authorities to help those displaced find suitable

⁶⁶ MHCLG, May 2021: Rental Mediation Service: www.gov.uk/guidance/rental-mediation-service.

⁶⁷ Ministry of Justice, February 2020: Mortgage and Landlord Possession Statistics 2019: www.gov.uk/government/statistics/mortgage-and-landlord-possession-statistics.

⁶⁸ Ministry of Justice, May 2020: Mortgage and Landlord Possession Statistics in England and Wales: www.gov.uk/government/statistics/mortgage-and-landlord-possession-statistics-january-to-march-2020.

⁶⁹ NRLA, July 2019: Possession Reform in the Private Rented Sector: Ensuring Landlord Confidence: www.nrla.org.uk/download?document=1084.

⁷⁰ Ministry of Justice, May 2020: Mortgage and Landlord Possession Statistics in England and Wales: www.gov.uk/government/statistics/mortgage-and-landlord-possession-statistics-january-to-march-2020.

⁷¹ Trust for London, May 2021: Homelessness and Rough Sleeping in the Time of Covid-19: www.trustforlondon.org.uk/publications/homelessness-and-rough-sleeping-in-the-time-of-covid-19.

⁷² NRLA, July 2019: Possession Reform in the Private Rented Sector: Ensuring Landlord Confidence: www.nrla.org.uk/download?document=1084.

alternatives at a cost to the taxpayer. Furthermore, there will be fewer homes available to rent privately, and if supply of social stock is insufficient, public sector expenditure on temporary housing will rise. A Freedom of Information Request (FOI) in 2018 highlighted the fact that local authorities had spent £3.7 billion on temporary accommodation between 2013-14 and 2017-18 – already representing an increase of 56% from five years prior⁷³.

Question: What would be the positive impacts of reform?

- 53. Nearly 91% of landlords support the creation of a dedicated housing court⁷⁴. But court reform is not simply about possession – despite the mechanism provided by the Homes (Fitness for Human Habitation) Act 2018, tenants are reluctant to take bad landlords to court due to the complexities of the system, costs and the time commitment involved. Moreover, as well as the obvious benefits to ‘good’ tenants and landlords, faster access to justice would result in visible sanctions for both criminal landlords and anti-social tenants, improving the sector as a whole.
- 54. Specialist Judges, appointed for their knowledge and expertise in the field, would enable cases to be expedited, as vexatious claims can be eliminated with ease. As a consequence, both court time and resources would be used more efficiently, providing a consistent standard of justice for landlords and tenants alike. This would make longer tenancies workable for landlords. Without one, alongside enhanced grounds for eviction, landlords will be reluctant to offer longer terms where the route to repossession is neither straightforward nor guaranteed. Landlords would benefit from longer tenancies through reduced void periods and fewer renewals, while tenants would benefit from security offered by longer term tenancies.

Question: If this area of law is reformed, can you identify what the costs or other negative impacts of reform might be?

- 55. The one-off financial investment required to establish a housing court has been calculated to be in the region of £78m⁷⁵. Clearly this is not an insignificant sum, however Propertymark believes the benefits to all parties to be sufficient to warrant the expenditure. Improved efficiencies in the system (including through process simplification, use of digital technologies and mediation) would minimise the costs involved in delays and would accumulate over time enabling considerable savings to be made. Provided a housing court harnesses the expertise of specialist Judges, the rights of all parties would be strengthened meaning no unintended, negative consequences in terms of judgements.

Question: Does the problem adversely impact equality, diversity and inclusion by affecting certain groups in society, or particular areas of the country, more than others?

- 56. The present system is not equitable: landlords face financial difficulty, tenants are unable to overcome barriers to access, and judgements are inconsistent. Private renters are more likely to be young BAME individuals, so reforms that enable better access to justice for tenants will benefit these groups more significantly. Individuals aged 25-34 account for 32% of private

⁷³ Inside Housing, August 2018: The Cost of Homelessness: www.insidehousing.co.uk/insight/insight/the-cost-of-homelessness-council-spend-on-temporary-accommodation-revealed-57720.

⁷⁴ NRLA, July 2019: Possession Reform in the Private Rented Sector: Ensuring Landlord Confidence: www.nrla.org.uk/download?document=1084.

⁷⁵ Lettings Industry Council Section 21 Working Group, October 2020: Beyond Section 21: www.thelettingsindustrycouncil.co.uk/post/beyond-section-21-capturing-the-benefits.

rented households⁷⁶, while Chinese (45%), Arab (51%) and Other White (non-British or Irish) (59%) have the highest proportions in the private rented sector – compared with just 16% for White British households⁷⁷. A specialist housing court would ensure that tenant and landlord rights were upheld consistently across all cases.

57. The abolition of Section 21 without reform to the court system and mandatory grounds for eviction is likely to have an impact certain protected characteristics under the Equality Act 2010, with single parents, those who are retired or have disabilities most likely to be negatively affected. Tenants on lower incomes are generally considered to represent a higher risk for landlords due to likelihood of rent defaulting, and without the certainty of repossession, landlords will take a much more cautious approach by opting to rent to people who are highest on the income scale. The most vulnerable prospective tenants will therefore be excluded from the private rented sector and, compounded with the inevitable reduction in private rented sector stock due to landlords leaving the market, pressure on rents as well as on other tenures to accommodate those previously housed in the private rented sector, homelessness cases are likely to rise. This will disproportionately affect the BAME groups highlighted previously, given their predominance in the sector, and if the social rented sector is unable to house these displaced private rented sector tenants, a rise in homelessness is inevitable.

Question: Why is the independent, non-political Law Commission the appropriate body to undertake this work, as opposed to a Government department, Parliamentary Committee or NGO?

58. The Law Commission consulted on dispute resolution within the rented sector in 2007 but focused on alternative methods of redress and modernisation rather than reform of law. It is now necessary, for the reasons outlined, to establish a housing court so that the justice system is fair, accessible and up to date. Legislation affecting the private rented sector is varied and spans multiple Government departments. The Law Commission's independence makes it the appropriate body to comprehensively review and reform the system.

Question: Have you been in touch with any part of the Government about this problem? What did they say?

59. Propertymark responded to the Ministry for Housing, Communities and Local Government's (MHCLG) Call for Evidence on establishment of a housing court in 2019 and its New Deal for Renting consultation the same year. In both submissions, Propertymark highlighted the need for court reform and the problems and practicalities of abolition of Section 21. To date, the UK Government has not issued a response to either consultation.

Question: Is any other organisation such as the Government or NGO currently considering this problem? Have they considered it recently? If so, why should the Law Commission also look into the problem?

60. As noted, MHCLG previously consulted on this issue in 2019, calling for evidence on user experience of the present system and views on the establishment of a housing court.

⁷⁶ MHCLG, July 2021: English Housing Survey Private Rented Sector 2019-20:

www.gov.uk/government/statistics/english-housing-survey-2019-to-2020-private-rented-sector.

⁷⁷ MHCLG, March 2021: Renting from a Private Landlord (Ethnicity Facts and Figures): www.ethnicity-facts-and-figures.service.gov.uk/housing/owning-and-renting/renting-from-a-private-landlord/latest#full-page-history.

Additionally, in January 2019 Propertymark attended a Housing Court Stakeholder Event hosted by The Law Society. As of July 2021, no response from the UK Government has been published. A report published alongside the call for evidence outlined many of the issues reported here, suggesting there is some consensus on the problem, however the nature of the required reforms necessitate cross-departmental working, which may explain the lack of movement. The Law Commission's independence and ability to take a holistic approach to reform would enable the establishment of a housing court, and with the pandemic-related backlog of cases expected to exacerbate delays once all lockdown measures are lifted, it is necessary to do so urgently to avoid perpetuating delays in proceedings that could harm both landlords and tenants.