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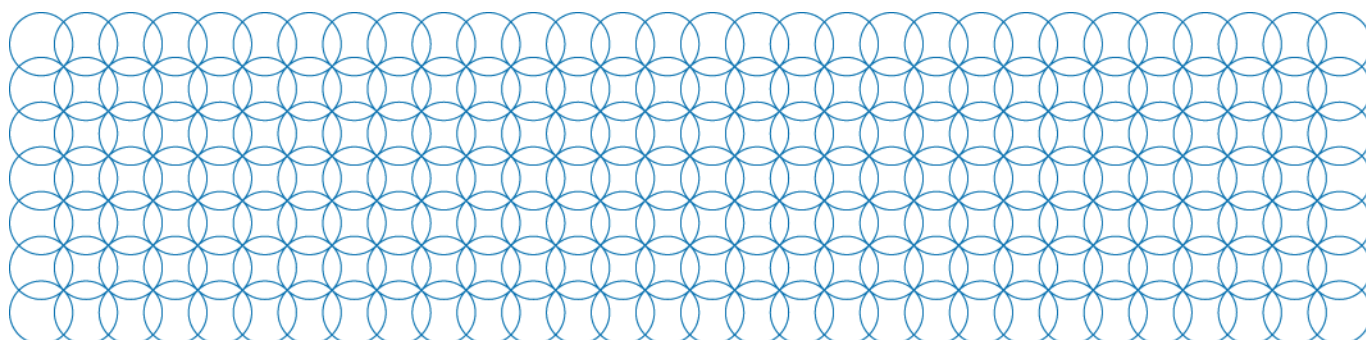
Mortgages

Power of Sale and Residential Property

Consultation Paper CP55/09

Published on 29 December 2009

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JUSTICE

Mortgages

Power of Sale and Residential Property

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About this consultation

- To:** Lenders, borrowers and their respective advisers.
- Duration:** From 29/12/09 to 28/03/10
- Enquiries (including requests for the paper in an alternative format) to:** Civil Law Branch
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- How to respond:** Please send your response by 28/03/10 to:
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Email: civillawreform@justice.gsi.gov.uk
- Response paper:** A response to this consultation exercise is due to be published in Summer 2010 at:
<http://www.justice.gov.uk>

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Foreword

I am pleased to publish this consultation paper on the sale of homes by mortgage lenders. The paper was announced in the Consumer White Paper in July 2009 and forms part of a wide range of initiatives by the Government to protect and support homeowners. The loss of a home due to financial difficulties is a traumatic event for any individual or family. The Government considers repossession action should be a lender's last resort after other options have been considered first. It also believes that borrowers should not lose their homes without the opportunity of receiving help from the courts. This consultation paper addresses one of the ways in which this might be assured.

I hope that everyone with an interest in this topic will respond to this consultation.

A handwritten signature in black ink that reads "Bridget Prentice". The signature is written in a cursive style and is centered on the page.

Bridget Prentice

Executive summary

This consultation paper seeks views on proposals to amend the law in relation to residential owner-occupier mortgages to ensure that such properties cannot be sold without either a court order or the homeowner's consent. This would mean that the borrower would always have the opportunity to access the protections offered by the court. The proposals would:

- allow a lender to exercise the power of sale over residential owner-occupied properties only where they had obtained a court order of the consent of the borrower
- only apply to residential owner-occupier mortgages and would not apply to buy to let or other commercial loans
- not affect other remedies open the lender
- not change the practice in relation to the majority of cases where lenders already obtain an order for possession before selling
- not change the practice whereby borrowers hand in the keys and the lender accepts them. In these cases no court order would be required.
- provide legal certainty in the case of abandoned properties where the property appears deserted and the borrower cannot be contacted by requiring the lender to obtain a court order before selling

We seek the views of consultees on these matters.

This consultation paper follows on from concerns expressed after the High Court ruling in the case of *Horsham Properties Limited v Clark and Beech* in 2008. The case raised concerns in the press and Parliament that homes might be sold without a court order. The intention to publish the consultation paper was announced in the July 2009 Consumer White Paper.

Introduction

This paper sets out for consultation a provisional proposal that lenders should only be able to sell owner-occupied homes over which they hold mortgages with the prior approval of the court or the agreement of the borrowers. The consultation is aimed at property owners, lenders, their respective advisers and persons interested in the mortgage market in England and Wales.

This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The consultation criteria, which are set out on page 46 have been followed.

An Impact Assessment has been completed and does not indicate that the proposals are likely to lead to significant additional costs or savings for businesses, charities or the voluntary sector, or the public sector. If you disagree with this conclusion you are invited to send your reasons as part of your overall response to this paper. A copy of the Impact Assessment is attached to the paper (Annex A).

Copies of the consultation paper are being sent to:

Council of Mortgage Lenders
Finance and Leasing Association
Intermediary Mortgage Lenders Association
British Bankers' Association
Building Societies Association
Citizens Advice Bureaux
Shelter
Money Advice Trust
Chancery Bar Association
The Law Society
The Society for Licensed Conveyancers
The Institute of Legal Executives
Association of Her Majesty's District Judges
Office of Fair Trading
Financial Services Authority
Land Registry

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper.

Chapter 1: Background and introduction to the proposals

1. In this paper we examine the exercise by mortgage lenders of their power of sale over owner-occupied homes. We make a provisional proposal that the law should be amended to prohibit the exercise of this power without either the agreement of the borrowers or the prior approval of the court. The approval of the court will be granted either through a possession order or, where no possession order has been made, through an order approving the sale. The proposal will not affect the exercise of the right to appoint receivers. We consider that in general this will reinforce rather than change current practice.
2. The proposed reform relates only to the law of England and Wales and will only apply to mortgages of residential owner-occupied property. This paper does not relate to the power of sale in relation to other mortgages, including buy to let loans and loans for other commercial purposes.
3. The paper is not concerned with and does not comment on the regulatory framework of the lending industry or the rules made by regulators. Nor does it address the effect of the Consumer Credit Acts.

Wider policy context

4. This consultation takes place in the context of wider Government action in relation to lending. In response to current economic challenges, the Government has taken action to reform financial services regulation and to put in place extra protections and support for homeowners struggling with their mortgage payments.

Changes to the regulatory environment

5. In 2004, the Government extended the scope of Financial Services Authority (FSA) regulation to include first-charge residential mortgages. The FSA's regime provides important protections for consumers, including requirements that lenders treat customers fairly and treat repossession as a last resort. The Government is committed to a framework of protection for mortgage borrowers that remains sound, and is taking action to help ensure this is the case.
6. The Government is taking action to reform the banking and financial services regulation. On 8 July, the Government published Reforming Financial Markets, a paper setting out the Government's analysis of the causes of the financial crisis, along with a series of proposals to reform and strengthen financial regulation, and protect and support consumers. The consultation period for these proposals closed on 30 September, and on 19 November the Government published a document setting out its

response to the consultation. This document is available on the Treasury's website.¹

7. This document made specific announcements in relation to the regulation of mortgages, namely that the Government would:
 - review the case for FSA regulation of second-charge mortgages;
 - review the case for FSA regulation of buy-to-let mortgages; and
 - consult on measures to protect consumers when lenders sell on mortgage books.
8. On 25 November, the Government published a consultation document on proposals for action in these three areas. This consultation will close on 15 February 2010 and is available on the Treasury's website.²
9. On 19 October, the FSA published a discussion paper on its approach to mortgage regulation and a package of proposals to improve its existing regime. Stakeholders may wish to view this paper, which is available on the FSA's website.³

Action to prevent repossessions

10. The Government remains committed to helping households through the downturn and ensuring that there is an appropriate framework of support for mortgage borrowers. Government has taken action to strengthen the framework of support for homeowners and to ensure help is available at every stage, including:
 - For people worried about mortgage payments or beginning to get into arrears, we are investing £130million in providing free face-to-face debt advice services between 2006 and 2011. Over the past year over 100,000 families have benefited from information and advice on their mortgage difficulties.
 - For those requiring tolerance from their lenders we have taken action and reached agreement with the major mortgage lenders to not repossess a property for at least three months after an owner goes into arrears – by June 2009, over 136,000 borrowers were benefiting from forbearance offered by their lender, an increase of 74% on the previous year. The FSA's Mortgage Markets Review sets out new higher standards to be put in place to strengthen the regulatory protections for struggling homeowners.
 - For those who need to lower their payments, direct financial assistance from the Government is helping over 200,000 people – with many more set to benefit over the next two years.

¹ http://www.hm-treasury.gov.uk/reforming_financial_markets.htm

² http://www.hm-treasury.gov.uk/consult_mortgage_regulation.htm

³ http://www.fsa.gov.uk/pages/Library/Policy/DP/2009/09_03.shtml

- Even once someone is in front of the court, there is still government help for them: we've doubled the funding for free 'on the day' advice and representation for those in court. 35,000 households have got help from the court advice desk service in 2008-09.
 - For those who have exhausted all other options we have introduced the Mortgage Rescue Scheme and Homeowners Mortgage Support.
11. In 20 October 2008, following concerns that possession orders were being obtained in cases where other remedies had not been exhausted, the Master of the Rolls approved a new Mortgage Pre-Action Protocol (MPAP). It sets out the actions courts expect lenders to take before bringing a possession claim to court. This protocol was developed by the Housing and Land sub-committee of the Civil Justice Council (CJC) in consultation with the Ministry of Justice, HM Treasury and relevant stakeholders. The MPAP appears to have been successful in reducing the number of possession order cases going to court.
 12. Shortly after the publication of the MPAP critical reports appeared in the media on the High Court decision in *Horsham Properties Group Ltd v Clark and Beech*.⁴ The case revolved around the mortgage lender's use of particular contractual and legal remedies when the borrower was in arrears on mortgage payments. Of particular media interest was the lender's use of its power of sale, whereby the property was sold to a third party to pay off the mortgage debt. According to the property law of England and Wales, and to the terms of the mortgage contract in question, the lender was able to do this without seeking a court order of any kind, and did not seek to obtain physical possession of the property before it was conveyed to the buyer.
 13. *Horsham* did not change the law in this area. In addition, the mortgage in question in *Horsham* was a buy to let mortgage, under the terms of which the borrowers were not permitted to live in the property themselves. Further, the borrowers continued to live in the property for a substantial period of time without making payments. This was not a case of a mortgage taken out for the purpose of funding an owner-occupied family home.
 14. However, in the light of the concerns expressed about the case in Parliament and the press, the Justice Secretary ordered an inter-departmental review by officials of the protections afforded to borrowers in arrears when lenders are pursuing recovery of the debt, including the exercise of the power of sale. The review concluded that the outcome of the *Horsham* case did not pose a threat to homeowners. It recommended that no immediate legislation was necessary in relation to the powers of lenders, but legislation to prevent a potential future occurrence of problems could be beneficial.

⁴ [2008] EWHC 2327 (Ch)

15. Following consideration of these findings, the Government decided that a consultation should be held on proposals to restrict the exercise of the power of sale in residential owner-occupier cases. The intention was to close what had become known as the 'Horsham loophole'. This decision was announced in the Consumer White Paper published in July 2009, which stated that "[w]e also intend to consult shortly on proposals to amend the law to ensure that owner occupied homes cannot be sold by lenders without taking court proceedings."

Content of consultation paper

16. In this paper, we invite comments on the provisional proposal that the power of sale in residential owner-occupier cases should in general only be exercisable with the approval of the court or by the agreement of the parties. This could only be achieved by legislation and there are several different forms the legislation could take. We would welcome proposals as to the detail of the legislation but we are not concerned with drafting it at this stage. We would, however, make clear that we do not propose that an order for sale would be necessary where an order for possession has been obtained. The policy intention is to ensure that homeowners have an opportunity to have their case considered by the court, not to create an extra burden on lenders. It is envisaged that where it has not been possible to reach agreement with the borrower either an order for possession or an order for sale would be needed. There would not be a requirement for both.
17. In addition to the question of whether to proceed with this proposal, there are three particular points of detail on which we would be very grateful for views. The first relates to the application of the reforms to existing mortgages. Should the reforms be restricted to future mortgages only? The second relates to abandoned properties, from which we exclude cases where the borrower simply posts or otherwise delivers the keys to the property to the lender. Under the proposal a lender who accepts an offer of the keys from the borrower is proceeding by agreement. The class of abandoned properties is therefore in our view likely to be quite narrow. Should the approval of the court be necessary to sell an abandoned property?
18. The third relates to the definition of the class of residential owner-occupier mortgages that will be subject to the reforms. In the vast majority of cases a mortgage taken out over a home will be for the purpose of buying the home, but what about mortgages granted over homes to secure business debts or to buy goods or services unconnected with the home?
19. We would also be grateful for views as to whether the conclusion in our initial impact assessment is correct. This is that the Horsham loophole is not being exploited at present and is very unlikely to be so in the future. The closing of the loophole is therefore in essence cost-benefit neutral at present.

20. In Chapter 2 we will discuss the current law and practice relating to the power of sale and also, by way of comparison, other mortgage remedies. The proposals do not, however, affect these other remedies. Chapter 3 discusses the issues arising from the present situation, whilst possible policy options are considered in chapter 4. Chapter 5 sets out our provisional proposal. The questions raised are set out in the Questionnaire in Chapter 6 and the Impact Assessment forms Annex A to the paper.
21. In this paper we use the term borrower for mortgagor and chargor and lender for mortgagee and chargee. We also use the following definitions.
CML: Council of Mortgage Lenders
FLA: Finance and Leasing Association
CAB: Citizens Advice Bureau
CCA: Consumer Credit Act 1974 and 2006
FSMA: Financial Services and Markets Act 2000
AJA: Administration of Justice Act 1970 and 1973
LPA: Law of Property Act 1925
22. As mentioned, our proposals only relate to *residential owner-occupier mortgages*: This is not a defined legal term. For our purposes, a residential owner-occupier is a borrower, who uses the mortgaged property as his or her home. The mortgage may be a first or subsequent charge. However, we do not include mortgages of homes that are intended to secure payment of business debts. These loans are commercial in nature and give rise to different considerations. We exclude buy to let mortgages because they are commercial investments in property. This definition follows in general terms the approach taken by lenders. It is not reflected in the present law of mortgages.
23. By contrast, the term *mortgage* is well understood: We use the term mortgage to include charges over property generally. We do not distinguish between the two basic types of mortgage: charges by way of legal mortgage, which take effect as if they were a mortgage in the traditional sense, and those which in legal theory take effect as a lease. We distinguish where necessary between first and subsequent mortgages. For our purposes, there is no material difference between registered and unregistered land. Charges arising by action of a charging order over a home are outside the scope of this consultation paper.
24. The concept of *equity of redemption* is long standing, but may not be widely understood. Under the law of England and Wales, this term describes the right of the borrower to redeem the security by paying off the debt. This is distinct from the term 'borrower's equity' in the property, which is used to describe the net worth of the property to the borrower when the mortgage loan is repaid.

Chapter 2: Current Law and Practice

Mortgages

25. A mortgage is a security created over a property by a debtor in favour of a creditor to secure the repayment of a debt or performance of some other obligation. It is a contract and it creates a proprietary right in the property charged with the payment of the debt. The contractual obligation to repay the debt exists independently of the security interest. Even if the property is sold, the debt may remain. In the residential property market, mortgages are the single most important financial device available to enable the purchase of a home. The mortgage contract for the purchase of a home will usually spread the repayment of the debt over a period of twenty or twenty-five years.
26. The essence of taking a security for the loan is that the security can be realised. The cost of doing this in individual cases feeds into the overall cost of borrowing for all borrowers. The rights in favour of the lender enabling the property to be sold are balanced by a corresponding right of the borrower: the equity of redemption, which allows the borrower to pay off the loan and redeem the security.
27. Mortgages, as contracts relating to interests in land, are governed by the civil law areas of contract law and land law. Mortgages are also generally created as part of a financial services transaction and are regulated as such. In 2004, the Government extended the scope of Financial Services Authority (FSA) regulation under the Financial Services and Markets Act 2000, including the important protections for borrowers mentioned above, to include first-charge residential mortgages. Other consumer credit business, including second-charge mortgages, is regulated by the Office of Fair Trading under consumer credit legislation. As noted above, the Government is currently consulting on transferring the regulation of second charge mortgages from the OFT to the FSA.⁵
28. All contracts, including mortgages, may be made up of two types of contract terms: express and implied. Express terms are those provisions that are specifically stated to be part of the contract. Implied terms are those that will be deemed by a court to be part of a contract even though they go unsaid. They may be created by statute, custom, or the behaviour of the parties. Many of the implied terms in mortgages are default provisions, that is to say, it is only if the mortgage contract is silent on a particular issue that the statutory provision will apply. Mortgage contracts frequently contain terms that are more favourable to lenders than the equivalent statutory implied term. Terms and conditions may therefore

⁵ http://www.hm-treasury.gov.uk/consult_mortgage_regulation.htm

vary between lenders and each mortgage will be governed by its own terms.

Remedies of the Lender

29. Where negotiations between the borrower and lender have failed to remedy a default, there are four main options for the lender, these are: sale, taking possession, appointing a receiver, and foreclosure. In the majority of cases, especially in the residential owner-occupier context, the lender will wish to sell the property in order to pay off the debt. These remedies apply to first and subsequent mortgages. A subsequent lender will however have to redeem the prior charges in order to realise the value of its security, which is an important practical difference. Once the mortgage debts and any other costs payable to the lender under the terms of the mortgage have been paid, the balance of the sale proceeds (if any) will be paid to the borrower.

Power of Sale

30. The lender will have a power of sale under almost all mortgages, either by the operation of express terms of the contract or implied under statute. The earliest statutory provision was in the Trustees, Mortgagees, etc, Powers Act 1860 (known as Lord Cranworth's Act), and the current statutory power is contained in section 101 of the Law of Property Act 1925.
31. The power of sale is a self-help remedy, that is to say, it may be exercised by the lender without taking the matter through the courts. The lender contracts to sell the property, receives the purchase money, and uses the money to pay off the loan for which the property was security.
32. Section 101, as a "default" clause, only has effect if the contract does not specify any other arrangements for the power of sale. Under section 101 there are two stages to activating the right of the lender to sell the property: the legal power must arise, and then the power must become exercisable. The power of sale arises when the mortgage is by deed (nearly every mortgage is by deed) and when the money is due. If the mortgage is payable by instalments, the power arises as soon as any instalment is in arrears. The power of sale is exercisable only when the power has arisen and one of the following has occurred: (i) notice requiring payment has been served, three months has passed and money is still owing, or (ii) some interest is two months in arrears, or (iii) the borrower is in breach of some other provision in the mortgage deed or the 1925 Act. If the power has arisen and one of the above three situations has come to pass, the lender has the right to sell the property in order to get its money back.
33. The mortgage contract may exclude or amend the statutory power, but in the absence of evidence of contrary intention the lender will have access to this remedy. Standard terms and conditions with some major lenders state that the power of sale becomes exercisable as soon as *any*

payment is missed, which is more favourable to the lender than the statutory default provision.

34. When exercising the power of sale, the lender has a duty under the general law to act in good faith but no general duty of care to the borrower. There is no duty to maximise revenue from the sale, for example, by waiting for the market to improve. The lender must pay any revenue in excess of the debt and expenses to the borrower (not to any subsequent creditors), and the lender may not sell to himself (or an agent of his).
35. The power of sale is deemed to have been exercised as soon as a contract for sale has been made, even if it is conditional. At that point the borrower has, at least temporarily, lost his or her equity of redemption, while the contract exists. If the contract for sale falls through, the equity of redemption is revived. A purchaser who buys the property from the lender takes it free of the mortgage.
36. The exercise of the power of sale is illustrated by the *Horsham* case. The case did not change the law.

Horsham Properties Group Ltd v Clark and Beech

37. The facts were as follows: the borrowers took out a buy-to-let mortgage with a lender that specialises in that market. The borrowers fell into arrears in October 2004 and payments to the lender on the mortgage ceased altogether in October 2005. In September 2006 the lender appointed receivers to manage the property and it was sold at auction. The new owner initiated court proceedings to evict the occupiers – the borrowers who had, at some point, moved into their investment property, in breach of express terms of the buy-to-let mortgage contract.
38. Mrs Beech, one of the borrowers, contended that the eviction was a violation of the Human Rights Act 1998 in that she had been unlawfully deprived of her possession in infringement of Article 1 of the First Protocol by the actions of both the lender and the purchaser. The right of a lender to appoint receivers and to exercise the power of sale without requiring the permission of the court beforehand, as found in the mortgage deed and in the Law of Property Act 1925 section 101, was upheld as part of the intrinsic nature of the transaction created by the borrower and the lender. The human rights argument was rejected by the court on the grounds that, due to the qualified nature of rights over a mortgaged property, the property itself had never been an outright ‘possession’ belonging to the borrower from the moment the mortgage was made. In October 2008 the borrowers were evicted as trespassers.

Possession

39. Another remedy available to a lender when a borrower defaults may be to take possession of the property. The restrictions on the exercise of the power are of interest for the purposes of this paper because they form an obvious model on which control of the exercise of the power of sale might

- be based. Possession in this sense is equivalent to active ownership rather than mere occupation.
40. In practice, the vast majority of court actions following a mortgage default are actions for possession. A lender will usually only take such action as a precursor to exercising the power of sale in order to recoup its money where a borrower has defaulted. It is not necessary for the lender to take possession of the property before exercising the power of sale, because the sale may be with or without vacant possession.⁶
 41. The lender's right to have possession of the mortgaged property is central to the concept of secured lending and seems to have featured in mortgage contracts since the earliest UK examples of such loans. Until late in the 19th century it was common practice for the lender to take actual possession of the property during the period of the loan, to rent it out or derive some other income from it.
 42. As loans to facilitate the purchase of a home to live in became more common, this method of creating a mortgage conflicted with the purpose of the loan. In such circumstances mortgages began to contain terms granting possession to the borrower, with the lender agreeing not to exercise its right to possession unless the borrower defaulted on the loan. This broadly represents the arrangements on possession between lenders and borrowers in residential owner-occupier mortgages today.
 43. Unless there is evidence of contrary intention in the mortgage deed, the position in law is that the lender is entitled to possession of mortgaged land from the moment the mortgage is made, regardless of default. No court order is necessary, even where the property is a dwelling house and the court could have granted some kind of relief to the borrower.
 44. Where payment of the loan is to be by instalments, the contract usually contains terms to the effect that possession is not available to the lender until there has been a default of some kind.
 45. A lender seeking possession must act in good faith and for the purpose of enforcing the lender's security, not for other purposes. Once in possession, the lender is under a duty to account strictly to the borrower; not only for all the money (or other value) it collects but also all it ought to have collected, had it managed the property with due diligence. For this reason, possession is usually only sought as a prelude to exercising the power of sale. Since the duty to account as a lender in possession may be quite burdensome, a lender who intends to manage the property for any length of time will normally appoint a receiver (on which see below). Where a sale is imminent the obligation may well not be too burdensome.
 46. Possession may be taken in two ways. In residential cases the lender will usually apply to the court for an order for possession, a hearing will be

⁶ *Horsham Properties Group Ltd v Clark and Beech* [2008] EWHC 2327 (Ch)

held, and, if appropriate, an order made. The effect of the order is generally that the borrower must hand over possession of the property to the lender within 28 days of the date of the order being made. However, as we discuss in the next section, the court has various powers to modify the effect of the order.

47. When a lender decides to take a possession action against a borrower in court it must issue proceedings under Part 55 (Possession Claims) of the Civil Procedure Rules. At the hearing, the judge will require evidence that the lender has complied with the MPAP by making all reasonable efforts to negotiate with the borrower to resolve the situation out of court. If there were proposed repayment plans that were not accepted, the lender will have to explain why that was the case. Failure to comply with the MPAP may therefore adversely affect the lender's ability to obtain a possession order. There are, however, no formal specified sanctions for failure to comply.
48. Alternatively, the lender may take possession peaceably without an order of the court. The most common circumstance of peaceable possession happens when borrowers 'turn in the keys' to the lender and the lender accepts possession by agreement. A lender may also take peaceable possession where a property has been abandoned. However, so long as the right to possession has arisen it seems that peaceable possession could legally be taken by the lender at any time, subject only to the limits of the general law, which prescribes that a person may not use or threaten violence (whether against person or property) for the purpose of securing entry to residential premises.⁷

Other Remedies

49. Exercising a power of sale or the right to possession are not the only remedies available to lenders in cases of borrower default. They are, however, by far the most common ones in relation to residential owner-occupier properties. Lenders may appoint receivers to manage a property or even foreclose on the mortgage.

Appointment of Receivers of Rent on behalf of the borrower

50. The Law of Property Act 1925 allows lenders to appoint receivers of rent. This provision is still extant, however most modern mortgage deeds contain an express power to allow a person appointed by a lender to take charge of a mortgaged property when the loan is in default, usually with a view to sale or to collect rental income for the lender to service the arrears. The receiver of rent acts on behalf of, and in the interests of, the borrower.
51. Section 109 of the LPA 1925 covers appointments of receivers and states that they may only be appointed when the mortgagee has: 'become entitled to exercise the power of sale conferred by this Act.' This power is

⁷ Criminal Law Act 1977 section 6, Protection from Eviction Act 1977 section 1

currently exercisable without remedy to the courts. There is no intention to change this right in the proposals outlined within this consultation document. There will be no need to gain an outright possession order before a lender can appoint a receiver. The current provisions for appointing a receiver of rent, and their rights and obligations, will remain unaffected.

Foreclosure

52. Foreclosure is only available by an order of the court, and its effect is to transfer full ownership of the mortgaged property to the lender. Foreclosure is very rare. The borrower's right to redeem (to pay the loan off and regain full rights in the property free of the charge) is extinguished by an order for foreclosure, but so is the lender's right to sue the borrower for any amount outstanding on the loan. The right to foreclose arises when payment has become due at law, and acceptance of late payments does not waive the right to foreclose. The court may reopen a foreclosure under certain circumstances, which makes the finality of the order uncertain. As this property is almost never used in the residential owner-occupier context it is not discussed further in this consultation. There is no intention to change this right in the proposals outlined within this consultation document.

Relief for the Borrower

53. The law provides for the rights of the lender to the remedies described above to be qualified in certain cases by the ability of the court to grant relief to the borrower. The most important of these potential reliefs is found in section 36 of the Administration of Justice Act 1970, as amended by section 8 of the Administration of Justice Act 1973. The combined effect of these provisions is to give the court discretionary powers to grant relief to borrowers in repossession proceedings, where their financial difficulty is likely to be temporary.
54. The exercise of these powers is limited to situations where it appears, in the opinion of the court, that the borrower will be able to 'catch up' or resolve other default within a reasonable period of time, if the court were to give the borrower that opportunity. If the court is satisfied of those conditions, it may adjourn proceedings, suspend an order for possession it has made, or postpone the date for possession. It may not suspend or set aside an order for possession that has already been executed by the lender taking possession.
55. The 'reasonable' amount of time over which the court may order the arrears to be paid off will vary according to the particular facts of the case. In *Cheltenham & Gloucester BS v Norgan*⁸ it was ruled that arrears could be paid off in instalments over the entire remaining period of the

⁸ [1996] 1 All ER 449

mortgage, but normal practice appears to be that arrears are likely to be spread over two to four years, as the judge sees fit.

56. If the lender does not make out the case for claiming possession based on arrears the court will set the case aside. Otherwise the court will potentially have 5 options: adjournment, a possession order, a suspended possession order, a money judgment, and a time order.
57. Adjournment: If there have been some errors or irregularities in paperwork the court might adjourn for them to be sorted out. The court may also take this option if, due to extraordinary circumstances, the borrower is not able to attend the hearing and has notified the court of this situation. Evidence from court visits suggests that adjournment is sometimes used where the court hears that a major change in the financial circumstances of the borrower is imminent.
58. Possession orders: This is the most likely outcome where the borrower is not at the hearing and has not communicated with the lender. An outright possession order requires the occupier to vacate the property on the date specified in the order, generally 28 days after the date of the hearing, although actual possession may only be given at a later date.
59. Suspended possession orders: If there is a plan for paying off the arrears, and the court accepts that the plan is reasonable and practicable, the court might grant a suspended possession order. This means that a possession order has been granted to the lender, but it may not be acted upon while the borrower is conforming to the terms of the repayment plan. Only if the borrower fails to adhere to the new plan will the order come into effect.
60. Section 36 only applies where possession proceedings are brought. It therefore does not apply where a lender uses a self-help remedy, such as entering the property and taking possession peaceably and/or exercising the power of sale without a court order.

Relief for the Borrower under the Consumer Credit Acts

61. While most mortgages are regulated by the Financial Services and Markets Act,⁹ and are therefore excluded from many of the provisions of the Consumer Credit Acts,¹⁰ certain provisions of the CCAs do apply to all land mortgages.¹¹ Consideration of these issues is outside the scope of this paper.

⁹ See paragraph 10 above

¹⁰ CCA 1974 Section 16 (6)C

¹¹ CCA 1974 Section 16 (6)D

Chapter 3: Issues for Consideration

Sale without Possession Order

62. Most mortgages contain provisions for actions that may be taken by the lender when the borrower defaults, without requiring the permission of the court to take such action.
63. In the High Court case *Horsham Properties Group Ltd v Clark and Beech*,¹² the lender used one such provision by exercising the power of sale, without involvement from the court, in accordance with the provisions of the mortgage deed.
64. The *Horsham* case concerned a commercial loan where the receivers, who had been appointed by the lender, sold the property to a buyer who did not demand vacant possession. This buyer sought and eventually obtained a possession order against the former owners, who by this time had only the status of trespassers. As mentioned above, this attracted considerable criticism.
65. The CML has released a statement on behalf of all of its members that they will not move to sell a residential property in which the customer is resident and the loan is non-commercial without first obtaining a court order for possession.¹³ Information from lending industry stakeholders indicates that even prior to this statement, the practice was never used in residential owner-occupier situations. After checking with advice sector stakeholders, the courts, and the media, the MoJ has not found any cases where this has occurred on a non-commercial loan. One reason for this may be that in most cases, we imagine that the buyer of a property from a lender will require vacant possession or a sitting tenant. Buying subject to the occupation of even a trespasser requires a willingness to go to court and recover possession before any enjoyment or income can be had from the property.
66. Mortgages are generally created as part of a financial services transaction. The majority (first-charge residential mortgages) are regulated by the FSA. FSA regulation imposes a number of outcome-focused requirements on first charge mortgage lenders. At a high level there are a number of principles which all regulated firms must satisfy, including the principle that they treat their customers fairly. Targeted conduct of business requirements support this objective through, for example, requiring lenders to:
 - Have in place a policy for ensuring the fair treatment of borrowers in payment difficulties;

¹² [2008] EWHC 2327 (Ch)

¹³ subject to the normal exceptions, such as customer fraud

- Make all reasonable efforts to reach an agreement with customers regarding any shortfall so that repossession is an action of last resort;
 - Make early contact with customers in payment difficulty and provide information about their options, including signposting the availability of independent advice sources, and;
 - Provide customers with regular information about accounts in arrears and any charges that are being applied.
67. In November 2008 FSA wrote to the heads of all lending institutions in the UK, stating that if lenders were to employ the power of sale in situations where a court order for possession would have been denied, the FSA would be inclined to view such actions as unfair practices.
68. Second and subsequent mortgages are regulated by the OFT under consumer credit legislation. The OFT is responsible for enforcing its regulations.
69. This framework of regulation provides borrowers with important protections and affords appropriate means of redress. As mentioned above, this framework of regulation is currently under review. As we have explained, the terms of this regulation of mortgage lending business are outside the scope of this consultation, but the existence of regulatory control is clearly an important factor in protecting homeowners from abuse at the hands of lenders.
70. Notwithstanding the apparent lack of use – or indeed intention to use – the power of sale as a means of avoiding the court protections available in relation to the exercise of the right to possession, the possibility of the use of a power of sale in this way still seems to be a cause for concern. From this perspective, the present law provides potential for abuse by a lender of its rights. Critics of the present position point to the apparent imbalance between the protections available in possession proceedings before the court and the apparent freedom for lenders in relation to the power of sale.
71. On the other hand, from the lender's perspective, the power of sale is essential to the secured lending market because it significantly lowers the risk that lenders will be unable to collect the debt. In turn, this lowers the cost of lending, and interest rates are usually far lower than on unsecured loans.
72. Agreement apart, the only situations in which taking peaceable possession and selling the property without a court order usually occurs in practice are the voluntary handing in of the keys by a borrower, which is often described as a voluntary repossession, and a lender taking possession where a property is abandoned. By abandoned, we have in the mind circumstances where the borrower cannot be traced and genuinely appears to have deserted the property. Each of these will be considered in turn.

Handing in of keys

73. Surrendering possession by voluntarily handing in of the keys does not present problems when it is done by agreement between the borrower and lender. This process remaining outside the protection of the court is of benefit to both parties as it saves the time and money which unnecessary court proceedings would require. We acknowledge that this assumes the agreement is properly reached, but we are not aware of any concerns regarding fraud or undue influence, for example, in these circumstances.
74. A further potential problem that we wish to note also raises an issue of certainty. There is apparently a practice that borrowers in severe financial difficulties with their mortgage will try to walk away from their liabilities by posting or otherwise delivering the keys to the property to the lender. This certainly does not end their contractual liability for the debt to the lender, but does it amount to a surrender of possession? Does acceptance by the lender of the keys amount to a peaceable taking of possession? We think that it must, so that the lender is then in possession.

Sale of abandoned properties

75. Where a property is abandoned and the lender is unable to contact the borrowers, the lender may simply take possession of the property. In cases where borrowers have genuinely disappeared and left the property it is useful for the lender to be able to obtain and sell the property in order to recover the money that was borrowed. However, as outlined above, in strict legal terms a lender has a right to possession at any time, limited only by the terms of the mortgage contract.¹⁴ Lenders do not have to prove that a property is abandoned before taking possession, or even bring the matter before the courts at all.¹⁵
76. The CAB notes anecdotally that they have seen cases where the lender thought a property had been abandoned (due to a very poor state of repair) and attempted to take peaceable possession of what was not, in fact, a vacant or abandoned property. By way of further illustration, we have also been contacted by a borrower, who alleges that in her case a lender took possession of her property without warning after the mortgage had been repaid in full. This would seem to be an extraordinary case but it does illustrate that recognising when a property has been abandoned may not always be straightforward.

¹⁴ Subject to the limits of the general law described above, in particular Criminal Law Act 1977 section 6, Protection from Eviction Act 1977 section 1

¹⁵ *Ropaigealach v Barclays Bank Plc* [2000] QB 263

77. There also remains the theoretical possibility of lenders taking possession when a borrower is merely away, for example on a lengthy holiday. This could clearly cause considerable expense, inconvenience and distress to the borrower if it were to occur. We would stress that we are not aware that this happens with any frequency in the current market. If it were to occur, we understand that lenders will deliver possession back to the borrower. However, the lender may take possession where the property appears to be abandoned because the borrower's debt is mounting rapidly whilst the borrower cannot be found. In such cases the lender may decide to take possession without going to court.
78. The case of *Ropaigealach v Barclays Bank Plc*¹⁶ indicates the kind of problem that might arise if a lender decides to take possession of an apparently abandoned property without going to court. Here the borrowers were in substantial arrears and the property was being renovated. After a lengthy period of attempting to get the borrower to address the problem the lender took peaceable possession of the vacant property and sold it at auction. Having discovered that their home was being sold from neighbours, the borrowers then challenged the sale in court, stating that the property was not abandoned but merely empty whilst being refurbished. They were, however, unsuccessful as the lender did not require a court order before taking possession or exercising the power of sale. Had the borrower been successful then the lender would have had to compensate the borrower for loss suffered. This case went as far as the Court of Appeal and demonstrates both the difficulty faced by lenders in deciding whether or not a property is abandoned and the lengthy legal action can follow where a lender gets this decision wrong.
79. Like the *Horsham* case, *Ropaigealach* illustrates a remedy that is available to lenders without the involvement of the courts, and as such it is subject to the potential criticism that it leaves borrowers inadequately protected. Also as with *Horsham*, lending industry stakeholders have stated that it is extremely rare to see the right to possession exercised in this way, and that where mistakes are made, in practice lenders will usually return the keys to the borrower.

Situation after the exercise of the power of sale – uncertainties

80. From the borrower's perspective the threat of the lender taking peaceable possession and then selling the property without his or her agreement or a court order is bad enough, but the situation is also not entirely satisfactory from the point of view of a lender, who may think that a right has been properly exercised only to have to defend it in proceedings. By contrast with obtaining the sanction of the court, the self-help remedy of selling the property without the benefit of a prior order for possession is uncertain in its effect, even though in what we imagine are the vast majority of cases where it is used, there are no problems.

¹⁶ [2000] QB 263

81. There is also a potentially wider problem with bringing the mortgage to an end and selling the property unilaterally. Some people may argue that as a matter of human rights both in relation to respect for the home and to the right to have one's rights determined by the court, the law should require the lender to obtain the consent of the court before taking action to sell a mortgaged owner-occupied home.
82. Even if, as we consider, the present law is compatible with rights under the Human Rights Act 1998 and the European Convention on Human Rights, there may still be concerns that the power of sale arises and is exercisable on terms that are essentially set by the lender. Frequently, it seems, the power will arise and be exercisable on any default, significant or not. In practice, lenders do not rush to repossess and sell, but it might be argued that statute should set a meaningful minimum level of protection rather than a default provision that can be excluded by any provision to the contrary. Of course, this might have the effect of increasing costs on lenders and thereby costs of borrowing to borrowers. The question raised therefore is what level of protection and oversight by the court is proportionate to the costs involved – costs which would be likely, ultimately, to be added to the mortgage debt?
83. It may also be seen as unsatisfactory that the sale of the mortgaged property by the lender without any sanction of the court appears to extinguish the borrower's equity of redemption.¹⁷ It is not clear that this general rule has ever been tested fully. The equity of redemption is capable of reviving in some circumstances, so why not in the case of an unfair sale by a lender? The argument might run that the mortgage is only a security and so the court has or should have power to grant relief where an equity of redemption has been extinguished by the exercise of a power of sale.

¹⁷ *National and Provincial Building Society v Ahmed* [1995] 2 EGLR 127, this is also mentioned in *Ropaigealach v Barclays Bank Plc* [2000] QB 263

Chapter 4: Policy Options

84. In chapter 3 we identified the issues arising from the present law. In this chapter we consider the actions that might be taken in relation to them.

Sale without Possession Order

85. This consultation was triggered by concern that lenders could sell an owner-occupied home without obtaining a court order. This concern arose as a result of parliamentary and media coverage of the *Horsham* case.
86. From the advice sector perspective, the CAB said to us that lenders should not be able to sell a residential property (or appoint receivers to do so) without going to the court for a possession order. Shelter, too, believes that lenders should be required to obtain a court order for possession before being permitted to sell a property.
87. Although they both accept that there may need to be some exceptions to deal with, for example, agreed surrenders of possession by borrowers, they propose in essence that obtaining a possession order should be a pre-condition of exercising a power of sale. The imposition of such a pre-condition would mean that the court would always have a chance to exercise its discretion under section 36 of the Administration of Justice Act 1970 to grant relief to a borrower. Such a change could only be introduced by legislation.
88. Another approach suggested is that the power of sale should not free the property of the rights of the borrower except by order of the court. The aim would once again be to ensure the court was involved.
89. From the lender's perspective, the CML is firmly of the view that the power of sale and similar rights are fundamental to the secured lending market. It cautions that any restriction on those rights could have significant adverse consequences for lenders and the economy as a whole. The CML also stresses that changes made to the power of sale in relation to residential owner-occupied properties could have unintended consequences adversely affecting the commercial lending and securitisation sectors. There may also be problems under human rights law if overriding changes in legislation disrupts existing contracts. Similarly, the FLA describes the power of sale as the cornerstone of the secured lending market, and urges the Government not to make any changes restricting the use of this remedy.
90. The positions of the lenders and the advice sector are diametrically opposed. But there does not seem to be a pressing actual problem in need of solving. First, CML members have issued a voluntary statement that the power of sale will not be used as against owner-occupiers without a court order for possession. Second, the FSA has written to all lenders to

- inform them that if lenders were to employ the power of sale in situations where a court order for possession would have been denied, the FSA would be inclined to view such actions as unfair practices. Third, it is widely agreed that the course of action taken by the lender in *Horsham* is so rare as to be nearly unheard-of in owner-occupier circumstances. There is no evidence that rogue lenders are exercising their powers of sale in ways that are unfair.
91. If the remedy is not used in these circumstances and there is no intention to use it (as appears to be the case), its abolition would in effect codify in law the present position in practice. This would remove the opportunity for potential misuse. Such legislation could be introduced at a convenient time in the future.
 92. However, its codifying nature would not mean that such legislation would be straightforward. It would, critically, need to define the mortgages to which it relates.
 93. Lenders classify many mortgages of residential property as commercial mortgages. Including any of these mortgages within the scope of the legislation would raise difficulties. Lenders would argue that the requirement of a court order for possession should not apply beyond residential owner-occupiers who are at risk of losing their homes. It should not extend to the protection of investors in residential property generally. To do otherwise would be to change the legal balance of commercial transactions and potentially increase the cost of borrowing and the supply of lending.
 94. We agree that the mere fact of occupation by a borrower should not restrict the rights of the lender. A mortgage to secure business debts over a residential property or over a buy-to-let property or a second home seems properly to fall into a different category from residential owner-occupier mortgages. Any change in the law that would affect these other mortgages would significantly impact commercial relationships and would draw into the issue matters that are beyond its scope.
 95. Taking all these points into account, the options in relation to residential owner-occupier mortgages are (a) leave the present legislative provision alone, or (b) make the exercise of the power of sale conditional on obtaining an order from the court for possession or for sale or, in the alternative, by agreement with the borrower. The justification for the first option is that in relation to residential owner-occupier mortgages the problem is rare. In support of the second option the change would have no significant effect, positive or negative, at present, but would prevent the relevant situations occurring in the future and reassure borrowers. A reform of this kind would reinforce the present culture of solution-seeking negotiation rather than adversarial action.
 96. We accordingly provisionally recommend that the law should be amended so that the lender's power of sale under a residential owner-occupier

mortgage should not be exercisable other than by order of the court or by agreement with the borrower.

97. This leads to the question: when will an order of the court authorise the exercise of the power of sale? Our provisional view is that sale should only be authorised when a possession order has been obtained or a court issues an order permitting the sale in circumstances where it would authorise the right to take possession. The potential effect of this would be to ensure that, in the absence of agreement, the borrower would have the benefit of consideration by the court of the reliefs available to borrowers under the Administration of Justice Act 1970 in all cases. On this basis, a suspended possession order would therefore not authorise the exercise of the power of sale. An unconditional possession order would. This would mean that possession orders obtained through possession proceedings would continue to be sufficient to allow a lender to sell. However, even in circumstances where the lender did not bring possession proceedings a court order would still be required before the power of sale could be exercised.
98. The extent of this proposal needs further definition: does it apply to all mortgages or just to future ones? What should happen where properties are abandoned? What precisely does 'residential owner-occupier mortgage' mean?

Scope: Future mortgages or all mortgages?

99. Retrospective interference with established property rights inevitably raises questions as to compliance with the Human Rights Act 1998 and article 1 of Protocol 1 to the European Convention on Human Rights. However, if our contention that the proposed change is only codifying existing practice is right then the change is more theoretical than real and including existing mortgages within the scope of the reform might be consistent with Convention rights. Potentially, it might also be argued that interposing the court on the same basis as happens in possession hearings is a proportionate control on the use of property and may be compatible with Convention rights even in relation to existing mortgages.
100. Legislating for future mortgages only would not seem to give rise to these human rights issues. The only issue this would raise is that since no-one is using the power of sale in this way, it is unnecessary to change it. However, doing so might be a useful preventative measure.
101. Due to the concerns surrounding applying the proposed legislative changes to existing mortgage contracts, we provisionally propose that the changes should apply to future mortgages only. We would welcome consultees views on this.
102. While the passing of possession from borrower to lender is usually framed in an adversarial context, it should be remembered that the ability to take possession without the need to consult the court undoubtedly

serves both parties well in those situations where a voluntary surrender of the property is agreed. Such arrangements can save money and time.

103. The existing power may also serve a useful purpose where the borrower has abandoned the property and is uncontactable. In such cases the lender needs a legal ground to bring the mortgage to an end. The problem, as the *Ropaigealach*¹⁸ case illustrates, is to define when a property is abandoned. This is a problem that is not restricted to mortgage law. If our provisional proposal is adopted and the exercise of the power of sale is restricted to cases where the parties agree or the court orders it, the options in relation to abandoned properties are either to create a special category of law for them or not to do so.

Abandoned properties

104. A special category would require a clear or at least workable definition – and the law does in general recognise that property can be abandoned. However, we are not attracted to that because of the residual uncertainty that must be left by any decision of the lender to treat the property as abandoned. The lender only ever has external indicators by reference to which to decide if the property is abandoned, such as state of repair, absence of the borrower and absence of communication from the borrower. The mind of the borrower is closed to it. We consider therefore that an agreement should be the only alternative to a court order. We believe that the situation where the property is abandoned and the borrower cannot be contacted is likely to occur in only a very small number of cases and to result in an unopposed application to the court. However, we would be grateful for consultees' views on the number of properties that would be affected. The greater certainty that this should produce seems to us to be a (small) price worth paying. Our provisional proposal does not therefore include a special provision for abandoned property.

Hand in of keys

105. A related question is whether a voluntary hand-in of keys should of itself amount to an agreement. We do not think that this would be acceptable. The lender must be free to return the keys to the borrower or at least to attempt to do so. The requirement is for agreement between the parties, the borrower cannot hand over possession unilaterally. Agreement will only be reached where the lender accepts possession by accepting the keys. We therefore do not propose to make any special provision for 'handing in the keys' in our provisional proposal. A voluntary hand-in of keys should not of itself amount to an agreement to give possession to the lender. We consider that this is the position in law.

¹⁸ *Ropaigealach v Barclay's Bank Plc* [2000] QB 263

Definition of “residential owner occupier mortgage”

106. The final issue of the three we mentioned in paragraph [97] is to define residential owner occupier mortgages. As stated at the outset, our proposals are not intended to have an impact on business loans or on buy to let mortgages.
107. Residential owner-occupier mortgages is not a legal term of art or even a technical category used by the mortgage industry. This raises the question of how is such a category to be defined. Whilst the core definition is reasonably easy to understand, there are areas at the edges which may or may not be included.
108. The core definition of a residential owner-occupier mortgage is where an individual (or individuals) takes out a mortgage to finance the purchase of a property in which the borrower intends to live. This is the classic example of the home-owner mortgage. The proposals outlined above should definitely apply to mortgages which fall within this core definition. We consider that this should extend to mortgages to finance the building of a home for occupation by the borrower or its improvement. This category should not include loans secured on the family home to secure financing for a business or investment venture, perhaps linked to a business account overdraft.
109. Whilst we acknowledge that the ability to raise money secured on the family home is vital to the establishment and running of small businesses, these loans are essentially of business nature. Second and holiday homes should not therefore be excluded unless they fall within the category of commercial loans – for example, where the purpose of owning the property is to derive an income from it. This approach avoids arguments over, for example, the qualifying length of occupation in any year necessary to make the property a principal family home. The key issue is whether the loan is for commercial or domestic purposes, not whether the property on which it is secured constitutes a principal residence.
110. Once a mortgage falls within this category we do not think that its characterisation for these purposes should change. This will avoid having to decide whether different rules will apply if further monies can be drawn down against a mortgage.
111. In our view, a mortgage for purposes not related to the property – for example to buy a yacht or to fund an education - would not fall within a core regime even though it is for the benefit of borrower.
112. The question is bound to be raised as to whether a loan for mixed purposes would qualify for the protection. We think that in general a mortgage loan for mixed purposes must be outside the scope of the new provision. However, the mere inclusion of an obligation to repay costs and expenses to the lender should not tip a mortgage from one category to another.

113. We do not think that it will be particularly difficult to determine the purpose of a mortgage. The lender will require the borrower to inform it of the purpose for which the money to be secured is required as it does at present. Should there be a dispute about the purpose the true situation at the time the mortgage was created will have to be proved. Lenders will be in a position to protect their interests at the outset and can presumably insist that an existing mortgage is replaced by another if funds are requested for a new purpose.
114. Where there is more than one mortgage over a property, it is our provisional view that each mortgage should be assessed according to its own terms. If a borrower decides to take out a commercial loan over their home this is a commercial decision and they should not receive extra protection merely because there is still a first residential owner-occupier mortgage outstanding over the property. This preserves the present position. We would, however, welcome views on how the interaction between first and subsequent mortgages should operate.
115. The acquisition of a buy to let property would be outside the scope of the exemption. Of course, it is not unknown for borrowers to provide accommodation for family members or friends (whether alone or with others). Should a house provided by a father for a student daughter and shared with fellow students be treated as a residential owner-occupier home for these purposes? On the one hand it can be argued that it should not be, because it is not a home for the borrower. However, this could clearly lead to difficult and emotive cases, for example, where an elderly relative has a home provided and the power of sale can be exercised without reference to the court. We would welcome views on where the boundary should be drawn and whether there are any established definitions of categories of mortgages that might be adopted for the purposes of the proposal.

Chapter 5: the provisional proposal

116. In this chapter we summarise our provisional proposal that a lender's power of sale in relation to a residential owner-occupier mortgage should only be exercisable by agreement with the borrower or by order of the court.
117. We propose that, in the absence of agreement, the exercise of the power of sale should only be considered to be authorised by the court either where an order for possession exists, or where the court makes an order for sale using the same criteria as it does for granting an order for possession. A suspended possession order would therefore not authorise the exercise of the power of sale. An unconditional possession order would. Orders for sale could be suspended in the same manner as orders for possession are at present. The provisional proposal should apply to mortgages entered into after the new restriction comes into force. We welcome views as to any possible retrospective application.
118. We do not propose any special treatment for abandoned properties. Where a property is abandoned and the borrower cannot be contacted we propose that a lender will need a court order in order to sell the property. We welcome views on this proposal and the potential scope of its impact.
119. Nor do we propose to make any special provision for unilateral 'handing in the keys'. As the power of sale may be exercised by agreement, where the borrower hands over the keys because he or she has reached an agreement with the lender, (or the lender accepts a unilateral 'handing in' of keys), this would mean there is no requirement for a court order.
120. The proposal will apply to residential owner-occupier mortgages. A mortgage falls within this category when it is a mortgage to finance the purchase of a property in which the borrower intends to live. This is the classic example of the home-owner mortgage. This includes mortgages to secure loans to finance the building of a home for occupation by the borrower or its improvement. It does not include loans secured on the family home to secure financing for a business or investment venture, perhaps linked to a business account overdraft.
121. Once a mortgage falls within this category we do not think that its characterisation for these purposes should change. This will avoid arguments as to whether the special restrictions on the power of sale will apply.
122. A loan for mixed purposes must be outside the scope of the new provision. However, the mere inclusion of an obligation to repay costs and expenses to the lender should not tip a mortgage from one category to another.

123. In our provisional view, where there is more than one mortgage over a property each mortgage should be assessed according to its own purpose. This means that in all circumstances where a borrower takes out a business loan over their home this mortgage to secure the loan will not attract the additional protections that we propose.
124. We have assessed the possible impact of the proposal and attach an impact assessment to this paper. The assessment is that the proposals will not in general impose any additional costs or bring any additional benefits beyond those already applicable to existing law and practice. Where there is a possibility that the proposals might lead to an increase in cost, the increase seems likely to be very small. We would welcome views on the impact assessment.
125. If it is decided in the light of the response to this consultation to legislate then a draft Bill can be prepared and introduced when an appropriate opportunity arises.

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

1. **Do you think that legislative change is needed in relation to the exercise of the power of sale by lenders in the residential owner-occupier context?**
2. **Do you agree that a lender's power of sale in relation to a residential owner-occupier mortgage should only be exercisable by agreement with the borrower or by order of the court?**
3. **Do you consider that this reform should only apply to new mortgages created after the legislation comes into force?**
4. **Do you agree that, in the absence of agreement, the exercise of the power of sale should only be considered authorised where a possession order has been obtained, or the court makes an order permitting the sale?**
5. **Do you agree that such an order for sale should be subject to provisions equivalent to those in section 36 of the Administration of Justice Act 1970 as amended?**
6. **In relation to abandoned properties as defined above, do you agree that the power of sale should only be exercised where a court order has been obtained because the borrower cannot be found and so cannot enter into an agreement?**
7. **How many cases have consultees encountered where a property is abandoned and the borrower cannot be contacted? How many of these have resulted in an unopposed retaking of peaceable possession and a sale?**
8. **Do you agree with the definition proposed of residential owner-occupier mortgages?**
9. **Do you think there is an existing defined category of residential mortgages that could be used to define the scope of these proposals?**
10. **Do you consider that the definition should include homes bought by a person for the occupation of family members?**
11. **Do you agree that in cases where there is more than one loan over a property, the proposals should apply to each loan separately, with each assessed according to its own purpose?**
12. **Do you agree with the initial impact assessment?**

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 28/03/10 to:

**Ministry of Justice
Civil Law Branch
Legal Policy Division
6th Floor
102 Petty France
London SW1H 9AJ**

Tel: 020 3334 5334

Fax: 020 3334 3230

Email: civillawreform@justice.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <http://www.justice.gov.uk/index.htm>.

Alternative format versions of this publication can be requested from civillawreform@justice.gsi.gov.uk, Civil Law Branch, Legal Policy Division 020 3334 5334.

Publication of response

A paper summarising the responses to this consultation will be published around three months after the end of the consultation period. The response paper will be available on-line at <http://www.justice.gov.uk/index.htm>.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Annex A – Impact Assessment

Summary: Intervention & Options		
Department /Agency: Ministry of Justice	Title: Impact Assessment of Power of Sale and Residential Property Consultation Paper	
Stage: Consultation	Version: Draft	Date: December 2009
Related Publications: Power of Sale and Residential Property Consultation Paper		

Available to view or download at:

<http://www.justice.gov.uk>

Contact for enquiries: Felicity McMahon

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What is the problem under consideration? Why is government intervention necessary?

The law of property currently allows a mortgage lender to sell a residential owner-occupied property without a court order or the consent of the homeowner. This denies that homeowner the protections available at a court hearing. Although this is not happening in practice in relation to residential owner-occupier properties, there has been concern expressed in Parliament and by the public that such procedures could be used in the future. To change the law in this regard requires government intervention.

What are the policy objectives and the intended effects?

The objective is to ensure that residential owner-occupied properties cannot be sold without either a court order, or the consent of the homeowner. The change would be a legal one rather than a practical one. It is designed to prevent the possible use of these unfair practices in the future. This will ensure that residential homeowners are protected, without placing additional burdens on the mortgage lending industry. Proposed changes are limited to mortgages over residential owner-occupied properties and would not affect business loans or buy-to-let mortgages.

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

The options available are either to do nothing, or to reform the law by legislating to prevent the option of selling without a court order or consent being available to mortgagees.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? The policy would be reviewed within three years of implementation.

Ministerial Sign-off For consultation Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:



.....Date: 14 December 2009

Summary: Analysis & Evidence

Policy Option: 1

Description: Reform the Law

COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' There would be some minor one-off costs for mortgage lenders and homeowners associated with familiarisation with the new law. These are likely to be very small as existing practice already complies with the proposals. There may be some minor annual costs for lenders and / or borrowers as court proceedings may be required in a small number of additional cases involving abandoned properties.	
	One-off (Transition)	Yrs		
	£ Insignificant			
	Average Annual Cost (excluding one-off)			
£ Insignificant			Total Cost (PV)	£ Insignificant
Other key non-monetised costs by 'main affected groups' None				

BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups' Legal certainty will benefit both borrowers and lenders as the litigation risk of disputes relating to when a home can be sold without a court order will be reduced.	
	One-off	Yrs		
	£ Small			
	Average Annual Benefit (excluding one-off)			
£ Small			Total Benefit (PV)	£ Small
Other key non-monetised benefits by 'main affected groups' Residential owner-occupiers can be sure that mortgagees cannot sell their home without either a court order of their consent. This ensures that court protections apply. The law will reflect current practice and consumer expectations, and will enhance public confidence in the legal protection available.				

Key Assumptions/Sensitivities/Risks As the majority of cases are in practice brought through court proceedings already, it is assumed that changing the law in this way would have no significant behavioural impact and hence impose little or no cost on the mortgage lending industry.

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
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What is the geographic coverage of the policy/option?		England and Wales		
On what date will the policy be implemented?		To be confirmed		
Which organisation(s) will enforce the policy?		Courts		
What is the total annual cost of enforcement for these organisations?		£ N/A		
Does enforcement comply with Hampton principles?		Yes		
Will implementation go beyond minimum EU requirements?		N/A		
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		
Will the proposal have a significant impact on competition?		No		
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)			(Increase - Decrease)		
Increase of	£ N/A	Decrease of	£ N/A	Net Impact	£ neutral

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value

Evidence Base (for summary sheets)

INTRODUCTION

1. The law of property of England and Wales allows a mortgage lender to sell a residential owner-occupied property without a court order or the consent of the homeowner. In practice, lenders do not use this power of sale in the residential owner-occupier context without a court order or the consent of the homeowner. However, concern has been expressed, following the case of *Horsham Properties Group Ltd v Clark and Beech* [2008] EWHC 2327 (Ch), that the law allows for such actions, and the possibility remains that they may be used in the future. The use of such practices in the residential owner-occupier context is considered to be unfair.

BACKGROUND

2. In general, where a borrower defaults on their mortgage, repossession, usually a precursor to sale of the property, will take place after a court hearing. The lender must demonstrate to the court that they have grounds for possession. The judge also will require evidence that the lender has complied with the Mortgage Pre-Action Protocol by making all reasonable efforts to negotiate with the borrower to resolve the situation out of court. If the borrower made any offers of repayment plans that were not accepted, the lender will have to explain why that was the case.
3. The court also has available to it the discretionary power to grant relief to the borrower in possession proceedings under section 36 of the Administration of Justice Act 1970 and section 8 of the Administration of Justice Act 1973. The exercise of these powers is limited to situations where it appears, in the opinion of the court, that the borrower will be able to 'catch up' or resolve any other default within a reasonable period of time, if the court were to give the borrower that opportunity. If the court is satisfied of those conditions, it may adjourn proceedings, suspend an order for possession it has made, or postpone the date for possession. It may not suspend or set aside an order for possession that has already been executed. Otherwise the court will grant an order for possession. The lender will in most cases then go on to sell the property.
4. However, the lender has available to it an alternative route, the power of sale. In the absence of express provision in the mortgage contract, the implied term under Section 101 of the Law of Property Act 1925 applies. This is a two stage process: the legal power must arise, and then the power must become exercisable. The power of sale arises when the mortgage is by deed (nearly every mortgage is by deed) and when the money is due. If the mortgage is payable by instalments, the power arises as soon as any instalment is in arrears. The power of sale is exercisable only when the power has arisen and one of the following has occurred: (i) notice requiring payment has been served, three months has passed and money is still owing, or (ii) some interest is two months in arrears, or (iii) the borrower is in breach of some other provision in the mortgage deed or the 1925 Act. If the power has arisen and one of the above three situations has come to pass, the lender has the right to sell the property in order to get its money back.
5. Section 101 operates as a default clause, applying where there is no clause in the mortgage contract specifying other arrangements for the power of sale. The power of sale is a self-help remedy. This means that the lender is not required to obtain a court order prior to selling the property.

PREVIOUS WORK

6. Following the *Horsham Properties* case, in which a buy-to-let property was sold without a court order or consent of the borrowers, concern was expressed in Parliament and the press that the same procedure could be used to sell residential owner-occupied homes. In light of this the Justice Secretary ordered a review of the protections afforded to borrowers in arrears when lenders are pursuing recovery of the debt. The review group approached key stakeholders in the lending, advice and legal sectors for their views on current practices. Meetings to discuss the issues were also held between MoJ staff and representatives from Citizens Advice Bureau, Shelter, Council of Mortgage Lenders and Finance and Leasing Association. Written responses were provided by nine stakeholders, and data from those were compiled with information from Government departments to form the basis for this report. This information was supplemented by site visits to county courts by Ministry of Justice officials to attend mortgage possession hearings. This review reported to Ministers in March 2009.
7. The Justice Secretary has now decided to issue this public consultation paper to elicit views from all interested parties on whether or not, as a preventative measure, the law in this area should be changed. This decision was announced in the Consumer White Paper published in June 2009.

PROBLEMS WITH THE CURRENT LAW

8. The current law allows a lender to sell a property without either a court order or the consent of the borrower. This causes concern in the residential owner-occupier context as, if used, it would mean that a homeowner's home could be sold without them being able to access the protections of the court. Paragraph 3 above gives a brief description of the discretionary relief which the court can provide a borrower in repossession proceedings. However, these are only available where the case is already before the court. If the lender chooses a self-help route, the court does not have discretion to provide any such relief.
9. Where there is agreement between the parties, for example where the borrowers agree to hand back the keys to the lender and the lender accepts them (often referred to as voluntary repossession), there is a benefit to both parties in not requiring them to go to court, with the time and costs that this involves. However, where there is no such agreement there is potential for the power of sale without a court order to cause problems. The only situation in practice in which lenders utilise the power of sale without consent or a court order in the residential owner-occupier scenario is in relation to abandoned properties. By abandoned we mean the situation where a property appears to be deserted and the borrower is uncontactable. In these circumstances under the current law the lender may take peaceable possession of the property and then sell it. In cases where the property genuinely is abandoned this saves the lender the costs of a court hearing. However, it can be difficult to judge when a property has been abandoned if the property is in a poor state of repair, undergoing refurbishment and/or the borrower has been away for a period of time.
10. There is anecdotal evidence that there are cases where lenders take or attempt to take possession of property that was not in fact vacant or abandoned, but merely in a poor state of repair. There also remains the theoretical possibility of lenders taking possession when a borrower is merely away, for example on holiday. As there is no requirement to bring court proceedings, lenders do not have to prove that a property is abandoned. We stress that we are not aware of this happening with any frequency in the current market, and understand that where a property is repossessed in this manner when not in fact abandoned, in practice the lender is likely to return possession to the borrower. Nonetheless, a repossession and sale in circumstances where the residential owner-occupied property has not genuinely

been abandoned will cause significant hardship and distress to a borrower, and the legal proceedings that may result will be time-consuming and costly for both borrower and lender.

SECTORS AND GROUPS AFFECTED

11. The proposals will affect the mortgage lending industry. However, as lenders already use court proceedings rather than self-help remedies in almost all residential owner-occupier situations, the change will affect the law rather than the current practice of lenders.
12. Anyone who has a mortgage for the purposes of financing their own home and who defaults on that mortgage will be protected by these proposals. Again, the vast majority of homeowners are protected by the current practice of lenders, but the proposals would clarify the law and ensure that homeowners remain protected in the future.
13. The proposals would only apply to residential owner-occupied properties. The proposals would have no effect on business loans or buy-to-let mortgages.
14. The proposals would not affect the power to appoint a receiver.
15. In cases where lenders already go to court to obtain a possession order this would continue to be sufficient to authorise a sale under the proposal, so the proposal would have no effect in these (the majority) of cases.

SCALE OF THE ISSUE

16. Data from the Council of Mortgage Lenders (whose members hold 98% of mortgage assets in the UK market) shows that there are currently about 11.5 million first charge residential mortgages in the UK with an average loan value of around £100,000.¹ These figures include residential buy-to-let mortgages, which Financial Services Authority data suggests represented around 10% of the residential mortgage market in 2008. These buy to let mortgages would not be affected by these proposals. Finance and Leasing Association data shows that there are about 400,000 second-charge loans out with an average of £28,000 outstanding at present. The Bank of England estimates that the total value of secured lending in the UK is over £1.2 trillion.
17. At the end of 2008 about 250,000 mortgages were at least 3 months in arrears with their payments, which was significantly more than in the previous quarter.² In 2007, 26,200 properties were repossessed by first charge lenders. In 2008 this rose to around 40,000.
18. These figures indicate that significant numbers of people are affected by mortgage arrears and that the numbers are increasing. This impression is supported by evidence from the advice sector, which deals with queries about debt problems more than any other issue.³
19. It is not known how many properties are repossessed through the use of self-help remedies. Abandoned properties, voluntary repossessions and other non-court ordered repossessions are not recorded separately in the data we have seen. If consultees have or are aware of this data we would be grateful for it in order to make a fuller assessment.

¹ These CML figures include part of the buy-to-let market. BTL mortgages are commercial loans, and those included in these figures are on residential properties.

² The increase may be attributed in part to the recent reductions in interest rates. As interest rates (and therefore monthly payments) go down, a given sum of arrears will suddenly represent a greater number of monthly payments.

³ In 2007/08 CAB offices dealt with 64,053 enquiries on mortgages and secured debt arrears. In the first three-quarters of 2008/09 this figure had already been surpassed at 65,045 enquiries, so the final figure for the year is expected to be significantly higher than the previous year.

20. Given that there is very little discrepancy between the leading sets of figures (Council of Mortgage Lenders, Ministry of Justice and Financial Services Authority) and some include out of court repossessions, whereas the Ministry of Justice figures do not, we estimate that out of court repossessions constitute only a small proportion of repossessions at present.⁴ Of those out of court repossession, the vast majority are likely to be done by agreement with the borrower – the typical example being the borrower agreeing to hand the keys back to the lender and the lender accepting. Although it has not been possible to obtain figures, it appears that the number of properties repossessed without a court order where the property is (or appears to be) abandoned, is very small. Again, we would welcome any relevant figures consultees are able to provide.
21. The Ministry of Justice has been able to find no examples of the use of the power of sale as in the *Horsham Properties* case in a residential owner-occupier case. That it is not used is supported by the industry and regulator’s attitude towards the use of the power of sale without a court order or consent in the residential owner-occupier context. In November 2008 the Financial Services Authority wrote to the heads of all lending businesses in the UK, stating that if lenders were to employ the power of sale in situations where a court order for possession would have been denied, the Financial Services Authority would be inclined to view such actions as unfair practices. The Council of Mortgage Lenders has released a statement on behalf of all of its members that they will not move to sell a residential property in which the customer is resident and the loan is non-commercial without first obtaining a court order for possession. Information from lending industry stakeholders, obtained in preparing the review ordered by the Justice Secretary, indicates that the practice was never used in residential owner-occupier situations, even before this statement was made.

THE RATIONALE FOR GOVERNMENT INTERVENTION

22. Amending the law as proposed would ensure that residential owner-occupiers are protected by the law and not merely the practices of the lending industry. It would ensure that, if agreement between lender and borrower cannot be reached, residential owner-occupiers are always afforded the opportunity to come before the court and potentially benefit from the discretionary relief available to the court in all cases where the power of sale is to be exercised by the lender. The objective is to ensure that residential owner-occupiers remain protected in the future.

Economic rationale

23. The conventional economic approach to Government intervention is based on efficiency or equity arguments. Government intervenes if there is a perceived failure in the way a market operates (“market failures”) or if it would like to correct existing institutional distortions (“government failures”). Government also intervenes for equity (fairness) reasons. In this case, intervention would be justified primarily on equity grounds. The policy will offer protection to homeowners by eliminating the potential for practices the Government deems unfair. This will be done in a way which should not have a significant negative impact on the mortgage industry.

⁴ On first charge loans the review by officials found that voluntary possessions were at their highest in the early 1990s, amounting to 40% of all possessions at that time. In 2004 approximately 10% of possessions were voluntary, and in the third quarter of 2008 that had risen to 19%. This practice is uncommon in relation to second charges, with one lender reporting that less than 5% of possession cases involve voluntary surrender.

OPTIONS FOR REFORM

24. Aside from the 'do nothing' base case, one option has been considered: to reform the law. This would provide an opportunity to put the law into line with lending practice in the residential owner-occupier context, and ensure that homeowners remain protected in the future, regardless of any changes which might occur to lending practices. It would then be impossible for a *Horsham* case to arise in this context. The proposals would:
- change the law so that lenders could not exercise the power of sale in the residential owner-occupier context without a court order or agreement of the borrower;
 - ensure that residential owner-occupiers always have the opportunity to access to the discretionary statutory reliefs available from the court: for example to adjourn proceedings or suspend a possession order (as all cases where agreement cannot be reached would go before the court); and
 - require a lender to obtain a court order even where it considers a property to be abandoned. This would provide certainty to all parties.

COSTS AND BENEFITS OF OPTIONS

BASE CASE: DO NOTHING

25. As the base case, there are no costs or benefits associated with this option. The problems of the current law will remain. It will still be legally possible for lenders to exercise the power of sale without a court order, and the uncertainty surrounding abandoned properties will still remain.

OPTION 1: REFORM OF THE LAW

Costs

26. The reform of the law will have minimal one-off costs for all parties who would need to become familiarised with the new law. Lenders currently use court repossession proceedings rather than the out of court exercise of the power of sale in most cases involving residential properties, where there has not been an agreement between the parties. The legal changes will codify the current declared practice of lenders of not moving to sell a residential property in which the customer is resident and the loan is non-commercial without first obtaining a court order. This option would therefore result in no significant behavioural change in the practices of mortgage lenders.
27. However, mortgage lenders may face some minor costs in cases where they would now be required to obtain a court order in cases where a property is abandoned. As explained above, it is estimated that abandoned properties currently represent a very small percentage of the residential owner-occupier mortgage market and the costs both in financial terms for lenders and in terms of court time should be small. It is noted that when the lender is successful it will be able to recover these costs from the borrower (from the

proceeds of sale of the property if sufficient or through operation of the contract if not). These costs may therefore ultimately be borne by borrowers. We estimate that the costs of unopposed proceedings will be around £1,200. This consists of:

Legal fees (based on 4 hours work)	£400
Issuing the claim using Possession Claims Online	£100
Fixed recoverable commencement costs (approx)	£100
Hearing Fee (assuming the case is fast track)	£500
Pre-Trial Check-List	£100
TOTAL	£1,200

28. HMCS may face some minor costs associated with the increase in cases requiring a court order. However, as set out above, these costs are not expected to be significant. Further, any additional court costs will be recovered through court fees.

Benefits

29. The proposals would bring the benefit of legal certainty for all parties in mortgage power of sale cases, by requiring a court order in all cases where agreement is not reached between the parties. For borrowers this means that the law will reflect both the practice of lenders and their expectations that their residential owner-occupied home cannot be sold without either their agreement or a court order. Public confidence in the law will be enhanced by its reflection of practice and consumer expectations. In cases where a lender intends to exercise the power of sale without the consent of the borrowers, the borrowers would have the opportunity to benefit from the reliefs available for borrowers in possession proceedings before the court. This would remove the anomaly that where a lender chooses to go to court protections for the borrower are available, but where the lender chooses to act out of court they are not available.
30. Where an agreement can be reached between the lender and borrower there will still be no need for court proceedings. This benefits both parties and HMCS as it avoids the time and costs involved in a court case.
31. In cases involving abandoned properties where the property appears deserted and the borrower cannot be contacted, the requirement that the lender obtain a court order will provide certainty for both parties. As it is difficult for lenders to definitively establish when a property is abandoned, this legal certainty will reduce the risk of resulting legal proceedings that would arise if a residential owner-occupied home is repossessed and sold in circumstances where it has not genuinely been abandoned. Such a sale would cause significant hardship and distress to a borrower, and any subsequent legal proceedings would be time-consuming and costly for both borrowers and lenders.

NET IMPACT

32. The proposed reforms outlined in Option 1 would provide legal certainty for both borrowers and lenders, and would ensure lenders are protected by the law. The changes in the law

would reflect both current mortgage lending practice and the expectations of borrowers. It would remove the anomaly whereby whether a borrower is able to access the discretionary protections of the court depends entirely on whether a lender chooses to bring possession proceedings or not. The proposals may impose some minor costs on all parties as outlined above. However, these costs are not expected to be significant.

33. This consultation paper asks for the views of all interested parties on these proposals, which we consider would have a small, but genuine net benefit to all relevant parties in clarifying the law and ensuring that residential owner-occupier homeowners are protected in the future.

ENFORCEMENT, SANCTION AND MONITORING

34. The proposals would simply form part of the law of property as enforced by the courts through possession proceedings. Should a lender attempt to exercise the power of sale without a court order or agreement, it is proposed the borrower would be able to bring an action. There are a number of legislative ways of achieving the proposed reforms and we welcome views on this.
35. As there is no pressing problem, this preventative measure could be introduced at a convenient time in the future. The legislation would be codifying in nature.
36. The Department will review the responses to the consultation paper, with a view to considering how to proceed.

SPECIFIC IMPACT TESTS

Small Firms Impact Test

37. It is not anticipated that these proposals would have a disproportionate impact on small businesses.

Competition Assessment

38. The sector most affected will be the mortgage lending industry. Although there may be a small increase in the number of cases which must be dealt with by way of court proceedings, as a court order will be required for abandoned properties, any increase is not considered likely to favour or have a disproportionate effect on any particular lenders. It is therefore not anticipated that the proposals would give rise to competition concerns.

Legal Aid

39. We do not consider that the proposals will have any impact on legal aid expenditure.

Sustainable Development

40. Having read and followed the guidance, including the screening against the five principles of sustainable development, the Ministry of Justice is satisfied that there will be no significant environmental impacts resulting from the proposed policy.

Carbon Assessment

41. Having assessed this proposal against the DEFRA guidance on carbon assessment, the Ministry of Justice does not consider that the proposals will have any effect on emissions of greenhouse gases. We have not, therefore, conducted a full carbon impact assessment.

Other Environment

42. This proposal has been screened against the DEFRA guidance on environmental impact and the questions on greenhouse gas emissions, climate change, waste management, air quality, landscape change, water pollution, habitat or wildlife and noise. The Ministry of Justice is satisfied that there are no significant impacts.

Health Impact Assessment

43. The Ministry of Justice has concluded that a health impact assessment is not necessary. The proposal will not have a significant effect on human health or have an effect on the wider determinants of health. In addition, it will not impact on the lifestyle-related variables provided in the guidance or on health or social care services.

Race/Disability/Gender Equality Assessment

44. On carrying out a screening exercise for race, disability and gender there was no evidence to suggest that the implementation of the proposals would have any specific race, disability, gender or equality effects. Consequently, the Ministry of Justice has decided that a full equality impact assessment is not required.

Human Rights

45. Having regard to the guidance on this specific impact test from the Cabinet Office, the Ministry of Justice considers this proposal to be human rights compliant and that it will not result in any restriction of these rights.

Rural Proofing

46. Having screened this proposal against the rural proofing guidance, the Ministry of Justice considers that the proposals will have no significant or different impact on rural areas.

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.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact Julia Bradford, Ministry of Justice Consultation Co-ordinator, on 020 3334 4492, or email her at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

Julia Bradford
Consultation Co-ordinator
Ministry of Justice
102 Petty France
London SW1H 9AJ

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under the **How to respond** section of this paper at page 33.

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