

Repossessions Group

Final Report



The Scottish
Government

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Executive Summary

1. As the Repossessions Group, set up by Scottish Ministers in response to the current economic downturn and consequent rise in repossessions, we were asked:
 - to consider urgently whether the legal protection for homeowners in Scotland at risk of repossession provided through UK legislation and in Scotland through such vehicles as the Mortgage Rights (Scotland) Act 2001 and the Conveyancing and Feudal Reform (Scotland) Act 1970 is adequate and, if necessary, make specific recommendations on ways in which either reserved or devolved legislation should be strengthened; and
 - to consider what else the Scottish Government, the UK Government and others such as lenders, advice agencies and legal services might do to help those at risk of repossession and reduce the risk of repossession.
2. We welcomed recent initiatives by the Scottish and UK governments. Recognising that some of these initiatives are new, it was felt that their efficacy should be kept under review and amended in the light of experience.
3. We identified four stages as being key when helping struggling home owners. Our recommendations sit within this context:
 - preventing problems from emerging or accelerating, through advice and other forms of assistance;
 - the provision of every reasonable opportunity for a home owner to sustain home ownership where problems have led to action being taken by creditors;
 - the opportunity to retain the home through an alternative arrangement, either as a tenant or through shared equity, where continuing the mortgage is not sustainable; and
 - the smooth transition to other forms of housing where the home has to be vacated.
4. In addition to these, a need for separate repossessions data for Scotland was considered necessary both to understand the extent of the issue and to fine tune policy responses. We recommend that the Financial Services Authority (FSA) be asked to require lenders to provide regional data on a regular basis, preferably every quarter, but at least six monthly. Given the weakness in the historical data, efforts to improve the robustness of court data across Scotland were welcomed.
5. To prevent problems from emerging or accelerating, and in addition to the efforts already made by advice agencies and lenders, we recommend that a range of independent advice be provided for those facing financial difficulty.
6. This should include clear and easy to understand information from lenders and courts (at each stage of the repossessions process); clear warnings as to the risks of non-regulated ‘sale and rent back schemes’; provision for those facing redundancy to be directed to relevant financial advice; encourage the fast-tracking of those at risk of repossession for face-to-face assistance; the prioritisation of increased capacity across the advice sector when allocating resources nationally and locally; and liaison in the identification and resolution of strategic gaps in advice provision by a range of bodies.

7. We welcomed assurances by lenders that they will show appropriate forbearance towards borrowers, and encourage such restraint to be shown to Scottish borrowers wherever possible and where this is in the borrower's best interest. We feel that monitoring the take-up of Homeowner Mortgage Support (HMS) as run by the UK Government, consideration of options for rescheduling debt to make repayment more sustainable, and liaison between lenders and advice agencies as to policy could further assist those facing financial difficulties and avoid cases going to court.
8. We note that the intimidating nature of the court process can put people off action to resist repossession. To address this perception, we recommend changes to the Sheriff Court Ordinary Cause Rules which simplify procedures and make them easier to understand, improve accessibility, and develop court processes.
9. To address perceptions as to the bureaucracy involved in claiming legal aid, as well as the operation of clawback arrangements, we recommend that the Scottish Legal Aid Board (SLAB), and where relevant the Scottish Government, consider a number of relevant issues. These include; the judicial rate of interest, liaison between SLAB and solicitors as to the impact of clawback arrangements, and clarification as to the sale of houses over which SLAB has standard securities.
10. We feel that a shortcoming of the existing legislation lies in the need to invoke a special application when seeking to order a temporary suspension of the lender's enforcement rights. We believe that (with the exception of such examples as a voluntarily surrendered or an abandoned property) all enforcement cases should be by application to the court and should be subject to a court hearing at which the court should be able to order a temporary suspension even where no application under the Mortgage Rights (Scotland) Act 2001 has been lodged.
11. We recommend a number of amendments to the Conveyancing and Feudal Reform (Scotland) Act 1970 and the Mortgage Rights (Scotland) Act 2001 to facilitate such change. We suggest that these amendments require lenders, through primary legislation, to provide evidence that they have complied with FSA regulatory requirements.
12. At the same time, we recognise that, for some householders, remaining in a property as a home owner will not be sustainable nor in their best interests. In such circumstances, we note the need to ensure that transition arrangements are as smooth as possible and urge the Scottish Government to keep such arrangements as the Mortgage to Rent (MtR) and Mortgage to Shared Equity (MtSE) schemes under review.
13. We believe that our recommendations, in addition to existing measures protecting home owners in Scotland, would ensure better protection, which is more easily accessed and more widely available. The recommendations are covered in greater detail and are defined more specifically in the main report.

1 Introduction

- 1.1 Due to the credit crunch and the subsequent economic downturn, repossessions¹ are of increasing concern in Scotland and across the rest of the UK. Available data from the Council of Mortgage Lenders (CML) show that repossessions across the UK have increased considerably over recent years. Specifically, 40,000 properties were repossessed in 2008. This mirrors the annual levels of repossessions seen in the mid nineties. The CML originally forecast that there would be a further increase to 75,000 repossessions in 2009. This would have matched the highest previous figures as recorded in 1991.² However, it now thinks that this forecast looks pessimistic and expects to revise the figure downwards in its next housing market forecast update during the summer.
- 1.2 Data from the Scottish courts, however, offers a different perspective. The number of court actions initiated for ‘mortgage / loan lender’ repossessions decreased by 51% during the period April 2008 to January 2009. Between September and December 2008, numbers decreased each month. They did, though, increase by 15% in January 2009. Of these actions, the number of repossession decrees granted for the lender showed a steady increase of 58% from April to October 2008. This has, however, decreased by 43% between October 2008 and January 2009, with numbers slightly below those granted in April 2008. Whilst such information provides a useful snapshot of contested repossessions, data on court actions for repossession cannot be used to estimate robustly the number of, or trend in, actual repossessions because of the number of cases that are raised but do not necessarily result in final repossession and differences in the way court data was recorded before April 2008. The need for better Scottish data on repossessions in future is an issue on which we make recommendations later in this report.
- 1.3 We recognise that changes in the level of repossessions relate in part to increases in home ownership as well as current economic circumstances. The increase in the number of home owners on lower incomes has meant that relatively small changes in financial circumstances have had a greater impact upon the sustainability of home ownership than in previous downturns.³ In our view, future policy on home ownership needs to give as much weight to the long term sustainability of that housing option as it does to accessing it.
- 1.4 This context means that it is not possible to predict the extent to which current measures can have a mitigating effect on the predicted rise in repossessions. We have considered measures to assist home owners in financial difficulty to stay in their homes, but we also recognise that, in some situations, it may be in their best interests to exit home ownership.
- 1.5 In our view, the approach towards struggling home owners should be framed in four ways:

¹ Whilst the word ‘repossession’ may not be the legally correct one (with the lender never having had possession in the first place), it is used in this report as convenient shorthand.

² See Annex B for further discussion of the statistical evidence.

³ The shift in ownership levels are demonstrated by the ‘Scottish Household Survey’ - <http://www.scotland.gov.uk/Topics/Statistics/16002>.

- to prevent problems emerging or accelerating in the first place, through advice and other forms of assistance;
 - where problems have led to action being taken by creditors, to ensure that the home owner has every reasonable opportunity to sustain home ownership;
 - where continuing with the mortgage is not sustainable, to allow the home owner to retain the home through some other arrangement (for example, as a tenant or through shared equity according to the Home Owner Support Fund schemes); and
 - where the home has to be vacated, to ensure that the transition to other forms of housing is made as smooth as possible.
- 1.6 In response to the rising rates of repossession – particularly the latest forecast from the Council of Mortgage Lenders – the Scottish Government invited key stakeholders to form a Repossessions Group. We were asked to consider whether existing legislative protection in Scotland is adequate or requires strengthening, and whether more needs to be done both legislatively and non-legislatively.⁴
- 1.7 The establishment of the Repossessions Group was announced on 13 January 2009.⁵ We operated as a sub-group of the Debt Action Forum (DAF) which was announced on the same date. Our first meeting took place on 11 February 2009.⁶
- 1.8 In this report we consider changes and improvements to current provisions by tracing the experience of a home owner faced with repossession; from the obligations placed upon lenders seeking repossession, through to the rights available within court and the safety nets provided by Scottish Government initiatives. The structure of the report seeks to reflect that ‘journey’; from problems emerging at the outset to options available if repossession becomes inevitable. However, many of our recommendations are relevant at various points in that journey.
- 1.9 This report reflects discussion between members of the Group. Members of the Group represent a wide range of interested parties and due to the nature of the process and timescale, those representing membership organisations were unable to consult widely among their members. The proposals do not, therefore, necessarily represent the views of all of their members. We recognise that wider consultation would need to take place in order to facilitate the implementation of some of our recommendations, particularly on those requiring legislation.

2 Free Independent Advice for Those Facing Financial Difficulties

- 2.1 The issue of access to independent advice to prevent problems escalating and to help intervene to avoid court action was considered in more detail by a joint group including members from both the Repossessions Group and the Debt Action Forum. The full report from this group is appended to the DAF report. It makes recommendations that relate to areas of common concern for ourselves and the Forum about improving long-term strategic planning of advice provision to make it more able to meet shifts in need for assistance such as those being experienced now as a result of the economic downturn. It also includes recommendations about action that could be taken to deal

⁴ See Annex A for the specific wording of the Group’s remit.

⁵ See Annex A for a list of the Group’s membership.

⁶ See Annex A for a list of the dates on which the Group met.

with the more immediate problems facing people now, who need to access assistance, and to manage pressures that are being faced by existing advice agencies in trying to meet steep increases in demand for assistance.

- 2.2 We agree with the recommendations in the Access to Advice paper, and the relevant recommendations that relate to repossession are reflected and incorporated into our report.
- 2.3 We note that there is a certain degree of overlap between the advice discussed here and that under legal aid (as covered later). What follows here relates to independent advice for those finding themselves in financial difficulty, whereas that advice discussed later relates specifically to advice offered, further down the line in the repossessions process, to those facing court action for repossession.

Current Situation

- 2.4 It is important that borrowers experiencing difficulty making payments are encouraged to seek financial advice at the earliest possible stage. Emphasis should be placed upon the need to resolve issues as early as possible, in keeping with the recommendations of the Civil Justice Advisory Group convened by the Scottish Consumer Council.⁷ We welcome, therefore, efforts made by lenders and the lending sector to offer good advice, such as the Council of Mortgage Lenders' commitment to having lenders review management policies in line with new industry guidance on 22 October 2008.⁸ We similarly welcome the Finance and Leasing Association's (FLA) Good Practice Guidelines for Second Charge Mortgage Lenders which was published in November 2008 and which focused on the assistance provided to customers in arrears. Free debt advice should be easily accessible in order that borrowers can start to address problems before they escalate; before, for example, a court action is raised.
- 2.5 The first, and potentially most important, safety net for those faced with repossession is access to appropriate debt advice.

Recent Action

- 2.6 The Scottish Government has taken positive steps to encourage people to take action at an early stage to resolve their debt problems, and reduce the risk of them spiralling out of control to the point at which repossession becomes a risk. We welcomed action by the Scottish Government on this front including:
 - A recent TV and on-line advertising campaign, with accompanying leaflets, in association with the Money Advice Trust, and backed with £400,000 of Scottish Government funding, to raise awareness of the help provided by the National Debtline and to encourage people to tackle their debt problems as early as possible.⁹ The campaign appears to have been successful with the number of Scottish calls to the National Debtline more than doubling (from 3.6% to 8.4%) and hits on the Scottish

⁷ 'The Civil Justice System in Scotland – a Case for Review?' The Report of the Civil Justice Advisory Group (chaired by Lord Coulsfield), Scottish Consumer Council, 2005.

⁸ <http://www.cml.org.uk/cml/filegrab/AsandPindustryguidance22Oct08.pdf?ref=6055>

⁹ Further details of the schemes can be found at <http://www.scotland.gov.uk/News/Releases/2008/11/21114452> and <http://www.scotland.gov.uk/News/Releases/2008/11/14145918>

part of their website increasing significantly during the campaign, albeit from a low base;

- An additional £1m for Citizens Advice Scotland to increase the capacity of face to face debt advice services available through Citizens Advice Bureau (CAB); and
- An additional £3m being allocated through the Scottish Legal Aid Board (SLAB) to increase access to legal advice and representation, including in-court advice (discussed further in section 4).

2.7 Welcome though these developments are, we remain concerned about the length of waiting times for access to face to face assistance at advice agencies. Repossession cases are inevitably so complex as to make face-to-face assistance vital at some point in the process, not least because more Government support options are now available to clients.

2.8 A particular concern related to the presentation of non-regulated ‘sale and rent back’ schemes as options to avoid repossession; insofar as these might not be the best options for consumers nor provide them with appropriate levels of protection as tenants. We note the Office of Fair Trading’s recent consultation on the regulation of ‘sale and rent back’ and welcome its recommendation that statutory regulation is required.

New Options

2.9 We considered a number of ways in which advice for those facing repossession might be improved and **we recommend** the following:

- lenders and the courts ensure clear and easy to understand information and assistance for borrowers (with contact numbers for organisations able to offer support) at appropriate stages of the action and court proceedings arising from mortgage arrears;
- those responsible for the regulation of advertising ensure clear warnings on the dangers of non-regulated ‘sale and rent back’ schemes always accompany such advertising;
- those facing redundancy be pointed more clearly towards appropriate sources of independent financial advice (noting that this is illustrative of the general need to identify all potential trigger points);
- advice umbrella bodies encourage the importance of fast-tracking those at risk of losing their homes for face-to-face assistance;
- building capacity across the advice sector should be made a priority when the Scottish Government and local authorities allocate resources nationally and locally along with support to enable agencies to gain accreditation under the National Standards for Information and Advice Providers; and
- the Scottish Government, the Convention of Scottish Local Authorities (CoSLA), the Scottish Legal Aid Board and advice agencies should work together to ensure that greater attention is given to identifying and meeting any strategic gaps in advice provision, and that activity be co-ordinated more effectively.¹⁰

¹⁰ We note the relevance of the Review of Legal Advice and Information Provision 2001 and the Strategic Review of Legal Aid 2004 in this regard.

3 Government Mortgage Support Schemes for Those Facing with Repossession

- 3.1 We welcome the measures that both the Scottish and UK Governments have taken to address rising repossessions in the current economic climate. We consider it important to note that such Government schemes have to be options of last resort and must not undermine responsibilities on lenders and borrowers to consider where possible, and to reach voluntary agreement on, deferred payments and other such ways to address arrears.

Scottish Government Support

- 3.2 The Scottish Government's response to the deteriorating economic situation, and specifically to the forecast increase in repossessions, has been to create a series of safety nets, as people find themselves in financial difficulty. The aim is to try to reduce the numbers of people getting into serious problems and facing the prospect of losing their homes. The first of these examples is the provision of debt advice as described above. This operates in tandem with the schemes detailed below.

Mortgage Support and the Home Owners Support Fund

Current Situation

- 3.3 The second safety net focuses on schemes which help home owners to retain their homes, after they have fallen behind with mortgage repayments. The Home Owners' Support Fund was announced in June 2008, with an original budget of £25m. Funding is now £35m over two years. Based on previous experience, it is estimated that this will help around 600 home owners. The Home Owners' Support Fund comprises the following schemes:
- Mortgage to Rent, which helps home owners with little or no equity to sell their homes to a registered social landlord and to become tenants. This scheme started in 2003 and has helped over 850 households since its launch. The scheme was recently evaluated, and a revised scheme was launched on 16 March 2009; and
 - Mortgage to Shared Equity, which helps home owners who have at least 25% equity in their homes to reduce the amount of debt secured against their property to a manageable level. This scheme opened for applications on 16 March 2009.
- 3.4 We welcome the support provided by the Scottish Government through these two schemes, and the additional funding provided for them, which is proportionately more than that provided in England. Correct though it is not to undermine the responsibility on lenders to take action to avoid repossessions, and although welcoming the fact that the Scottish Government schemes are more generous than those applying in England, the fact remains that, as south of the border, they will help only a relatively small number of those facing repossession.

Further Action Required

3.5 We recognise that for some householders remaining in a property as a home owner will not be sustainable nor in their best interests. For those households, it is important to ensure that transition arrangements are as smooth as possible. We urge the Scottish Government to keep the new MtR / MtSE arrangements under review; to ensure that funding is able to keep pace with demand; and that eligibility rules do not constrain households which have no other choices. We also repeat our concern about the risks of private ‘sale and rent back’ schemes.

- **We urge** the Scottish Government to keep under review, in these difficult and uncertain circumstances for homeowners, whether funding for these schemes is adequate. We also consider it important to monitor eligibility criteria in order that people who have few other options are not unnecessarily excluded.

UK Government Support (UK Homeowner Mortgage Support (HMS) Scheme / Support for Mortgage Interest (SMI))

UK Homeowners Mortgage Support Scheme

Current Situation

3.6 The Homeowners Mortgage Support Scheme is intended to provide greater assurance to homeowners that they will be able to remain in their home if they suffer a temporary fall in income, but expect to recover at a later date. The scheme complements the current framework of UK Government support, which includes the Support for Mortgage Interest (SMI) scheme (aimed primarily at households where no one is in work).

3.7 The Homeowners Mortgage Support Scheme enables lenders to reduce a borrower’s current monthly mortgage payments, with the deferred payments rolled up, added to the principle, and paid at a later date when the borrower’s circumstances have improved. The UK Government will guarantee the lender against a proportion of any loss incurred on the deferred interest payments, in case the borrower defaults.

3.8 While welcoming this scheme, and that it applies across the UK, we note that it is dependent on the voluntary cooperation of lenders, not all of whom may take part. This will inevitably create issues of unfairness where a borrower with one lender not taking part in the scheme may be denied, through no fault of their own, access to support on offer to borrowers in similar financial circumstances, but with a lender willing to take part.

Further Action Required

- We welcome the sign-up under the scheme and the fact that other lenders offer similar options, but without the UK Government’s guarantee. We recognise that it may not be possible to make participation in the scheme compulsory, but **encourage** the UK Government and lenders to ensure maximum participation.

3.9 We recognise that the UK Government guarantee is designed to minimise the risk of lenders more actively pursuing repossession as the two year deferral period comes to an end. However, we note that the scheme still leaves a residual and potentially heightened risk of repossession occurring where a person's financial situation has not improved over the two years, particularly where the deferred interest payment increases the level of mortgage repayments then required.

- **We recommend** that the risk that the Home Owners Mortgage Support Scheme simply puts off the risk of repossessions occurring to a later date is carefully monitored as the scheme is rolled out

Income Support for Mortgage Interest (SMI)

Current Situation

3.10 Income Support for Mortgage Interest is a scheme whereby homeowners who lose their jobs receive financial help with the interest payments on their mortgage. The scheme was introduced in the early 1990s to address the then housing crisis. The level of support provided – and the waiting times involved – have fluctuated to reflect the need for such a scheme. From 5 January 2009, homeowners have only had to wait 13 weeks – as opposed to the previous 39 – to be eligible for support (this corresponding to the three month limit at which banks consider mortgage payments to be seriously in arrears). From this date, too, the capital limit for loans on which SMI is based increased from £100,000 to £200,000.

3.11 We welcome the increase in financial assistance available through SMI but note that the assistance is only available where no member of the household is in employment. This means that the scheme provides no support to families suffering the temporary loss of one income as a result, for example, of a redundancy. We recognise that the UK Home Owners Mortgage Support Scheme is intended to provide support in such situations.

Further Action Required

- However, in light of the concerns about the potential inequalities arising from the voluntary nature of participation in the UK Home Owners Mortgage Support Scheme (noted in paragraph 3.8), **we recommend** that making SMI available when a household has lost one income would be fairer and provide greater reassurance to those families facing an uncertain future. We also find it disappointing that SMI is not paid on second charge mortgages. This would be a straightforward reform which would benefit many home owners, and we believe that SMI should be extended in this way.
- **We also recommend** that the rate at which SMI is paid should be fixed to the actual rate of interest paid by the home owner, rather than to the Bank of England base rates. The current rate at which SMI is paid (6.08%) still leaves many households with a shortfall. The lowering of interest rates has partly mitigated this, but once interest rates rise again home owners may struggle to meet full interest payments.

4 Action by Lenders to Help Those in Financial Difficulty and to Avoid Cases Going to Court

Current Situation

- 4.1 The way first charge mortgage lenders deal with arrears and repossessions is usually regulated by the Financial Services Authority (FSA), dependent upon the type of loan and when this was taken out. FSA regulation requires that lenders follow a regulatory framework, set out in the 'Mortgage Conduct of Business' Sourcebook (MCOB). MCOB 13 covers procedures which should be adopted when handling arrears and repossessions, the subsequent sale of a property in possession, the records lenders must keep, the information that must be provided to customers, and the recovery of any outstanding debt. Consumer credit lending is dealt with by the Office of Fair Trading (OFT).
- 4.2 In particular, MCOB 13.4.5 sets out the steps required before a lender can commence an action for repossession. Before a lender can begin an action for repossession, it must provide the customer with a written update detailing a list of the due payments either missed or only paid in part, the total sum of the payment shortfall, the charges incurred as a result of the payment shortfall, the total outstanding debt and an indication of further charges likely to be incurred. The lender must also ensure that the customer is informed of the need to contact the local authority concerning eligibility for local authority housing after the property is repossessed.
- 4.3 The FSA announced on 27 November 2008 that it had written to the Chief Executives of all mortgage administrators about fair treatment of customers in arrears. The letter asked firms to review policies and procedures and to ensure that these were compatible with both MCOB and TCF (Treating Customers Fairly) requirements. Chief Executives were asked to respond to their firm's FSA relationship team by 31 January 2009.
- 4.4 We welcome mortgage lenders' commitments to assist borrowers in difficulty to help themselves. We feel that it is important such commitments are met in practice (noting FSA evidence that this is not always the case).¹¹ We also welcome the view that was expressed to us that lenders regard repossession as the least desirable option, not least because such action is estimated to incur losses for the lender of £35,000 on average.¹² With this in mind, emphasis should be placed on the MCOB requirement that lenders deal positively and sympathetically with those in arrears and that court action should remain an option of last resort.

Recent Action

- 4.5 We also welcome the commitments made by lenders in 2008 to the UK Government:
- to have lenders review arrears management policies in line with new industry guidance. Members were asked to review their arrears policies against the guidance

¹¹ http://www.fsa.gov.uk/Pages/About/What/thematic/mortgage_arrears/index.shtml

¹² The costs incurred by lenders who repossess, and their reluctance to repossess, is covered by the Communities and Local Government Committee report 'Housing and the Credit Crunch' at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmcomloc/101/10102.htm>

and where necessary update them by 31 January 2009. The guidance was welcomed by the FSA and consumer groups such as Citizens Advice. We also welcome the FLA's Good Practice Guidelines for Second Charge Mortgage Lenders;

- to provide consumer information to borrowers in arrears to help explain the arrears management process. The CML has produced sample wording for its members to use and to adapt as necessary, depending upon their own individual approaches; and
- to put into place a strategy for contacting borrowers coming out of initial deals.¹³

4.6 Similarly, we find ongoing work amongst lenders encouraging. This seeks to:

- encourage better liaison between lenders and advice agencies, reflecting a widespread desire to ensure that borrowers have access to good advice. This is particularly important in cases where borrowers have debts with a variety of creditors; and
- ensure the more widespread availability of consumer information from a variety of sources.

New Options

4.7 We welcome assurances by different lenders that they will show appropriate forbearance towards borrowers.

At the same time, **we recommend** that:

- lenders be encouraged to show restraint with Scottish borrowers wherever possible (with court action being considered only as a last resort), and where this is in the borrower's best interest;
- regular data be monitored on the impact of HMS (and other forms of forbearance, where these can be assessed) and its take-up in Scotland;
- lenders be encouraged to look at options for rescheduling debt to make repayment more sustainable; and
- lenders and advice agencies liaise as to policies and procedures for struggling homeowners.

4.8 Enforcement of such an approach through regulation would be extremely difficult and a matter for the UK Government and the FSA rather than the Scottish Government.

- As indicated above, **we recommend** that information and assistance for borrowers should be made as simple as possible by lenders. It should be in clear and easy to understand English and should always take account of any differences in the legal position in Scotland.

¹³ Guidance covering each of these issues is found at <http://www.cml.org.uk/cml/filegrab/AsandPsindustryguidance22Oct08.pdf?ref=6055> The following letter from the FSA also urged compliance with MCOB rules http://www.fsa.gov.uk/pubs/ceo/arrears_repossessions.pdf

5 Measures to Help Those Faced with a Repossession Order or Those Appearing in Court

Current Situation

- 5.1 In-court advice services provide a valuable resource in seven of the busier Scottish courts, and law centres similarly provide valuable support in Glasgow, Paisley and Dundee. However, provision is by no means universal across Scotland, and although some courts allow it, as things stand, in-court advisers are not permitted to represent clients in repossession proceedings. Our attention was also drawn to the CoSLA conducted money advice survey as well as the Access to Advice paper provided to the Debt Action Forum as useful resources to inform approaches to help those facing repossession proceedings.
- 5.2 Moreover, the majority of court actions for repossession are uncontested, and can be uncontested even where in-court advice is available. About 30% of defaulting borrowers voluntarily abandon their property to the lender. We were concerned that misconceptions prevail as to the law: for example it may be that some borrowers think that by such abandonment they free themselves from responsibility for the loan, which is incorrect, or they may find the court process too intimidating. We considered ways to make it easier for borrowers to defend a case. These relate to the court system itself, as well as the arrangements that are in place in Scotland for legal aid.

Rules of Court / Rights of Audience

- 5.3 Particularly for repossession cases, the current court structure or process by which these cases are dealt with creates barriers to the effective delivery of advice and representation. This is a separate issue to availability or otherwise of representation.
- 5.4 Rent arrears cases are summary cause, while repossession actions are heard under ordinary cause, both in the sheriff court. As such, there is a real limit to what non-solicitor advisers can do in such cases. They are not allowed to appear at all under ordinary cause rules and can only appear at the first hearing in rent arrears cases, or at subsequent hearings where the action is undefended. Even this ability is at the sheriff's discretion. Anecdotally, not all sheriffs permit lay representatives in their courts, or do not allow them to appear to the extent the rules permit. If the action is defended, a lay representative cannot appear. If a solicitor cannot be found to take a case, the person will almost certainly have to represent themselves.
- 5.5 While most courts have a specific session set aside for summary cause and, within that, many also have separate sessions for eviction actions, repossession actions can appear anywhere on the ordinary cause roll. This makes it extremely difficult to connect advice services efficiently with people who may be in need of assistance, compared with the relative ease with which duty desk/advice services can be arranged around heritable days.
- 5.6 Also, repossession actions proceed under ordinary cause rules. This means that, unless a notice of intention to defend is lodged by the defender, no hearing will take place and decree will be granted in absence. There is therefore no opportunity for a representative to appear on the defender's behalf. People can be encouraged to intervene early and defend an action, but in practice (for various reasons) only a small percentage do. We believe that a machinery is needed which triggers intervention by the court and with it

an opportunity for the home owner to be represented if the home owner desires, not dependent on defences being lodged (see paragraphs 6.10 to 6.34 in which we advocate a mandatory hearing in all cases of repossession proceedings where the homeowner is in occupation). Procedure in England and Wales is different, which means that both eviction and repossession cases can benefit from in court duty representative arrangements.

Recent Action

- 5.7 The grant funding programme that is being taken forward by SLAB is focusing directly on improving the availability of advice and representation for people who do appear at court unrepresented, and to make connections with them at as early a point as is possible. The funding will focus on delivery of assistance by solicitors as well as other advisers, specifically to try to deal with the constraints there currently are on lay advisers appearing in court.
- 5.8 The Gill Review is also considering many of the issues that currently affect the feasibility of linking people to appropriate assistance at the right time.
- 5.9 We welcome the recent action by the Scottish Government to help those appearing in court, in particular:
- Increasing the disposable income limits for legal aid, making up to one million more people eligible for legal aid from April 2009; and
 - Making £3m available over two years to increase the in-court advice and other forms of advice for people facing repossession and, through the recruitment of more Scottish Legal Aid Board solicitors, directly and quickly address obvious gaps in the availability of solicitors willing to take on legal aid cases.

New Options

- 5.10 While the outcome of the Gill Review is awaited, we agree with the suggested actions identified in the Access to Advice paper designed to tackle some of the barriers that affect people seeking to use current remedies and that would also assist them to use any amended remedies under an amended Mortgage Rights (Scotland) Act in particular. We agree that these suggested actions should be fed back to the Gill Review team, with a view to ensuring mutually supportive recommendations. The key recommendations from that paper are set out below.
- 5.11 Firstly, Sheriffs could be encouraged to use their discretion to allow lay representatives to participate more fully in court proceedings to the extent that they currently do not. The possibility that specialist lay representatives could provide representation in some additional circumstances could also be explored. This would require change to court rules, or legislation to authorise representatives to conduct specific proceedings in the sheriff court. While this would widen the range of potential representatives, it would have a resource implication for agencies seeking to provide representation. However, this would fit well with the purpose of the SLAB's grant funding scheme, and the current arrangements for in-court advice provision.

- 5.12 Court programming is at the discretion of the Sheriff Principal. If repossession actions could be grouped in some way, preferably alongside eviction actions (albeit these are summary cause), this would also facilitate the planning and co-ordination of any in-court advice or duty representative scheme. Similarly, if the calling of these types of case could be co-ordinated across a group of courts in a given area, so that eviction and repossession cases called in different courts on different days, this would facilitate the provision of a peripatetic duty advice and representation scheme, enabling one representative to cover several courts. The more costly alternative is to have duty arrangements in place in each court in an area for any day on which ordinary or summary cause actions might call.
- 5.13 This would be of particular importance if our detailed recommendations for changes to the Mortgage Rights (Scotland) Act that would result in repossession cases calling in court are taken forward. Grouping of cases in the way suggested above would facilitate the most effective and efficient means of enabling access to services providing advice and representation.
- 5.14 Also, despite the action indicated in paragraphs 5.7 to 5.9, the court process can still be intimidating and confusing, potentially putting people off action that might help them resist repossession. We note that the civil courts review is looking at how housing cases, including repossessions, are dealt with, and whether they should be dealt with in a separate forum, perhaps outwith the courts.

We recommend changes to the Sheriff Court Ordinary Cause Rules (and, where necessary, to the relevant primary legislation) which:

- require that the papers served on a borrower, which initiate proceedings, include easily understandable plain English information. This information should explain repossession proceedings in the sheriff court and should refer the borrower to agencies that might be of assistance;
- enable borrowers in repossession proceedings to be represented by non-solicitor/advocate representatives (with clarification as to what might constitute such a representative) if they would find that helpful;
- ensure that ordinary cause actions which relate to mortgage repossessions are held in clusters as is often the case with summary cause actions for Scottish Secure Tenancies (SSTs). This should increase access to independent advice, including in-court advice. This new arrangement will however only operate well if recommendation 23 (that in general all enforcement cases for repossession should be heard in court) is implemented; and
- simplify the process by which an application may be made under the Mortgage Rights (Scotland) Act 2001, by the creation of a pro-forma application, with a view to enabling such applications to be easily made by lay persons.

A Simplified Recall Procedure

- 5.15 In discussing improvements to the legislation, we noted the scope for a simplified recall procedure. Current protections require the defaulter to apply for a Section 2 Mortgage Rights (Scotland) Act order in response to an action immediately after this is raised. Unfortunately, many defaulters do not address matters at this stage and only start to deal with them after the court decree is granted when a repossession date is already set.

- 5.16 Making the front end of the repossession process simpler and more accessible is a key part of this report. This could be complemented by a simpler post decree option for borrowers who do not defend the case when it is first raised. Advice agencies point out that they are often contacted by borrowers who have not responded to the repossession action and have been presented with a letter detailing the date on which they are due to be repossessed. A simplified Reponing Note procedure (similar to the Minute for Recall procedure in the Summary Cause Rules) could help advice providers and in-court advisors to stop impending repossessions and link people back into the court process and its protections.
- 5.17 Ordinary Cause Reponing Notes can be lodged with the court where the defender does not defend the action raised against them and decree for repossession is granted. Once lodged, this stops a repossession taking place and takes the case back to court where the case can commence from the beginning. Current procedure means a solicitor is normally needed to draft the note, a Sheriff needs to authorise it at court, and there is a lodging fee of £75. An amended procedure should include abolishing the lodging fee, allowing the note to be lodged with the Sheriff Clerk, and that the note have a simpler format similar to the form in the Summary Cause procedure.

Legal Aid

- 5.18 Legal aid can facilitate vital assistance from a solicitor for people who would otherwise be unable to afford it. It operates using a set of eligibility tests, which can appear complicated, but are designed to enable the system to continue to operate on an on-demand basis. We have considered the way that legal aid operates with regard to repossession actions, and there have been some concerns raised that this structure acts as a potential barrier to people taking forward defences and ultimately being able to secure their homes.

Contributions

- 5.19 Around a quarter of applicants for civil legal aid are assessed as able to pay a contribution towards the cost of their case. Until 7 April 2009, the maximum contribution payable was around £2,500. With the recent very substantial increase in the upper income limit for civil legal aid, the maximum contribution has also increased substantially (although the rate for those already eligible is unchanged).
- 5.20 The Board will only ever require someone to meet the cost of their case. If they have already paid more, they will be refunded. The average repossession case costs very much less than the average contribution. Based on a normal repayment schedule, the average repossession case would require payment of a monthly contribution of around £20 per month (an average case cost of £400, payable over 20 months, interest free). However, the average assessed contribution would be closer to £60 per month, which may appear significantly less affordable.
- 5.21 To avoid people being put off by the size of their assessed contribution when their case is likely to cost significantly less, SLAB allows solicitors to estimate the cost of the case at the outset. If the solicitor does so, SLAB will limit the amount collected to the estimated case cost. If the case turns out to be more expensive, SLAB will recover the rest of the contribution. However, the cost of most repossession actions should be readily estimated at the outset. SLAB is aware that not all solicitors advise their clients of this option, so some clients may be put off unnecessarily.

Clawback

- 5.22 Where someone wins or keeps property as a result of a legally aided case, SLAB will recover the cost of the case from the amount won or kept. This is known as clawback. There has been much confusion about how clawback operates in repossession cases. This may also have put people off defending a repossession, for fear that SLAB will make them sell their home if they keep it. SLAB has never forced the sale of a home and in any event, clawback is only payable in around half of all repossession cases (no clawback will be payable where the outstanding mortgage is greater than the value of the home).
- 5.23 SLAB will usually defer payment if someone decides to sell their home, or to arrange a repayment schedule. SLAB may also take a standard security, so that when the property is eventually sold, part of the proceeds can be used to discharge the liability. SLAB is obliged by law to charge the judicial rate of interest on all standard securities. This IS currently 8%, considerably higher than base rate.

New Options

- 5.24 Nevertheless, concerns still exist about the perceived bureaucracy surrounding the process for claiming legal aid, and the operation of clawback arrangements.

We recommend that:

- the interest rate chargeable for standard securities should be linked to the base rate, rather than tied to the judicial rate which is currently set at 8% (in line with the Scottish Law Commission's recommendations in relation to interest);
- solicitors be encouraged to contact SLAB whenever they have concerns about the impact of the clawback or contribution arrangements on their clients' ability to access legal aid, and that, where possible, SLAB look sympathetically at all such cases;¹⁴
- we would welcome clarification by SLAB about the steps that may be taken to recover legal aid costs, particularly clarification about how the available options for debt recovery would be used where a standard security is in place;
- the Scottish Government and SLAB (insofar as any such decision is for the Scottish Government with SLAB assuming an advisory function) keep the operation of the legal aid system under review (especially the income/capital thresholds at which contributions have to be made), and wherever possible simplify processes to encourage greater willingness among solicitors to engage in legal aid cases; and
- the Scottish Government should give further consideration to whether SLAB should be given a discretion to waive clawback where the cost (for instance of the standard security) would be disproportionate to the clawback concerned.

¹⁴ We do note, though, that SLAB has no discretion in applying the rules relating to clawback. The extent of SLAB's ability to look sympathetically at a case only extends to its ability to extend timescales for payment or the method by which the debt is deferred (by standard security).

Contextual Differences between Scotland and England/Wales for Helping people Faced with Repossession Proceedings

- 5.25 All of the suggestions set out above are designed to achieve the maximum positive benefit, bearing in mind the specific Scottish context with regard to the court process and the legal aid system. We believe that it is vital that this context is taken into account rather than to import arrangements that have been put in place in England/Wales.
- 5.26 The Legal Services Commission (LSC) housing possession duty scheme provides access to free initial assistance on the day in some courts in England and Wales. Any follow up work or work prior to hearings is subject to normal legal aid eligibility testing. It is, therefore, not accurate to suggest that there is free legal assistance for all in England and Wales on repossession matters. We also note that the eligibility limits are far more generous in Scotland than in England and Wales for people needing to access legally aided assistance.
- 5.27 Also, it is significant that in England, in contrast to the Scottish position, there is no judgement in default in repossession cases. That means that courts have set days on which the mortgage repossession cases call, and duty solicitor schemes can operate effectively, with individuals who turn up to a first hearing on the relevant day able to access initial advice. It is hard to see how duty solicitors organised in the same way as the English system could catch cases and assist people faced with repossession, given the current Scottish system.
- 5.28 Whilst the English arrangements have great merit in themselves for their own operating context, we believe that we should not simply emulate these arrangements. They would not (a) give completely free assistance; (b) provide blanket coverage; or (c) be effective given the current procedures for dealing with repossession cases in the Scottish courts.

6 Legislative Protection

- 6.1 We have reviewed the relevant legislation in an action for repossession, particularly the 1970 Act as a means by which to raise a claim for repossession, and the 2001 Act as the principal means by which such a claim might be resisted. We have considered the ways in which this legislation might be amended or strengthened to ensure that homeowners receive appropriate protection.

Present Situation

Conveyancing and Feudal Reform (Scotland) Act 1970

- 6.2 In the event of a borrower's failure to make the necessary repayments or to comply with any other term under a standard security, the creditor (lender) is entitled to seek to repossess and sell the property. The main remedies available to the lender following default are to proceed by way of a calling-up notice under s.19 of the 1970 Act; to proceed by way of a notice of default under s.21 of the 1970 Act; or to apply to the sheriff court under s.24 of the 1970 Act.

6.3 It is understood that in the vast majority of cases affecting residential property, in which the borrower is still in occupation of the property, proceedings are raised under section 24 of the 1970 Act.

Section 24 Application: Application to Court for Remedies on Default

6.4 Where a debtor (borrower) is in default, s.24 of the 1970 Act permits the creditor (lender) to apply to the court for a warrant to exercise the power of sale. Prior to the introduction of the 2001 Act, there was no procedure giving a court discretion to refuse an application in terms of s.24 where the court was satisfied that the creditor was entitled to the remedy or remedies sought; that is, that the debtor was indeed in default.

Mortgage Rights (Scotland) Act 2001

6.5 The 2001 Act changed the law on repossession by secured lenders and provided greater protection for borrowers and their families. The purpose of the 2001 Act is to permit a debtor (borrower) under a standard security over a residential property to apply to the court for an order suspending the rights of a creditor to sell the property.¹⁵ Section 1 of the 2001 Act provides that an application may be made to the sheriff court when the creditor (lender) has served a calling up notice, a notice of default, has made an application under s.24 of the 1970 Act, or has raised an action under s.5 of the Heritable Securities (Scotland) Act 1894 (affording the power to eject the proprietor in personal occupancy).

6.6 An application under s.1 may be made by:

- the debtor (borrower) him or herself;
- the proprietor (where the debtor is not also the proprietor);
- the debtor's or the proprietor's non-entitled spouse or civil partner where the property is the matrimonial or family home and is the spouse/partner's sole or main residence; or
- by a person living with the debtor/proprietor as husband or wife, or in a like relationship where they are a same sex couple, where the property is that person's main residence.¹⁶

6.7 Section 2 of the 2001 Act concerns the disposal of the application. Under s.2(1)(a) it may suspend the exercise of the creditor's rights to such an extent or for such a period of time and on such occasions as it thinks fit. In the case of an application under s.24 of the 1970 Act or s.5 of the 1894 Act, the court may continue the proceedings to such date as it thinks fit.¹⁷ The court can only make an order if it is satisfied that it is "*reasonable in all the circumstances*" to do so. In considering whether to make an order and on what terms such an order should be made, the court is to have regard to the factors listed in s.2(2). Those factors are:

- the nature and reasons for the default;

¹⁵ 2001 Act, s.1

¹⁶ 2001 Act, s.1

¹⁷ Such proceedings can be further continued under s.2(5)(b)

- the applicant's ability to purge the default and where appropriate their ability to participate in a debt arrangement programme approved under Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002;
- any action taken by the creditor to assist the debtor; and
- the availability of suitable alternative accommodation for the applicant or any other person residing at the security subjects.

6.8 Section 2(3) provides that if an order has been made and the debtor performs the obligations under the standard security, the security has effect as if the default had not occurred. Where requested by the creditor or the applicant, the court may vary or revoke an order made under s.2(1)(a).

Implementation of Section 11 of the Homelessness (Scotland) Act 2003

6.9 We welcome the action taken by the Scottish Government to require lenders and landlords to inform local authorities when initiating court action for repossession, so that local authority homelessness services are geared up to respond quickly to any forthcoming presentation for homelessness and proactively offer as much advice and assistance as they can at the earliest opportunity.

Problems with the Existing System and Options for Legislative Change

Improvements to the Mortgage Rights (Scotland) Act 2001

6.10 We considered a paper which presented different options to ensure that legislation provided suitable protection to homeowners facing repossession. Discussion focused upon ways in which the Mortgage Rights (Scotland) Act 2001 could be improved.

6.11 We note the peculiarity of the existing system whereby a secured creditor does not necessarily need to bring a case before the court. If a lender proceeds by way of either a 'calling up notice' or a 'notice of default,' and if a homeowner leaves the property of his / her own volition, the creditor is able to take possession of and sell the property without appearing before the court. Although in practice the bank usually gets a court order under s.24 of the 1970 Act, the fact just mentioned creates a logical difficulty for the policy of debtor protection. One cannot be sure that a court will protect the debtor if the case does not have to go through the court in the first place.

6.12 This is, we think, the reason, or a reason, why the 2001 Act opted for a system in which it is up to the debtor to make an application to the court to obtain protection. The trouble with that, however, is that most debtors never actually take that step. We do not have statistics as to the proportion of cases in which an application is made under the 2001 Act, but we understand that the figure is around 10% to 20% or perhaps even lower.

6.13 To ensure that the policy behind the 2001 Act can always be applied by the court, the first step would have to be to change the law to ensure that all enforcement cases have to go to court (with specified exceptions as covered above). This would require the 1970 Act to be amended. Such amendments, though, would not be too radical in terms of new burdens imposed on lenders, in that most (but not all) banks bring such cases before court anyway. Moreover, this proposal would harmonise the arrangements for

repossession of owner occupied homes with those in relation to rented homes. In the case of rented homes, all but a handful of cases are raised as summary causes, the rules in relation to which require that eviction actions must always call in court, irrespective of whether the action is defended.

- 6.14 To make this change, a rule could be introduced requiring the Sheriff Court to consider in every case¹⁸ whether to suspend enforcement in accordance with the 2001 Act principles. Consequently, there would be more scope to deliver the policy of the Act.
- 6.15 The provision might be framed as follows:
- in respect of property to which the 2001 Act relates, a standard security can competently be enforced only by means of a section 24 application;
 - in considering a section 24 application in relation to such property, the court should, whether the application is opposed or not, suspend the exercise of the specified rights to such an extent (if at all) as is provided for by section 2 of the 2001 Act.
- 6.16 The Group noted that s.2 of the Mortgage Rights (Scotland) Act 2001 says that the court may suspend the secured creditor's enforcement powers 'for such period ... as the court thinks fit'. The Group also noted that s.40 of the Bankruptcy (Scotland) Act 1985 says that the trustee's power to sell the debtor's home may be suspended, but there is a statutory maximum to the suspension period that the court can order.
- 6.17 The Group discussed the idea of amending s.2 of the 2001 Act to set a maximum to the suspension period which the court can impose. The unlimited nature of the existing power is arguably unfair to creditors, and might even be held to be inconsistent with Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR). If a maximum period were to be specified, the period ought to be less than the maximum period specified in s.40 of the 1985 Act, on the basis that a secured claim should not be rendered less effective than an unsecured one.
- 6.18 The Group did not, within the time available, come to a concluded view on these issues, but it recommends to Ministers that these issues ought to be considered further.
- 6.19 At the same time, we recognise that it may not be desirable to lengthen the period for the repossession of properties which have been abandoned or voluntarily surrendered; that properties lying empty may deteriorate; and that they need to be sold as quickly as possible. One approach, therefore, could apply where people are still living in the property to be repossessed and another where it is empty. A list of exceptions could be drawn up following research (which should also consider criteria according to which a property's abandoned status might be determined).
- 6.20 An owner's disappearance, for example, might make it difficult for the creditor to serve a notice. This might prolong the repossession process. The problem might be addressed by considering the property abandoned, if no response is given to the notice served.

¹⁸ That is, every case covered by the 2001 Act. It would not affect, for example, standard securities over commercial property. At the same time, allowance would be made for instances of voluntary abandonment or where it is in the best interest of the borrower to exit home ownership.

- 6.21 It is also important to ensure that voluntary surrender is not made a longer or more difficult process. It is also vital, though, that the borrower clearly understands that there is a court remedy/other alternative avenues open to them. Additional costs to debtors ought to be considered too, whereby the trade-off between additional protection and increased costs is addressed.
- 6.22 This alteration would appear to render the application procedure in the 2001 Act redundant. Amendments would, therefore, need to be made. The 2001 Act notice period, though, could still serve to alert people to their rights.
- 6.23 We recognise that such change would have cost implications in terms of additional judicial time, and that proposed legislative changes should be subject to a full cost benefit analysis. By adopting default rules for undefended cases, though, the costs should be modest. The issue could also be resolved if less time was spent on evictions in the social rented sector (insofar as fewer cases involving the eviction of social tenants are drawn out through the court process, as opposed to less time being spent on each case).
- 6.24 This change represents a feasible solution in the short term. In the longer term, we feel that the law of standard securities requires further consideration; both in terms of residential and other cases. This might be a suitable project for the Scottish Law Commission to undertake.

6.25 We recommend:

- that, subject to formal consultation with all affected interests, when the impact on court time and lenders can be examined in more detail, the Scottish Government act to ensure that the protection available through the Mortgage Rights (Scotland) Act 2001 should apply in all cases, not just those where the borrower makes an application (except where the borrower has voluntarily surrendered the property or where it has been abandoned); and
- that, in the longer term, the Scottish Law Commission review the law of standard securities.

Requiring the Courts to Ensure that the Lender Has Considered Every Alternative to Repossession

- 6.26 We believe that it is too early to assess the impact of the UK Government’s Pre-Action Protocol. Whilst it might focus lenders’ minds on the issue of rising repossessions, we note too that there are issues with consistency of its interpretation by judges, and that similar concerns might exist if any equivalent were to be introduced in Scotland.
- 6.27 We note that the Pre-Action Protocol in England and Wales does not have any substantive legal effect, and does not directly affect the rights or obligations of either the borrower or lender.
- 6.28 Nevertheless, we believe that a requirement for the courts to consider that all appropriate steps have been taken by the lender to avoid repossessions would have considerable merit.

- 6.29 Most lenders, for their own ease as far as possible, seek to operate repossession processes in a uniform way across the UK. The processes introduced to comply with the protocol in England and Wales are likely, therefore, in effect to apply here by default, not least because CML's own guidance, which was introduced at the same time as the protocol in England and Wales, and emphasised the importance of ensuring that every alternative to repossession was considered, applies across the UK.
- 6.30 We note that pre-action protocols are not a common feature of the legal system in Scotland (although there is one for commercial actions in the Court of Session and three voluntary examples in place for personal injury, professional negligence, and industrial disease cases), and we are conscious that the independence of the judiciary means that Scottish Government Ministers cannot impose any pre-action protocol in Scotland. Indeed the protocol in England and Wales was not actually introduced by UK Ministers, although they welcomed its introduction, for similar reasons of independence.

- **We recommend** that the Scottish Government take steps to amend the primary legislation to require lenders to show that they have considered every reasonable alternative to repossession, and the courts to consider the extent to which they have done that when deciding on repossession cases. Factors to be considered might include: the nature of and reasons for the debt in relation to which a decree is granted; any action taken by the creditor to assist the debtor in paying the debt; the debtor's financial position; the reasonableness of any proposal by the debtor to pay the debt; or the reasonableness of any refusal by the creditor of, or any objection by the creditor to, any proposal by the debtor to pay that debt.

Improved Legislative Protection

- 6.31 Where the borrower's mortgage is in arrears, there is rarely any basis on which to defend an action under section 24. Accordingly, the principal means by which a borrower might resist repossession proceedings is by way of an application under the 2001 Act, the essential purpose of which is to enable the court to give the borrower time to repay the arrears, to make arrangements for the sale or remortgage of the property.
- 6.32 It is not possible to give an exact figure for the number of repossession cases in which an application is made by the borrower under the 2001 Act. However, it is our understanding (largely on the basis of information provided by lenders' representatives on the group) that the figure is no greater than 10% and may be as little as 5%. It therefore seems reasonable to suggest that the Act is underused.
- 6.33 Various reasons were put forward as to why this is the case, including:
- a lack of awareness among borrowers that the provisions exist and are available to them;
 - the formality and complexity of the process, which is difficult to utilise without legal advice and representation;
 - the difficulty in assessing such advice, particularly in certain parts of Scotland;

- the cost of representation, which may have to be met by the borrower if they are ineligible for legal aid;
- the perception that the Act can only assist the borrower if he/she has concrete proposals for the payment of the outstanding arrears within a certain period of time; and
- the apparent inflexibility of the legislation, which offers limited options to the court.

6.34 Discussion of the legislative improvements focused on how effective they could be in protecting homeowners. Specifically, we considered the extent to which the protection on offer might have more of an impact were there to be less reliance on the home owner – unfamiliar with legal complexities as they often are – to initiate their defence. We suggest that ways to improve borrower representation in actions for possession might focus upon the recommendations immediately below.

To improve legislative protection, **we recommend** the following amendments to the Conveyancing and Feudal Reform (Scotland) Act 1970 and the Mortgage Rights (Scotland) Act 2001:

- that lenders be required to raise court proceedings in all actions for the repossession of residential property, but only after they have taken certain steps (reflecting the regulatory requirements of the FSA or other relevant regulatory bodies), and with the exception of cases in which the lender can demonstrate that the property has been voluntarily surrendered or abandoned;
- that actions under section 24 of the 1970 Act must call in court and be subject to a hearing at which the borrower may be represented, irrespective of whether an application is made by the borrower under the 2001 Act. The following issues would be determined at this hearing:
 - whether the lender has taken those steps required of them (as per the first bullet point above);
 - whether the proceedings ought to be continued or adjourned;
 - whether a borrower ought to be required to lodge an application under the 2001 Act, where they have not already done so but have nonetheless appeared or have been represented at the hearing;
 - whether any application made by the borrower under the 2001 Act ought to be granted or refused at the hearing, or alternatively considered at any evidential hearing; and
 - whether it is reasonable to grant decree in favour of the lender, where there has been no appearance by the borrower, and having regard in particular to the factors set out in section 2(2) of the 2001 Act.
- that calling up notices and the form of action applicable to them (sections 19 and 20 of the 1970 Act) should be preserved and that these should continue to be applicable for voluntary surrenders and abandoned property;
- that cases of voluntary surrender or abandoned properties should not have to be subject to court action or a court hearing;
- that provision for non-solicitor/advocate representation be included within the 2001 Act;
- that consideration should be given to allowing the calling up notice period, with agreement, to be reduced to nil, as was the position prior to the 2001 Act; and
- that the factors to which the court is directed to have regard in terms of section 2(2) of the 2001 Act be extended. This extension should include consideration of the options and support available to the borrower to assist him in meeting his obligations to the lender and in retaining his property. This might include the MtR and MtSE schemes, Homeowners Mortgage Support and any other forms of mortgage support available at the time and relevant to different lenders.

Tenants of Private Landlords Subject to Repossession Proceedings

- 6.35 In our discussions we recognised that a particular problem might be experienced by tenants of landlords who themselves have defaulted on their mortgage. There are a number of different circumstances in which this might happen. We were advised that, in many cases, the mortgage may not be a buy-to-let mortgage and the lender may not be aware of the existence of a tenant. We believe that the scale and nature of this problem merits further investigation.
- 6.36 We noted the UK Government's intention to consult over the summer on improved protection for tenants in this situation in England and Wales. Whilst there are differences between the relevant statutory provisions in Scotland and in England and Wales, we believe that tenants in Scotland should have no less protection. Solutions are likely to be found by improving both the legal framework and the dissemination of good practice.
- 6.37 We discussed a proposal to change the provisions of the Housing (Scotland) 1988 Act which apply in cases where the lender seeks to evict the assured tenant of the defaulting borrower. Currently the court must grant an eviction order in such cases. The proposal suggested that such evictions should be discretionary. This would have the effect of allowing the court to consider whether, in all the circumstances of the case, it would be reasonable to grant a decree for possession in favour of the lender. We also discussed whether the relevant case law¹⁹ should be written into statute, clarifying that lenders must take a separate action to recover a property where the defaulting borrower has let the subjects under an assured tenancy.
- 6.38 These are complex issues. Within the scope of our work, there was not time to consider all the options that might be pursued. We recommend therefore that, in preparing proposals, following our report, the Scottish Government seeks to evaluate the problem and potential solutions more fully with a view to ensuring that tenants who may have no knowledge that their landlord is in default do not become additional victims of the changed economic conditions.

Expenses

- 6.39 A number of the recommendations made within our report have implications for the expenses involved in repossession cases. Two issues appear to be key in this regard. Firstly, by requiring more cases to call in court, it is important that already indebted people are not unnecessarily exposed to further debt. Secondly, it should be remembered that mortgage contracts currently require the borrower to agree to meet all the lenders costs in taking action in pursuit of default, and that there is no discretion for the court to amend this. We noted the issue of expenses in our discussions and recommend that the Scottish Government consider whether it might be appropriate to clarify the law in this area and whether expenses attributed to court actions should be scrutinised by the court. At the same time, we recognised that there might be concerns that, ultimately, such a change might not be in the borrower's interest.

¹⁹ Tamroui v. Clydesdale Bank (1997).

7 Other Action that Could Be Taken by Government and Others

- 7.1 We note that there is no regional breakdown of the data indicating UK-wide repossessions. Estimating the number of Scottish repossessions, on a per capita equivalent, is somewhat inaccurate. To understand more clearly both the level of repossessions in Scotland, the effectiveness of those measures introduced to address rising repossessions in the current economic downturn, and whether further action is required in future, it would be useful to have access to Scottish-specific data from lenders.
- 7.2 We recognise that some additional costs may be incurred for lenders in supplying such data. There is currently no incentive for them to supply data in different ways in different parts of the UK.

We recommend:

- that the Financial Services Authority be asked to require lenders to provide regional data on a regular basis, preferably every quarter, but at least six monthly, to better understand the numbers of repossessions in Scotland and other parts of the UK (to the benefit of policy makers in Scotland and elsewhere); and
- similarly, in terms of information gathering, that court data be regularly analysed to compare the number of repossession actions raised in sheriff courts with the number of decrees granted over the same period.

- 7.3 Our discussion considered two further issues; evictions of tenants in the social rented sector, and the recommendations in the recent OFT report about ‘sale and rent back’ schemes, which propose that such schemes be brought into the scope of FSA regulation. As to the latter, we welcome proposed action by the UK Government to achieve this and urge that regulation be implemented speedily.
- 7.4 We were also concerned that evictions of tenants in the social rented sector should not be considered as less significant than those of home owners, and urged the Scottish Government to set up a similar group to the Repossessions Group to quickly review whether the support and protection available for social rented sector tenants also needed strengthening.

8 Conclusion and Summary of Recommendations

- 8.1 The existing legislation and other measures recently taken by the Scottish and UK Governments already offer home owners in Scotland considerable protection when appropriately accessed. However, we believe that our recommendations would ensure better protection, which is more easily accessed and more widely available across Scotland, for home owners at risk of repossession.
- 8.2 We also recognise that the current economic climate affects tenants in the social rented sector and note the need to consider changes to enhance their security.
- 8.3 In the current difficult economic circumstances, with forecasts of a potential significant rise in repossessions occurring this year, we believe these proposals assume even greater importance. We recognise, however, that our legislative proposals would need to be subject to a formal consultation process. This should involve a wide range of

interested stakeholders, so that issues such as the impact on lenders and the smooth running of other court business, could need to be more formally assessed.

8.4 We recommend that the actions below are taken by the Scottish Government and other interested parties.

No.	Recommendation	Follow Up Action & Responsibility	Paragraph Reference
1.	Lenders and the courts to ensure clear and easy to understand information and assistance for borrowers.	Lenders / Courts	2.9
2.	Visible warnings as to the risks of non-regulated sale-and-rent-back schemes.	Sale-and-Rent-Back Providers and Scottish Government	2.9
3.	Improved relevant advice for those facing redundancy.	Lenders and Employers	2.9
4.	Those at risk of losing their homes to be fast tracked when receiving face to face assistance.	Advice Agencies	2.9
5.	Capacity across the sector to be made a priority when allocating resources (with support to gain accreditation).	Scottish Government	2.9
6.	Liaison between Scottish Government, CoSLA, SLAB and Advice Agencies to address gaps in advice provision	Scottish Government, CoSLA, SLAB, Advice Agencies	2.9
7.	The Scottish Government to keep under review, in these difficult and uncertain circumstances for homeowners, whether funding for schemes is adequate (and to recognise that further funding may still be required), and whether eligibility requirements are appropriate.	Scottish Government	3.5
8.	The UK Government and lenders to be encouraged to ensure that there is maximum participation in the UK Home Owners Mortgage Support Scheme; that it be a requirement for those lenders receiving significant lenders of public funding to assist others with their own financial problems.	UK Government and Lenders	3.8

9.	The risk that the Home Owners Mortgage Support Scheme simply postpones the risk of repossession to a later date be monitored as the scheme is rolled-out.	UK Government	3.9
10.	SMI be made available when a household has lost one income to make the scheme fairer and to provide greater reassurance to those families facing an uncertain future.	UK Government	3.11
11.	Rate at which SMI is paid to be fixed to the actual rate of interest paid by the homeowner.	UK Government	3.11
12.	Lenders to be encouraged to show similar restraint with Scottish borrowers wherever possible (with court action being considered only as a last resort), and where this is in the borrower's best interest.	Scottish Government, UK Government and Lenders	4.7
13.	Regular data to be monitored on the impact of HMS and its take-up in Scotland.	Scottish Government, UK Government and Lenders	4.7
14.	Lenders to be encouraged to look at options for rescheduling debt to make repayment more sustainable.	Lenders	4.7
15.	Lenders and advice agencies to liaise as to policies and procedures for struggling homeowners.	Lenders and Advice Agencies	4.7
16.	Lenders' advice for consumers to be made as simple as possible; in plain English and taking account of any differences in the legal position in Scotland.	Lenders	4.8
17.	Sheriff Court Ordinary Cause Rules (and relevant primary legislation) to be amended (papers to include easily understandable plain English information, lay representation, ordinary cause actions relating to mortgage repossessions to be held in clusters, and simplification of application process under the Mortgage	Scottish Government and Rules Council	5.14

	Rights (Scotland) Act 2001.		
18.	Interest rate chargeable for standard securities be linked to the base rate, rather than tied to the judicial rate (currently set at 8%)	Scottish Government	5.24
19.	Solicitors be encouraged to contact SLAB whenever they have concerns about the impact of the clawback or contribution arrangements on their clients' ability to access legal aid.	SLAB and Law Society of Scotland	5.24
20.	Clarification by SLAB as to the steps that may be taken to recover legal aid costs, particularly about how available options for debt recovery would be used where a standard security is in place.	SLAB	5.24
21.	Operation of the legal aid system to be kept under review (especially the income/capital thresholds at which contributions have to be made), and wherever possible simplify processes to encourage greater willingness among solicitors to engage in legal aid cases.	Scottish Government and SLAB	5.24
22.	Scottish Government to consider whether SLAB should be given a greater discretion to waive clawback where the cost (for instance of the standard security) would be disproportionate to the clawback concerned.	Scottish Government	5.24
23.	Subject to formal consultation with all affected interests, and where the impact upon court time and on lenders can be examined in more detail, the Scottish Government to bring forward legislation to ensure that the protection available for the borrower through the Mortgage Rights (Scotland) Act should apply in all cases not just those where the borrower defends the action (except where the borrower has voluntarily abandoned the property).	Scottish Government	6.25

24.	Scottish Law Commission be invited to review the law of standard securities, over the long term.	Scottish Government and Scottish Law Commission	6.25
25.	Scottish Government to take steps to amend the primary legislation to require lenders to show that they have considered every reasonable alternative to repossession, and the courts to consider the extent to which they have done that when deciding on repossession cases.	Scottish Government	6.30
26.	Legislative protection for home owners facing repossession to be improved through amendments to the Conveyancing and Feudal Reform (Scotland) Act 1970 and the Mortgage Rights (Scotland) Act 2001.	Scottish Government	6.34
27.	The Financial Services Authority to be asked to require lenders to provide regional data to better understand the level of repossessions in Scotland and other parts of the UK.	Scottish Government to liaise with FSA	7.2
28.	Court data to be regularly analysed to compare the number of repossession actions raised in sheriff courts with the number of decrees granted over the same period	Scottish Government	7.2

Annex A: Repossessions Group Remit, Membership and Meeting Dates

The **remit** of the Group was:

- to consider urgently whether the legal protection for homeowners in Scotland at risk of repossession provided through UK legislation and in Scotland through such vehicles as the Mortgage Rights (Scotland) Act 2001 and the Conveyancing and Feudal Reform (Scotland) Act 1970 is adequate and, if necessary, make specific recommendations on ways in which either reserved or devolved legislation should be strengthened; and
- to consider what else the Scottish Government, the UK Government and others such as lenders, advice agencies and legal services might do to help those at risk of repossession and reduce the risk of repossession.²⁰

Membership

Adrian Stalker (Chair)
Paul Brown, Legal Services Agency
Gavin Corbett, Shelter
Keith Dryburgh, Citizens Advice Scotland
Anne Feeney, Convention of Scottish Local Authorities
Paul Fenn, Home Loan Management
David Forrester, Finance and Leasing Association
Kennedy Foster, Council of Mortgage Lenders
Yvonne Gallacher, Money Advice Scotland
George Gretton, Scottish Law Commission
Mark Higgins, Irwin Mitchell
Sarah O'Neill, Consumer Focus Scotland
Hazel Thoms, Scottish Legal Aid Board
George Way, Law Society of Scotland

Meeting Dates

1. Wednesday 11 February 2009
2. Wednesday 4 March 2009
3. Wednesday 1 April 2009
4. Wednesday 22 April 2009
5. Wednesday 13 May 2009

²⁰ This is set out online at <http://www.scotland.gov.uk/Topics/Built-Environment/Housing/access/repossessions>

Annex B: UK / Scotland Repossession Statistics

Council of Mortgage Lenders – UK Statistics

Repossessions across the UK have increased considerably in the last few years. Recently published figures from the Council of Mortgage Lenders show that repossessions were as high in 2008 as they were in the mid 90s (at 40,000) and will be as high in 2009 as the previously highest recorded levels of 1991 (at 75,000).

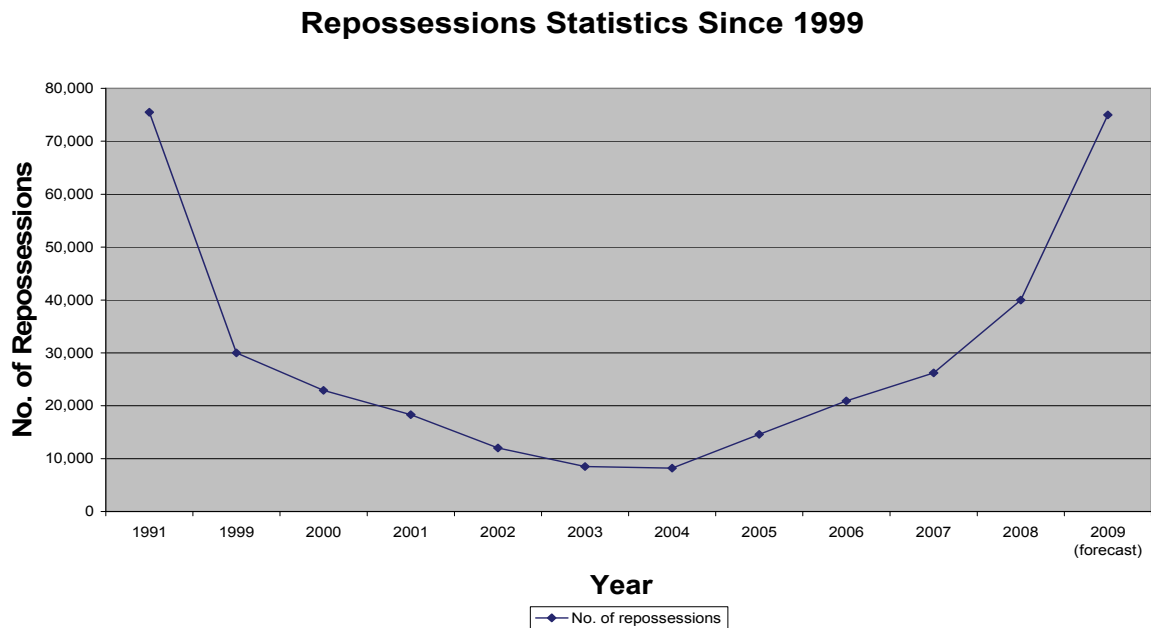
In 2008, of the homeowners who had their homes repossessed, 18.6% simply ‘handed back the keys.’ This was up from 13.9% in 2007. However, during the period 1994 to 2002, the percentage of people who voluntarily handed back their properties was always higher than 18.6%.

There is no specific data on repossessions in Scotland. However, available data (see below) show that repossessions across the UK have increased considerably over the last few years.

CML UK repossessions statistics since 1999 (1991 for comparison):

Year	No. of repossessions
1991	75,500
1999	30,000
2000	22,900
2001	18,300
2002	12,000
2003	8,500
2004	8,200
2005	14,600
2006	20,900
2007	26,200
2008	40,000
2009 (forecast)	75,000

The following graph underlines the sharp increase both seen and predicted:



Scottish Court Statistics

It should be noted that data on court actions for repossession cannot be used to estimate the number of, or trend in, actual repossessions. Scottish Government analysts have created a short life working group to look at improving the coverage and timeliness of data on such issues.

Number of court actions initiated for 'mortgage / loan lender' repossessions decreased by 51% during the period April 2008 to January 2009;

Numbers decreased each month between September 2008 and December 2008, but increased by 15% in January 2009;

Number of repossession decrees granted for the lender showed a steady increase from April to October 2008 (58%), BUT this has decreased by 43% over the past three months to just below the number granted in April 2008;

Court orders in England and Wales increased by 19% in 2008 (compared to 2007 figures);

The vast majority of actions are granted in favour of the lender and are undefended;

Landlord / Property owner repossessions have remained relatively stable with decreases in November and December counteracted by an increase in January.



The Scottish
Government

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