



## **Response to: Consultation on impacts of joint tenancies on victims of domestic abuse**

### **About Rights of Women**

Rights of Women is a legal rights organisation which specialises in supporting women who are experiencing – or at risk of experiencing – all forms of Violence Against Women and Girls (VAWG), including domestic and sexual violence. In our approach, we recognise the additional barriers posed by the intersection of gender-based abuse, racism, structural inequality and other forms of discrimination and oppression that impact on women's vulnerability, exclusion and marginalisation.

By offering a range of services – including specialist telephone legal advice lines, legal information and training for professionals – we aim to increase women's understanding of their legal rights and improve their access to justice. We empower women to make informed choices where they come into contact with the criminal, family, employment or immigration and asylum legal systems so they can live free from violence.

Rights of Women is a registered charity 1147913 and Company Limited by Guarantee.

### **Rights of Women's consultation response**

Before answering the specific questions asked in the consultation we would point out that as a women's legal organisation we will confine our responses to law and legal policy issues within our skills and experience. We have chosen to respond to the questions which relate specifically to family law (questions 18 to 21) as that is where our knowledge and experience will be most useful.

### **Q1: Please could you select the following option that most applies to you:**

- Legal professionals

**Q17: Please provide your views on how effective the current means available to landlords to support victims in joint tenancies, as set out above, are.**

We are only responding to questions which relate to family law as other organisations are better placed to respond to this question in detail. We would like to raise one point which seems to have been overlooked in the consultation, which is that some social landlords insist on a court order even though the perpetrator consents to the joint tenancy being assigned to the survivor. This creates unnecessary litigation and expense. It can also create further harm to survivors (for example, perpetrators may threaten or abuse survivors if they feel she is taking too long to obtain the order).

**Q18: Have you ever been involved in the process of taking legal to transfer a joint tenancy due to domestic abuse?**

Other (see below).

**If yes and known, please detail:**

- **What your role in the process was (e.g. victim, landlord, lawyer)**
- **What type of legal action you took**
- **How long the process took**
- **Who was involved in the process (please do not use names)**
- **Whether the legal action was successful**
- **Any difficulties you faced during the process**

Rights of Women has advised many survivors of domestic abuse on the law and procedure relating to transfers of tenancies on our family law advice lines. In addition, advisors at Rights of Women have experience of representing women in applications to transfer a joint tenancy in the Family Court.

It is not possible to answer the specific questions as Rights of Women has experience of advising many women on these issues and the questions are framed to gather experience of one case. However, we have addressed systemic issues in question 19 where we have highlighted barriers and difficulties women face based on our experiences both in advising women on the advice line and in representing women in practice.

Information on how long applications take, who is involved in the process and success rates should be ascertained from the data held by HMCTS.

We have provided a case study below to illustrate the types of cases we come across:

One advisor supported Lina (not her real name) following her husband's application for a financial orders and divorce. Lina migrated to England and spoke little English. She fled to a refuge after experiencing domestic abuse. By the time the perpetrator's application for

financial orders came before the courts Lina and her child had been living in temporary accommodation for 5 years, and had been relocated to several different addresses in different parts of the country. This caused significant detriment to the survivor and the welfare and education of her child. As Lina was eligible for legal aid she was advised that she could apply for an order for the secure tenancy of the home she had lived in with the perpetrator to be transferred to her sole name. After a lengthy court process she was able to obtain the order and finally achieve safety and stability for herself and her child. Lina was completely unaware of her options before seeking legal advice. If her husband had not instigated legal proceedings, and had Lina not been eligible for legal aid, she would probably have continued living in temporary and insecure accommodation.

**Q19: Please provide your views on how successfully the law on joint tenancies functions to enable victims to transfer such tenancies into their own name. Please provide reasons.**

**If you have views on multiple different legal mechanisms, please separate your reasoning for each.**

**You could also consider whether and how the law on joint tenancies could / should be changed to support victims of domestic abuse.**

Our view is that the legal mechanisms to achieve a transfer of tenancy are used fairly infrequently and are therefore unsuccessful in achieving the aim of enabling survivors to live safely in their homes. We believe this is because the law on transfer of tenancy is overly complicated, and the process to obtain an order is costly and lengthy.

Many survivors who call our advice lines do not know what type of tenancy they have, whether it is possible to assign the tenancy, or that it is possible for one of the joint tenants to unilaterally surrender the tenancy. As a result, there are many survivors who are not aware that they can apply to transfer a tenancy.

Those survivors that go on to consider applying for a transfer of tenancy must then ascertain which of the several different legal mechanisms is appropriate for their situation. They must complete several documents, face the perpetrator at potentially several hearings, and make legal arguments. This can overwhelm survivors to the extent that they decide not to embark on such applications and deal with the consequences of being homeless or remaining on the joint tenancy instead. These issues are heightened for women with additional vulnerabilities such as women with disabilities, migrant women who may have less knowledge of the laws and procedures of England and Wales or women who face additional language barriers.

Survivors who are married or in a civil partnership with the perpetrator must apply for a divorce or dissolution in order to obtain a transfer of tenancy (unless they apply under Schedule 1, Children Act 1989). This additional set of legal proceedings adds to the feeling of being overwhelmed. The court cannot make an order assigning the tenancy to the survivor until the divorce or dissolution has reached the 'conditional order' stage, which adds delay to the process and may necessitate the additional application of an injunction to forbid

the perpetrator from serving a notice to quit before the order to transfer the tenancy is obtained. All of this adds to the cost and complexity of the case and stress to the survivor. It also makes unfair distinctions between survivors who are married/in a civil partnership and those who are not. It is procedurally easier to obtain a transfer of tenancy where a couple has been cohabiting leaving victims of abuse who are married or in a civil partnership in a more complex legal position.

The issues the courts will consider when deciding an application to transfer a tenancy is the housing and financial resources of both parties. In cases where the perpetrator continues to live in the home, and the survivor has fled the home temporarily thereby showing she is able to provide alternative accommodation for herself and her children, the survivor is at a distinct disadvantage despite the reason she is not in the home is her own safety. This indicates that the needs and safety of the survivor and any children are not sufficiently prioritised.

The ability to secure legal support and representation is a key consideration for survivors contemplating whether to apply for an order to transfer a secure tenancy. Legal costs will be several thousands of pounds which survivors who need these types of orders are unlikely to be able to afford. Many survivors who call our lines are unable to satisfy the legal aid means test despite being unable to afford legal representation and this is reflected in research by Surviving Economic Abuse and others.<sup>123</sup> Some survivors may decide not to proceed with the application as result of being unable to access legal representation. Survivors who choose to apply without legal representation have to deal with the impact of litigating directly with their perpetrator and struggle to understand the law and procedure which can negatively impact upon their case.<sup>4</sup>

Survivors who are eligible for legal aid sometimes tell us that they find it difficult to find legal aid lawyers to take on their case. This could be because these types of applications are economically unviable at legal aid rates, and there are fewer firms with legal aid contracts. Occasionally we receive calls from survivors who appear to be eligible for legal aid but have been led to believe that legal aid is no longer available for these types of disputes, which may be because professionals and the public struggle to understand the very complicated legal aid eligibility criteria.

Survivors who are eligible may also experience delays in obtaining legal aid in circumstances where legal aid providers are unable to use delegated functions, which leaves survivors at risk in cases where the perpetrator could surrender the tenancy at any time.

The family justice system is underfunded and experiencing delays and backlogs for hearing cases, leaving parties with unresolved legal issues for what may be years in some cases.

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<sup>1</sup> Orr, S., Denied justice: How the legal aid means test prevents victims of domestic abuse from accessing justice and rebuilding their lives, Surviving Economic Abuse, 2021.

<sup>2</sup> Walker, S-J. and Hester, M. for the Domestic Abuse Housing Alliance (2019), Policy Evidence Summary 4: Justice, housing and domestic abuse, the experiences of homeowners and private renters.

<sup>3</sup> The Law Society, Prof. Hirsch, Loughborough University, 2018: [Priced out of Justice? Means testing legal aid and making ends meet](#)

<sup>4</sup> Speed, Anna, Richardson, Kayliegh, Northumbria University (2022), 'Should I Stay or Should I Go Now? If I Go There will be Trouble and if I Stay it will be Double': An Examination into the Present and Future of Protective Orders Regulating the Family Home in England and Wales', The Journal of Criminal Law

This places survivors of domestic abuse at particular disadvantage. If they are living with the perpetrator because the court has refused to make an occupation order, they face an ongoing risk of harm during the course of lengthy proceedings. If they fled the home, they are likely to be living in temporary and unstable housing, causing significant anxiety and potentially increasing the chances that they may return to the perpetrator. Delay is also harmful to children who are either living with a perpetrator of abuse or who have their lives disrupted because of changes to their accommodation.

We recommend:

- Simplifying the law and procedure to enable transfers of tenancies to survivors of domestic abuse. Legislation should be introduced that enables the Family Court to transfer a tenancy to a survivor of domestic abuse. We support the Domestic Abuse Housing Alliance and other's proposals<sup>5</sup> that there be certain scenarios where a transfer is automatic or where there is a presumption that a transfer will take place. We suggest that legislation should address transfer of tenancy for both joint tenancies *and* sole tenancies which is currently possible under the different legislative provisions. We would not support legislation that separates rules in relation to joint tenancies from sole tenancies as this will lead to further complication.
- Legal aid should be available to survivors of domestic abuse to ensure they understand their legal options and are represented through the process.
- Address the issues which have led to significant backlogs in the family justice system's ability to hear cases and reduce delays which leave survivors in unsafe situations.

**Q20: Have you ever taken any (other) legal action, such as obtaining an occupation order, against your abuser? Please include details on why you did / did not take legal action, and your experience of that legal action.**

- Yes
- No

**Please provide details.**

We frequently provide advice on non-molestation orders and occupation orders to survivors on our family law advice lines.

If the perpetrator continues to live in the home then a survivor may apply for him to be excluded from the home. The experiences we hear from survivors who are joint tenants applying for occupation orders can be summarised as follows:

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<sup>5</sup> DAHA, Standing Together, Women's Aid: [Joint Tenancies and Survivors of Domestic Abuse Domestic Abuse Bill Briefing](#)

The courts have emphasised that an occupation order excluding someone from their home or interfering with their property rights is a draconian order which should only be made as a last resort<sup>6</sup>. This sets a very high bar for the applicant survivor.

When applying the balance of harm test the court will consider the likelihood of the perpetrator being able to secure alternative accommodation if he were excluded from the home. If a perpetrator is unlikely to secure alternative accommodation then the prospects of the courts excluding him are low. The fact that local authorities will consider a perpetrator who is excluded due to domestic abuse to be intentionally homeless (thereby lowering his chances of obtaining alternative accommodation) is sometimes a reason why the courts decide not to exclude him from the home.

The courts very rarely make an occupation order excluding the perpetrator from the home at a without notice hearing. The usual practice is to make the non-molestation order and list an urgent on-notice hearing to consider the occupation order. Even with a non-molestation order in place, survivors we speak to would not feel safe living in the home with the perpetrator once he is served with notice of her application. Survivors who have nowhere else to stay whilst they await the on-notice hearing may be reluctant to make the application at all.

Occupation orders are short term measures usually made for a period of 6 to 12 months. If an order transferring the tenancy is not made in that time then the applicant will have to apply to renew the occupation order (with all the added expense and trauma that this involves), or live with the risk that the perpetrator may return to the home.

It remains to be seen whether the approach to excluding perpetrators from their home or the short-term nature of these orders will change with the introduction of Domestic Abuse Protection Orders (DAPOs).

The legal aid means test is a significant barrier for survivors who need legal advice and representation in order to apply for an occupation order. Whilst the 'domestic abuse waiver' means that many survivors will be eligible, the contributions are unaffordable because of the way income and capital is assessed which makes legal advice and representation inaccessible. Research commissioned by the Law Society found that 20% of victim-survivors who were eligible for an injunction could not proceed with the application as they could not afford the contributions that were required with the waiver<sup>7</sup>. We recommend that these issues are addressed as a priority as part of the Government's means test review.

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<sup>6</sup> Chalmers v Johns [1999] 1 FLR 392; Wiseman v Simpson [1988] 1 FLR 490; G v G (occupation order) [2000] 2 FLR 36

<sup>7</sup> Research into the impact of the legal aid capital and contribution thresholds for victims of domestic violence, 2018, The Law Society

**Q21: Please provide your views on how successfully temporary injunctions work to enable victims to prevent perpetrators from serving a notice to quit. Please provide reasons.**

An injunction which prohibits the perpetrator from serving a notice to quit is temporary, so it will only assist a survivor for a limited period of time. Furthermore, injunctions of this nature are ancillary to other applications (i.e. an application for an order transferring the tenancy to the survivor). Injunctions are not a permanent, standalone solution to a survivor's housing issue. An occupation order preventing the perpetrator from excluding the survivor from her home would not be enough to prevent him from serving notice to quit<sup>8</sup>.

Once an injunction is obtained it may be fairly useful in temporarily preventing the perpetrator from surrendering the tenancy until further orders are obtained to transfer the tenancy. However, survivors may face the following issues when trying to obtain an injunction to prevent the perpetrator serving notice to quit:

- The costs associated with applying for an injunction (for those who are not eligible for legal aid) will be many thousands of pounds. This is in addition to the costs for the application to transfer the tenancy and possibly divorce / civil partnership dissolution. The cost alone prohibits survivors from applying for injunctions.
- Those who are eligible for legal aid sometimes find it difficult to find a legal aid lawyer willing to take on the case, for reasons similar to those discussed in response to question 19.
- Some survivors may be reluctant to apply because if she is unsuccessful she may have to pay the perpetrator's legal costs.
- The existence of a joint tenancy which is capable of being terminated by one tenant is not enough to obtain an injunction. The courts will only grant an injunction if they consider it to be proportionate. This means that most judges will want evidence that the perpetrator is likely to serve a notice to quit, for example evidence from the survivor that the perpetrator has expressed an intention to surrender the tenancy. Survivors who are not able to produce such evidence may be dissuaded from applying for the injunction and will be left living in fear that the perpetrator could, at any time, serve notice to quit.

**Rights of Women**

**10 May 2022**

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<sup>8</sup> Harrow LBC v Johnstone [1997] 1 WLR 459