Introduction
1. The Council of Mortgage Lenders (CML) is the representative trade association for mortgage lenders. Our 136 members and 82 associates comprise banks, building societies, insurance companies and other specialist mortgage lenders who, together, lend around 98% of the residential mortgages in the UK. In addition, the CML members have lent over £60 billion UK-wide for new-build, repair and improvement to social housing.

2. CML Scotland welcomes the opportunity to respond to the Scottish Government Consultation on Repossession of Residential Property: Protection of Tenants

3. This response has been prepared following consultation with members including members of our arrears and possessions panel, our legal panel and our buy to let panel. In addition we are grateful to a number of our associate law firms - who represent lenders in possession cases – who have also contributed to this response.

4. We have looked at the Scottish Government proposals at the end of this response. There are however a number of general points and issues that should be taken into account by the Scottish Government and these are discussed in the first part of this response.

Executive summary
5. Whilst having huge sympathy with unauthorised tenants (UTs) we believe that the numbers concerned are very low and that the situations where the UT does not know about the possession action are very few. Any action considered by the Scottish Government should be proportionate. A good starting point would be to identify the scale of the problem as they have endeavoured to do in England and Wales.

6. An UT occurs because a borrower has acted in breach of his mortgage conditions. A lender is an innocent party in these circumstances. UTs usually occur in the owner occupier sector rather than the buy to let sector.

7. Lenders work with the interests of tenants and UTs in mind. If an UT is identified and is willing to work with the lender, our members will do all they reasonably can to assist.

8. The consultation paper states it “is about how to improve the protection for unauthorised tenants in the event of the landlord’s property being repossessed by a mortgage lender, while balancing the needs and rights of lenders”. Unfortunately it does not explain what the needs and rights of lenders are and we have attempted to explain these in this response.
9. We would urge the Scottish Government to pull back from these proposals and set up an Expert Group to examine this issue.

General Comments
10. The consultation paper outlines that in the time which was available to it the Repossession Group did not have sufficient time to consider the options that might be pursued to strengthen the protection for UTs. We entirely agree that this was the case but it was our understanding that it was agreed this was a complex issue which required further investigation and it would be worthwhile bringing together a number of members of the Repossession Group with expertise in this area to consider the matter further. Unfortunately this did not happen and we are now faced with 3 potential options for legislation without any detailed study of the issue and as admitted in the consultation no understanding of the extent of the problem. In our view it is disappointing that potential legislative options are being considered on this basis.

11. There seems to be an assumption in the consultation that all UTs will have a short assured tenancy but this may not be the case. There may not be a written tenancy agreement in existence and it could be based on a verbal agreement between the borrower and tenant. Alternatively there could be a written agreement to let for a longer period than you would normally see in a SAT. Are the options intended to cover all types of tenancies?

Legal Position of Lenders
12. A Lender should not be bound by the terms of a tenancy it has not consented to (and which does not exist when the mortgage is granted). Any reversal of this position will impact on the lender’s security and the Scottish Government must ensure that nothing in any ensuing legislation changes this position.

13. It is important to remember that the lender’s contractual relationship is to the borrower. The lender has a number of legal and regulatory duties which it owes to the borrower. Under Section 25 of the Conveyancing and Feudal Reform (Scotland) Act 1970 “A creditor in a standard security having right to sell the security subjects may exercise that right either by private bargain or by exposure to sale, and in either event it shall be the duty of the creditor to advertise the sale and to take all reasonable steps to ensure that the price at which all or any of the subjects are sold is the best that can be reasonably obtained.” To delay sale because of an UT may put a lender in breach of that duty – particularly in a falling market.

14. Since October 2004 owner occupier loans (but generally not buy to let loans) have been subject to regulation by the Financial Services Authority. Part of that regulation requires lenders to treat customers fairly. The customer is the borrower and not the tenant – whether consented to or otherwise.
15. Regulation is also through a set of rules in the “Mortgages and Home Finance: Conduct of Business sourcebook” (MCOB). MCOB 13 relates to arrears and possessions. Clause 13.6.1 states that a firm must ensure “whenever a property is repossessed (whether voluntarily or through legal action) and it administers the regulated mortgage contract or home purchase plan in respect of that property, steps are taken to (1) market the property for sale as soon as possible; and (2) obtain the best price that might reasonably be paid, taking account of factors such as market conditions as well as the continuing increase in the amount owed by the customer.”

16. The guidance note accompanying the rules recognises that a balance has to be struck when deciding when to sell the property but does not refer to the position of tenants. This is a balancing act that lenders are naturally nervous about. Delay could be challenged by the borrower through the courts or through the Financial Ombudsman. The statement provided by the FSA in the consultation on UTs in England and Wales does little to offer lenders comfort on this point.

17. Clearly as outlined in 15 (2) above in looking at the balance which needs to be struck you have to look at the continuing increase in the amount owed by the landlord. As an example the average mortgage in the UK is currently £110,800 and the average interest rate at September 2009 was 3.58%. An interest only mortgage on this basis would require a monthly interest payment of £330 and this would be compounded as interest was applied to the mortgage with no payment being received.

18. The consultation recognises that an UT in Scotland enjoys certain protections which are not available in England and Wales. It has to be remembered that prior to raising possession proceedings a lender will have had to go through its forbearance arrangements with the landlord before raising an action for possession. Once a possession order is granted and should the tenant not wish to leave the property voluntarily the lender would have to apply for a Notice of Ejection. We understand that on average from serving of the initial possession papers through to actual ejection can take between 200 and 360 days. Surely this gives the tenant adequate time to find alternative accommodation.

Data protection issues

19. In the corresponding consultation in England and Wales it refers to work having been carried out with the Information Commissioner in the area of data protection issues. The Scottish Government do not appear to have given any consideration to the issue of the level of information which lenders can provide to either a tenant or UT to enable them to obtain advice and understand their rights and obligations in a situation where their landlord faces repossession. A lender’s prime responsibility is to the borrower who is their customer and they are currently treading a very fine line on what they may or may not say to a tenant or an UT. The Scottish Government may wish to mirror our call to the UK
Government to give consideration to lessening of data protection requirements and expressly allowing disclosure of information between a lender and a tenant/UT in the situations contemplated by the consultation.

**Tenants being unaware of the lender taking possession**

20. The consultation refers to tenants first become aware of the matter when the lender seeks to enforce the repossession order. This should not be the case. Lenders are required by court rules to serve a notice on the occupier by recorded delivery. If it is thought this could be strengthened due to the fact that the tenant does not read the notice then consideration could be given to following what is now done in England and Wales where the notice has to be addressed to the occupier or any tenant of the property. A simple and practical solution.

21. In addition lenders will often carry out checks at the property themselves before seeking possession. Some lenders send agents to try to make contact with the borrower and any tenant (authorised or otherwise) would have the chance to make contact at that stage.

22. Similar checks are made throughout the process and in our view it is very rare for the tenant not to know about their landlord’s position early on in the possessions process. The tenant may choose not to take action but that it a different issue.

23. It is important that the focus on an UT does not prejudice the lender to such an extent that the lender will not be able to show forbearance to the borrower.

**Some Practical Steps which could be taken to avoid UTs**

24. The Scottish Government in recent years has done a lot work in terms of the relationship between landlord and tenant through the likes of the introduction of the landlord registration scheme and the development of accreditation schemes. In our view steps should be taken at the outset of the contract between landlord and tenant and it is in this area that the Scottish Government should be concentrating its efforts and not introducing legislation which impinges on the contractual rights of an innocent party, the lender.

25. There is the possibility of resolving the issue by due diligence at the start of the transaction. A Sasine or Land Register search can show a prospective tenant whether there is a Standard Security recorded/registered against the property. If consent is obtained at the start of the transaction the tenancy will be binding on the lender and can only be terminated by the lender in accordance with the law surrounding the relevant tenancy. Due diligence of this type would remove the issue of UTs entirely.

26. We appreciate that this approach does not match the informality that the introduction of short assured tenancies brought to the market. It would also increase costs – both for the borrower and the tenant. Likewise it would impose
an administrative burden on lenders which would need careful consideration. So there would be both advantages and disadvantages to making due diligence of this type compulsory. It is however disappointing that the Scottish Government does not seem to have given any consideration at all to this stage in the process.

27. The Form of Short Assured Tenancy could be looked at to see whether it could be amended to either include:
   - A warning notice to advise the tenant to check the Sasine or Land Register to ascertain whether there is a Standard Security over the property. A guidance note could also be produced in this regard.
   - Incorporating into the Tenancy Agreement a clause which requires the landlord to confirm whether a Standard Security over the property.
   - What would happen in the case an HMO? Would the application require to be by all tenants or could you have individual tenants under the HMO making successive applications?

Scottish Government Proposals
28. We not believe that any of the proposals outlined are particularly attractive from the perspective of our members. They are innocent parties in the case of UTs and it is the borrower who is in breach of their mortgage terms and conditions.

29. The paper is silent on some of the factors we believe that a Court should have to take into account if it was to be given power to intervene on behalf of UTs.
   - Is the tenant in collusion with the borrower to delay possession?
   - Is the occupancy a genuine tenancy or some form of occupancy e.g. the rent of a room which should not be given such protection?

30. The paper does not say what would happen to the rent if the Court were to allow the U/T a continued period of occupancy. In our view the UT should during such a period pay the rent to the lender so as not to prejudice the lender or borrower. Receipt of that money should not be regarded as acceptance of rent and should not require the lender to “accept the tenancy” or to be obligated to take on responsibilities of landlord under the tenancy. If the Scottish Government intends to proceed with any of its proposed options this should be provided for in the legislation and we would strongly oppose any of the options set out in this consultation if this point is not dealt with in any amendments to the Home Owner and Debtor Protection (Scotland) Bill. It would also be necessary to consider what would happen if UT did not pay rent during this period.

31. What would happen if the Court allowed a continued period of occupancy at the end of that period the UT chose not to vacate the property? They would clearly be in breach of a Court Order but would the lender still need to apply to evict the UT? If so given the present length of time taken to obtain an eviction
order it would be a further 3 month period before the lender could physically obtain possession.

32. Should the Scottish Government be determined to push through any of these proposals the initial feedback from our members is that they would favour option 2 as this would give them certainty over the outstanding length of the tenancy whereas the other options leave matters much more open ended.

**Conclusion**
33. We would urge the Scottish Government to pull back from these proposals and put together a Group of interested parties including lenders and their advisers who could look at this issue as a matter of urgency and consider potential solutions. It is surely not right to introduce legislation when you do not understand the extent of the problem and which does nothing to address the underlying root of the problem which is the failure of the landlord to obtain the consent of the lender to the lease.

34. This response has been prepared by the CML in conjunction with its members. Any comments or enquiries should, in the first place, be directed to:

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