The Law Commission
Consultation Paper No 168

RENTING HOMES
2: CO-OCCUPATION, TRANSFER AND SUCCESSION

A Consultation Paper

London: TSO

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Honourable Mr Justice Toulson, *Chairman*
Professor Hugh Beale QC
Mr Stuart Bridge
Professor Martin Partington CBE
Judge Alan Wilkie QC

The Secretary of the Law Commission is Mr Michael Sayers and its offices are at Conquest House, 37-38 John Street, Theobalds Road, London WC1N 2BQ.

This consultation paper, completed on 22 August 2002, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

The Law Commission would be grateful for comments on this consultation paper before 15 November 2002. Comments may be sent –

By post to:

Matthew Waddington
Law Commission
Conquest House
37-38 John Street
Theobalds Road
London
WC1N 2BQ
Tel: 020-7453-1208
Fax: 020-7453-1297

By e-mail to:

housingandadmin@lawcommission.gsi.gov.uk

It would be helpful if, where possible, comments sent by post could also be sent on disk, or by e-mail to the above address, in any commonly used format.

All responses to this Consultation Paper will be treated as public documents, and may be made available to third parties, unless the respondent specifically requests that a response be treated as confidential, in whole or in part.

The text of this consultation paper is available on the Internet at:

http://www.lawcom.gov.uk

83-250-04

THE LAW COMMISSION

RENTING HOMES 2: CO-OCCUPATION, TRANSFER AND SUCCESSION

CONTENTS

	Paragraph	*Page*
PART I: INTRODUCTION		1
Introduction	1.1	1
Scope of our proposals	1.3	1
Exclusions	1.4	1
The subordinate nature of this consultation paper	1.6	2
Issues addressed in this paper	1.20	4
The nature of the occupation agreement	1.24	5
Structure of the contract	1.25	6
The persons to whom the agreement will apply	1.31	6
The period of time over which the agreement will last	1.32	7
Regulatory impact	1.35	7
PART II: OBTAINING CONSENT		8
Introduction	2.1	8
Structure of consent requirements	2.5	8
The current position	2.5	8
Simplifying the options	2.16	11
Withholding consent: reasonableness in consent requirements	2.27	12
Special cases	2.34	13
Effect of transactions where necessary consents have not been obtained	2.45	15
Our approach	2.47	15
PART III: CO-OCCUPATION AGREEMENTS		20
Introduction	3.1	20
The current law of joint occupation	3.3	20
Our approach	3.9	21
Joint occupation agreements – creation	3.14	22
Joint occupation agreements – liability	3.20	23
Joint and several liability	3.21	23
New joint occupiers entering the agreement	3.29	24
A right to a joint agreement?	3.32	24

	Paragraph	*Page*
Effects of applications to bring in new joint occupiers	3.51	27
Joint occupiers seeking to withdraw from the agreement	3.59	29
The formal route	3.62	29
The informal route	3.102	35
Non-contractual arrangements	3.113	38
Possession proceedings – proposals for protection	3.115	38
Restricting the landlord's power to regulate non-contractual occupiers?	3.124	39
Amending the Family Law Act 1996	3.132	40
Other matters	3.139	42
PART IV: THE RIGHT TO TAKE IN LODGERS		43
Introduction	4.1	43
Type I agreements	4.3	43
Definition of "lodger"	4.6	43
A consent requirement?	4.20	46
Application to type II agreements	4.29	47
Should lodgers have a written agreement?	4.37	48
The effect of a lodger on the head landlord	4.42	48
PART V: SUB-OCCUPATION AGREEMENTS		50
Introduction	5.1	50
The current law	5.4	50
Statutory provisions	5.6	51
Our approach	5.9	52
Type I agreements	5.11	52
Sub-occupation agreements of part of the premises	5.12	52
Sub-occupation agreements of the whole of the premises	5.19	53
Type II agreements	5.30	55
The type and content of the sub-occupation agreement	5.34	55
The type of agreement	5.35	55
The terms of the sub-occupation agreement	5.47	57
Formalities	5.57	58
The effect on head landlords of authorised sub-occupation agreements	5.59	59
The resulting liabilities of landlords and sub-occupiers	5.67	60
PART VI: TRANSFERRING RIGHTS OF OCCUPATION		62
Introduction	6.1	62
Transfers	6.3	62
The current position	6.3	62
Our approach	6.5	63
Transfer of Rent Act statutory tenancies	6.12	63

	Paragraph	*Page*
Special cases	6.14	64
A right to transfer by mutual exchange	6.15	64
Transfers to potential successors	6.42	68
Transfer by order of family courts	6.57	70
Effects of the transfer of the right to occupy to another	6.72	73
Consent	6.73	73
Method of transfer	6.75	73
Formalities	6.78	74
The position of parties after a transfer	6.82	74
The relationship between sub-occupation agreements and transfers	6.103	79
Transfers of the residual periods of long leases	6.113	81
PART VII: THE EFFECTS OF THE DEATH OF AN OCCUPIER		82
Introduction	7.1	82
The effect of the death of the occupier on the agreement	7.2	82
The current law	7.2	82
Our approach	7.6	83
Termination of the agreement	7.16	85
A statutory right of succession	7.42	88
The present position	7.48	89
Our provisional proposals	7.50	90
Who should have the right to succeed?	7.55	91
How many successions should be permitted?	7.71	93
What counts as a use of succession rights?	7.82	95
When can the status of successor be lost?	7.88	95
To what should successors succeed?	7.97	96
Should there be separate treatment of fixed-term agreements?	7.101	97
Should joint succession be possible?	7.102	97
How should disagreements about who should succeed be resolved?	7.105	98
An alternative approach?	7.110	98
Effects of succession on past and future rights and liabilities under the agreement	7.113	99
Survivorship in joint agreements	7.120	100
Statutory succession	7.122	100
Termination of the agreement on death	7.127	101
PART VIII: OCCUPATION AGREEMENTS AND THIRD PARTY RIGHTS: TRANSFERS OF LANDLORD'S RIGHTS AND OTHER MATTERS		103
Introduction	8.1	103
The need to use principles of land law?	8.4	104

	Paragraph	*Page*
Housing law and land law	8.10	105
The policy of land law	8.12	105
Statutory exceptions to the land registration scheme	8.16	106
Overriding interests	8.26	108
The impact on licences	8.30	109
Conclusion	8.37	110
Rent Act 1977 statutory tenancies	8.43	111
Other third party matters	8.47	112
Application of the land law approach to landlords' successors in title	8.49	112
Registration of title	8.50	112
Informal leases	8.54	113
Mortgages	8.58	114
Landlords' superior landlords	8.64	115
The responsibilities of the new landlord: the effects of assignment of the landlord's reversion	8.74	117
The current position	8.75	118
Our approach	8.80	119
Other matters	8.88	120
Where occupiers can stop a landlord dealing with the landlord's interest	8.105	122
Social landlords	8.107	123
Private sector landlords	8.112	124
PART IX: SUMMARY OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS		125
APPENDIX: THE EXISTING SUCCESSION RULES		141
The Rent Act 1977	A.2	141
Member of the family	A.7	142
Residence	A.8	142
Determining priority	A.10	143
The Housing Act 1985	A.11	143
Member of the family	A.13	143
Successor	A.14	143
Determining priority	A.16	144
The Housing Act 1988	A.18	144
The Housing (Scotland) Act 2001	A.24	145
Qualified persons	A.26	146
Order of priority	A.28	147

PART I
INTRODUCTION

INTRODUCTION

1.1 In the first consultation paper arising out of our current project – Renting Homes 1: Status and Security, Consultation Paper 162 (henceforth "CP 162") – we set out our provisional proposals for the simplification of the law relating to the status and security of tenure of those with the right to occupy premises as a home, other than as freeholders or long leaseholders. At the heart of those proposals was the proposition that the granting of rights to occupy premises as a home should be seen primarily as a matter of contract between the parties. The terms of the contract would be shaped by principles of consumer law which would outlaw terms that were unfair.

1.2 We argued that this consumer approach would have two principal advantages:

(1) The contract would contain a full statement of the legal rights and obligations of both landlords and occupiers under the occupation agreement. Particularly, if expressed in Plain English, we argued that this should assist both sides to the contract to understand their legal position more readily than they can at present.

(2) This approach would be generally more suitable for this sector of the housing market. It would replace the complex and frequently incomprehensible combination of contract law, landlord and tenant (real property) law and statute law which had characterised the legal regulation of the rented sector of the housing market in the past.

SCOPE OF OUR PROPOSALS

1.3 The scope of our proposals was deliberately set wide. We argued that it should cover the vast majority of arrangements whereby the right to occupy a home has been granted by a landlord to an occupier. In particular, it would cover arrangements which, under the present law, would be classified as licences as well as tenancies.

Exclusions

1.4 We acknowledged that there would have to be exclusions from the proposed scheme. The letting of holiday homes or the grant of rights to occupy by a resident landlord were two such examples. Also excluded from our proposals were arrangements that did not relate to the *renting* of *homes* and which were, in any event, subject to other regulatory regimes. We did not, therefore, consider business tenancies, licensed premises and agricultural tenancies where alternative statutory schemes exist. It also excluded long leases (where we adopted, as a cut off point, leases in excess of 21 years) which amount, in economic and social terms, to a

form of owner occupation rather than a way of renting a home. Otherwise, we argued that there should be as few exceptions as possible.[1]

1.5 Our final recommendations on the scope of the scheme we propose will, of course, have to await our analysis of the responses to CP 162 and consideration thereof.

THE SUBORDINATE NATURE OF THIS CONSULTATION PAPER

1.6 Despite its length, CP 162 was based on the straightforward assumption that there would be a single landlord and a single occupier. It sought to set out proposals to regulate the relationship between the landlord and occupier.

1.7 In reality, people do not structure their lives in this simple and straightforward way. The situations in which occupation agreements are made will be much more varied and complex than this. A variety of examples can be envisaged:

(1) the landlord may wish to contract with a married or unmarried couple who wish to cohabit. They may be of different sexes or the same sex;

(2) the landlord may wish to contract with a group of friends, for example, a student letting;

(3) the landlord may wish to contract with a group who have come together for the sole purpose of sharing a flat or house;

(4) the landlord may wish to contract on a basis that combines one or more of the above, for example, a couple seeking to share with one or more friends;

(5) once a person has been granted a right to occupy, they may wish to bring in another as a lodger;

(6) a person with a right to occupy may wish to permit another/others to share or live in the premises on a non-contractual basis.

1.8 After the agreement has been made the occupier may want new people to be able to live at the property. This could be achieved by bringing them into the agreement as occupiers having a direct contractual relationship with the landlord, whether as a joint occupier with the original occupier or as a replacement for the original occupier (who may have died or moved). Alternatively, it may involve the new occupier having no direct legal relationship with the landlord. This may happen, for example, where the occupier allows other people to live in the premises on a non-contractual basis or grants a sub-occupation agreement. To reflect this variety of situations, our scheme needs detailed rules which determine how each of these transactions should be carried out, and what the position will be if it is not done correctly.

1.9 In legal terms, under our new scheme, persons who share accommodation may be classified as: co-occupiers (either contractual joint occupiers or non-contractual

[1] The final scope of these exclusions will depend at least in part on the outcome of the debate on our suggestion that the six month moratorium on the court being able to order possession be removed: see the summary at CP 162, para 9.162.

occupiers), lodgers or sub-occupiers. We deal with each of these categories, respectively, in Parts III, IV and V.

1.10 In addition, occupiers may want to transfer their rights of occupation to others. The circumstances in which this might be possible are considered in Part VI. Problems can also arise when an occupier dies: do others have the right to succeed to his or her occupation rights? These are considered in Part VII.

1.11 All these situations raise potentially tricky legal questions. Who is bound by the occupation agreement at any given time? What is the extent of the occupiers' liability under the contract? What rights of control should the landlord have over the identity of those who occupy the premises? What happens on the death of an occupier; can rights of occupation be passed on by will?

1.12 In the past, housing statutes have sought to deal with questions relating to succession, assignment and sub-letting but have given less detailed attention to joint tenancies and the rights of other members of an occupier's household. They have also made little express reference to the legal effects of dealings with the landlord's interest.

1.13 Our scheme must endeavour to accommodate the range of situations that arise in practice. It must be flexible enough to take account of the varieties of ways in which people live and straightforward enough to enable people to know where they stand if things go wrong.

1.14 In thinking about each of these categories, we must consider the relationship between the original occupier and joint occupiers, non-contractual occupiers, lodgers, sub-occupiers, transferees and successors. We must also consider the extent to which the landlord is bound by arrangements made with these people, who were not parties to the original agreement.

1.15 One aspect of this paper, to which we think attention should be drawn here, is that we have sought to consider the effect of the creation of occupation agreements on parties other than parties to the agreement. The question we have asked is: what should the basis be for deciding what rights occupiers under agreements covered by our new scheme have "against the world"? On what basis should the law decide whether the landlord's successor in title is bound by the agreements of their predecessor? This involves the consideration of the interaction of our proposed scheme with established principles of land law, particularly the law of landlord and tenant. These issues are considered in Part VIII.

1.16 We should make clear at this point that we are not suggesting that our new scheme should be expanded to interfere with the principles of land law over these issues. In practice, this will mean retaining a role for the lease-licence distinction. This approach is consistent with the suggestion made in CP 162 that that distinction should not have a role as between the immediate landlord and occupier, but that the distinction would remain of importance in determining the scope of third party rights and obligations. Our general approach is to propose that occupiers under agreements which count as leases will have rights both against the new landlord and against the world, whereas those under licences will not. However, we suggest that the consequences of a new landlord being bound should be determined by rules contained in our new scheme, rather than under the Landlord and Tenant (Covenants) Act 1995.

1.17 In order to avoid wholesale repetition of the argument in CP 162, we have in general taken the contents of that paper as read. Where necessary, we summarise the principal features of the arguments made there; and we frequently cross-refer to CP 162 for discussion of matters dealt with only briefly here. In this sense, this paper must be seen as subordinate to CP 162.

1.18 Nevertheless, it is essential that this paper both identifies the issues that need to be addressed to make our proposed scheme work, and offers clear and comprehensible solutions to the problems that arise in peoples' day to day lives. Notwithstanding the varieties of ways in which people may want to occupy their homes, our objective is to create a legal framework that is sufficiently clear to enable any occupier to know what his or her legal rights and obligations are, and also to allow the landlord to know what his or her rights and obligations are.

1.19 We will be looking for assistance from consultees for confirmation that we have achieved these objectives, and for information and suggestions relating to situations we have not contemplated.

ISSUES ADDRESSED IN THIS PAPER

1.20 Bearing these preliminary observations in mind, we summarise the principal issues addressed in this paper in a little more detail here:

(1) *Joint occupiers and non-contracting occupiers*. As indicated above (para 1.7), many people will want to occupy premises on a shared basis, as partners, friends or in other groups. Part III considers what should be the basic legal position where the landlord grants the right to occupy to more than one person. It also asks whether there should be circumstances in which existing occupiers should have a right to bring a new occupier into the agreement. It examines the extent of the rights and liabilities of the new occupier, both as against the other occupiers and as against the landlord. It then turns to consider the position of others in the occupier's household who do not have a contractual relationship with either the occupier or the landlord.

(2) *Lodgers*. In many situations, an occupier may want to take another person in to live in his or her home as a lodger. In Part IV we examine the extent to which occupiers should have the right to take in a lodger. We look at the position of the lodger as against the occupier and also as against the landlord.

(3) *Sub-occupiers*. Where an occupier does not wish to live in his home, or only wishes to live in part of it, he or she may want to "sub-contract" their rights of occupation to another. Part V deals with the question of the extent to which an occupier may sub-contract his or her rights of occupation – either to part only of the premises or extending to the whole of the premises – to others. We consider the extent to which landlords should be able to control this process. We ask what rights, if any, sub-occupiers would have against the landlord, if requirements relating to the obtaining of consent have not been complied with.

(4) *Transfer*. In Part VI we consider whether occupiers should be able to transfer (assign) their rights of occupation to another and, if they can, what is the nature of the relationship between the new occupier and the

landlord. We also consider the particular matter of the extent to which occupiers may enter arrangements to exchange their rights of occupation with another. Consideration is also given to the situation where a court orders an adjustment of occupation rights.

(5) *Succession*. Part VII considers the effect of the death of an occupier on the occupation agreement and the extent to which occupiers should be free to pass the rights under their occupation agreement to others.

(6) *Landlords' successors in title*. As mentioned above, Part VIII asks on what basis the law should decide what rights the occupier has against other classes of people. In particular, it considers what happens to the relationship between the landlord and the occupier when the landlord transfers their interest in the property to another.

1.21 One of the issues that recurs throughout this paper is the extent to which a landlord should be able to control any transactions which an occupier may wish to enter into in relation to his or her rights of occupation. Thus, as a preliminary matter, in Part II of this paper, we discuss the different rules relating to the current requirements for obtaining the consent of the landlord before the occupier takes a step, such as sub-letting or assigning the agreement. We propose a simpler set of rules and a new terminology.

1.22 In each case we consider whether occupiers should have the right to insist on changes to the agreement or the occupation of the property. We consider how such changes should be made. Where the parties to the agreement change, we discuss what requirements should be placed on the landlord to amend the written agreement. We also consider the effect there should be on the contractual liabilities, past and future, of the landlord, the occupier and any new occupier, if such a change is successfully carried out.

1.23 Some of the changes require the landlord's consent and will not be effective without it. In Part II we consider the effects of purported but unlawful exercises of the rights to transfer and make sub-agreements. In Part III we consider the effects where the consent required to bring in a new joint occupier is refused.

THE NATURE OF THE OCCUPATION AGREEMENT

1.24 In CP 162, we placed considerable emphasis on the occupation agreement as the source of rights and obligations as between landlords and occupiers. It was made clear in the discussion in CP 162 that the nature of this agreement would not be determined solely by contractual negotiations between the landlord and the occupier. Statute will determine:

(1) the structure of the contract;

(2) the persons to whom the contract will apply; and

[2] The right to take in lodgers and the rights of succession do not require the landlord's consent; there is, therefore, no question of any effect of a purported but unlawful exercise of the right.

(3) the period of time over which the contract will last.

The structure of the contract

1.25 We suggested[3] that the contract would contain three different types of term:

(1) Core terms;

(2) Compulsory terms;

(3) Default terms.

1.26 *Core terms:* These terms would relate to the core elements of the agreement and would include the names of the parties, the identity of the premises and the rent payable. They are terms which would have to be agreed between the landlord and tenant and properly recorded in the written agreement.

1.27 *Compulsory terms:* We identified two types of compulsory terms. Firstly, there were those that related to the circumstances in which a landlord could take proceedings for possession; secondly, there were terms – currently implied by statute – which would be set out expressly in the agreement. For example, we anticipated that section 11 of the Landlord and Tenant Act 1985, which currently implies certain repairing obligations on the landlord into tenancy agreements, would be adapted to become an express compulsory term of our proposed occupation agreements. These terms would in effect be imposed and not be capable of amendment.

1.28 In this paper, where we provisionally propose the introduction of a compulsory term into the occupation agreement, we shall broadly be reflecting existing (statutory) tenants' rights.

1.29 *Default terms:* Other terms will be available if the occupation agreement does not otherwise deal with the issue. We described these as the default terms. It must be remembered that default terms may be replaced by terms that have been negotiated by the parties, subject to the overriding principle of fairness in the Unfair Terms in Consumer Contracts Regulations 1999.

1.30 In short, while the occupation agreement is a form of contract, it is one whose shape and content is, to a significant degree, determined by underlying statutory rules.

The persons to whom the agreement will apply

1.31 As the list of issues to be considered in this Part clearly reveal, occupation agreements cannot be limited in their effect simply to those parties to the initial agreement. If this were to be the outcome, the occupation agreements would not cover the many complex living arrangements that people enter into. We seek to ensure that our occupation agreements can accommodate the fact that there may well be changes to the identity of the occupiers, and indeed landlords, under the agreement. We want to ensure that, as far as possible, changes made to the

[3] See CP 162, paras 6.89 to 6.124.

agreement do not require the agreement to be terminated and a new one created. We address these issues in this paper.

The period of time over which the agreement will last

1.32 By including proposals for provisions relating to when possession proceedings may be brought and that occupation agreements should not as a general rule be determined without an order from the court, we have already signalled that the terms of the contract – as shaped by statute – will determine the period of time over which occupation agreements will exist.

1.33 In this paper we examine a number of other situations in which the time during which the agreement will persist is considered. For example, we consider what should happen when one of a number of co-occupiers wishes to quit the premises; we also consider what should happen to the agreement on the death of an occupier.

1.34 It should be understood, therefore, that the agreements which we propose comprise a particular sort of statutory contractual arrangement. We hope that the majority of the matters to be addressed in this paper will be capable of being determined by the terms of the occupation agreement, as shaped by the underlying statutory rules. These issues will be discussed, in context, below.

REGULATORY IMPACT

1.35 We noted, in CP 162 at paragraph 1.95, that Government departments are all required to undertake a regulatory impact assessment of legislative proposals. As we explained there, although the Law Commission does not undertake this exercise, nevertheless **we would find information about the regulatory impact of our proposals extremely helpful**.

PART II
OBTAINING CONSENT

INTRODUCTION

2.1 In Parts III, V and VI we consider a number of situations in which a requirement to obtain consent will be required before a transaction can go ahead. For example: whether an occupier is entitled to add a new occupier to a joint occupation agreement, whether an occupier can create a sub-occupation agreement, whether an occupier is entitled to exchange his or her agreement with another person are all circumstances which will, we suggest, depend on the giving of consent by the landlord.[1] In Part IV we also raise the question of whether there are some circumstances where a landlord should have to consent to the introduction of a lodger.[2]

2.2 Where consent is required, the further question will arise as to the circumstances in which the person from whom consent is sought can properly withhold that consent.

2.3 To avoid constant repetition of the arguments, we hope it will assist the reader if we discuss the question of consent separately. It can then be assumed that – unless the context otherwise requires – the principles set out in this Part will apply in any case where there are consent requirements.

2.4 Three issues are considered:

(1) How should requirements to seek consent be structured?

(2) When should the withholding of consent be permitted?

(3) What should be the effect of ignoring any requirement to obtain consent?

STRUCTURE OF CONSENT REQUIREMENTS

The current position

2.5 The current law on the assignment of leases and sub-letting contains a number of provisions relating to the question whether the landlord's consent is needed. The starting point is the agreement. But contractual terms are supplemented by statutory provisions, which relate in particular to the restrictions, if any, on the landlord's ability to withhold any such consent.

2.6 As in other areas of housing law, the general common law and land law are supplemented by a number of specific housing-related statutory provisions. Provisions in the Rent Act 1977, the Housing Act 1985, the Housing Act 1988

[1] We do not consider here the issues where the head lease is not covered by our new scheme, or where a mortgagee's consent is required for the granting of a tenancy. These issues are covered in paras 8.64 to 8.73 and 8.58 to 8.63 below.

[2] Para 4.36.

and the Housing Act 1996 deal, in a variety of ways, with the circumstances in which sub-letting and/or assignment are permitted, and the consequences of failure to obtain requisite consents. These rules are themselves affected by the Landlord and Tenant Act 1927 and the Landlord and Tenant Act 1988. The result is a patchwork of provisions that is confusing, even for experienced practitioners.

2.7 Under the current law, four possible situations exist:

(1) no consent is needed and therefore a tenancy can be freely assigned or sub-let;

(2) there is an absolute prohibition, so that no lawful assignment or sub-letting can occur;

(3) consent is needed but it cannot be unreasonably withheld (a "fully" qualified covenant); and

(4) consent is needed but it can be unreasonably withheld (a "merely" qualified covenant).

We deal with each of these situations in turn.

No consent needed

2.8 At common law the tenant is able to assign or sublet without consent if there is no express covenant which prohibits the tenant from doing it. In practice, it is rare for a professionally drafted lease or tenancy agreement not to include an express covenant dealing with the question of assignment and sub-letting.

2.9 The only statutory intervention which prohibits the imposition of a requirement for the giving of consent is found in section 93(1)(a) of the Housing Act 1985. This gives secure tenants an absolute right to take in lodgers without the consent of the landlord.[3]

2.10 By contrast with a tenancy, a licensee – who has only a personal interest in the property – will usually have no power to assign or sub-let unless the power to do so is expressly given.

Absolute prohibitions

2.11 Under the current law, absolute prohibitions on the making of assignments or sub-letting are valid, save in three cases where rights for secure tenants are implied by statute and cannot be over-ridden.[4] The provisions of the Landlord and Tenant

[3] We discuss the right to take in a lodger in Part IV below.

[4] The Housing Act 1985 implies three relevant terms into secure tenancies which cannot be expressly overridden: (i) the right to assign by way of mutual exchange under s 92, subject to detailed procedures involving consent; (ii) the right to take in lodgers without consent under s 93(1)(a) and (iii) the right to sub-let part of the premises with the landlord's consent under s 93(1)(b). These terms are not implied into introductory tenancies.

Acts 1927 and 1988, which apply to qualified prohibitions, do not apply to absolute prohibitions.[5]

2.12 Even where there is an absolute prohibition in a tenancy agreement, there is nothing to stop a landlord agreeing to an assignment or sub-letting. For this reason absolute covenants against assignment or sub-letting are popular with private residential landlords' advisers, in that they give the landlord a great deal of flexibility. The landlord can depart from the strict terms of the prohibition when they so wish.

Qualified prohibitions

2.13 A "qualified" prohibition is one which prohibits assignment or sub-letting unless the landlord's consent has first been obtained. Two types of qualified prohibition may be identified:

(1) A "fully qualified" prohibition is where consent is required, but it cannot be unreasonably withheld.

(2) A "merely qualified" prohibition. Such a clause merely requires the landlord's consent; it does not impose any restrictions on the withholding of that consent. Thus under such a clause consent may, quite legitimately, be unreasonably withheld.

2.14 In practice, merely qualified prohibitions are usually deemed to be fully qualified by virtue of section 19 of the Landlord and Tenant Act 1927.[6] In other words the landlord is only entitled to withhold consent where it would be reasonable to do so. The Landlord and Tenant Act 1988 adds to this and applies to all fully qualified prohibitions, whether drafted as such or deemed to be such by the 1927 Act.[7] It imposes duties on the landlord to give a written decision (with reasons for any refusal) within a reasonable time of receipt of a written request for consent. It also imposes liability in damages for failure to comply with this duty.

2.15 Under section 15 of the Housing Act 1988, a merely qualified prohibition on assignment and sub-letting is implied into periodic assured tenancies (on which the landlord has not taken a premium and in which there is no express prohibition). The Landlord and Tenant Acts 1927 and 1988 do not apply to this particular category of implied prohibition.[8] Therefore in such a case, the landlord *can* unreasonably refuse consent to the assignment of a periodic assured tenancy.

[5] See para 2.14 below. Even where there is an absolute prohibition, an unlawful assignment will still be valid, although in breach – see para 2.45 below.

[6] This provides that consent may not be unreasonably withheld.

[7] The Act derived from a report of the Law Commission, Leasehold Conveyancing (1987) Law Com No 161.

[8] Housing Act 1988, s 15(2).

Simplifying the options

2.16 We think there is scope for simplification of these options.

The landlord's veto

2.17 As is apparent from the above analysis, there is in practice very little difference between an absolute prohibition and a "merely qualified" prohibition. The first does not require the landlord to do anything; the latter does require the landlord to take the step of saying no, but this can be done on any grounds whatsoever. Thus the outcome is the same.

2.18 In either case, and notwithstanding the term in the agreement, there is nothing to prevent the occupier from asking the landlord to ignore the term and allow him or her to take the step concerned. At the same time, the landlord has complete freedom to choose whether or not to allow the occupier to take the relevant step. In such circumstances, we consider that it would be appropriate to assimilate the two.

2.19 For the purpose of this paper, we describe this as the *landlord's veto*.[9]

Consent provision

2.20 The distinction should then be clear. Either there is a landlord's veto, which means that the landlord can simply say "no" to any proposal put to them; or there is a consent provision, which means a provision in which the landlord's approval is required but which he or she can only refuse on reasonable grounds.

2.21 When we refer to a consent term, in this paper, we mean a term that allows the landlord to refuse consent only where it is reasonable to do so. The question of reasonableness is discussed below.[10] There will be particular circumstances in which additional factors will need to be taken into account.[11]

2.22 There may be situations in which a person seeking consent claims that he or she asked for consent, but the person from whom the consent has been sought denies that they received the request. Arguments could be avoided were there to be a general requirement that any request be in writing. Such a provision would be reinforced by a requirement that proof of service of the request be provided.

No consent provision

2.23 There is always a third option, namely that the agreement contains no provision at all requiring consent. In such a case the occupier can do as he or she wishes.

[9] In a 1985 general report on covenants in landlord and tenant law – which was followed by Leasehold Conveyancing (1987) Law Com No 161 and in part taken up in the Landlord and Tenant Act 1988 – we criticised merely qualified covenants as "an anomalous and misleading staging post" between absolute and fully qualified prohibitions. We recommended that they should "be eliminated altogether from this area of the law". See Codification of the Law of Landlord and Tenant: Covenants Restricting Dispositions, Alterations and Change of User (1985) Law Com No 141 at para 4.70.

[10] See below paras 2.27 to 2.44.

[11] See for instance the questions discussed in paras 3.35 to 3.36 and 3.56 below.

Conclusion

2.24 We provisionally propose that three standard possibilities should be recognised:

(1) no requirement for consent;

(2) a requirement that the landlord gives consent, which can only be withheld on reasonable grounds;

(3) a landlord's veto.

These will be contained in the occupation agreement as appropriate.

2.25 **We further provisionally propose that the relevant term in the agreement should provide that any request for consent should be made in writing and that proof of service, for example by recorded delivery, should be obtained.**

2.26 The situations in which one or other of these positions should be a compulsory term, which cannot be amended, or a default term, which can be, is considered in the following parts of this paper.

WITHHOLDING CONSENT: REASONABLENESS IN CONSENT REQUIREMENTS

2.27 As will be seen, in most cases where we propose that the occupier can only do something with the landlord's consent, our standard position is that consent can only be refused on reasonable grounds. The obvious difficulty with the concept of reasonableness is that there can be considerable scope for argument as to what is or is not reasonable.

2.28 There is a great deal of case law on the question of reasonableness and unreasonableness, but most of this derives from the law relating to commercial leases. These involve taking into account rather different considerations from those which are likely to affect the granting of consents in relation to residential occupation agreements. We do not think that principles developed in the context of business leases should automatically be applied in the residential context.

2.29 We have considered whether we should attempt a detailed statutory definition of the concept of reasonableness. However, we have concluded that this would be just as likely to generate argument as leaving the question of reasonableness to the courts.

2.30 What is important is that an appropriate balance should be struck between the interests of landlords and the interests of occupiers in deciding whether or not consent should be granted or may properly be withheld. We have concluded that this should, in the last resort, be an issue that is left to the courts, just as the question of the reasonableness of making an order for possession is a question that is left to the courts.

2.31 This does, however, raise the question whether the discretion of the courts to determine what is or is not a reasonable refusal of consent should in any way be

structured. We suggest that in particular contexts, there should be a further refinement of what constitutes reasonableness.[12] We would welcome views on whether the general test of reasonableness should be the subject of a structured discretion and if so whether there are particular factors the courts should be required to take into account. These might include, for example, the likely ability of a new occupier to be able to pay his or her share of the rent; or the likelihood that they will behave in a responsible way if they take up occupation in the premises.

2.32 **We provisionally propose that what is meant by "reasonable" should not, in general, be statutorily defined.**

2.33 **We invite views on whether the discretion of the court to determine reasonableness in this context should be statutorily structured, and if so what factors should be taken into account.**

Special cases

2.34 There will be particular instances where it will be necessary to consider specific matters in reaching a decision on reasonableness.

Negotiated terms relating to consent

2.35 For example, in contexts where a requirement to give consent is contained in a default term, the parties will be free to agree an alternative term which specifies factors that must be taken into account in determining reasonableness. A failure to consider those factors could lead to the conclusion that consent was unreasonably withheld.

Failure by the landlord to respond

2.36 One of the problems that arises in practice is that the person from whom consent is required may simply ignore any request for consent. It is already the law that in the case of tenancies to which the Landlord and Tenant Act 1988 applies the person to whom application for consent is made must reply within a reasonable time.[13] This duty may be enforced as a claim in tort for breach of statutory duty.[14]

2.37 We think that it is not unreasonable to propose an extension of these provisions to our proposed scheme, so that a continued failure to respond to a request for consent should not prevent the occupier from taking the step concerned.[15] The question remains whether the period within which the requirement to give consent

[12] See eg the discussion at paras 6.29 to 6.37 below, in relation to consent to mutual exchange.

[13] Landlord and Tenant Act 1988 s 1. Consent may be given subject to conditions; if withheld, written reasons for refusal must be given. Where the recipient of an application is not the person able to give the consent, that person is under a duty to pass it on to the person who can give the consent: s 2. Where a tenant has granted an interest to another, and that other wishes in turn to grant a further interest, but this cannot be done without the consent of the head landlord, a similar duty to give consent within a reasonable time is imposed: s 3.

[14] *Ibid*, s 4.

[15] A similar issue arises in relation to the duty on the landlord to provide an address: see CP 162, para 6.79.

should be satisfied should remain simply "reasonable" or whether it should be more precisely defined. Our preliminary view is that a more precise definition would be more useful.

2.38 **We provisionally propose that it should be a compulsory term in the agreement that where a person whose consent to a transaction is required fails to respond within a given period to a request for consent, this should be regarded as an unreasonable refusal of consent, so that the requisite consent should be deemed to have been given.**

2.39 **We invite views on what that appropriate period should be.**

Provision of reasons for refusal

2.40 We also think that where landlords are entitled to refuse consent they should provide reasons for refusal; otherwise the occupier will find it hard to judge whether or not the refusal is reasonable. It will also be of assistance to the occupier if the landlord is required to state their reasons for refusal in writing. Again this provision is already found in the Landlord and Tenant Act 1988;[16] the principle should therefore be extended to all agreements falling within our proposed scheme.

2.41 **We provisionally propose that where landlords think they have reasonable grounds to refuse consent, they should be required to inform the occupier of the reasons why consent was refused.**

2.42 **We invite views on whether the landlord should be required to provide a written statement of reasons and, if so, whether this should be a universal requirement to apply in all cases or one that only arises where the occupier asks for it.**

2.43 The further question remains of what the sanction should be on the landlord who, having been asked for a statement of reasons, fails to produce one. The most draconian sanction is to provide that the landlord who fails to provide reasons, or fails to provide the correct reasons,[17] should be deemed to have provided reasons that failed to demonstrate that the withholding of consent was reasonable. This approach would be consistent with our provisional proposal where the landlord has failed to respond within a defined time period.[18] Alternatively, or in addition, the current remedy – an action in tort for breach of statutory duty – could be made available.

2.44 **We invite views on the sanction that should be applied to the landlord who fails to provide a written statement of reasons, following a request – properly made – so to do.**

[16] Landlord and Tenant Act 1988, s 1(3)(b)(ii) and s 3(2)(b)(ii).

[17] This might occur in a large office where a set of reasons relevant to one case was inadvertently sent to another; in such a case it might be thought that the draconian solution suggested would be too severe.

[18] See para 2.36 to 2.39.

EFFECT OF TRANSACTIONS WHERE NECESSARY CONSENTS HAVE NOT BEEN OBTAINED

2.45 Under the present law, transactions in breach of covenants against assignment or sub-letting – whether absolute, merely qualified or fully qualified – do not prevent an assignment or sub-letting being valid.[19] Instead they render the tenant[20] liable to eviction for the breach of the agreement. Statutory provisions may result in the tenancy being taken outside relevant housing legislation, so that a tenant loses his/her protective housing status.[21] Statute may also prevent the tenancy coming back into protection again even after the unlawful transaction has ended.[22]

2.46 We accept that this situation is necessary in the context of commercial leases or long leaseholds. But we think that – for the purpose of housing law – the present state of the law is unnecessarily confusing.

Our approach

2.47 For the purpose of our scheme, we think that where the occupier has made an arrangement with a new person to occupy the premises, contrary to the landlord's veto, or without obtaining the requisite consent, the following consequences should flow:

(1) Any agreement entered into without the required consent should still be valid as between the parties to the unauthorised agreement.

(2) As against the occupier who entered the unauthorised agreement, the landlord should have the right to take proceedings for possession on the ground that a term of the occupation agreement had been broken.

(3) As against the person who imposed the veto or who had reasonably refused consent, any purported transaction made in breach of a veto or a term requiring consent should not be valid. Thus a landlord would not be bound by the consequences of a transaction carried out by an occupier in the teeth of a veto or where consent had been reasonably withheld.

2.48 **We provisionally propose that the occupation agreement should make clear that any transaction carried out by the occupier, which was either contrary to the landlord's veto or subject to consent which has been reasonably withheld, will expose the occupier to the possibility of possession proceedings for breach of the occupation agreement, and will not bind the landlord.**

[19] See *Governors of the Peabody Donation Fund v Higgins* [1983] 1 WLR 1091.

[20] Who will be the head tenant in a case of unlawful sub-letting, and the assignee in a case of unlawful assignment.

[21] See Housing Act, 1985 s 91(2) and s 93(2), and Housing Act 1996 s 125(5)(a) and s 125(6).

[22] Housing Act 1985, s 91(2) and s 93(2). Note that there is no equivalent provision in the Housing Act 1988.

2.49 Where necessary consent is not obtained, the effect is that the occupier will continue to be the occupier, but the position will be different as between an unlawful sub-occupier and an unlawful assignee.

2.50 An unlawful sub-occupation agreement will take effect in the way agreed between the sub-occupier and the occupier, who becomes the sub-occupier's landlord. But on termination of the head agreement, the head landlord will not be bound by the sub-occupation agreement as they have not consented to it.

2.51 By contrast an unlawful purported assignment will not take effect in the way agreed between the purported assignor and assignee. Instead the occupier (the purported assignor) will continue as such, while the purported assignee (if they move in) will merely be the occupier's guest.[23] If the occupier or the landlord terminate their agreement, there will be no question of the landlord having to accept the purported assignee as an occupier at that point, as the agreement to which the purported assignee tried to become a party will have ended.

When should receipt of rent count as consent by the head landlord?

2.52 The head landlord can, in unlawful assignment or sub-occupation agreement cases, decide to give their consent on discovering what has happened. An assignment involves an immediate change for the landlord, in that they start treating the new person as the occupier, whereas in a sub-occupation agreement the head landlord's legal position does not alter until the termination of the head agreement. Where a head landlord takes rent directly from a purported assignee, knowing of the attempted unlawful assignment, then they should be taken to have consented to it. The assignment should become effective from that point.

2.53 The position is more complex where the head landlord continues to take rent from the occupier despite knowing of an unlawful sub-occupation agreement. We want to avoid the creation of a new category of "tolerated but unlawful sub-occupier", where the landlord permits an unlawful sub-occupation agreement to continue for an indeterminate period, which will not be binding on the landlord at the termination of the head agreement.

2.54 Under the current law a landlord might be taken to have waived the breach by continuing to accept rent from the occupier in full knowledge of the unlawful sub-occupation. We believe the current detailed rules on waiver, and remedy of breaches in forfeiture cases, are not appropriate in our new scheme. Instead repossession for breach will be subject to reasonableness, which will more appropriately deal with issues relating to repossession against the original occupier.

[23] This will only give the purported assignee a right to sue the purported assignor for damages, as it will not give any right to override the landlord's refusal of consent so as to make the purported assignment effective. If the purported assignee starts paying the rent to the occupier, then an unlawful sub-agreement will be created instead of the purported assignment. If the landlord stops receiving rent they can be expected to check why. If the landlord knowingly takes rent from the purported assignee, then they may effectively be giving consent – see below paras 2.52 to 2.55. There will only be a problem if the landlord can be deceived into taking rent from the purported assignee in the belief that it is from the occupier.

2.55 Under our new scheme we believe that the potential problem of landlords artificially claiming that they did not realise that they did not know they were receiving rent from a new occupier, and thus claiming that they had not given their consent to the new arrangement can be avoided. Where this has happened, at the point when the head agreement is terminated, the sub-occupier could then argue that the degree of delay on the part of the landlord was such as to amount to the unreasonable refusal of consent (in that the head landlord had lived apparently happily with the situation for all this time) so that the allegedly unlawful sub-occupation agreement was really lawful. While there should not be a rule requiring the landlord to refuse rent from, or take possession proceedings against, the occupier in order to maintain their refusal of consent to a sub-occupation, their failure to take any action might be used as evidence that their refusal was contrived or otherwise unreasonable.

When should receipt of rent count as creation of a new agreement by the landlord?

2.56 So long as the original occupier's agreement is not terminated, the landlord will not have any direct relationship with the unlawful occupier. The only effect on the landlord of the unlawful occupation will therefore be that it will entitle the landlord to take action for damages (or eviction) for breach of contract against the original occupier, rather than against the unlawful occupier.

2.57 In some cases the landlord will decide to apply for possession against the occupier for the breach of the agreement. In such cases, any unlawful occupiers[24] will be liable to be evicted without separate proceedings when the possession order against the occupier is enforced, just as happens to the rest of the occupier's household.[25]

2.58 In other cases the original agreement will terminate without the landlord obtaining a possession order. This might be because the landlord follows the abandonment procedure or accepts a surrender from the occupier.[26] Alternatively it might be because the occupier gives notice to quit.[27] Any rights of occupation of the unlawful sub-occupier or the unlawful purported assignee will fall away with the termination of the agreement. The landlord then has a choice of whether to grant a fresh agreement to the unlawful occupier, or to take possession proceedings against them as trespassers.

2.59 Where the landlord starts knowingly accepting rent from the new occupier, they would thereby be deemed to accept the person as a new occupier under a new agreement and would thus be subject to the duty to issue a fresh written agreement. We do not think it right that landlords should have the ability indefinitely to postpone taking proceedings for possession, and in the meantime

[24] Whether they are unlawful sub-occupiers, or are no more than guests of the occupier following an ineffective unlawful assignment.

[25] Who would have been served with notice of the possession proceedings at the property where possession was sought on a discretionary basis – see our proposals at 3.115 to 3.123.

[26] See CP 162, paras 10.62, 10.65.

[27] See CP 162, para 10.49.

purporting to collect money in lieu of rent, pending proceedings for possession which do not materialise.[28]

2.60 We accept that it may not be reasonable to expect a landlord to start proceedings on the very day they learn of the existence of the new occupier. We also accept that it may not be reasonable to expect a landlord to refuse payments in these circumstances. We think there should be a period of grace during which the landlord would be entitled to accept money on the basis that it was advance damages for trespass, not rent. However this period should not be an indefinite one. It should only last while the landlord investigates the new occupier, to see whether or not the new occupier is someone the landlord would be willing to take on as the occupier. If the landlord decides not to take the new occupier on but decides instead to take possession proceedings, the period should be extended pending the eviction.

2.61 Any payments made pending a decision on whether to evict should be made purely as a way of advance payment of trespass damages, or by a person who claims to be a lawful occupier and does not want to build up rent arrears.

2.62 If they are made in return for the landlord not proceeding with eviction then they should be seen as rent and lead to the creation of a fresh agreement. The fresh agreement would normally be a type II periodic agreement,[29] so the landlord could evict the new occupier on notice using the accelerated possession procedure.

2.63 If the landlord ultimately decided they were happy with the new occupier, they could replace that agreement with one on the same terms as held by the original occupier (which might have been a type I, or a fixed term, or otherwise on better terms).

2.64 **We provisionally propose that after a prescribed maximum period during which the landlord should be able to take such payments without starting possession proceedings, a fresh agreement, covered by our new scheme, should be taken to have been created if, after termination of the original agreement, the landlord accepts payments from an unlawful occupier in return for delaying, or not taking, possession action against them as trespassers.**

2.65 **We invite views on whether there should be a prescribed maximum period of time during which the landlord should be able to take such payments, without starting possession proceedings, and without being taken to have created a new agreement. Alternatively should it be left as a matter of fact**

[28] Where a person occupies property as a trespasser, the land owner is entitled to compensation for this occupation. The technical term is "mesne profits", or payments in relation to the property for the trespass. Although the sums thus payable are often the same as the rent would be, they are not classified as "rent" so as to ensure that the trespassers cannot argue that they are a tenant of the land owner. The payment for occupation would be classified as "advance damages for trespass" in cases where an action for trespass had not yet been commenced, but could be.

[29] See below on social landlords.

to be determined by the court whether the landlord has agreed to refrain from or delay possession action in return for the payments?

2.66 There may be cases where a social landlord would not want to enter a long-term type I agreement with an unlawful sub-occupier but would be willing to enter a short-term type II agreement, either to allow them time to move out or while deciding whether they should have a type I agreement. In CP 162 we invited views on whether social landlords should have a free choice as to when they may use the type II agreement; or whether there should be a general requirement for them to use type I agreements, with a statutory list of exceptions.[30] If the former option were to be preferred, there would be nothing to prevent a social landlord from making a type II agreement in this situation. On the other hand, if the use of type I agreements became a general requirement, it would be necessary and sensible to allow social landlords to let in such circumstances on a type II agreement.

2.67 **We provisionally propose that, if there is to be general requirement on social landlords to use type I agreements, one of the exceptional circumstances justifying use of a type II agreement would be where the landlord wished to make a temporary arrangement with a new occupier who has been granted the right to occupy without the landlord's consent or in breach of a landlord's veto.**

[30] CP 162, para 11.4 to 11.15.

PART III
CO-OCCUPATION AGREEMENTS

INTRODUCTION

3.1 As noted at the outset of this paper, CP 162 was written on the deliberately simplistic assumption that the landlord would be entering into a contract granting the right to occupy premises with one person – the occupier. This was necessary to explain the basis of our proposed scheme.

3.2 In this part we consider:

(1) the current law of joint occupation, and how the principles of that law should be adapted to our proposed scheme;

(2) the creation of joint occupation agreements;

(3) the liability arising under joint occupation agreements;

(4) the circumstances in which new occupiers may enter a joint occupation agreement;

(5) how joint occupiers may seek to leave the agreement; and

(6) non-contractual arrangements.

THE CURRENT LAW OF JOINT OCCUPATION

3.3 At present, the rights of those who have entered agreements to share property are determined primarily by the principles of the law on joint tenancy and tenancy in common, found in land law. It is important to stress that these principles apply to all cases where there is co-ownership of land, not just to cases where land has been rented.[1] Furthermore, the principles do not apply to licensees who are sharing.

3.4 While it is not necessary for the purposes of this paper to give a full account of this law, a number of points should be noted.

3.5 First, an important distinction between joint tenancy and tenancy in common is that under joint tenancy a "right of survivorship" applies. This means that, on the death of one joint tenant, the survivor takes over the whole of interest in the property. This will often suit those who have lived together for many years, whether as husband and wife or in other long-term relationships. But where property has been acquired on the basis of sharply different contributions this may be unfair. Tenancy in common provides that property is held on undivided shares but, on the death of a co-owner, the interest holder has full testamentary powers to leave his or her share by will to another.

[1] The Law Commission has recently considered these principles in its recent publication Sharing Homes: A Discussion Paper (2002), which can be found at http://www.lawcom.gov.uk/misc/property.htm.

3.6 Secondly, another feature of joint tenancy (as opposed to tenancy in common) is that liability to meet the obligations under the joint tenancy agreement is, unless there is any provision to the contrary, "joint and several". This means that each tenant is liable to meet in full the obligations under the agreement. This is so even where one tenant who was supposed to contribute to meeting those obligations fails to make the proper contribution, for example to payment of the rent.[2]

3.7 Thirdly, the law relating to joint tenancy limits the number of persons to whom a legal joint tenancy can be granted to four.[3] Any further joint tenants have only an equitable interest in the property. These are rules of long-standing, well understood by conveyancers and an integral part of the land registration requirements of HM Land Registry.

3.8 While these principles can be applied relatively easily in cases where the co-tenants are all named on the tenancy agreement, problems start to arise where premises are shared by a number of people, but only one is named on the agreement; or where one or more of the co-tenants leaves and the remaining ones wish to bring in new occupiers to take the place of those who have quit.

OUR APPROACH

3.9 Our starting point is that we want to adapt those principles of the current law relating to co-ownership which are relevant to fit our proposed scheme of housing law. Our aim is to allow more flexibility by allowing a greater degree of access to and departure from a continuing co-occupation agreement, without affecting other co-occupiers.

3.10 Thus we will seek to reproduce for the purpose of our scheme the principle of the joint and several liability of joint tenants, and – where relevant – survivorship.

3.11 But we propose a new right whereby occupiers may seek to bring a new occupier into the agreement, with the consent of the landlord. This would replace the present legal position, which requires the original tenancy agreement to be assigned, or terminated and a new one created.[4] We regard this process as unnecessarily cumbersome and poorly understood.

3.12 Turning to the termination of joint agreements, we propose that individual occupiers should have the right to terminate just their own interest in a joint agreement, rather than, as at present, requiring them to bring the whole agreement to an end when they wish to leave.

3.13 We also consider whether there is any need to entrench in the occupation agreement a compulsory term giving occupiers the right to regulate who should live in their home on a non-contractual basis. And we make proposals for

[2] In such a case the joint tenant who has met the liabilities under the agreement is able to seek to recover from the other joint tenant to the extent of his share: *Chalmers, Guthrie and Co v Guthrie* (1923) 156 LTJ 382.

[3] Law of Property Act 1925, s 34(2).

[4] Secure tenants do not appear to be able to assign their tenancies to another person jointly with themselves – see Part VI below.

procedural changes to enhance the position of non-contractual occupiers in possession proceedings.

JOINT OCCUPATION AGREEMENTS – CREATION

3.14 We do not seek to disturb the current land law rule that the number of persons to whom a legal joint tenancy can be granted should be limited to four. In the context of the scheme we are proposing, however, we think that the distinction between legal and equitable interests involves a great deal of legal technicality, which serves only to confuse landlords and occupiers.

3.15 We see no reason why, for the purpose of our scheme, when a landlord seeks to enter an occupation agreement under our proposed scheme they should be required to treat the first four occupiers named on the agreement any differently from any others.

3.16 There are, of course, good reasons to limit the numbers who may live in any particular home, which derive from more general considerations of public health. But these can quite properly be regulated through the law relating to overcrowding.[5]

3.17 **We provisionally propose that there should be no limit to the number of people to whom joint rights of occupation may be granted, subject to the overall limit imposed by the laws against over-crowding**.

3.18 This provisional proposal would not prevent a landlord making an express stipulation limiting the total number of occupiers to fewer than would be permitted by rules on statutory overcrowding.

3.19 The law on land registration would continue to require that the only first four named joint occupiers in agreement covered by our new scheme which counted as leases, rather than licences, could be registered at HM Land Registry. We have proposed that our scheme should apply to all agreements for periods of up to 21 years.[6] While currently none of the agreements covered by our new scheme would need to be registered, on the coming into force of the Land Registration Act 2002, leases for seven years or more will have to be registered and there will be voluntary registration for leases between three and seven years.[7] Nevertheless in the vast majority of cases, registration of occupation agreements will not be required as they would be for a period of less than three years.[8]

[5] See Housing Act 1985, Part X.

[6] See CP 162, para 9.18.

[7] See Land Registration Act 1925, s 8 – leases of 21 years and under are protected as overriding interests under s 70(1)(k). See also Land Registration Act 2002, s 4(1)(c) and s 33(b).

[8] Even though a periodic occupation agreement may last for many years, its length is for these purposes determined by the length of the periods at which the rent is paid (weekly, fortnightly or monthly) not the total period of occupation under the agreement.

JOINT OCCUPATION AGREEMENTS – LIABILITY

3.20 We suggested above that questions relating to the extent of the liabilities that arise under joint occupation agreements should be based by analogy on the current law of joint tenancy. This would mean that joint occupiers would have joint and several liability to meet the terms of the contract during the life of the agreement. In addition, when a joint occupier dies, the remaining joint occupiers should normally take over the rights and obligations under the agreement through the principle of survivorship.[9]

Joint and several liability

3.21 Landlords frequently want to enter a contract granting the right to occupy premises as a home to more than one person. This may be for any number of reasons. A very practical one is that the market rent of a flat or house may be beyond the means of an individual occupier, but be within the collective means of a group.

3.22 Under the present law relating to joint tenancy, each member of the group is normally liable to meet his or her obligations under the tenancy "jointly and severally".[10] Thus each member of the group would be liable, individually, for the whole of the obligations imposed by the tenancy.

3.23 Although an arrangement may have started on the basis that each joint occupier will make a contribution to the rent, should one or more occupiers fail to keep up their contribution, responsibility for the total rent will fall on the shoulders of the remaining joint occupiers.[11]

3.24 In practice, while the original members of the group remain the same, there will not usually be a problem. But it should be clear that the group as a whole remains responsible for the payment of the whole rent and for meeting the other obligations of the agreement.

3.25 Problems often arise where one of the group leaves the premises, and the occupiers are either unable to replace that person or under the terms of their agreement are prevented from doing so.[12] The question then arises: what rent should the remaining member(s) of the group be paying? And more generally, what is the scope of their liability under the contract? If there is joint and several liability under the contract, then the remaining party or parties to the contract remain liable for the payment of the whole rent, not just a proportion of it.

[9] The issue is discussed at paras 7.7 to 7.15 below.

[10] See C Harpum, *Megarry and Wade, The Law of Property* (6th ed 2000) at paras 9–02 to 9–08.

[11] In the event of one of a number of joint occupiers having to pay the entirety of the rent, he or she will have – at least in theory – the right to claim reimbursement from the other joint occupiers: *Chalmers, Guthrie and Co v Guthrie* (1923) 156 LTJ 382. Under the new scheme, we will reproduce and extend the effect of the Landlord and Tenant (Covenants) Act 1995, s 13(3) – which applies the Civil Liability (Contribution) Act 1978 to joint and several covenants in leases – to all agreements under our scheme, including licences.

[12] We discuss, at paras 3.29 to 3.50 below, the circumstances in which the right to occupy may be taken up by a person who is not a party to the original contract.

3.26 In our view, the notion of joint and several liability is well established and understood in the residential rented sector. Landlords would certainly expect to impose it when entering agreements under our new scheme. This appears to us to be reasonable.

3.27 Our judgement is that it would be right to make joint and several liability the normal contractual position that should apply if the agreement is silent on the point. That position can be achieved if there were a default term in all occupation agreements that joint occupiers would be liable jointly and severally. The parties will then be at liberty to depart from this.

3.28 **We provisionally propose that, where an occupation agreement is entered into by more than one occupier, there should be a default term that liability of the occupiers under that agreement should be on the joint and several basis.**

NEW JOINT OCCUPIERS ENTERING THE AGREEMENT

3.29 Next we consider whether there are circumstances in which a new person, not a party to the original joint agreement, might be able to be brought into the agreement, and if so how this might be achieved.

3.30 Currently there is no statutory provision which entitles a new joint tenant to be brought into a joint tenancy agreement. It can therefore only be done with the consent both of the existing tenants and of the landlord.

3.31 Under the present law of landlord and tenant, this can be achieved in two ways. Either there can be an assignment of the interest by the current tenant or tenants to the current tenant(s) plus the new tenant or tenants; or there can be a surrender of the old tenancy to the landlord and the grant by the landlord of a new tenancy to the new parties. While either route achieves the same result, there can be differences on the extent to which pre-existing liabilities are carried forward into the post-assignment/grant situation. We are anxious that our proposed scheme should not be bedevilled by any uncertainties that may arise from such a distinction.

A right to a joint agreement?

3.32 We have therefore considered whether there should be circumstances in which an occupier should be entitled to require the landlord to permit a new person to be added to the agreement as a joint occupier.

3.33 A number of steps have already been taken in this direction:

(1) In 1996 the then Department of the Environment issued a circular,[13] now replaced by statutory guidance to which local authorities must "have regard",[14] dealing with cases where there is a long term joint commitment

[13] Department of the Environment, Local Authority Joint Tenancies Circular 7/96 (May 1996).

[14] Department of the Environment and Department of Health, Code of Guidance on Parts VI and VII of the Housing Act 1996: Allocation of Housing Accommodation, Homelessness (1996) Annex C – published under Housing Act 1996, s 169 and s 182.

to the home which is likely to continue. Situations envisaged included joint commitment by spouses, friends, or unpaid live-in carers. The guidance provides that local authorities "should normally" grant joint tenancies to such groups, subject to there being no adverse implications for good use of the stock. It also says local authorities should tell applicants of the availability of joint tenancies and give written reasons for any refusal to grant one.[15]

(2) The Housing Corporation's "Assured Tenant's Charter" states that assured tenants are entitled to know their landlord's policy on the giving of joint tenancies.[16]

(3) The Housing (Scotland) Act 2001, section 11(5) goes further and creates a right to bring in a joint tenant. The existing tenant and a potential new joint tenant can apply jointly in writing to the landlord for the new person to be included as a new joint tenant. The incomer must either already live at the property as their only or principal home, or must intend to do so, but there is no requirement for any particular relationship to exist between the incomer and the current tenant.

The right is not an absolute one. The landlord can refuse the application. But the landlord must consent unless it has reasonable grounds not to. The Act does not define what would qualify as reasonable grounds. Like the rest of the Act the provision only applies to the social rented sector, not the private rented sector. It also applies to short Scottish secure tenancies.[17]

3.34 In the light of these developments, we think it would be appropriate to propose that, at least in relation to type I agreements, it should be possible for an occupier to be able to apply to his or her landlord to request that a new person should be added as a joint occupier. If granted, the agreement to occupy should be expanded to include that person. The right should not be absolute, but conditional on the landlord giving consent.

3.35 In accordance with our general approach, consent should not be unreasonably withheld. The assessment of reasonableness would include the risk of prejudice to the landlord from the possibility that the proposed new joint occupier might become the sole occupier, but this should be based on an objective assessment of risk, rather than an unreasonable fear. Such possibilities might be relevant where the landlord thinks the applicant does not have a need for the type of housing

[15] Where joint tenancies are not used, the guidance seeks to achieve a similar effect on the death of the tenant. It says the local authority should give a tenancy of the property, or a suitable alternative, to another member of the household who is not a statutory successor. This only applies where the extra-statutory succession is to someone who has lived there for a year, or has been looking after the tenant or their dependants, and only where it is a priority given other demands on the stock. In fact, the person would seem to have to be able to qualify for allocation through Housing Act 1996, Part VI as there is no relevant exception.

[16] Housing Corporation, The Assured Tenant's Charter (1998) p 15.

[17] Housing (Scotland) Act 2001, s 34(6). These are the equivalent of introductory tenancies or of certain uses of type II agreements by social landlords under our suggestions in CP 162, paras 11.16 to 11.29 (relating to probationary type II agreements).

provided by the particular landlord; or, in the case of social housing, is seeking to exploit the right to joint occupation to jump the housing queue; or, more generally, is unlikely to be able to pay the rent.

3.36 We also think that one of the factors that the landlord should take into account is whether the addition of one or more joint occupiers will raise the number of occupiers in the premises above that which the landlord regards as reasonable or desirable.

3.37 We have asked ourselves whether the provision in the occupation agreement providing for the right to apply to bring a new joint occupier into the agreement should be a default term, which the parties can amend, or a compulsory one, which they cannot. We anticipate that were the term to be a default one only it would be so frequently contracted away as to render the proposed new right illusory. In view of the developments listed at paragraph 3.33 above, we have come to the provisional view that the term should be a compulsory one.

3.38 We seek views on whether the right to apply to become a joint occupier should be an open one, so that any one can apply; or whether it should be limited to particular categories of people – for example, spouses or cohabitees (whether of different or the same gender); or, as in section 11(6) of the Housing (Scotland) Act 2001, those whose only or principal home is, or is intended to be, the property in question.

3.39 We have also asked ourselves whether the proposed new right should apply to all types of agreement or be limited to type I agreements. We accept that there is an argument that the desire of occupiers to bring new parties into a home is something that will occur in all parts of the rented sector of the housing market. If we do not provide for it across the board, occupiers will in practice enter into arrangements with joint occupiers without any reference to the landlord. On the other hand it could be argued that the policy developments relating to joint occupiers (see paragraph 3.33 above) have occurred exclusively in the social rented sector, and that therefore these proposals should be similarly limited. It could also be argued that private landlords should be able to have greater control over the identity of their occupiers.[18]

3.40 **We provisionally propose that there should be a compulsory term in the agreement that an occupier should be able to apply to the landlord for permission to have someone else brought into the agreement as a new joint occupier. The landlord should be able to refuse consent unless it is unreasonable to do so**.

3.41 **In this context, the assessment of reasonableness should take account of all relevant circumstances including in particular any prejudice to the landlord that might arise if the new person ended up as sole occupier**.

[18] A similar argument is raised in the context of the right to take in a lodger not being extended to type II agreements: see paras 4.29 to 4.36 below.

3.42 **It should also take account of the numbers that would reside in the premises and the landlord's interest in retaining control over those numbers**.

3.43 **We invite views on whether the right to apply for a joint occupation agreement should be limited to particular categories of people. If so, we invite views on what those categories should be**.

3.44 **We invite views on whether the provisional proposal should be limited to type I agreements only, or should apply to all agreements falling within our proposed scheme**.

3.45 If the landlord refuses consent and the occupier regards the refusal as unreasonable, we consider that it is necessary that the occupier should be able to apply to the county court to determine the question. The court would then have the power to determine the reasonableness or otherwise of the refusal of consent.

3.46 If the court agrees that the refusal of consent was unreasonable, we see no benefit in suggesting that there should be further formalities to be completed before a new joint occupier is added to the agreement. We therefore propose that, in an appropriate case, the court should have power to order that a new occupier be added to the agreement, as the result of which the new occupier would become a co-occupier from the date of the order or any other date fixed by the court.[19] We think it right to ask whether the court should, at the same time, have a power to amend any of the other terms of the agreement.

3.47 **We provisionally propose that where the occupier regards the refusal of consent as unreasonable, he or she should have the right to apply to the county court for a determination of the matter**.

3.48 **We further provisionally propose that, in appropriate cases where the landlord was held to have been unreasonable, the court should have the power to add a new occupier to the agreement**.

3.49 **We invite views on whether the court should have any wider power to vary the terms of the agreement**.

3.50 In any event, the order would take effect as a variation of the original agreement. It would therefore entitle both the new and existing occupiers to seek a revised version of the agreement from the landlord, taking account of this variation.[20]

Effects of applications to bring in new joint occupiers

3.51 If the landlord consents, or a court order is obtained, the person will become a joint occupier under the agreement. Their status will then, in respect of the future of the agreement, be the same as that of other joint occupiers. They will therefore

[19] This power would be analogous to the power to make vesting orders under Family Law Act 1996, Sched 7.

[20] We discussed the rights of occupiers to a copy of varied agreements in CP 162, paras 6.156 to 6.158.

have joint and several liability with the original occupier as against the landlord, as outlined above.

3.52 There is a separate question as to whether the new joint occupier should take a joint part in rights and liabilities under the agreement in respect of the period before they entered the agreement.

3.53 There is no obvious reason why they should obtain benefits. For instance it would not seem right that they should be able to sue, under the agreement, for the effects of disrepair during a time when they were not a party to the agreement.

3.54 If they are not to obtain benefits, it would seem wrong for them to be saddled with liabilities arising before they entered the agreement. The most common example would be that they should not acquire joint liability for rent arrears built up by the original occupier. This will mean that they cannot be sued for damages or debt in relation to such defaults. That still leaves open the question of whether they can be evicted on the basis of the original occupier's previous breach of contract.

3.55 We do not think it is appropriate to allow the possibility of eviction in such circumstances. As joint occupiers cannot be evicted singly, this means the original occupier will effectively become free of the threat of eviction for their previous breaches (although they would still be liable, solely rather than jointly, for damages).

3.56 The consequence of this, we believe, would be that it would generally be reasonable for a landlord to refuse consent to the addition of a new joint occupier to the agreement where the existing occupier(s) were in significant breach of the agreement at the time the application to join was made. The only exception would be where the breach was so minor that a court would not consider it reasonable to evict the occupiers for it anyway. If that were the case, the landlord would not have lost an effective remedy (that is, the ability to take possession proceedings in respect of the breach) by giving consent. We do not believe it is overly burdensome to expect landlords to check for such breaches before deciding whether to give consent, given that part of good management is to check that occupiers are observing the terms of their agreement on an ongoing basis anyway.

3.57 If the landlord does not consent, and a court order that the refusal was unreasonable is not obtained, the person will not become a joint occupier. They might of course still move in to the property, but this will give them no contractual rights as against the landlord. Nor will it in itself give them any contract with the occupier. Their status will therefore be the same as other non-contracting occupiers, as outlined below at paragraphs 3.113 to 3.140. This will not directly affect the landlord. In fact they may commonly already have had this status before applying to become joint occupiers, for instance as the co-habitee or adult child of the occupier.[21] If they wish to enter into a contract to occupy the property, then they will have to do so with the occupier, rather than the landlord. They will then become the occupier's lodgers or sub-occupiers, as described in Parts IV and V below.

[21] The rights of a non-contracting spouse are greater than others by virtue of family law – see paras 6.57 to 6.71 below.

3.58 If a failed applicant for joint occupation does move in, and the landlord starts knowingly to accept rent from them, this may alter the position. It will be a question of fact, for the court to decide in the last resort in any dispute, as to whether the landlord has thereby entered a new agreement with them, and whether it is joint with the original occupier (who may or may not have abandoned). It will be much harder for the failed applicant to demonstrate that the landlord has accepted a joint agreement than it will be in other cases where the occupier is replaced by the new person. The landlord will be able more easily to argue their behaviour is consistent with the continuation of the original agreement. This is especially so where the failed applicant is the spouse of the occupier, who thereby has a right to tender rent on behalf of the occupier, as described below at paragraph 3.134.

JOINT OCCUPIERS SEEKING TO WITHDRAW FROM THE AGREEMENT

3.59 There may be many reasons why those who have jointly entered an agreement giving them the right to occupy a dwelling find that the arrangements cannot continue as originally envisaged. A couple may fall out and decide to live apart; a group of friends may find they are not getting on as well as they anticipated; one joint occupier may receive an offer of employment in another part of the country, or abroad. It is important that our proposed scheme can cope with these common situations in a clear and flexible way that balances the interests of the occupiers and the landlord better than the current law.[22]

3.60 We suggest that, in practice, a joint occupier who wants to withdraw from a joint agreement will, broadly, do so in one of two ways. Either he or she will make a decision to leave by taking the proper steps and following any formalities required; or he or she will simply depart without letting anyone know what his or her intentions are. We accept that there will be many withdrawals that fall between these two extremes.

3.61 We discuss first what the formal route of withdrawing might be. We then consider the situation when a person withdraws without following the formal route.[23]

The formal route

3.62 There are two key issues that need consideration:

(1) How can a joint occupier withdraw from the agreement?

(2) What formalities, if any, should be fulfilled by a joint occupier who wishes to withdraw from the agreement?

Type I agreements

3.63 In CP 162, we proposed that there should be a type I agreement which would confer substantial security of tenure on an occupier. We anticipated that this type

[22] See eg para 3.73 below.

[23] Of course, if the formal route can be made clear and straightforward, it may encourage more to follow it.

of agreement would be used primarily by social landlords. We also thought there would be little point in there being a type I agreement for a fixed term, rather than on a periodic basis,[24] and we do not consider the possibility of a fixed term type I agreement further here.

3.64 In CP 162 we considered the principal ways in which an occupier might bring an agreement to an end, formally, and proposed that the present ability of tenants to give notice should be reproduced in modified form.[25]

3.65 There is however one particular problem currently associated with the use of a notice to quit by a joint tenant. It is settled law that a notice to quit served by one joint tenant operates to bring the whole tenancy to an end, regardless of the wishes or indeed the knowledge of any other joint tenant.[26] It appears that attempts to attenuate the effect of a notice to quit served by a single joint tenant have so far met with failure.[27] It can be argued that the ability of one joint tenant to end the tenancy without the knowledge of the other, and possibly with the encouragement of the landlord, can cause injustice and hardship.

3.66 We acknowledge that the current law is commonly relied on, particularly by social landlords where a relationship between two joint tenants has broken down and one joint tenant leaves. Often this is in family sized property. The departing tenant takes the children, leaving the remaining tenant effectively under-occupying the premises. The landlord may agree to re-house the departing tenant in the original property (or elsewhere) only if the departing tenant gives notice to quit.[28] The landlord can then regain possession of the original property because the whole joint tenancy has been ended. Effectively the use of a tenant's notice to quit operates as a way around the remaining tenant's security of tenure, as the current repossession grounds only allow for the possibility of obtaining an order for possession on the basis of under-occupation where the tenant has succeeded to the tenancy.

3.67 We want to ensure that our scheme does not prevent sensible arrangements being made to take care of the various circumstances in which one joint occupier may leave. But we are not convinced that adopting the present rules relating to a joint tenant's notice to quit achieves this objective.

[24] CP 162, paras 7.12 to 7.17.

[25] CP 162, para 10.49.

[26] See *Greenwich London Borough Council v McGrady* (1982) 6 HLR 36 and *Hammersmith and Fulham London Borough Council* v *Monk* [1992] 1 AC 478.

[27] *Newlon Housing Trust v Alsulaimen* [1999] 1 AC 313. The service of a notice is not a disposition of property which can be set aside under the Matrimonial Causes Act 1973, s 37(2)(b).

[28] In many of these cases this has occurred where a local authority has received a homelessness application from the departing tenant. However, this appears to be due to a misunderstanding of the effect of Housing Act 1996, s 175(3) and s 191(1) – under which a person who has a tenancy is already homeless if it is not reasonable for him or her to continue to occupy it. A person will only make him or herself intentionally homeless if he or she gives the accommodation up when it would have been reasonable to continue to occupy it.

OUR APPROACH

3.68 In our view, joint occupiers should be able to withdraw from a joint occupation agreement by serving notice, but without artificially destroying the whole occupation agreement. At the same time, there is an argument that provision should be made to enable landlords to seek repossession in situations where the occupier(s) who have been left behind are not appropriate[29] to the home in question.

3.69 We are attracted by the provisions of the Housing (Scotland) Act 2001 relating to the right of joint tenants to extract themselves from their agreement. Under section 13 of that Act a joint occupier has a right to serve notice ending only his or her own interest, not the whole tenancy.[30]

3.70 It may be argued that this could prejudice the remaining occupiers who may find themselves liable on their own for the full rent. However, this is less prejudicial than finding themselves evicted without warning. In any event, the effect of one joint occupier leaving could also be mitigated by provisions which enable a new occupier to be brought into the premises, either as a new joint occupier or as a lodger.[31] Broadly, we think that it is reasonable to expect occupiers to realise that if they jointly take on a property which they cannot afford singly then they may either have to find somewhere cheaper to live if one of the joint occupiers quits or to find another person to join them.

3.71 We certainly think that the remaining occupiers should be put on notice of the departing occupier's intention by requiring that person to give a copy of their notice to the remaining occupiers. Alternatively it might be simpler to require the landlord to send a copy of the notice to the remaining occupiers. In either case, the notice would warn the remaining occupiers that they may need to take steps to protect their position in the home.

3.72 This still leaves the question of prejudice to the landlord. A social landlord with a limited stock of housing designed to meet housing need might be left with an occupier who does not have the degree of housing need normally required for someone to occupy that property, and thus to whom the landlord would not offer an occupation agreement if the occupier intended to live there on his or her own. If the remaining occupier is unable to continue to pay rent (whether by means of housing benefit or otherwise) on too large a property for his or her needs, then the landlord could repossess the property on the basis of rent arrears, in an appropriate case.

3.73 The current law provides a solution for the landlord in this situation – the departing joint tenant issuing a notice to quit – but it is an artificial one. One irrational side effect is that it gives the social landlord an absolute right to repossess

[29] Eg because the home is too large for the occupiers left behind or contains special facilities – eg for people with disabilities – that are not needed by the remaining occupants.

[30] Under the Housing (Scotland) Act 2001, s 20 a landlord can similarly use the abandonment procedure against some, rather than all, of the tenants – see para 3.104 below.

[31] See the provisional proposals at paras 3.40 above and 4.5 below respectively.

against the remaining occupier, without regard to reasonableness and with no obligation to find him or her alternative suitable accommodation.

3.74 If it is necessary to allow social landlords to repossess properties in this situation, then we provisionally consider that it would be better to do so directly by means of what we have, in CP 162, called the estate management circumstances justifying repossession.[32]

3.75 In CP 162, we invited views on whether these circumstances should, for the type I tenancy, broadly follow the model of assured tenancies or the model of secure tenancies. In the first, there is a broad power to gain possession, so long as suitable alternative accommodation is provided. In the second, there is a defined list of estate management reasons set out expressly in the legislation (and again subject to suitable alternative accommodation).

3.76 If the former option is to be preferred, no special provision need be made. After the departure of the outgoing joint occupier or occupiers, the landlord could use the broad estate management power to move the under-occupying remaining occupier to alternative accommodation.

3.77 If the latter option is adopted, a new specific circumstance justifying repossession could be included in the list, on the model of that which already exists where a statutory successor succeeds to too large a property.[33]

3.78 However, it is not clear that such a basis for repossession would be desirable. On the one hand, it assists the social housing landlord to better meet some of its objectives, in securing best use of the landlord's stock for housing purposes. On the other hand, by doing so at the expense of the security of the occupier, it reduces the level of security of tenure that is the foundation of the type I agreement (and thus may be detrimental to others of the landlords' objectives, such as the maintenance of a mature, mixed community). Here, again, there is a conflict between the rights of the individual occupier and wider housing management priorities.

3.79 We therefore consider it appropriate to ask for views on whether our provisional proposal that a joint tenant should be able to give notice without bringing the agreement to an end should be balanced with an extension to the estate management powers of social landlords to allow repossession, with the provision of suitable alternative accommodation, where the withdrawal of one or more joint occupiers renders the property unsuitable for the remaining joint occupier or occupiers.

3.80 By way of supplementary questions, we also ask, first, whether any such proceedings should be taken within a fixed time period, and if so, what that period should be; second, whether there should be a period before which such proceedings should not be able to be started, during which the remaining occupier(s) could seek to find a lodger or a new joint occupier.

[32] CP 162, paras 7.77 to 7.83.

[33] CP 162, para 3.41, Table 3, Ground 16.

3.81 It would of course be the case that, whichever route was chosen, an order for possession would be made only if the court found that it was reasonable to make the order.

3.82 **We provisionally propose that a joint occupier under a type I agreement should be able to terminate his or her interest in the agreement by written notice to the landlord without this bringing the whole agreement to an end**.

3.83 **We further provisionally propose that a copy of the notice should be served on the remaining occupiers**.

3.84 **We invite views as to whether the copy should be served by the occupier seeking to withdraw from the premises, or by the landlord**.

3.85 **We invite views on whether, following the departure of one or more joint occupier or occupiers, the landlord of a type I tenancy should be able to seek repossession of the home, subject to reasonableness and the provision of suitable alternative accommodation, if the home is no longer suitable for occupation by the remaining occupier or joint occupiers**.

3.86 **If there is to be a special ground of possession, we also invite views on whether the landlord should be required to make use of it within any defined time limit. If so, what should the time limit be? Should there be a period before which the landlord should not be able to take proceedings, to enable the remaining occupiers find a lodger or a replacement joint occupier?**

Type II periodic agreements

3.87 In the case of a type II periodic agreement, the issues are less acute, not least because the type II agreement does not attract any great degree of security of tenure.

3.88 We think that a joint occupier who wishes to withdraw from a periodic joint occupation agreement should be able to issue a notice, on the same basis as with a type I agreement. In other words, it will have the effect of determining his or her obligations under the agreement, but will not bring the whole agreement to an end.

3.89 The remaining occupier may then seek to bring an additional person into the premises, either through seeking to take in a lodger or by agreement with the landlord to grant a sub-occupation agreement of part of the premises, or – with consent – by bringing in a new joint occupier.[34]

3.90 However, given the lack of security of tenure, we do not think that there is the same need to confer a special opportunity for the landlord to seek an order for

[34] See paras 3.29 to 3.50 above.

possession. The landlord may achieve this relatively easily by the "notice-only" procedure which attaches to the type II agreement.[35]

3.91 In any event, as we anticipate that the primary user of the type II agreement will be the private rented sector, the landlord will be more concerned with receiving payment of the rent, than meeting housing need for social purposes.

3.92 **We provisionally propose that a joint occupier under a type II agreement, should be able by written notice to the landlord to determine his or her interest in the agreement without this bringing the whole agreement to an end**.

Type II fixed term agreements

3.93 In CP 162 we expressed the hope that landlords might be encouraged to "write-up" type II agreements and confer, through the terms of the agreement, a greater degree of security of tenure than would attach to a type II periodic agreement.

3.94 We also envisaged that, in such a fixed-term agreement, it would be possible to insert a clause analogous to a break clause in a fixed-term commercial lease.

3.95 Where a joint fixed term occupation agreement is made, with no break clause, all the joint occupiers will remain jointly and severally liable under the agreement for the term of the agreement. Should one of the joint occupiers wish or indeed need to withdraw from the agreement, this can only be achieved by direct negotiation with the landlord.

3.96 In CP 162 we suggested that it should be possible for landlords and occupiers to agree to bring a fixed-term agreement to an end, by a process analogous to surrender which applies in the context of the law of landlord and tenant. However we proposed that the current requirement that any express surrender be by deed should be replaced by a simple requirement of writing. In the context of a joint agreement, this could only be achieved where all the joint occupiers co-operate and agree to surrender their rights to occupy.[36]

3.97 Where a fixed-term agreement contains a break clause, we proposed in CP 162 that the occupier should be able to take advantage of any such break clause by giving notice to the landlord on a similar basis to the occupier's notice to terminate a periodic agreement.[37] It would be possible for all the joint occupiers to act collectively in accordance with such a break clause and thereby terminate the agreement.

3.98 It would be possible for the landlord and joint occupiers to agree on the extent to which the joint occupiers would, individually, have access to the break clause. By analogy with our treatment of joint tenants under a type I tenancy, however, there is an argument that, at least as a default position, each joint occupier should

[35] See CP 162, paras 8.33 to 8.35.

[36] *Hounslow London Borough Council v Pilling* [1994] 1 All ER 432.

[37] CP 162, paras 8.60 to 8.68.

individually have access to the break clause, which would then have the effect of terminating only his or her obligations under the agreement. It would not bring the entire agreement to an end.

3.99 The remaining occupier(s) would still have the responsibilities and liabilities under the agreement. He or she would also be able to take advantage of the right to take in a lodger or to grant a sub-occupation agreement of the premises, as may be appropriate and in the latter case as agreed with the landlord.[38]

3.100 **We provisionally propose that it should be a default term of fixed term type II agreements with a break clause that where one of a number of joint occupiers exercises the break clause, it will have the effect of only terminating his or her rights under the agreement and will not bring the entire agreement to an end. The remaining occupiers will be entitled to remain in occupation, having assumed all the rights and obligations under the agreement**.

The liabilities of the occupier who has left

3.101 On the basis that a former joint occupier has left the premises having issued the appropriate notice, it would be clear that he or she would remain jointly legally liable for any liabilities incurred until the date on which the notice became effective, and would similarly be entitled jointly to the benefit of the agreement in respect of that period. From that date he or she would not be subject to any further liabilities, or benefit from any rights under the agreement.

The informal route

3.102 The discussion above deals with the situation where a joint occupier desires to withdraw from the joint agreement, and has followed the notice formalities which satisfy his or her wish to be freed from the agreement, where permitted by the terms of the agreement

3.103 However, in many cases an occupier will withdraw from the agreement without completing any formalities. While the withdrawing occupier will remain legally liable jointly for the rent and for the other obligations under the agreement, this will be little comfort to either the landlord or the remaining occupiers(s) if he or she cannot be traced or is not worth proceeding against.

3.104 In CP 162 we suggested the adoption of a procedure for landlords to take possession after serving notice to check if the occupier has treated the agreement as terminated by abandonment, based on section 17 of the Housing (Scotland) Act 2001.[39] Section 20 of that Act provides for a similar procedure for the landlord to use where it appears a joint tenant has abandoned the premises.[40] There are some

[38] See further paras 4.3 to 4.41 and 5.9 to 5.33 below.

[39] CP 162, para 10.65. This does not involve the landlord terminating the agreement, but rather checking that the occupier has abandoned the agreement. Thus any order by the court is in the nature of a declaration, rather than a mandatory possession order.

[40] The procedure applies where it appears that a joint tenant is not occupying the house and does not intend to occupy it as his or her home. The landlord may serve notice on the abandoning tenant stating: their belief that the tenant has abandoned the premises; requiring

differences from the procedure for sole tenants, presumably to reflect the different position where there are other tenants still in occupation and so there will be less obvious evidence of abandonment.[41]

3.105 We think that this procedure should be adapted to the situation under our new scheme in England and Wales where a joint occupier has withdrawn from the premises and effectively disappeared. Of course, it will only be effective where the occupation agreement contains a clause requiring the occupier to occupy the premises. The key feature of the procedure should be that it should apply where it appears that the occupier does not intend to remain bound by his or her obligations under the agreement. As there are greater difficulties in establishing this where the property has not been completely abandoned by all the occupiers, we believe we should reproduce the part of the Scottish provision whereby two warning notices are required.

3.106 We provisionally propose that the procedure whereby a landlord may seek to terminate an occupation agreement, where it appears that the premises have been abandoned, should also apply where a joint occupier has abandoned the premises. If the first notice produces no response, the landlord should be required to serve a second notice giving the occupier another eight weeks in which to apply to court to challenge the finding of abandonment.

3.107 The procedure would not terminate the whole of the agreement, but would only terminate the departed joint occupier's interest in the agreement. It follows that the remaining joint occupiers would continue to be responsible for the obligations under the agreement. In order that they may plan for this, the landlord should also give the remaining occupiers notice of their intention to show that the departed occupier's interest has been abandoned.

3.108 It is hard to predict the circumstances in which a landlord might wish to take advantage of the abandonment procedure. However one consequence of the process being completed is that the landlord and the remaining occupiers would then be clear that the departed occupier was no longer a party to the agreement. This might be the precursor to a social landlord bringing proceedings for possession against the remaining occupiers on the possible estate management basis discussed above.[42]

3.109 **We provisionally propose that, when the landlord intends to use the abandonment procedure against a joint occupier who has withdrawn from**

the tenant to reply within four weeks if he still intends to occupy the premises as his or her home and informing the tenant of the consequences if the landlord then remains of the belief that the tenant has abandoned the premises.

41 Under s 20 the actual termination of the joint tenant's interest follows the serving of a further notice on the abandoning tenant which, at the end of the notice period (which must be at least eight weeks), will bring his or her interest to an end. The abandoning joint tenant's recourse to court, to challenge the abandonment decision, is more limited than that for a sole tenant, who under s 19(1) has six months from the date of termination to take proceedings. A joint tenant can apply to the court, provided any proceedings are started within the eight week notice period.

42 CP 162, paras 7.77 to 7.83.

the premises, the landlord should also notify the other joint occupiers of this intention.

3.110 **We further provisionally propose that where a landlord has used the proposed abandonment procedure against a departed occupier, the remaining joint occupiers would continue to be jointly and severally bound by the agreement in the same way as if the removed occupier had given notice under a notice clause**.

3.111 Departed occupiers may react in four main ways to the initial warning notice:

(1) They may fail to respond at all. In that case the procedure will entitle the landlord to serve the second notice. Unless the occupier applies to court, within the eight week period, to challenge that notice, the landlord will be entitled to treat the agreement as terminated in respect of that occupier.

(2) They may reply saying they wish to be released from the agreement. In that case the landlord should similarly be entitled to treat the agreement as terminated in respect of that occupier.

(3) They may reply in a way which satisfies the landlord that they have not abandoned the agreement. In that case the landlord will withdraw the notice. It will still be possible for the landlord to take any action against the other occupiers for any rent arrears. It will also be open to the other occupiers, under the normal principles in joint and several liability, to seek a contribution from the defaulting occupier if they have had to pay the landlord the full rent.

(4) They may reply in a way which does not make it clear that they no longer see themselves as bound by the agreement, but also does not satisfy the landlord that they have not abandoned. In that case the landlord should apply to court for a declaration as to whether the occupier has in fact abandoned. It would be for the court to decide on the evidence available, including any evidence from the occupier, whether the occupier regarded themselves as still bound by the agreement.

3.112 **We provisionally propose that, where there is a response from the departed joint occupier to the initial notice, which is equivocal as to whether the occupier has or has not abandoned, there should be a procedure to enable the landlord to obtain an declaration from the court. If satisfied that the occupier has demonstrated an intention no longer to accept being bound by the agreement, the court should declare that the agreement has terminated in respect of that occupier**.

NON-CONTRACTUAL ARRANGEMENTS

3.113 Where an occupier decides to permit others to live in his dwelling on a gratuitous basis, such arrangements will fall outside the scope of our scheme as there will be no contract which will fall within the scheme.[43]

3.114 There are, nevertheless, three issues which we think need consideration in this context:

(1) Whether non-contractual occupiers should have any protection when possession proceedings are brought against the occupier of the premises in which they are residing.

(2) Whether there should be any limits to the powers of landlords to impose restrictions on non-contractual occupiers occupying the premises.

(3) Whether the Family Law Act 1996 needs amendment to take account of non-contractual occupiers under our proposed scheme.

Possession proceedings – proposals for protection

3.115 In CP 162 we provisionally proposed, at paragraph 12.27, that in exercising its discretion in possession proceedings, the court should be explicitly required to consider various factors including the effects of making an order for possession on the occupier's household. This is clearly necessary where an entire household may be evicted because of the activities of one of its members.

3.116 We have noted that section 14(3) of the Housing (Scotland) Act 2001 imposes a specific duty on a landlord to investigate before starting possession proceedings whether there are "qualifying occupiers" in residence. These are defined, by section 14(6), as other people occupying the property as their only or principal home who are the tenant's adult family members or lawful sub-tenants or sharers. The landlord must serve copies of any notice seeking possession on anyone found, and those people then have a right to be joined as parties to any subsequent proceedings.

3.117 In mortgage possession proceedings, procedural rules which have a similar effect apply in England and Wales.[44] The mortgagee must serve a notice at the premises 14 days before the hearing, addressed to any occupiers there, that proceedings against the mortgagor are being taken. The occupiers may apply to be joined as defendants, at the court's discretion.[45] Similarly in landlord and tenant cases if the landlord knows of anyone who may be entitled to claim relief against forfeiture as an under-lessee, the particulars of claim must be served on that person.[46]

3.118 In order to ensure that there is no unfairness to non-contracting occupiers, we think that a similar principle should be attached to our proposed scheme.

[43] CP 162, paras 6.5 to 6.8.

[44] See CPR Pt 55, r 10.

[45] See CPR Pt 19.

[46] See CPR Practice Direction 55.4, para 2.4.

3.119 Any requirement to notify non-contractual occupiers will only be necessary in cases where the court must exercise its discretion before granting an order of possession. We invite views as to whether the principle should apply to all discretionary cases, or be limited to possession proceedings relating to type I agreements.

3.120 **We provisionally propose that our new scheme should include rights for non-contracting occupiers to be notified of any possession proceedings**.

3.121 **We invite views on whether the procedure for so doing should be modelled on the rights of "qualifying occupiers" in the Housing (Scotland) Act 2001, sections 14 and 15, or to the provisions relating to mortgage possession hearings in the Civil Procedure Rules 1998**.

3.122 **We further invite views as to whether the people who must be notified should also have a right to be joined as defendants, or should only be able to do so at the court's discretion**.

3.123 **We further invite views as to whether these notice requirements should attach to all discretionary possession proceedings or only those which arise from type I agreements**.

Restricting the landlord's powers to regulate non-contractual occupiers?

3.124 At present, some rights to succession and assignment depend on the successor living in the property as their only or principal home.[47] At least in theory, therefore, such entitlements could be thwarted if the landlord could prevent the occupier moving into the home those who might claim these entitlements.

3.125 Traditional covenants against assignment and sub-letting also cover "parting with possession." This could suggest that no "parting with possession" was to be permitted. Some private landlords go further and use clauses providing that the property should only be used as a home for named people, prohibiting occupation by persons under a particular age, or even restricting overnight guests.

3.126 Such provisions may or may not be regarded as "unfair" under the Unfair Terms in Consumer Contracts Regulations 1999, depending on the circumstances. The Office of Fair Trading suggest at group 18(h) in their guidance[48] that restrictions will be unfair if they are not required to protect the landlord's legitimate interests. They state that terms against overnight guests are an example of a potentially unreasonable prohibition.

3.127 **We invite views as to whether there are – currently or potentially – significant problems arising from attempts by landlords to regulate those who may live with the occupier on a non-contracting basis**.

[47] See Parts VI and VII below.

[48] See CP 162, para 6.11 and Office of Fair Trading, Guidance on Unfair Terms in Tenancy Agreements (November 2001).

3.128 If there are such problems, it would be possible to move away from the current position, and instead permit the occupier to have primary control over who should be able to occupy the premises on a non-contractual basis.

3.129 This could be achieved in one of two ways.

(1) The occupation agreement could contain a default term which allowed the occupier the freedom to control who would occupy the premises on a non-contractual basis, with departures from the default being regulated under the Unfair Terms in Consumer Contracts Regulations.

(2) Alternatively, the agreement might contain a compulsory term guaranteeing the occupier's right to do so.[49]

In each case, the term would be subject to the premises not thereby being rendered statutorily overcrowded, and to the contracting occupier being responsible for any anti-social behaviour by non-contractual occupiers.

3.130 At least in the absence of evidence of abuse by landlords, we are not at this stage persuaded that a compulsory term is warranted.

3.131 **We provisionally propose that the occupation agreement should contain a default term which allowed the occupier the freedom to control who would occupy the premises on a non-contractual basis, with any departures from the default being regulated under the Unfair Terms in Consumer Contracts Regulations 1999.**

Amending the Family Law Act 1996

3.132 Nothing in our proposals seeks to alter the effect of the "matrimonial home rights" contained in Family Law Act 1996, section 30.[50] These provisions are mainly concerned with regulating housing rights as between spouses who are occupiers, rather than as between the occupiers and the landlord. Nevertheless, they include an important right in section 30(3), which will need to be preserved, to have payments of rent by the spouse who is not a tenant treated as made on behalf of the other spouse who is the tenant. There is also the right in section 30(4) to have a non-tenant spouse's occupation of the home treated as occupation by the tenant spouse for the purposes of housing legislation.[51] Under section 35(13) or section 36(13), former spouses and current or former cohabitants who are granted an occupation order also obtain these matrimonial home rights.

[49] One of the objections to a compulsory term might be the lack of control that the landlord would then have, eg over the numbers of non-contractual occupiers. Statutory rules on overcrowding (for which we make provisional proposals as to repossession in CP 162 at para 7.91) are of limited effect, since a much higher level of overcrowding is set as the test for criminal liability under Housing Act 1985, Part X than would be acceptable to most landlords.

[50] These provisions are designed to ensure that a spouse or co-habitee who falls within the scope of the provision, but who is not a tenant, nevertheless has a right, as against the tenant, to occupy the premises. See the discussion at paras 6.57 to 6.71 below.

[51] This is currently important for preserving security, since each of the main Acts dictate that security is lost if the tenant ceases to occupy the property as their principal home.

3.133 **We provisionally propose that Family Law Act 1996, section 30 be amended to refer to occupiers under our new scheme**.

3.134 Current housing legislation makes provision for those with "matrimonial home rights" in connection with the adjournment, stay, suspension or postponement of possession proceedings.[52] These provisions are commonly interpreted as meaning that the non-tenant spouse should have the same rights as the tenant, and even that the non-tenant spouse should be able to defend against the making of a possession order in the first place.[53] In fact all that the provisions do, on the face of the statute, is to preserve the rights in section 30 of the Family Law Act 1996 to occupy and tender rent. They do not create a right to make applications or put forward defences. If it were not for these housing law provisions those limited matrimonial home rights would terminate, under section 30(8)(b) of the Family Law Act 1996, on the making of a possession order.[54] The housing law provisions allow those matrimonial home rights to continue after the possession order "in relation to, or in connection with any adjournment, stay, suspension or postponement". The result is that, for example, rent paid by the non-tenant spouse counts as compliance with the terms of the suspension of a possession order or the adjournment of proceedings. In CP 162, we provisionally suggested that the agreement should not end until the execution of a possession order.[55] In that case we believe the matrimonial home rights should continue to the same point.

3.135 Nonetheless we feel that the position should in fact be amended to reflect the common misunderstanding. Above, we invited views as to whether occupiers, who are not party to the agreement and who do not have matrimonial home rights, should have a right to be joined in any repossession proceedings. We think the argument in favour of joining those with matrimonial home rights is even stronger.

3.136 **We provisionally propose that, in relation to cases where the occupier obtains an adjournment, stay, suspension or postponement of a possession order, a partner's matrimonial home rights to occupy and tender rent should be preserved until the possession order is enforced**.

3.137 **We further provisionally propose that the current law should be expanded so that those with matrimonial home rights are given the right to be joined to possession proceedings with the same rights as the occupier to defend themselves against the making of a possession order and to apply after a possession order for any adjournment, stay, suspension or postponement**.

[52] See Rent Act 1977, ss 100(4A) and (4B); Housing Act 1985, ss 85(5) to (5A) and Housing Act 1988, ss 9(5) and (5A). In CP 162, para 12.10 we provisionally proposed reproducing in our new scheme a right of adjournment, stay, suspension or postponement for occupiers who are party to the agreement.

[53] LAG: Luba, Madge and McConnell, Defending Possession Proceedings (5th ed 2002) p 32, para 2.58 and Shelter: Moroney and Harris, Relationship Breakdown and Housing: A Practical Guide (1997) p 251, para 11.31.

[54] This problem was recognised in *Penn v Dunn* [1970] 2 QB 686, which led to the introduction of these provisions in previous versions of the legislation.

[55] CP 162, para 12.52.

3.138 We should note that occupation orders are only available between spouses or opposite-sex couples, not between same-sex couples. If those with occupation orders are given preferential treatment in terms of possession proceedings, as compared with other non-contracting occupiers, this will not be consistent with our view of same-sex relationships in the context of statutory succession.[56] However, it is not appropriate for this project to seek to interfere with the basis on which occupation orders are made in family law.[57] Rather the existence of this issue adds to the attraction of the option, suggested above at paragraphs 3.130 to 3.123, of allowing all non-contracting occupiers to join in possession proceedings.

Other matters

3.139 There are other respects in which non-contractual occupiers are protected by the law. Examples include the following.

(1) The non-contracting occupier may have the benefit of a duty of care in negligence.

(2) Statutory provisions such as the Occupiers Liability Act 1957 and the Defective Premises Act 1972 can benefit non-contracting occupiers in the property.

(3) If an order for possession is made on a basis which requires suitable alternative accommodation to be available, the needs of the tenant's family, not just the tenant, must be taken into account.

(4) Under the Contracts (Rights of Third Parties) Act 1999 the landlord and contracting occupier can agree to give the benefit of any covenants to other non-contracting occupiers expressly.

3.140 We do not propose any alteration to these rules.

[56] See paras 7.56 to 7.59 below.

[57] The Family Law Act 1996 provisions originated in work by the Law Commission – cf Family Law: Domestic Violence and Occupation of the Family Home (1992) Law Com No 207. At that time the view was taken that same sex couples would be catered for adequately by covering them in the list of "associated persons", and there was no discussion of covering them in the new category of cohabitees. The way that the provisions on occupation orders were drafted then meant that same sex partners could not acquire matrimonial home rights under occupation orders.

PART IV
THE RIGHT TO TAKE IN LODGERS

INTRODUCTION

4.1 Under the Housing Act 1985, secure tenants have the right to take in a lodger.[1] The landlord authority's consent is not required. The only constraint is that the premises should not, as a result, become statutorily overcrowded.[2]

4.2 This is now a well-established tenants' right. Successive governments have considered that it advances socially useful objectives. For instance,

(1) it allows occupiers of local authority housing to earn some additional money,[3]

(2) it makes flexible and informal provision for better use of the accommodation, and

(3) it is conducive to labour market mobility.

TYPE I AGREEMENTS

4.3 In terms of the scheme we propose in CP 162, it also fits with the high level of personal autonomy that the type I agreement is aimed at securing for occupiers.

4.4 As the type I agreement is designed to substantively replace both local authority secure tenancies and fully assured tenancies let by registered social landlords, there is, necessarily, a choice between taking the right away from the category of social tenants who currently enjoy it (secure tenants), or giving it to those that do not (fully assured tenants). We think the former would be unacceptable.

4.5 **We provisionally propose that the right of a person to take in a lodger should be extended to all those with type I agreements, by means of a compulsory term to that effect.**

Definition of "lodger"

4.6 One of the notable features of the current law is that, while the right to take in a lodger is found in the Housing Act 1985, there is no statutory definition of "lodger". The term is, of course, a familiar one in common usage. The question we have to consider is whether, for the purpose of our scheme, a statutory definition is necessary.

[1] Housing Act 1985, s 93(1)(a); a similar right is not available to introductory tenants.

[2] Housing Act 1985 ss 324 to 326.

[3] Special tax treatment is afforded to the income generated from lodgers.

4.7 Although not defined in the Housing Act 1985, the term "lodger" is not unknown in law.[4] Woodfall suggests that the test whether a person is a lodger, as opposed to a sub-tenant, must be determined by the degree of control retained by the householder over the rooms which the lodger occupies.[5] The difficulty, from the point of view of this project, is that existing interpretations of the concept are set within existing principles of housing law. Thus, "lodger" falls within the category of "licensees" rather than tenants - essentially because lodgers do not have that degree of exclusive possession which characterises tenancy.

4.8 For the purpose of the scheme we are proposing we have sought, so far as possible, to argue that the distinction between tenancies and licenses should be ignored, and that, other things being equal, all contractual occupation agreements should fall within the scope of the scheme.

4.9 One way of attempting a definition of "lodger" might be to consider the nature and extent of services provided by the landlord to the lodger. If the landlord cleaned the lodger's rooms, or provided meals for the lodger, such services might be indications of the existence of a lodging agreement. The problem here would be to define the nature of services which would be relevant. This approach could also lead to argument about whether particular services were actually provided.

4.10 A second approach might be to look less at the provision or otherwise of specific services, but more generally at the degree of control the landlord exercises over the lodger. This would build on the approach already familiar in the law. The problem with this is that it lacks precision and may make it hard to determine, in any given case, whether a person is a lodger or has some other status.

4.11 A third approach, which we prefer, is to equate "lodgers" with those excluded from our new scheme because of sharing living accommodation with a landlord. This has the significant merit of being relatively straightforward and easy to understand.[6] In CP 162, we acknowledged that there would have to be some exceptions to the general approach that all occupation agreements should come within the scheme we propose. In particular we suggested that a person who shares accommodation with a resident landlord should not have any statutory protection, but should be able to be lawfully evicted by the resident landlord with the minimum of legal formality.[7]

4.12 We said, in CP 162 that, for these purposes, a resident landlord would be a person who occupies the premises as their only or principal home. We further observed that the only situation where the resident landlord would be able to remove the

[4] See eg *Douglas v Smith* [1907] 2 KB 568.

[5] See also *Appah v Parncliffe Investments* [1964] 1 WLR 1064.

[6] The same position applies to the owner-occupier who determines to take in a lodger. The concept does not use the lease-licence distinction. Currently some licences are covered by the requirements of s 3 and s 5 Protection from Eviction Act 1977 for four weeks notice in prescribed form and court proceedings before eviction. Tenants, as well as licensees, can be excluded from these protections by s 3A of that Act, and one of the exclusions is for sharing with landlords.

[7] CP 162, paras 9.109 to 9.112 and paras 9.133 to 9.139. Common parts such as means of access and stairways would not count as accommodation for these purposes.

sharer without having to seek a court order would be where the occupier was actually occupying the premises as his home.[8]

4.13 This still begs a number of questions. For example if an occupier takes in a lodger, but then goes away for a holiday, will the occupier remain in occupation? Presumably yes, as the absence from the home did not indicate that the occupier was going to reside elsewhere "as a home". Would the situation be different if the occupier went abroad for a fixed period to take up employment? Or was taken into hospital? Or was sent to prison? It could be argued that in all these situations, the absence from the home did not destroy the intention to occupy the premises as a home. Would it make a difference if the person was away for 6 months? A year? Five years? Could the quality of "lodging" be lost by a long absence?

4.14 To meet these theoretical possibilities, it might be suggested that any person who comes in to premises as a lodger simply retains the status of lodger, whatever the resident landlord decided to do.

4.15 This suggestion in turn raises the possibility that an occupier might take in a lodger while present in the home; then move on to repeat the exercise in other properties. This could result in a chain of "lodgers" whom the occupier/resident landlord had no intention of treating as lodgers, in any ordinary sense of that word. Rather the exercise would be a "sham" designed to give the occupier/resident landlord the ability to evict the so-called lodger without first having to go to court.

4.16 The case-law on "sham" transactions should be robust enough to prevent an occupier/resident landlord acting in this way.[9] While some may argue that we should not be proposing a test that might be the subject of sham transactions, we think, nevertheless, there is much to be said in favour of merging the concept of "lodger" with that of the person who occupies premises where there is a landlord who shares accommodation with the lodger.

4.17 **We provisionally propose that there should be a statutory definition of "lodger" for the purposes of the right to take in lodgers.**

4.18 **We further provisionally propose that "lodger" should be defined as a person who occupies premises where there is a resident landlord who shares accommodation with the lodger, irrespective of whether the person does so under a tenancy or a licence.**

4.19 **We invite views on whether the unprotected status of an occupier as a "lodger" should continue, even where the resident landlord no longer actually shares the accommodation with the lodger but retains the contractual right to do so.**

[8] Unless the landlord was effectively forced into obtaining a court order by the protection afforded by Criminal Law Act 1977, s 6 – see CP 162, paras 3.34 to 3.37.

[9] See eg *Street v Mountford* [1985] AC 809; *A G Securities v Vaughan* [1990] 1 AC 417.

A consent requirement?

4.20 As noted above, one feature of the current right is that it is exercisable by the secure tenant without the landlord authority having any say in the choice of lodger. If the right to take in a lodger were to be extended, it should perhaps be asked whether the right should be subject to the landlord's consent, which, in accordance with our normal principles, could not be unreasonably withheld.

4.21 The argument in favour of a consent requirement would be that there might be circumstances where the landlord felt that the occupier seeking to take in a lodger would not make a rational or responsible decision, and that therefore the landlord should have an overriding right to decline to consent to the occupier's choice of lodger, albeit the consent requirement could not be exercised unreasonably.

4.22 We can see four arguments for not having a consent requirement.

4.23 First, any decision to take a person into one's home is not one that would be taken lightly. Therefore the occupier seeking to take in a lodger would have made inquiry as to whether that person would be someone who would live amicably in the home.

4.24 Secondly, the need to get the landlord's consent adds an unnecessary degree of bureaucracy to what should be a simple and straightforward process.

4.25 Thirdly, as the lodger would usually be sharing living accommodation with his or her immediate landlord (the occupier who granted the right to lodge), he or she would fall outside the scope of our scheme.[10] The lodger who shared with the occupier/landlord could easily be removed from the premises, as the lodger's immediate landlord (the occupier) would be, for these purposes, a resident landlord. The lodger would have no security of tenure and would fall outside the scope of the Protection from Eviction Act 1977.

4.26 Fourthly, if the lodger caused any trouble which the occupier was unable or unwilling to do anything about, the (head) landlord has substantial powers to take possession proceedings for breach of the occupation agreement, for example on the grounds of nuisance, against the occupier (and thus by extension the lodger). If this resulted in an order for possession being made and executed against the occupier, the possession order would also cover the lodger.

4.27 We think that, on balance, the arguments against a consent requirement outweigh those in favour.

4.28 **We provisionally propose that the right to take in a lodger should be exercisable without a consent requirement, as at present**.

[10] For discussion of our proposals relating to such exclusions, see CP 162, paras 9.109 to 9.112 and 9.133 to 9.139.

APPLICATION TO TYPE II AGREEMENTS

4.29 We have considered whether or not the right should be extended to type II agreements. Some of the arguments above apply as much to type II agreements as to type I agreements. The lodger could be just as readily removed in a type II agreement, where the type II occupier was sharing accommodation with the lodger. Furthermore, the powers of the head landlord to remove the type II occupier (and with him or her, the lodger) are more extensive.

4.30 On the other hand, enhancing the personal autonomy of the occupier is a key feature of the type I, intended primarily for use in the social sector. Allowing type I occupiers the freedom to take in lodgers can be seen as part of that. The same is not necessarily true of type II occupiers, particularly in the private sector. It is arguable that, where the relationship between the head landlord and the type II occupier is essentially a commercial transaction, it is reasonable for such a private sector landlord to control the identity of others who may come to occupy their property similarly on a commercial basis.

4.31 In the context of the potential for anti social behaviour by lodgers, the situation is also different in the private sector (and, thus, in relation to type II agreements). Private landlords letting on type II agreements have adequate *powers* to evict troublesome occupiers and therefore lodgers. The problem in the private sector is more likely to be the unwillingness of a private landlord to use his or her powers.

4.32 Without the compulsory term giving the occupier the right to take in a lodger, which we propose in relation to the type I agreement, it would be open to a private landlord to permit the occupier to take a lodger. In the absence of a specific term providing otherwise, the landlord would have a veto – he or she could refuse to allow the occupier to take a lodger on any grounds, which would not be subject to the test of reasonableness.

4.33 If the occupier was required to ask permission of the landlord, who was able to exercise his or her veto, before taking in a lodger, it is possible that the landlord would be more willing to control potential anti social behaviour. If asked, the landlord may make enquiries about the identity of the proposed lodger and decline permission if he or she had doubts.

4.34 On the other hand, if consent were not required, once a lodger had been taken in by the occupier, the landlord might have to take possession proceedings against their occupier as being the only effective means to remove the unwelcome lodger. And even if the occupier was willing to terminate the lodger's agreement at the request of the landlord, making such a request requires a more positive step on the part of the landlord than merely declining consent, a step which a landlord may be reluctant to take.

4.35 **We invite views on whether or not occupiers under a type II agreement should also have the right to take in a lodger**.

4.36 **If the answer to the question is yes, we also invite views whether the right should be an absolute one, or one that can only be exercised with the consent of the landlord**.

SHOULD LODGERS HAVE A WRITTEN AGREEMENT?

4.37 Finally we consider whether lodgers should be entitled to have a written agreement (including both those occupying under the right provisionally proposed at para 4.5 above and any other lodgers).

4.38 It is the essence of a lodging agreement that the arrangement is informal. No doubt it is important for the parties to clarify key issues, such as which rooms may be shared, whether radios and televisions may be played at certain times, when the lodger has access to the kitchen or the bathroom and so on. It is arguable, however, that it would be at odds with the informality of the arrangement to require a written agreement. Further, the bargain between an occupier and a lodger is more likely to be made on a reasonably equal basis than one between a landlord, whether in the private or the social sectors, and a type I or type II occupier. In such circumstances, the sanctions we propose for failure by the landlord to provide the occupier with a written occupation agreement would, arguably, be inappropriate in the context of lodging agreements.[11]

4.39 On the other hand, it is inevitable that there will be some disputes about whether a person is a sub-occupier or a lodger. These might be easier to resolve if there were a written lodging agreement, though the existence of such would not prevent arguments that an agreement was a sham.[12] It may also be the case that many occupiers and lodgers would prefer to have a simple written agreement available.

4.40 Our provisional view, however, is that these advantages are not sufficient to justify the imposition of a *requirement* that the occupier should provide a lodger with a written lodging agreement.

4.41 **We provisionally propose, therefore, that there be no requirement for the provision of a written agreement between a lodger and his or her resident landlord**.

THE EFFECT OF A LODGER ON THE HEAD LANDLORD

4.42 The lodger does not have a direct contractual relationship with the head landlord, only with the occupier. The occupier is responsible to the head landlord for any behaviour of the lodger which puts the occupier in breach of their agreement with the landlord, just as they are for the behaviour of visitors or other household members. The relevant default terms, such as those on anti-social behaviour and damage to the property, will be drafted so as to make the occupier liable for taking reasonable steps to control lodgers, visitors and other household members, and for putting right any damage they cause.[13] This should protect the head landlord's interest in being able to exert control over the behaviour of lodgers, even though there is no direct contractual relationship.

[11] CP 162 paras 6.122 to 6.128.

[12] See above para 4.16.

[13] See the definition of serious anti social behaviour offered in CP 162 at para 13.40, which covers "the occupier or a person residing in or visiting the home".

4.43 There is a separate issue of the effect of the lodging agreement on the head landlord where the agreement between the occupier and the head landlord terminates. Lodgers are inherently in a very insecure position, given that they are excluded from our scheme. Under the current law they would all be licensees, so their rights would not be effective against the head landlord on termination of the occupier's agreement.

4.44 Our new definition of "lodger" might conceivably include a few people who would be classified under the current law as sub-tenants, rather than licensees, which would mean that the head landlord could be bound to accept them as tenants on termination of the head tenancy.[14]

4.45 We believe that it would be undesirable to reproduce this result in our new scheme. As the landlord has no control over the introduction of lodgers, so the landlord should not be bound by lodging agreements on termination of their agreement with the occupier.[15] The lodger should be treated like the occupier's other household members for this purpose, irrespective of whether under current law they would count as a tenant or a licensee.

4.46 **We provisionally propose that, on termination of an agreement covered by our new scheme, the head landlord should not be bound by any lodging agreement entered into by the former occupier, irrespective of whether that lodging agreement amounted to a tenancy or a licence**.

[14] This would be a very remote possibility given that in most cases the lodger does not have that degree of exclusive possession that would result in their claiming to have a tenancy.

[15] This will also avoid questions over whether the landlord is now no longer sharing with the lodger, so that the former lodger ceases to be excluded from our new scheme. For cases where agreements are terminated when there are sub-occupiers who are not lodgers, see paras 2.45 to 2.51 above and paras 5.59 to 5.74 below.

PART V
SUB-OCCUPATION AGREEMENTS

INTRODUCTION

5.1 In this Part we consider the position where an occupier wishes to give rights of occupation to another, while preserving the occupier's position with respect to the head landlord under the agreement. By analogy with the concept of sub-tenancy, we refer to these agreements as "sub-occupation agreements". Under such agreements, the occupier would be the landlord of the sub-occupier.

5.2 We discuss the cases where sub-occupation agreements would themselves be covered by our new scheme.[1] We ask in what circumstances this should be permitted, and whether there are circumstances where it should not be permitted. We consider what the type and content of these sub-occupation agreements should be. And we discuss the effect on head landlords of properly authorised sub-occupation agreements.

5.3 As with other questions addressed in this project, we seek to provide a framework that is comprehensible to both landlords and occupiers, and strikes an appropriate balance between their interests. We also wish to build on the framework we proposed in CP 162.

THE CURRENT LAW

5.4 At present, tenants, who wish to grant the right to occupy either all or part of their property to someone else for a limited period,[2] may be able to do so through the process of sub-letting. The law of landlord and tenant permits tenants to sub-let the whole of their premises, at the same time recognising that landlords may wish to control sub-letting. Sub-letting is thus permitted unless prohibited by a term in the tenancy agreement.

5.5 In many situations, sub-letting may be permitted only after the consent of the landlord has been obtained. Sub-letting in breach of such a covenant will be valid as between the tenant and the sub-tenant. In other words, although the sub-tenancy has been created without the permission of the head landlord, there is a valid relationship of landlord and tenant between the tenant (who becomes the immediate, or "mesne", landlord) and the sub-tenant. However, the sub-tenancy may not bind the head landlord. The breach of covenant by the tenant involved in the sub-letting may then result in the sub-tenant becoming liable to proceedings for forfeiture brought against the tenant (mesne landlord). Thus if the tenant (the mesne landlord) disappears, the position of the sub-tenant, as against the head landlord, becomes very precarious.

[1] As opposed to the lodging cases discussed in Part IV above, where the sub-agreement is excluded from our new scheme because the lodger shares living accommodation with the occupier.

[2] A purported letting covering the whole of the remaining period of the tenancy amounts to an assignment. We discuss the question of the assignment of the whole right of occupation in Part VI below.

Statutory provisions

5.6 Special statutory provisions allow a sub-tenant to apply to become the head landlord's tenant in proceedings for relief against forfeiture when a head landlord seeks to forfeit the lease of the sub-tenant's immediate (mesne) landlord.[3]

5.7 In addition, each of the current legislative regimes relating to housing makes different provision on this issue.

(1) The Rent Act 1977 contains no implied term against sub-letting.[4] The general landlord and tenant rules outlined above therefore apply to Rent Act protected tenancies. However, a statutory tenancy which arises under the Rent Act terminates as soon as the statutory tenant ceases to occupy it as his or her residence. Thus, sub-letting the whole will usually terminate the statutory tenancy. Sub-letting of part of the premises may be possible.

(2) The Housing Act 1988 provisions relating to sub-letting are the same whether the tenancy is fully assured or an assured shorthold tenancy, but they differ according to whether the tenancy is fixed term or periodic. In relation to a *fixed term* tenancy, the normal rules of landlord and tenant law mentioned above apply. However, under section 15 it is an implied term of a *periodic* assured tenancy that the tenant will not sub-let without the consent of the landlord. The landlord is allowed to withhold consent on any grounds, however unreasonable they may be.[5] Sub-letting of the whole premises will normally take the tenancy out of its assured tenancy status, as the tenant will not be able to show that he or she is still using the premises as their only or principal home.

(3) Under the Housing Act 1985 the position is more complex. Section 93(2) provides that, on sub-letting the whole property, not only does the tenancy cease to be a secure tenancy (even if the tenant actually remains in the property) but it also cannot again become a secure tenancy (for example, on termination of the sub-letting).[6] Sub-letting of part of the property is permitted, subject to the tenant obtaining consent from the landlord, consent which must not be unreasonably withheld.

(4) Under the Housing Act 1996, an introductory tenant or licensee can sub-let freely, subject to any express prohibitions, as that Act and the secondary legislation thereunder contain no implied term on sub-letting.[7] However, an introductory tenancy must meet the same "tenant condition" as a secure tenancy.[8] Therefore a sub-letting of the whole will abolish the

[3] Law of Property Act 1925, s 146(4).

[4] Special provision is made in the Rent Act 1977, s 23 for the tenant to retain protection despite any sharing with, or provision of board to, the sub-tenant.

[5] Subject to s 15(3).

[6] The same principles apply, even if the secure tenant is living away from the dwelling and thus in breach of the "tenant condition" – see the Housing Act 1985, s 95.

[7] See Housing Act 1996, s 134.

[8] Housing Act 1996, s 124(2).

tenant's introductory status, as the tenant will no longer be occupying it as his or her home.[9]

5.8 We conclude that, in law reform terms, there is a clear need to simplify the complexity of the current law as outlined above.

OUR APPROACH

5.9 It is consistent with the emphasis on the agreement, which we spelled out in CP 162, that the agreement itself should define the circumstances in which an occupier with an occupation agreement covered by our proposals should be able to create a sub-occupation agreement of the premises.

5.10 **We provisionally propose that the issue of whether or not an occupier should be able to enter a sub-occupation agreement of the premises should be determined by a term in the original agreement**.

TYPE I AGREEMENTS

5.11 We consider first the extent to which occupiers are entitled to create sub-occupation agreements of part of the premises; we then consider the position where occupiers wish to create sub-occupation agreements of the whole of the premises.

Sub-occupation agreements of part of the premises

5.12 As noted above, the Housing Act 1985 currently provides that secure tenants should have the right to sub-let *part* (but not the whole) of their premises.[10] This is not an absolute right but is subject to their obtaining the written consent of the landlord, consent which must not be unreasonably withheld.[11]

5.13 In the case of periodic assured tenancies for which no premium has been taken, it is an implied term, which can be overridden by express terms, that the tenant cannot sub-let the whole or part of the property without the landlord's consent.[12] Consent can be unreasonably withheld as section 19 of the Landlord and Tenant Act 1927 does not apply.[13]

5.14 In the case of other categories of tenants, the position is determined by the terms of any tenancy agreement or lease under normal rules of landlord and tenant. Thus sub-letting part of the premises is permitted where the agreement so provides. Whether or not the consent of the landlord is required also depends on the agreement; if it is, it must usually not be unreasonably withheld.

5.15 It might be asked whether, if a right to take in lodgers is to be part of our proposed scheme – as discussed in Part IV above – it is necessary for there to be separate

[9] Housing Act 1996, s 125(5)(a).

[10] Housing Act 1985, s 93(1)(b).

[11] Housing Act 1985, s 94(2).

[12] Housing Act 1988, s 15(1)(b).

[13] Housing Act 1988, s 15(2).

provision relating to the creation of sub-occupation agreements of part of the premises.[14]

5.16 The answer is that there will be situations in which a third party coming into the dwelling does not share living accommodation with the landlord, so that they would not fall within the proposed definition of lodger.[15] They would therefore be a sub-occupier rather than a lodger.[16] The obvious example is where the size and configuration of the premises are such that a sub-occupation agreement is possible which does not involve sharing with the landlord (for example, where there is a separable "granny" flat).

5.17 In view of the fact that secure tenants already have a statutory right to sub-let part of the premises, albeit subject to the consent of the landlord, we think that a similar right should be retained in the scheme which we propose. In order to sustain the principle of "landlord-neutrality" we think that such a right should form a term in all type I occupation agreements.

5.18 **We provisionally propose that there should be a compulsory term in the type I agreement that the occupier may enter a sub-occupation agreement of part of the premises, subject to the consent of the landlord, which may not be unreasonably withheld. This right would not however be available where the occupier would have to cease to occupy the property as a home in order to grant the sub-occupation agreement**.

Sub-occupation agreements of the whole of the premises

5.19 This leads to the next issue: should there be a different principle for sub-occupation agreements of the whole of the premises?

5.20 We would anticipate that social landlords, whose primary purpose is the provision of housing to satisfy housing need, might be unhappy if, having granted a right to occupy a dwelling to a person or family in housing need, such person or family then entered a contract with others, who did not have the same degree of housing need, entitling them to come and live in the home.

5.21 This argument could certainly be used to justify a landlord's veto on sub-letting of the whole property. This would reflect the effective prohibition that currently exists in the context of secure and periodic assured tenancies.[17] This argument could

[14] Separate treatment was needed under the Housing Act 1985 because the right to take in lodgers only applied to granting licences, so the provisions on sub-letting apply to tenancies. In our new scheme the definition of "lodger" will not be tied to licences only.

[15] See para 4.18 above.

[16] Where the occupier was away temporarily, they would still count as occupying the property as their principal home; thus the sub-occupier would be a lodger, as discussed in Part IV above, and could be removed easily. In other circumstances the occupier might cease to use the property as their main home, but still want to be able to come back to it and be prepared to come back only to part of it. This might be because the occupier has a job abroad but knows he or she will want to come back to the premises after a few years.

[17] See para 5.7 above.

indeed be used to justify an extension of the existing statutory prohibition to all grants of rights of occupation by social landlords.

5.22 Against this it may be suggested that, where an occupier can demonstrate that he or she needs to leave their current home for a defined period – but can also demonstrate that he or she will wish to regain possession at some future date – the occupier should be able to make a temporary transfer of his rights of occupation over the whole of the premises to another.[18]

5.23 Further, if a right to enter a sub-occupation agreement of part of the premises is, subject to consent, to be permitted, why should this principle not extend to a sub-occupation agreement relating to the whole of the premises? Arguably, the distinction between sub-occupation of part and sub-occupation of the whole is an unnecessary element of complexity which we should be striving to avoid.

5.24 While private landlords who have let on type I agreements may be less concerned about meeting housing need, they will also wish to be able to control the identity of the people living in their properties, not least so that they can be assured that they are people who will be able to pay the rent.

5.25 We would expect a well-drawn agreement to make express reference to the position on sub-occupation of the whole. Thus we think our proposed agreements should contain a term which deals with this question.

5.26 Notwithstanding the points made in para 5.23 above, we have come to the provisional view that the distinction between creating sub-occupation agreements of part of the premises, and of the whole of the premises should be retained. We therefore think that a default term, that there be a landlord's veto on the granting of a sub-occupation agreement of the whole of the premises, would be appropriate.

5.27 To deal with the issue in para 5.24 above, a landlord, who chose to do so, could replace the default term with a more generous one, allowing the occupier to make a sub-occupation agreement subject to the landlord's consent. The landlord could indeed remove any requirement for consent. And even if a landlord adopted the default term, the landlord could still, in any particular situation, choose not to exercise their veto.

5.28 **We provisionally propose that it should be a default term in the model type I agreement that there be a landlord's veto on the granting of a sub-occupation agreement which would involve the occupier moving out of the whole of the premises**.

5.29 We dealt in Part II above with the legal position as between the (head) landlord, the original occupier and the sub-occupier where an occupier has purported to

[18] This issue will often be addressed by our proposals for creating sub-occupation agreements of part of the accommodation, with the absent occupier retaining rights over the remaining part: see para 5.18 above.

grant a sub-occupation agreement, either in breach of the landlord's veto or without having obtained a necessary consent.[19]

TYPE II AGREEMENTS

5.30 We anticipate that type II agreements will be used primarily by private landlords, and only in special cases by social landlords. We have considered whether the right to enter sub-occupation agreements of the whole or part of the premises should be possible under a type II agreement.

5.31 Under current housing law, private landlords and tenants have rather greater flexibility to agree the basis for any such arrangement than is available to social landlords. However, the present legal position is notorious for its lack of clarity.

5.32 To assist in simplifying the law on this point, we think that the same principles relating to sub-occupation agreements, which we have suggested should apply to type I agreements, should also apply to type II agreements.

5.33 **We provisionally propose that the principles relating to sub-occupation agreements under type I agreements should apply equally to type II agreements**.

THE TYPE AND CONTENT OF THE SUB-OCCUPATION AGREEMENT

5.34 If occupiers are to be entitled to create sub-occupation agreements, three consequential questions arise: what type of agreement it should be, what the terms of the sub-occupation agreement should be, and what formalities should be required.

The type of agreement

5.35 The first point to note is that sub-occupation agreements will, by definition, be created by private individuals. Therefore, under the principles set out in CP 162, the default position would be that the sub-occupation agreement would fall in the type II category.[20]

Periodic or fixed-term

5.36 This still leaves open the question of whether the sub-occupation agreement would be a periodic or a fixed-term type II agreement.

5.37 Problems could arise if the sub-agreement purported to give greater security than the original agreement. This could occur where an occupier under a periodic type II agreement purported to create a fixed-term type II sub-occupation agreement.

[19] See paras 2.45 to 2.67 above.

[20] See CP 162, para 11.67.

5.38 The significance of these problems would depend on whether or not the head landlord is bound by the sub-occupation agreement.[21]

5.39 If they are not bound, then the head landlord will be able to seek to repossess the premises by taking proceedings against the original occupier. Once the head landlord had obtained an order for possession against him or her, any others on the premises would be trespassers, who could be evicted as such. Thus the new occupier will turn out to have less security than the sub-occupation agreement suggested. The new occupier would have been misled about his or her level of security. But their redress would be against the original occupier, not the head landlord.

5.40 If the landlord is bound by the sub-occupation agreement, and indeed is bound to the terms of the sub-occupation agreement rather than to the original agreement, then the landlord might end up taking on the new occupier under terms less favourable to the landlord than those which had originally been contracted for with the original occupier.[22]

5.41 However, as the head landlord would only be bound by the sub-occupation agreement if they had consented to its creation in the first place, arguably they should live with the consequences of giving their consent.

5.42 To avoid the problem of the sub-occupation agreement granting more contractual security than the original occupier has, a number of options can be considered.

5.43 The first is that our new scheme could prescribe that sub-occupiers should always take on a type II *periodic* tenancy, as a matter of law and irrespective of what the occupier and sub-occupier have agreed. This would protect landlords from accidentally agreeing to too high a level of (contractual) security in the sub-occupation agreement, which they might be saddled with if the original occupier disappeared. However this might be too inflexible and fail to cater for a minority of cases where all three parties were happy for the sub-occupier to have a greater degree of contractual security.[23] Further, it would be contrary to our general approach that, where possible, the agreement itself should be an accessible and accurate statement of the terms binding the parties.

5.44 A second option would be to provide that, where the landlord was bound by a sub-occupation agreement, the landlords' obligations towards the sub-occupiers should be determined by the terms of the original agreement rather than those of the sub-occupation agreement. This would ensure that landlords could not be prejudiced by the terms of the sub-agreement. They would only be concerned to vet the

[21] Basically the landlord will not be bound where consent was required but not obtained: see paras 2.45 to 2.67.

[22] The terms of a fixed-term sub-occupation agreement could offer the sub-occupier greater security, lower rent or a greater ability for the occupier to terminate the agreement than had been agreed in the original agreement.

[23] Formerly – under the principle of "nemo dat quod non habet" – a holder of an interest in land could not grant a superior interest out of it. This remains the case as far as third parties are concerned, but as between a licensee and their "sub-tenant" the sub-tenancy is now effective as a tenancy following *Bruton v London and Quadrant Housing* [2000] 1 AC 406.

potential sub-occupier, rather than also vetting the sub-agreement itself.[24] However this might unfairly result in the sub-occupier, who may or may not be aware of the head agreement, ending up with a new agreement which is different from the terms of their sub-agreement.

5.45 We provisionally conclude that both these options are over-protective and inflexible. Our preferred option, therefore, is that there should be a default term in the original agreement which provides that, where the landlord consents to the creation of a sub-occupation agreement, such sub-agreement should be a periodic type II agreement. If the head landlord found they were bound to accept the sub-occupier on the terms of the sub-agreement, they would be able to use the notice-only procedure to terminate the agreement in the normal way. If they wished to be more flexible and, for example, accept a sub-occupier on the basis of a fixed term type II agreement, they would be free to do so.

5.46 **We provisionally propose that the model agreements contain a default term which provides that any sub-occupation agreement should be a type II periodic agreement.**

The terms of the sub-occupation agreement

5.47 A further question arises whether the head landlord should be able to prescribe the terms which the original occupier was seeking to include in the sub-occupation agreement. The relationship between the occupier and the sub-occupier should be principally a matter for them. Initially, the landlord's interest in the sub-occupier's agreement will be limited, as at that point there will be no direct contractual relationship between them.

5.48 The landlord will, of course, wish to ensure that the sub-occupier does not appear to be the sort of person likely to cause nuisance or damage to the property, both of which are matters which may directly affect the landlord. But the fact that no sub-occupation agreement can be made without the landlord giving consent should avoid many of these problems.

5.49 If the landlord gives consent to the creation of the sub-occupation agreement, this raises the possibility that, at some point in the future, the landlord will become bound by the sub-agreement.[25] We have asked ourselves whether, because of this possibility, the landlord should, when giving consent, also be able to impose conditions relating to the content of any sub-occupation agreement.

5.50 In view of the fact that the default position we have proposed is that the sub-occupier will have a type II periodic tenancy, in relation to which security of tenure

[24] Eg a private landlord would look for evidence of ability to pay rent, whereas a social landlord would look for possible prejudice to their allocation policy. Both would want to be satisfied that the sub-occupier would not cause nuisance or damage to the property. These considerations can be distinguished from questions of whether the sub-agreement is itself acceptable in terms of length, security, level of rent or other terms. Again different factors will be relevant in the private and social sectors; a private landlord may want the agreement to charge more rent so as to protect the rent stream, whereas a social landlord may want to avoid occupiers making a profit out of social housing.

[25] See paras 5.59 to 5.66 below.

is limited, it could be argued that it would not be proportionate for our scheme to seek to prescribe that a landlord should be able to impose conditions as to the content of any sub-occupation agreement.

5.51 On the other hand it could be suggested that a landlord might actually be more willing to grant consent if they were able to exercise some control over the content of any sub-occupation agreement, or indeed simply wished to be given a copy of any sub-occupation agreement.

5.52 In order not to undermine the basic proposition that consent should not unreasonably be withheld, it would be essential that any conditions that the landlord might seek to impose on the content of a sub-occupation agreement should, equally, be reasonable.

5.53 If consent to the creation of a sub-occupation agreement was given, subject to reasonable conditions being met, the further question arises as to what the consequences should be of the occupier ignoring one or more of those conditions when entering the sub-occupation agreement. Should this failure to adhere to the conditions mean that the original consent was, as a consequence, to be deemed not to have been given?

5.54 We think that it would be unfair on the sub-occupier were the whole process of the creation of the sub-occupation agreement to be invalidated by a failure on the part of the occupier to adhere to one of the conditions. But we also think that, for example, if the landlord had required any sub-occupation agreement to be a type II periodic agreement, and the occupier sought to create a fixed-term sub-occupation agreement, the landlord should not be stuck with this breach of condition.

5.55 **We provisionally propose that landlords, on giving their consent to the creation of a sub-occupation agreement should be able to impose reasonable conditions as to the type or terms of the sub-agreement**.

5.56 **We further provisionally propose that breach of these conditions should not invalidate the consent, but that any sub-occupation agreement created without compliance with such conditions should be deemed to be a type II periodic agreement**.

Formalities

5.57 In cases where an occupier has the right to grant a right of sub-occupation, we think that the normal rules relating to the provision of a written copy of the agreement should apply.[26]

5.58 **We provisionally propose that, where a sub-occupation agreement has been properly entered into, the same rules and sanctions relating to the provision of a written copy of the agreement by the occupier to the sub-occupier should apply as they apply to the original agreement**.

[26] See CP 162, paras 6.122 to 6.135.

THE EFFECT ON HEAD LANDLORDS OF AUTHORISED SUB-OCCUPATION AGREEMENTS

5.59 It seems obvious that, where the sub-occupation agreement has been authorised by the giving of consent by the landlord, or because the landlord has not required consent to be given, the landlord should be bound by the consequences of these decisions.[27] It is an essential concomitant of this that if it is agreed that the landlord can only withhold consent to a sub-agreement on the grounds that it is reasonable so to do, then one of the factors in assessing that reasonableness must be whether the landlord would have been willing to grant an occupation agreement to the sub-occupier in place of the original occupier.[28]

5.60 If the original occupier brings the original agreement to an end by issuing a notice to quit, or a notice under a break clause or by surrendering the agreement, in such a case the sub-occupier would broadly step into the shoes of the original occupier from the date on which the notice or surrender took effect.[29]

5.61 This does not mean that the head landlord comes into a contractual relationship with the sub-occupier by virtue of the sub-occupation agreement as such. The occupier remains the person with liabilities to the landlord, and, in particular, is liable for the sub-occupier's behaviour where it puts the occupier in breach of the head agreement. This position is similar to the occupier's liability for the behaviour of visitors and other household members.[30] However, once the agreement between the head landlord and the occupier is terminated, the landlord may become bound by the agreement with the sub-occupier in the following circumstances.

5.62 If the landlord brings possession proceedings against the original occupier for breach of the original agreement (say, for failure to pay the rent) and the court orders possession to be given up and such order is executed, the sub-occupier will, from the date of execution of the order for possession, become the occupier under an agreement directly from the landlord.

5.63 We have considered what type of agreement would then bind the original landlord and the sub-occupier. It could be argued that the type of agreement should be the same as under the original occupation agreement. But this could have the effect that a sub-occupier with only a type II sub-occupation agreement could be promoted to a type I agreement, if that was the status of the original agreement.

5.64 On the other hand, it could be argued that the type of agreement created by the original occupier with the sub-occupier should be the type which the landlord takes over. After all that will have been the basis on which a landlord will have given his consent.

[27] In accordance with the general principles set out in para 2.47 the head landlord would not be bound by a sub-occupation agreement where they had not given consent, and this withholding of consent was reasonable.

[28] See paras 2.27 to 2.44 above for our discussion of reasonableness in consent requirements.

[29] We consider the question of the liability as between the landlord and the sub-occupier in a little more detail at paras 5.59 to 5.74 below.

[30] See para 4.42 above on the similar liability of occupiers for the behaviour of lodgers.

5.65 **We provisionally propose that, as between the landlord and the sub-occupier, the question of what type of agreement the landlord should be bound by should be determined by the type of agreement created by the original occupier with the sub-occupier**.

5.66 **We further provisionally propose that if the landlord has given consent, or has included a term in the agreement allowing sub-occupation agreements to be made without consent (replacing the default term), then on the termination of the original agreement**:

(1) The landlord should be bound by the sub-occupation agreement if the original occupier terminated the agreement by giving notice to quit or by exercising a break clause or surrendering. The sub-occupier should step into the shoes of the original occupier but only under the terms of the sub-agreement.

(2) If the landlord brings proceedings for possession against the original occupier or if the landlord used the abandonment procedure, then the landlord should have to serve notice on the sub-occupier (at the premises), who should be entitled to be joined in the action. The sub-occupier should be entitled to seek an order of the court converting the sub-occupier into a direct occupier of the landlord, but, again, on the terms of the sub-agreement. The court should do so unless it would have granted possession against this person if they had already been the occupier.[31]

The resulting liabilities of landlords and sub-occupiers

5.67 Where the head landlord ("L") becomes bound to accept the sub-occupier ("S") on the terms of the sub-agreement, this will effectively operate as a change of landlord in that sub-agreement. This leads to the question of the extent to which L or S will be liable for breaches of the sub-occupation agreement, which occurred before L became the new direct landlord.

5.68 We take the view that, as the new direct landlord, L should not be liable to S for any breaches of the sub-agreement by the previous landlord (the former occupier, "O") which occurred before L became the new direct landlord of S. Any remedies for breach should be pursued by S against O.

[31] The court might refuse to take this step, eg where there was clear evidence that the sub-occupier was in breach of the sub-occupation agreement with the occupier.

5.69 Nor do we think that L should be able to take action against S for any breaches of the former sub-agreement which S committed before the change of landlord.[32]

5.70 We do not believe that this latter proposition should cause landlords excessive hardship. L should have ensured that the terms of the sub-occupation agreement contained provisions to protect L's interests. These would provide that O should be able to take proceedings for possession against S for breach of the sub-occupation agreement and, where relevant, for damages. The original agreement between L and O should also provide that any damages obtained by O for damage to the premises should be passed to L. These proposals are in any event broadly consistent with the general rules of privity of contract and the Landlord and Tenant (Covenants) Act 1995.

5.71 If L took proceedings for possession against O, and it was clear that the primary cause of the breach was actually the behaviour of S, then the court would not require L to become the direct landlord of S.[33]

5.72 **We provisionally propose that the new direct landlord should not take the benefit or burden of any breaches of the agreement which occurred before the change of landlord.**

5.73 **We thus provisionally propose that the liability of the new direct landlord to the former sub-occupier should be limited to breaches of the agreement occurring after the date on which the new direct landlord became the new direct landlord. Any claims for breach of the sub-occupation agreement occurring before that date should be pursued by the former sub-occupier against the former occupier.**

5.74 **We further provisionally propose that the liability of the former sub-occupier to the new direct landlord should be limited to breaches of the agreement occurring after the new direct landlord became the new direct landlord. Where a breach of the sub-occupation agreement occurred before the new direct landlord became the new direct landlord, the former sub-occupier should remain liable to the former occupier.**

[32] This is broadly similar to what the position would currently be under Landlord and Tenant (Covenants) Act 1995, s 23 if the mesne landlord's interest had been assigned, in that a new mesne landlord would not obtain any benefits or liabilities in relation to any time falling before the assignment. However, under s 23(3) the new mesne landlord would be entitled to use a right of re-entry in respect of the sub-tenant's previous breaches. We are not reproducing an equivalent of forfeiture or rights of re-entry in our agreements. We set out below why we think, in the circumstances of a head landlord under one of our agreements taking on a sub-occupier, the head landlord should not be able to take action against the sub-occupier for the sub-occupier's previous breaches.

[33] This possibility is set out in para 5.66(2) above.

PART VI
TRANSFERRING RIGHTS OF OCCUPATION

INTRODUCTION

6.1 In this Part we consider the general question of the extent to which occupiers should be able to transfer the totality of their occupation rights to another. We also discuss more specific issues arising from

(1) the right to exchange,

(2) transfers to those with a potential right of succession, and

(3) certain powers of the courts to order transfer.

6.2 We also discuss a number of related matters, including

(1) the effects of the transfer of the right to occupy to another,

(2) the relationship between sub-occupation agreements and transfers, and

(3) transfers of the residual periods of long leases.

TRANSFERS

The current position

6.3 The total transfer of the property interest held by an existing tenant/leaseholder to another is currently achieved by the process of assignment. As with the law on sub-letting, the law on assignment is a complex mix of contract law, real property law and statute law. Broadly, whether a tenant/leaseholder has the right to assign to another will depend on the terms of the lease/tenancy agreement.

6.4 In the case of secure and introductory tenancies there is a more straightforward approach. The Housing Act 1985 and the Housing Act 1996 respectively provide that secure and introductory tenancies are completely incapable of assignment[1] except in prescribed circumstances.[2] A consequence of these provisions is that there can be no argument about the effect of a purported assignment; it is of no effect. The absolute nature of these provisions is – to an extent – counter-balanced by the statutory "right to mutual exchange"[3] which we discuss below.

[1] Housing Act 1985, s 91(1); Housing Act 1996, s 134(1).

[2] Housing Act 1985, s 91(3); Housing Act 1996, s 134(2).

[3] Housing Act 1985, s 92.

Our approach

6.5 As with our proposals on the creation of sub-occupation agreements, we think that the rules regulating the ability (or otherwise) of an occupier to transfer the whole of his or her rights of occupation to another should be set out in the agreement.

6.6 **We provisionally propose that any restrictions on the ability of occupiers to transfer the whole of their rights of occupation should be by way of a term in the occupation agreement**.

6.7 The process of assignment is essential for long leaseholds of over twenty-one years, not covered by our scheme.[4] Restrictions on the ability of the leaseholder to transfer his or her title to property would seriously undermine the leasehold market in those areas of the country where leasehold is commonly found.[5]

6.8 However we are not convinced that, in the context of the occupation agreements covered by our new scheme, an untrammelled ability permanently to transfer occupation rights to others who are total strangers to the original contract is appropriate. Indeed, to provide otherwise would seriously undermine the ability, particularly of social landlords, to allocate their properties to those most in need of social housing.

6.9 If an occupier wishes to give up his or her rights to occupy a property, this should be done through the process of issuing a tenant's notice to the landlord, surrendering the right back to the landlord, or, if the worst comes to the worst, abandoning the premises.[6]

6.10 **We provisionally propose that occupation agreements should contain, as a default term, a provision stating that there is a landlord's veto against the transfer of the right to occupy by the occupier to a third party**.

6.11 Because we propose this as a default term, landlords will be able expressly to grant more generous freedoms to their occupiers if they so wish.

Transfer of Rent Act statutory tenancies

6.12 We note here that Rent Act 1977, Schedule I, Part II, paragraphs 13 and 14 provide for a process of "transfer" of statutory tenancies by agreement between the outgoing tenant, the incoming tenant and the landlord. We have no knowledge of how frequently these provisions are used in practice, but we think that they would need to be preserved for Rent Act tenants under the scheme we propose.

6.13 **We provisionally propose that the rights of Rent Act statutory tenants to agree with their landlord to transfer their statutory tenancy should be preserved**.

[4] CP 162, paras 9.18 to 9.20.

[5] The nature of these markets may change as the provisions of the Commonhold and Leasehold Reform Act 2002 come into effect; but they will not alter the basic assumptions made in the text.

[6] These issues are discussed in CP 162, paras 10.49 to 10.69.

SPECIAL CASES

6.14 This general approach may need to be subject to a number of exceptions, which we now consider. They are

(1) the right to exchange,

(2) the right to transfer an agreement to a potential successor before death, and

(3) the requirement to transfer an agreement to another person under a court order in certain family proceedings.

A right to transfer by mutual exchange

Type I agreements

6.15 The right of secure tenants to exchange their tenancies was an important part of the "tenants' charter" to which the Housing Act 1980 gave effect. It is now contained in Housing Act 1985, section 92. It should be stressed that the right is not an unconditional one. It can only be exercised with the consent of the landlords involved. Special provisions on consent are found in Housing Act 1985, Schedule 3.[7]

6.16 Housing Corporation guidance says registered social landlords should make up for the lack of this statutory right in assured tenancies by including equivalent contractual provisions in their tenancy agreements.

6.17 The right retains its policy importance in helping to promote mobility across the country. It is "mutual" in that the exchange must be with another social tenant who wants to exchange his or her property with that of the transferor, or there must be a complete ring of tenants moving around a circle. This means that the interests of social landlords in meeting housing need will not be prejudiced as no new tenants, not in housing need, can come in to social housing because of the right. It is a right which many council tenants currently make use of. We have concluded that it is a right which should be reproduced in our new scheme.

6.18 As one of the objects of our proposals is to create a level playing field across the social rented sector, we think this right could properly be extended to all grants of the right to occupy made by social landlords under type I agreements. Most of the current problems caused by attempts to exchange between secure and assured tenants of social landlords will be removed by our proposal for a unified type I agreement covering both sectors.[8]

6.19 **We provisionally propose that it should be a compulsory term in any type I agreement granted by a social landlord that the occupier should have the**

[7] We discuss the question of consent in this particular context paras 6.29 to 6.37 below.

[8] In practical terms, the differences, which will persist unless Government policy changes (CP 162, paras 1.91 to 1.93), between local authority occupiers with the right to buy and registered social landlord occupiers who do not have the right to buy, may provide a significant disincentive to transfers between the two categories.

right to exchange his or her right of occupation with another occupier granted a type I agreement by a social landlord. The right to exchange would be subject to consent being given by the landlords affected.

6.20 The question then arises whether this right should be extended to occupiers under type I agreements which have been created by private landlords. We have stated that we want to make the new agreements as landlord-neutral as possible. A private landlord offering type I agreements could be seen as having voluntarily opted in to providing a high degree of security for their occupiers.

6.21 On the other hand, it is arguable that while the right to mutual exchange is properly a feature of the public/social rented sector, it would impose an unfair and unnecessary burden on private landlords. In any event, it might be suggested that the imposition of a right to exchange would be regarded as a significant extra burden by any private landlords who might thereby be deterred from entering type I agreements, which otherwise they might have considered.

6.22 Furthermore, private landlords will not usually allocate their homes on the basis of an assessment of housing need. If private landlords are included in the right of exchange, this could lead to social landlords having to accept as occupiers, via the exchange process, those who would not otherwise qualify for social housing on the basis of housing need.

6.23 Nevertheless, if we are correct in our assumption that use of type I agreements by private landlords would be rare, and that where this happened, the landlords might well be motivated by similar considerations that apply to the provision of social housing (for example, philanthropic organisations which did not want to register with the Housing Corporation), this might lead to the conclusion that there would have been *some* assessment of need. Thus, in the few cases where occupiers sought to use the right of mutual exchange to move from private to social landlords, the policies of social landlords would not be seriously compromised.

6.24 Equally it is now commonly accepted, that the policy behind social housing should not be purely about need, as sustainable mixed communities should be encouraged instead of "ghettoisation" of social landlords' estates. This might also indicate that to include occupiers of private landlords within the scope of the right to exchange would not seriously prejudice a social landlord's allocations policy.

6.25 If it was felt that to impose a compulsory term giving the occupier the right to mutual exchange on private landlords would be unacceptable, we wonder whether, as an alternative, there might be a default term in type I agreements created by private landlords providing for the possibility of the occupier having the right to exchange.

6.26 **We invite views on the following questions**:

(1) Should private landlords be required to make any provision for a right of mutual exchange in any type I agreement they may enter into?

(2) If the answer is yes, should this be by way of a compulsory term, or a default term?

(3) Would private landlords who might otherwise consider using type I agreements be deterred from doing so by the existence of a right of mutual exchange?

(4) Would the interests of social landlords be prejudiced if mutual exchanges led to their receiving type I agreement occupiers from private landlords who had never been through the allocations procedure of any social landlord?

Type II agreements

6.27 The right of mutual exchange does not currently apply to introductory or assured shorthold tenants. Given their short-term nature we do not think that such a right would appropriately apply to type II agreements

6.28 **We provisionally propose that such a clause should not be a compulsory term in any type II agreement**.

Consent to exchanges

6.29 Turning to the issue of consent, the current provisions are set out in great detail in Housing Act 1985, section 92 and Schedule 3. Unusually, there is no general discretion to refuse the application, which could be the subject of challenge if unreasonably withheld. Rather, these provisions are couched in a much more positive fashion. Consent can only be withheld on specific grounds listed in Schedule 3. If consent is withheld on other grounds it is to be treated as given.[9] This puts the tenant in a stronger and clearer position than in most other situations where consent is sought.

6.30 As there is no specific requirement of reasonableness, this might suggest that consent could be withheld on a Schedule 3 ground, even where it was unreasonable to do so. Nevertheless, it appears that Landlord and Tenant Act 1927, section 19 would imply a requirement that any refusal of consent must be reasonable into the provisions. Any refusal would also be subject to normal administrative law challenge for unreasonableness. Secure tenancies are not affected by the Landlord and Tenant Act 1988, because of section 5(3) of that Act.

6.31 There is a strict time-limit of 42 days from the tenant's application (though there are no provisions requiring the application to have been in writing or in a particular form) for the landlord to be able to rely on any of the grounds for withholding consent.[10] Oddly, there is no provision deeming a failure to reply to be either a refusal or a consent.

[9] Housing Act 1985, s 92(3). The grounds include the fact that the landlord is taking repossession action or that the estate management grounds would be available if the exchange took place. They also include, in grounds 3 and 4, provision for refusal if the property would be substantially too large, or unreasonably small (or otherwise unsuitable), for the needs of the assignee.

[10] Section 92(4).

6.32 Finally there are strict provisions on conditional consent.[11] The only condition which can be validly imposed is one that before consent is granted the tenant should first remedy any breach of their agreement.

6.33 One of the specific problems with the combined effect of subsections 92(3) to (6) is the lack of clarity as to the position where a landlord does not respond to a request within 42 days. After the time has expired, they cannot rely on any of the grounds for refusal. But as they have not actively replied withholding consent on any other non-permitted grounds, they cannot be deemed to have given consent under section 92(3). They may still be able to give consent subject to a condition under section 92(5), and there is no time limit on how long they take to do that.

6.34 We would like to see a much clearer time-table applied to the whole process, with a set of rules which is determinative of the position at the end of that time limit.

6.35 **We provisionally propose that the right to exchange should be subject to the landlord's consent**.

6.36 **We invite views as to whether the new scheme should reproduce the current requirements as to the landlord's consent to mutual exchange in Housing Act 1985, section 92 and Schedule 3, or whether instead a simpler, more clearly time-limited procedure should be adopted**.

6.37 **We ask whether, in the alternative, the same criteria of general reasonableness should be adopted as we are suggesting in other cases where consent is required, based on Landlord and Tenant Act 1927, section 19 and the Landlord and Tenant Act 1988**.

Chains of exchanges

6.38 It has been suggested to us that a problem with the current mutual exchange provisions is that they do not cater for "chains" of potential transfers unless the chains connect round in a complete loop, with the last person taking on the tenancy of the first. Thus if A exchanges with B, B exchanges with C, and C exchanges with D, it is essential that D moves into A's home. This conflicts with the wishes of some social landlords to be able to innovate with current ideas about "choice-based lettings".

6.39 It may be preferable to develop the current scheme so that not only would an occupier's right crystallise, as now, where the chain formed a complete circle of exchanging occupiers, but also where the chain started with a landlord who was prepared to accept the creation of a "void" and ended with a landlord who was prepared to allocate a "void". In the latter case, A could exchange with B, B could exchange with C, C could exchange with D, but D would not be required to complete the circle by moving into A's home. D could move into quite different premises; and A's home would be available for letting to someone new. The landlord's consent would remain the deciding factor, but it would involve new criteria for determining the reasonableness of the decisions of the landlords at either end of the chain.

[11] Section 92(5) to (6).

6.40 We understand that social landlords involved in exchange schemes also want to be able to facilitate chains of moves which may involve private landlords who have been approved for the purpose by all the participating social landlords. Further changes to the current system could be made to add this flexibility. It might be easier to achieve this through landlords' allocation policies than by an extension of the right to exchange. If all the landlords are willing to allow the moves, these can be done without the exercise of rights by the occupiers, but rather by using a series of surrenders connected to grants of new tenancies of the next property in the chain.

6.41 **We invite views as to whether the current requirement for the existence of a complete chain of exchanges should be retained, or whether it should be able to be waived by the landlords concerned**.

Transfers to potential successors

6.42 In Part VII, below, we discuss the question of the circumstances in which a person should be able to take over the rights of occupation of an occupier who has died. We provisionally propose that there should be, as there is now, a statutory scheme allowing certain people closely connected to the occupier to succeed to the agreement on the death of the occupier. Here we consider the prior question of whether an occupier should be able to transfer his or her rights to a potential successor while still alive.

6.43 Under the present law, secure and introductory tenants, though denied any general right of assignment, are permitted to assign to a potential successor.[12] This seems a very sensible provision. It does not prejudice the landlord as they would have exactly the same people as tenants as they would have had after the operation of the right of succession after the original tenant died; but it allows tenants to set their affairs in order before they die. It is particularly useful in situations where someone is considering going into residential care and wants to ensure that their potential successors are protected against the risk of loss of the home.

6.44 It should be noted, however, that the ability to assign is not an unqualified one. Under Housing Act 1985, sections 91 and 92, assignment to a potential successor is only a possibility and can be prohibited by express terms of the tenancy. Four possible situations can be envisaged.

(1) There is no express term prohibiting assignment; thus the common law applies so the tenant is able to assign to a potential successor without consent.

(2) There is an express term prohibiting such assignment absolutely; in such a case any assignment in breach of that term is effective to transfer the tenancy to the assignee, but will render the assignee (and assignor) liable to action for breach of the covenant and in particular to repossession (whether by forfeiture or for breach of the agreement).[13]

[12] Housing Act 1985 s 91(3)(c); Housing Act 1996, s 134(2)(b).

[13] *Governors of the Peabody Donation Fund v Higgins* [1983] 1 WLR 1091.

(3) There is an express term prohibiting assignment without the consent of the landlord, which may not be unreasonably withheld.

(4) There is an express term prohibiting assignment without the consent of the landlord, which may be withheld on any basis.

6.45 If an assignment goes ahead in circumstances (3) or (4), without the consent of the landlord, the assignee and assignor will also be liable to proceedings for forfeiture or for possession. However, the court in deciding whether to make a forfeiture or possession order, it will have to consider the reasonableness of so doing. One of the factors will be the age of the tenant and accordingly the likelihood that the prospective assignee will succeed in due course anyway.

6.46 In our view the present provisions allow for an unnecessarily complex range of options. We think a simpler approach would be to establish a general rule that transfer to a potential successor should be possible, subject to the landlord's consent.

6.47 **We provisionally propose that type I agreements should contain a compulsory term allowing for the occupier to transfer his or her rights to a potential successor, subject to the landlord's consent**.

6.48 The nature of the current market for type II agreements is more short-term and less secure than for type I agreements. There is therefore less likelihood that those occupying under type II agreements will have the same sense of attachment to home and location as those under a type I agreement. For this reason, we do not think that it is appropriate for there normally to be a right to succeed to a type II agreement, particularly not to a periodic type II agreement. Thus there would be no right to assign to a potential type II successor.

6.49 Different considerations apply where a fixed-term type II agreement has been created. Here we will be provisionally proposing that such an interest should be capable of being left by will or on intestacy. This does not necessarily mean, however, that the person entitled under the will or on intestacy should have the right to succeed to the agreement prior to the death of the occupier.

6.50 Nevertheless, we would not want to prevent a landlord and occupier agreeing this if they so wished.[14] We think that the best way to achieve this is to propose a default term that, in the case of type II agreements, there should be a landlord's veto over the ability of an occupier to transfer his right to a potential successor, prior to his or her death. This will not prevent the landlord from agreeing to this in any particular case.

6.51 **We provisionally propose that there should be a default term in the type II agreement giving the landlord a veto over the assignment of the agreement**.

[14] A similar outcome could be achieved by an occupier exercising his or her right to have joint occupiers brought into the agreement, then serving a tenant's notice, terminating his or her interest.

Transfers to joint successors

6.52 We have suggested above that there should be circumstances in which a new joint occupier may, subject to the consent of the landlord, be brought into the agreement.[15] In the context of the present discussion, we think it would often be useful for the occupier to be able to pass the agreement to more than one person. This is not possible in the present state of the law.

6.53 In particular this can be an issue in cases where an elderly parent is the secure tenant,[16] but is having to consider moving into residential care, leaving behind their adult child who may have been acting as their carer. Currently the only option available to the parent is to assign to their potential successor.[17] The problem with this is that the parent has to give up the tenancy completely to their child at a time when it is not clear whether they will be coming back out of residential care. If transmission could be to joint occupiers then the parent could transmit the agreement to the child/carer, jointly with themselves.

6.54 The current position can also lead to problems where there is a period of uncertainty while a choice is made by the potential successors, and in default by the landlord or the court, as to which of several potential successors should take up the position.

6.55 These difficulties could be eased by permitting transfer to joint occupiers. Indeed, if there is to be a right to apply to join an agreement then it would seem odd not to allow a joint agreement from the start.[18]

6.56 **We provisionally propose that it should be possible for the transfer to a potential successor to lead (subject to any terms in the contract) to the transfer to joint successors**.

Transfer by order of family courts

6.57 The family courts can currently order the transfer of a tenancy from one family member to another as part of their powers of dealing with the family's affairs. We believe that it is important that the family courts retain these powers.

Current family legislation

6.58 There are two principal sets of family law provisions under which a court may currently order a transfer of a tenancy between family members.

(1) Provisions aimed at property generally.

(2) Provisions aimed at tenancies specifically.

[15] See paragraphs 3.29 to 3.50.

[16] Or in cases of assured tenants to whom registered social landlords have contracted to grant improved succession rights in accordance with Housing Corporation guidance.

[17] We suggest in paras 7.67 to 7.68 below that we should adopt a version of the Scottish list of qualifying successors, to include non-family-member carers.

[18] Discussed at paras 3.29 to 3.50 above.

GENERAL PROPERTY PROVISIONS

6.59 In the case of spouses, a court can make a property adjustment order (on divorce, nullity and judicial separation) under Matrimonial Causes Act 1973, section 24.[19] Such orders only apply to "property" in the strict sense, so they would apply to contractual tenancies but not to (Rent Act) statutory tenancies or licences.[20] The order is not effective until the spouse complies by assigning the tenancy.

6.60 The Children Act 1989 contains similar powers to make property transfer orders.[21] These are available between parents of children, irrespective of their marital status, but are only for the benefit of the children. The court can make orders for settlement or transfer, to or for the benefit of a child, of "property" belonging to either parent. This will therefore cover tenancies where they are treated as property, as under Matrimonial Causes Act 1973, section 24.

6.61 The fact that a court orders an assignment under these provisions does not remove the requirement that, if the tenancy requires the landlord's consent before an assignment can occur, the landlord's consent to these court-ordered assignments is also required. By contrast, consent is not required when a court makes an order under the Family Law Act 1996.[22] This leads to confusion as to whether the landlord's consent is needed for these various orders to take effect. We believe our scheme should, if possible, result in greater transparency on this point.

6.62 The powers of the courts under the Matrimonial Causes Act 1973 and the Children Act 1989 to order transfers of property interests are based on there being property interests which can be transferred. These rules sit awkwardly with the underlying principles of the scheme we are proposing, which moves away from a reliance on the creation of a property interest as the basis of the occupation agreement.

6.63 This raises the question whether the Acts of 1973 and 1989 should be amended to ensure that they cover all occupation agreements that come within the scope of our proposed scheme, or whether those with occupation agreements under our scheme should simply rely on the provisions of the Family Law Act 1996 (discussed below).

6.64 We can understand that amending the Acts of 1973 and 1989 might lead to unintended and even unacceptable consequences which we have not anticipated. We therefore make no provisional proposals on the issue. However we would be pleased to learn the views, particularly of family law practitioners, on this issue.

6.65 **We invite views on whether Matrimonial Causes Act 1973, section 24, and Children Act 1989, Schedule 1 paragraph 1(2)(d) to (e) should be amended so that they apply to all occupation agreements falling within the scope of**

[19] Similar provisions, for transfer of property on foreign divorces, are currently in the Matrimonial and Family Proceedings Act 1984 Part III, particularly s 17(1).

[20] See *Hale v Hale* [1975] 1 WLR 931 and *Thompson v Thompson* [1975] 2 WLR 868 – tenancies count as property if they are legal interests capable of assignment.

[21] Schedule 1, para 1(2)(d) to (e).

[22] See para 6.67 below.

our new scheme, irrespective of whether they would otherwise be regarded as creating a property interest.

SPECIFIC PROVISIONS ON TENANCIES

6.66 The Family Law Act 1996, section 53 and Schedule 7, paragraph 7[23] makes provision for the court to vest protected, assured (including assured shorthold), secure or introductory tenancies in non-tenant partners of tenants. Schedule 7, paragraph 8 makes separate but similar provision for Rent Act 1977 statutory tenancies.[24] There is no equivalent of this provision in the Children Act 1989, and so these powers of transfer cannot be used between parents of a child where the parents are not married or cohabiting.

6.67 It is worth noting the following.

(1) This provision covers "tenancies" defined in the relevant housing legislation rather than by strict principles of landlord and tenant law. This is consistent with our fundamental approach of not relying on property law to define the nature of the agreements covered by our new scheme.

(2) This provision is available to heterosexual (but not homosexual) cohabitees and also to spouses even outside of the context of divorce and separation proceedings.[25]

(3) It does not rely on any action by the tenant, as the vesting is effected by the court order.

(4) In recognition of the potentially significant impact on the landlord who may be faced with a new tenant, the Family Law Act 1996 requires the courts on considering making such orders to have regard to the suitability of the parties as tenants, and to give the landlord an opportunity of being heard.[26]

6.68 The Family Law Act also makes explicit provision for both binding the new tenant into the benefits and burdens of the agreement and releasing the old tenant from them.

6.69 As the thrust of our provisional proposals is to move away from treating agreements covered by our new scheme as property and to see them as contracts governed by a special statutory scheme, and as the Family Law Act 1996, Schedule

[23] Formerly in the Matrimonial Homes Act 1983, Sched 1, which consolidated earlier legislation and only applied on divorce, nullity and judicial separation.

[24] Separate provision is not made for statutory tenancies arising under the Housing Acts 1985 and 1988, presumably because they are treated as actual tenancies whereas Rent Act statutory tenancies are not – see para 8.11 below.

[25] This was as a result of Law Commission recommendations in Family Law, Domestic Violence and Occupation of the Family Home (1992) Law Com No 207.

[26] Schedule 7, paras 5(c) and 14(1). In practice a court is unlikely to make an order transferring an assured shorthold tenancy or introductory tenancy in the teeth of opposition from the landlord. Equally they are unlikely where the order would lead to repossession on some other ground, eg the estate management ground.

7 already takes this approach, it therefore appears that that Act would need only minimal adjustment to cater for our new scheme.

6.70 **We provisionally propose that the Family Law Act 1996, Schedule 7 should be amended to refer to any agreement covered by our new scheme.**

6.71 **We provisionally propose that the model agreements under our new scheme should contain a compulsory term allowing agreements to be transferred by order of the court made under the Family Law Act 1996, Schedule 7.**

EFFECTS OF THE TRANSFER OF THE RIGHT TO OCCUPY TO ANOTHER

6.72 The law of landlord and tenant also deals with the effects of an assignment on the rights and liabilities of the assignor, assignee and landlord where a tenant has assigned the tenancy to another. As with the law on sub-letting, the law on the effects of assignment is a complex mix of contract law, real property law and statute law, much of which is ignored in practice. We believe the law should be simplified, so that transfers can be effected with a minimum of formality and result in the previous occupier having no ongoing liability for any future breaches of the agreement.

Consent

6.73 We have suggested, above, that there should be a default term in any occupation agreement that the landlord should have a veto over any proposed transfer. If, despite this, the landlord agrees that a transfer can take place, this consent should be binding on the landlord, and the transferee should, in general, step into the shoes of the transferor.

6.74 **We provisionally propose that a transfer should not take effect until after any necessary consent has been given by the landlord.**

Method of transfer

6.75 Under the current law, a tenancy can only be assigned by deed, even where the original tenancy did not have to be granted by deed.[27] If no deed is used, a contract to assign a tenancy may be enforceable in equity, but only if it complies with the requirements of Law of Property (Miscellaneous Provisions) Act 1989, section 2 by being in writing, signed by both parties and containing all the terms of the contract.[28]

6.76 These restrictions have a valuable role in leasehold conveyancing. They appear unnecessary in relation to occupation agreements of the sort covered by our new scheme. We recommended in CP 162[29] that agreements should be binding

[27] Law of Property Act 1925, s 54(2) allows the creation, but not the assignment, by parol of certain short leases. See *Crago v Julian* [1992] 1 WLR 372 on whether Law of Property Act 1925, s 53(1)(a) can enable assignment by writing without a deed.

[28] Under s 2(5)(a) there is an exemption for short leases from the requirement for writing, but it only applies to contracts for their creation rather than for their assignment.

[29] CP 162, paras 6.63 to 6.71.

between landlord and occupier without having to comply with land law rules on requirements for deeds or signatures. Similarly we believe that there should be minimal requirements in our new scheme for a transfer to take effect.

6.77 **We provisionally propose that any transfer should take effect from the moment at which the intention of the transferor and transferee is confirmed either in writing, or by the transferor giving up occupation to the transferee, or by the first instalment of rent which is paid to the landlord by the transferee and not by the transferor**.

Formalities

6.78 The resultant effect of the transfer is that an agreement now exists between the landlord and the transferee, in place of the agreement between the landlord and the transferor. It is central to our proposals that the occupier should have a written statement of the terms of the agreement.

6.79 It would be possible to regard the process of transfer merely as a variation of the original agreement, which should be treated on the same basis as any other variation of the agreement.[30] This would mean that the transferee would be entitled to ask for a written copy of the agreement should he or she so wish.

6.80 However, we think that it would be better to ensure that the landlord should have to provide sooner rather than later the transferee with a copy of the agreement. The transferee should have a full statement of the terms of the agreement, rather than relying on what information the transferor might have passed on. This would ensure that any misunderstandings were identified and resolved as soon as possible. Thus we think that it is preferable to regard the process of transfer as creating a new occupation agreement.

6.81 **We provisionally propose that the landlord should be required to serve on the transferee a written copy of the agreement, amended to show the change of occupier, within two weeks of the transfer. The same sanctions for failure to comply should be available as would be apply for failure to give a copy of the written agreement to the original occupier at the start of the agreement**.

The position of the parties after a transfer

6.82 Once a transfer has been properly completed, questions remain about the effect of the transfer of the liabilities of the transferee, the transferor and the landlord.

The current position

6.83 At present, in the case of leases rather than licences, these issues are addressed either through landlord and tenant law's twin doctrines of privity of estate and

[30] For our proposals on what should happen following a variation of the agreement, see CP 162 paras 6.140 to 6.158.

privity of contract, or, in respect of post-1995 tenancies,[31] by the Landlord and Tenant (Covenants) Act 1995.

6.84 In general, the assignee steps into the shoes of the assignor, becoming liable under the lease as well as being entitled to the benefit of it.[32] The assignor retains the benefit and burden in respect of any breaches which occurred before the assignment. The assignee only takes on the benefit and burden in respect of breaches which occur after the assignment.[33]

6.85 The doctrine of privity of contract still applies to pre-1996 tenancies. This means that the tenant who originally entered the lease (the assignor) remains liable – even though the assignee also becomes liable under privity of estate – on the covenants in the lease even after an assignment, or any further assignments, until the lease is terminated. While this is subject to a predictable end date in fixed term tenancies, it is entirely open-ended in the case of periodic tenancies.

6.86 By contrast, in relation to post-1995 tenancies, Landlord and Tenant (Covenants) Act 1995, section 5(2) releases the assignor from ongoing liability for breaches by assignees. This change did not receive much attention amongst housing practitioners, where many had already been working on the basis that assignors had no ongoing liabilities.[34]

6.87 Section 25 provides that the parties cannot contract out of the Act. However, section 16 allows for the use of "authorised guarantee agreements" (AGAs). In the circumstances in which a landlord can insist upon an AGA as a condition of consenting to the assignment, the assignor gives the landlord a guarantee for the

[31] Those created on or after 1st January 1996, under s 1(3), referred to by the Act as "new" tenancies.

[32] In a "new" tenancy this is the effect of Landlord and Tenant (Covenants) Act 1995, s 3(2), which applies to any covenants "whether or not the covenant has reference to the subject matter of the tenancy" under s 2(1)(a). It also applies to agreements for leases and equitable assignments under s 28(1), but under s 3(6) it does not apply to covenants which are expressed to be personal or which should have been registered. In a legal lease which is not a "new" tenancy, on the legal assignment of the tenant's interest, the benefit and burden will pass only in respect of those covenants which "touch and concern the land", under the rule in *Spencer's Case* (1583) 5 Co Rep 16a; 77 ER 72. Whilst in commercial leases this led to the precautionary practice by landlords of imposing, as a condition of their consent, a requirement that the assignee should enter direct covenants with the landlord, it was generally ignored in social tenancies. Many social landlords would grant a fresh tenancy to the purported assignee, sometimes as a way to avoid the formalities required for effective assignment, or through not appreciating the effect of assignment, but with the effect of binding the new tenant to all the covenants. However, some would be reluctant to do this where it would mean the assignee would avoid taking on the assignor's status as a successor (see the Appendix for an account of the current law relating to statutory succession).

[33] In a post-1995 tenancy this is because of Landlord and Tenant (Covenants) Act 1995, ss 23 and 24. In a pre-1996 tenancy the position is more complex – see C Harpum, *Megarry & Wade: The Law of Real Property*, (6th ed 2000) at 15–008 to 15–063.

[34] See Stuart Bridge, "Assignment Under Attack" Conv [2000] 474, pointing out that in *Burton v Camden LBC* [2000] 2 WLR 427 the court could have used the doctrine of privity of contract to hold that the departing tenant would still be liable for rent (so that the remaining tenant's entitlement to housing benefit would not increase).

performance of the covenants by the immediate assignee.[35] The AGA is limited in that under section 16(4) it cannot be made to cover breaches by any subsequent assignees.[36] Also the guarantor has the right, where the guarantor has had to make a payment under the guarantee because of the assignee's default, to an "overriding lease" under section 19 which is for three days more than the tenancy. This effectively gives the guarantor the ability to protect their interests through becoming the landlord of the defaulting assignee and thereby becoming entitled to forfeit the lease and evict the assignee.

6.88 The other potential problem is as to the effect on the assignee where, before the assignment, the assignor was in breach of the terms of the lease, or the landlord had served notice on or issued possession proceedings against the assignor. If the tenancy is assigned, then the landlord can still sue the assignor for any debt, but loses the ability to use the threat of eviction against the assignor or the assignee for that breach. However, it is not clear what the effect is where a tenancy is assigned after possession proceedings have begun or where there is a suspended possession order. It seems that a tenant/assignor can use the assignment effectively to avoid repossession. Where the assignee is a member of the household of the assignor, who will continue to allow the former tenant to live there as a member of their household, this may have the effect of undermining the effect of the possession order.

6.89 Usually this will not cause problems because a landlord can reasonably refuse consent to the assignment where there is an unremedied breach, such as outstanding rent arrears, or where possession proceedings have started. If the tenant/assignor assigns unlawfully the landlord can separately seek an order for possession for the breach constituted by the unlawful assignment. If the landlord fails to check properly before giving consent, or fails to use the breach to refuse consent to the assignment, then the assignee cannot be evicted for the default of the old tenant.

6.90 The landlord could of course grant consent subject to the condition that the breach was remedied before the assignment, or subject to the assignee agreeing to

[35] Landlord and Tenant (Covenants) Act 1995, s 22 added subsections (1A) to (1E) to Landlord and Tenant Act 1927, s 19. The effect is that a post-1995 lease can specify that it will be taken to be reasonable for the landlord to refuse consent to an assignment in the absence of an authorised guarantee agreement. However, by s 19(1E)(a), this does not apply to residential tenancies, so the court would look at reasonableness in the individual circumstances.

[36] Whether subject to an authorised guarantee agreement or not, the former tenant is also protected by ss 17 and 18. These provide that the former tenant will not be liable unless given notice of the new tenant's breach within six months, and that the former tenant will not be liable for any increase in rent or other payments which was voluntary on the part of the landlord.

pay an appropriate sum.[37]

6.91 Where the consent of the landlord is not required, then the landlord will be unable to retain the ability to threaten eviction. This can cause problems where a landlord has forgotten to include a prohibition against assignment in the tenancy and no statutory prohibition is implied. This may occur in the context of fixed term assured shorthold, or fully assured, tenancies, because Housing Act 1988, section 15 does not imply any prohibition on assignment into fixed term assured tenancies.[38] In relation to secure tenancies, some landlords wrongly believe the Housing Act 1985 always implies prohibitions on any assignment without consent; again they may omit to include an express prohibition, in which case assignments can be freely made to potential successors.

6.92 These complications do not arise where the transfer of the interest is the result not of an assignment, but by the operation of a statutory provision. The principal examples of statutory transfer are the procedure for a change of statutory tenant by agreement under Rent Act 1977, Schedule 1, paragraph 13, and the vesting powers of the courts under Family Law Act 1996, Schedule 7. Under these a person is deemed to be the new tenant in place of the former tenant. The Family Law Act 1996, Schedule 7, paragraph 7(2) specifically provides that any liabilities or obligations of the former tenant falling due to be discharged or performed after the order shall not be enforceable against the former tenant.

6.93 The doctrine of privity of estate does not apply to licences, as they do not create an interest in land. Licences will not normally be transferred to new licensees, except by novation of contractual licences where the original contract is terminated and a new one entered into by the new parties. The problems of the effects of transfer do not normally therefore crop up in licences, which are not anyway protected under the Rent Act 1977 or assured under the Housing Act 1988. However, secure and introductory licences, with exclusive possession, can exist under Housing Acts 1985 and 1996.[39] The right to assign by way of mutual exchange would appear to apply to secure licences under Housing Act 1985, section 92. However, there is no case-law as to the operation or effect of such an assignment.

Our approach

6.94 We believe it is essential to simplify this complex body of law, to render it more suitable to the residential occupation agreements, and to bring it more into line with common housing law practice.

[37] The commonest position is where the landlord wants to be able to continue to use the threat of eviction to back up a demand for arrears. The landlord may be able to persuade the assignee to accept a term in the tenancy binding the assignee to pay an amount equal to the arrears of the assignor. However, this must be done as a condition of the assignment and cannot be imposed later or there will be no consideration – see *Mrs Rakey Jones v Notting Hill Housing Trust* (unreported, 20 January 1999). In relation to councils, the Local Government Ombudsman has for some time warned such practices may amount to maladministration, as demanding a premium, or effectively selling the tenancy – see investigation 90/B/1668 into Wellingborough Borough Council, 5 December 1991.

[38] See para 2.15 above.

[39] See *Westminster v Clarke* [1992] 2 AC 288.

6.95 We have already suggested above that there should be a default term in the agreement imposing a landlord's veto on assignment. This will ensure landlords do not ignore the issue. None of our proposals suggests that any occupier should have a right to transfer without the landlord's consent.[40]

6.96 We think that where a transfer has occurred with the consent of the landlord, there should be a distinct statutory provision, modelled on the provisions of the Family Law Act 1996, Schedule 7, providing that the effect of a transfer of an occupation agreement which falls within the scope of our scheme should be that the occupation rights are vested in the transferee, who should take the place of the transferor in the agreement. It would not matter whether the occupation agreement constituted a tenancy[41] or a licence.[42]

6.97 Transferees should therefore not be liable for any breach of the agreement by a former occupier/transferor. Rather, landlords should be expected to protect their interests when considering whether or not to give their consent to a transfer.[43]

6.98 In situations where the occupation agreement was, in law and fact, a tenancy, the effect of the transfer should be that the tenancy was thereby transferred to the transferee. Thus, should the landlord assign their interest to another landlord at any future date, the rights of the transferee as a tenant would be preserved.[44]

6.99 These proposals would replace, for the purpose of occupation agreements that are classified in law as tenancies, the provisions of the Landlord and Tenant (Covenants) Act 1995, sections 17 to 20, which deal with the rights of former tenants following assignment.

6.100 We provisionally propose that the effect of a transfer to which the landlord has given consent should be to vest the rights and liabilities under the occupation agreement in the transferee. Thus the original occupier would be replaced by the new occupier as the party to the agreement with the landlord. The transfer should not of itself confer on the transferee any rights or liabilities relating to any time before the transfer took place. The former occupier should cease to have rights and liabilities for any events occurring after the transfer.

[40] See paras 6.19 and 6.35, 6.47 and 6.51, and 6.65 and 6.70 to 6.71 below for the position on mutual exchange, potential successors and family court orders, respectively.

[41] It should be made clear that any transfer of an occupation agreement should be governed by these principles, not by the rules found in the Landlord and Tenant (Covenants) Act 1995.

[42] In practice, many licences – including licences of supported accommodation, or those granted to lodgers – fall outside the scope of our scheme in any event.

[43] A particular difficulty might arise where it was proposed that the transfer should be to joint occupiers, and one of the transferees was to be a former occupier under the original agreement. In this situation, if such a person had rent arrears, the position of the head landlord should be protected by their refusal of consent to the transfer, rather than by taking possession proceedings after the transfer has taken effect.

[44] The question of the effect of the assignment of the landlord's interest is considered in Part VIII, below.

AUTHORISED GUARANTEE AGREEMENTS

6.101 We mentioned above that the Landlord and Tenant (Covenants) Act 1995, section 16 allows for use of "authorised guarantee agreements" (AGAs). These enable the landlord to insist that, as a condition of consenting to the assignment,[45] the assignor gives the landlord a guarantee for the performance of the covenants by the immediate assignee. The ability of the landlord to so insist does not, however, apply in the case of residential tenancies, where the question remains solely one of reasonableness in the particular case.[46]

6.102 We accept that these are of considerable importance in the assignment of commercial leases or other leasehold interests. We are not however convinced that they are appropriate for use in the context of the transfer of residential occupation agreements.

THE RELATIONSHIP BETWEEN SUB-OCCUPATION AGREEMENTS AND TRANSFERS

6.103 Under the law of landlord and tenant, one of the conditions for the creation of a lease is that there must always be a reversion. This means a period of time during which the landlord can resume possession of the property. Where a tenant attempts to create a sub-lease of the whole of the remaining term of a fixed term lease, so that there is no reversionary period left, this is deemed by operation of law to amount to an assignment of the original lease.[47] We accept the logic of the argument that sub-leases should be shorter than the leases out of which they are granted, and that the mesne landlord should retain a reversion. We have considered whether this principle should be applied to occupation agreements created under our new scheme.

6.104 We think that the reality is that the circumstances of our occupation agreements under our proposed scheme are really rather different from those in which business and other long leases are created.

6.105 First, the bulk of occupation agreements are periodic agreements, not fixed-term agreements. It is difficult to apply the requirement that there should be a reversion where a periodic sub-occupation agreement is carved out of a periodic occupation agreement.

6.106 Secondly, and by contrast, in the leasehold market, periodic leases are rare. Where a lessee with a periodic lease lawfully grants a fixed term sub-lease which expires later than the end of the next period of the periodic head lease, it is not regarded as odd that such grant is not deemed to be an assignment. This inconsistency would become much clearer where occupiers under periodic agreements granted fixed term sub-agreements. The logic of the current rule is partly based on what is the soonest date on which each lease could be determined, but in the residential

[45] See note 34 above.

[46] *Ibid*, s 19(1E)(a).

[47] See eg *Parc Battersea Ltd v Hutchinson* [1999] 22 EG 149, and C Harpum, *Megarry and Wade: The Law of Real Property*, (6th ed 2000) at 14–110 and 14–111.

market periodic agreements cannot normally be determined by the landlord at the end of the next period.[48]

6.107 Thirdly, the implications of a distinction between a sub-tenancy and an assignment of a tenancy are not straightforward. In particular the liabilities of the sub-tenant are quite different from those of the assignee. It can be expected that those creating sub-leases or assignments of commercial or other leases will obtain legal advice. This cannot be assumed in the case of residential occupation agreements. Even where there is a fixed term agreement, it appears undesirable to make such an important distinction turn on whether provision was made for the sub-occupation agreement to end a few days before the head agreement.

6.108 Fourthly, following *Bruton v London & Quadrant Housing Trust*,[49] licensees can grant a sub-lease, at least for the purposes of the relationship between them and their sub-tenant, even though that interest is greater than their own. Our new scheme is also focused on the relationship between the landlord and the occupier. It will make any sub-occupation agreement effective as between occupier and sub-occupier, irrespective of the legal classification of the interest of the occupier in the premises.

6.109 Fifthly, in the residential long lease market there is usually no requirement for the landlord's consent for any sub-letting or assignment. In the rented sector of the housing market, and as proposed for our scheme, the landlord's consent is normally required. The landlord does not have the same need to be able to resume possession of the premises at the end of a sub-occupation as they would have at the end of a sub-lease.

6.110 More pragmatically, the sub-occupier under a sub-occupation agreement will, so long as the original occupier remains undisturbed, regard the original occupier as his or her landlord. He or she would not regard the head landlord as such unless the immediate (mesne) landlord for some reason dropped out of the picture. By contrast, where the head landlord has given consent to the transfer of the whole agreement to another, the transferee would normally regard the head landlord as his or her landlord, the transferor having effectively dropped out of the picture.

6.111 We think that our scheme should reflect this practical expectation.

6.112 **We provisionally propose that where a sub-occupation agreement has been lawfully created out of a head agreement which is also covered by our new scheme, and the landlord (where consent is needed), the occupier and the sub-occupier have all intended to create a sub-agreement rather than a transfer, then the sub-occupation agreement should take effect as such and should not be deemed to be a transfer even if it is for the whole of the remaining term of the head agreement**.

[48] The current notice under Housing Act 1988, s 21 and the notice-only notice under our new type II periodic agreements, are of set lengths which are longer than the usual weekly, fortnightly or monthly period. Protection from Eviction Act 1977, s 5 requires four weeks notice to quit in unprotected tenancies.

[49] [2000] 1 AC 406. See para 5.43, note 23 above.

TRANSFERS OF THE RESIDUAL PERIODS OF LONG LEASES

6.113 By contrast, where the head lease is a long lease or other lease which is not covered by our new scheme any transfer of the residual period of such a lease, even if the period is for less than 21 years, should be remain outside the scope of our proposed scheme and be governed by the ordinary rules of landlord and tenant law.

6.114 In this context, we are aware that in some parts of the country, particularly in London, there is an active, if niche, market in the sale of what have been described as short-term leasehold reversions. These arise where a leasehold title to a property, originally the subject of, say, a 99 year lease, now has only a small number of years – fewer than 21 – left to run and the leaseholder or head landlord wishes to dispose of this remaining period for a capital sum.

6.115 Some might regard such tenancies as fixed-term occupation agreements for a period of less than 21 years, and thus within our proposed scheme. We think that this would not be the appropriate way to characterise such arrangements. They have been created out of a long-term leasehold tenancy which clearly falls outside the scope of our proposed scheme. The fact that they have been purchased by the outlay of a single capital sum shows that they still retain the character of "leasehold". They already fall within their own legislative scheme which determines, among other things, what happens at the end of the term.

6.116 The assignment of a long lease should not come within our new scheme, even where there is less than 21 years left to run on the long lease. The law on long leases should continue to apply in such cases.

6.117 Any question of whether such a fixed-term agreement constituted a sub-tenancy or an assignment should be determined by normal rules of landlord and tenant law.

PART VII
THE EFFECTS OF THE DEATH OF AN OCCUPIER

INTRODUCTION

7.1 This part deals with three distinct matters.

(1) First the impact of the death of an occupier on the agreement which conferred the right to occupy.

(2) Secondly, whether a right of succession – a central feature of the current law – should be retained in the scheme we propose.

(3) Thirdly, the effects of succession on the past and future rights and liabilities under the agreement.

THE EFFECT OF THE DEATH OF THE OCCUPIER ON THE AGREEMENT

The current law

7.2 The current law draws a distinction between agreements which create licences and those which create tenancies. Licences do not create any interest in land, but only rights personal to the licensee. Thus a licence will normally terminate on the death of the licensee.

7.3 By contrast, under current landlord and tenant law, when a landlord and tenant enter an agreement to lease land, whether for a fixed-term or on a periodic basis, they create a property interest in the land. Unless the lease provides otherwise, the property interest will automatically continue in being on the death of the tenant, by being passed under a will or on intestacy to the persons entitled to succeed. Even where there are no heirs, the property will pass to the Crown as *bona vacantia*. Thus, on the death of a tenant, the obligations of the tenancy continue unless the tenancy is formally brought to an end by the former tenant's successors (for example, by notice to quit or surrender) or by the landlord.

7.4 This can be awkward for all concerned. The landlord is unable to regain possession without terminating the lease, but is not to know whether the deceased tenant left a will or who may have been named as executors in it. The estate may eventually find it is liable for ongoing rent for a property which was not necessarily being used. It is particularly a problem on intestacy, where the administrators do not take the interest until the grant of administration by the court. There may therefore be a delay in any action by the estate. If the landlord wishes to end the tenancy in the meantime, they will not succeed unless they discover that they are required to serve notice to quit on the Public Trustee.[1]

[1] Under Administration of Estates Act 1925, s 9(1), as substituted by Law of Property (Miscellaneous Provisions) Act 1994, s 14(1).

Joint tenancies

7.5 Under the present law of landlord and tenant, joint tenancies attract the principle of the "right of survivorship". The effect of this is that the surviving joint tenant, who was already jointly and severally liable under and entitled to the benefit of the tenancy, simply continues as the sole tenant. This principle does not apply to licences.

Our approach

7.6 In considering our approach to the reform of this aspect of the law, we consider first the impact of the death of an occupier on a joint occupation agreement; then we look at what should happen in relation to a periodic agreement; finally we consider what should happen in relation to a fixed-term agreement.

Joint occupation agreements: the principle of survivorship

7.7 In our discussion of joint occupation agreements in Part III above, we proposed that the principle of joint and several liability should be the default position in relation to the liability of joint occupiers to their landlord. The other principal feature of joint tenancy, noted in passing in Part III, is the principle of survivorship. This provides that, on the death of one joint tenant, the remaining tenant(s) automatically take over the tenancy.

7.8 We see no reason why this principle of survivorship should not be adapted to all joint occupation agreements made under our scheme, so that on the death of a joint occupier, the remaining joint occupier(s) automatically take over the agreement.

7.9 **We provisionally propose that on the death of a joint occupier, the remaining occupier(s) should take over the occupation agreement**.

7.10 Under the Housing (Scotland) Act 2001, a joint tenant is regarded as just another qualified person in the list of people with the statutory right to succeed to the tenancy.[2] We take the view that a joint occupier is in a different position from any other potential successor. They were already an occupier under the agreement. They had taken on joint responsibility under the agreement. The landlord had agreed to take them on as an occupier.[3] Joint tenancies are currently commonly used as a way of ensuring that a person will take over the tenancy on the death of

[2] Housing (Scotland) Act 2001, Sched 3, para 2(1)(b). This means that a joint tenant will not take over the tenancy unless it was their only or principal home at the time of the death. They may also cease to be a tenant if there is a surviving spouse or cohabitee who opposes them and the landlord decides the tenancy should go to the spouse or cohabitee under Sched 3, paras 6 and 9.

[3] Or a court had ruled that it was not reasonable for the landlord to refuse to take on the person as a new joint occupier – see above para 3.47 and 3.48.

the other tenant.[4] Our view is that the special position of the joint occupier should be preserved and kept distinct from the discussion of the right of succession.[5]

7.11 **We provisionally propose that survivorship by joint occupiers should take priority over the right of succession under other statutory rules. The statutory succession rules should only take effect on the death of a sole occupier, including the death of the last of any joint occupiers**.

MORE THAN ONE SURVIVOR

7.12 We have considered whether there should be any exceptions to this principle. For example, if there were a large number of joint occupiers, there might be the potential for a large number of exercises of the right of survivorship, which would thereby deny the ability of the landlord to regain possession of his or her property. Insofar as this might be regarded as a problem, we think the dangers of this happening could be overstated.

(1) In the case of a periodic type II agreement, the landlord would be able to use the notice-only ground for seeking possession against all the joint occupier.

(2) In the case of a fixed-term type II agreement, the point at which the landlord could regain possession would be postponed until the fixed-term had expired, but that is what the landlord had agreed to in the first place.

(3) In the case of a type I agreement, particularly where the landlord was a social landlord seeking to meet housing needs, the postponement of the ability of the landlord to regain possession of a dwelling might reduce its ability to meet those needs. However, the landlord would only have entered into a joint agreement on the basis that the principle of survivorship would apply. Thus the argument that the landlord should bear the consequences of that decision seems strong.

7.13 In addition, we have in CP 162 proposed ways in which the landlord might seek possession of premises on an "estate management" basis.[6] Although discretionary, and only granted where the court thought it reasonable, and on the provision of suitable alternative accommodation, nevertheless ways would be open to the landlord to regain possession against surviving joint occupiers, if they no longer had the degree of housing need that would justify their being allocated a unit of social housing.

7.14 In a case where a joint occupier was brought into the agreement at a later stage, under the proposals set out in paragraphs 3.29 to 3.58, the same principles would apply. This might happen, for example, where the survivor of one joint occupation agreement takes another partner. They might apply to the landlord to have the

[4] See the guidance that local authorities should use joint tenancies for this purpose: Department of the Environment, Local Authority Joint Tenancies Circular 7/96 (May 1996), referred to above at para 3.33.

[5] See paras 7.42 to 7.112 below.

[6] CP 162, paras 7.77 to 7.83.

new partner joined as a joint occupier. If the landlord consents to this application, they should live with the consequences of that decision.

7.15 **We provisionally propose that the principle of survivorship should apply irrespective of the number of joint occupiers living in the premises at the date of the death of the occupier**.

Termination of the agreement

Periodic agreements

7.16 We suspect that most people would think that, on the death of the occupier (who was not a joint occupier) under a periodic occupation agreement,[7] the legal relationship between the deceased occupier and the landlord would be at an end. The fact that there are rights of succession to tenancies, which we discuss below, might well cause people to think that, without them, the death of the occupier brings the agreement to an end. We think that the law should broadly reflect this understanding.

7.17 The termination of the agreement would take place automatically and without the need for a court order. If the property is empty the landlord would be able to take possession immediately. If there are non-successors occupying the property they would become trespassers. The landlord would have the choice either of obtaining an order for possession against them as such,[8] while demanding damages for trespass (mesne profits), or of giving some or all of them a type II periodic agreement while deciding how to proceed.[9]

7.18 **We provisionally propose that there should be a compulsory term in type I and periodic type II agreements that, if the agreement does not pass to a joint occupier or to another person under the statutory rules on succession, the agreement should terminate automatically and without the need for a court order**.

7.19 This proposition does, however, raise the question of what should be the date on which the agreement should cease.[10] A compulsory term in the agreement covering the principle that the agreement ends on death could be framed in such a way as to leave the exact timing of the termination of the agreement to be determined in a related default term. Thereby, rather than a rigid rule, the parties could substitute their own agreed provisions on the timing, subject to the test of fairness under the Unfair Terms in Consumer Contracts Regulations 1999. The default term could provide that the agreement terminates as from the date of death of the occupier. But this could be varied by the parties.

[7] We discuss what should happen on the death of an occupier under a fixed-term agreement, see paras 7.31 to 7.41 below.

[8] Though not by the summary procedures currently available only where the trespasser entered as a trespasser.

[9] Compare the discussion, at paras 2.45 to 2.67 above, of the landlord's position where unlawful sub-occupiers hold over after termination of the head agreement.

[10] We deal with the separate question of what the effect of the succession should be on the rights and liabilities under the agreement from para 7.113 to 7.131 below.

7.20 Alternatively the default term could provide that the agreement terminated at a later date. One possibility would be four weeks after the date of the death, or after the landlord first becomes aware of the death, or after the date of the first missed rent payment following the death. The four week period would reflect the four week period which the occupier is required to give when giving notice to quit the agreement.[11]

7.21 We are anxious that, in relation to residential occupation agreements, our new scheme should not reproduce the technical requirements of the current law, whereby if the landlord does not terminate a tenancy, the personal representatives or administrators of the deceased's estate have to serve formal notice to quit on the landlord to bring the agreement to an end, even if the landlord is fully aware of the death.

7.22 Equally we can see that in some circumstances, particularly where rent is paid at long intervals or by housing benefit, the landlord may not realise the occupier has died for some time if nobody lets them know of the death. The issue becomes one of who should bear the responsibility for ensuring landlords are made aware of the death of an occupier: the families of the deceased occupier, or the landlord themselves.

7.23 Implicit in our consumer approach to residential occupation agreements is the proposition that the landlord (or their agent) should take active responsibility for the management of the accommodation. This might lead to the view that it was up to the landlord or their agent to check that the occupier is still alive. This is particularly so where the rent ceases to be paid, as the landlord should be checking why payments are missed.

7.24 On the other hand it could be argued that it is unrealistic to suggest that landlords keep their occupiers under continuous surveillance, and that rather it should be the responsibility of the deceased occupier's family or other heirs to notify the landlord that a former occupier has died.

7.25 We are inclined to the view that the default term should provide that termination of the agreement should take place on the date of the death of the occupier. If there are other people living at the premises who are not occupiers under the agreement, then the landlord will be entitled to damages, equivalent to the rent, from them for trespass. The problem of lost income would only arise where nobody else was left in the premises at the time of the death.

7.26 If the date of termination is the subject of a default term, the landlord will be able to vary that term so as to place more responsibility on the tenant's family/estate, though this would be subject to the test of fairness in the Unfair Terms in Consumer Contracts Regulations. This would allow the landlord to take into account particular reasons why the landlord might not easily discover that the death has occurred, for example where rent is only paid at long intervals.

7.27 If the agreement does not terminate immediately on death, there will be a need for the liabilities and rights that have arisen under the agreement to pass to the

[11] CP 162, para 10.49.

deceased occupier's estate. We discuss this further at paragraphs 7.127 to 7.131 below. Here we note that the possible complications this can cause are another argument in favour of termination of the agreement immediately on death.

7.28 **We provisionally propose that there should be a default term which specifies the moment, after death of the occupier, at which the agreement terminates**.

7.29 **We invite views as to whether that default term should provide that the agreement terminates immediately on death, or at the point at which the landlord does or should reasonably have become aware of the death**.

7.30 **We invite views as to whether such provisions would cause problems where housing benefit is paid direct to the landlord, and whether any such problems should be dealt with by changes to the housing benefit system rather than to the law on relations between landlords and occupiers**.

Fixed-term agreements

7.31 While the above principles may suit periodic agreements, we are concerned that they may be inappropriate for fixed term agreements. We have been anxious to promote the idea that in relation to the type II agreement, landlords could provide more than the bare minimum of rights to the occupier by the use of fixed-terms. Although, in practice it is likely that these agreements will, in the main, be relatively short-term, our scheme does admit the possibility of agreements for a fixed-term of up to 21 years being possible.

7.32 In many cases of short fixed terms at full rent, the provision for automatic termination on death may be appropriate, and a default version of the compulsory term in other agreements would be useful as the starting point.[12]

7.33 Automatic termination on death is likely to be particularly inappropriate where a large premium has been paid for a relatively long fixed term, and the agreement allows the occupier to transfer it to new occupiers, so that the agreement is a saleable asset more like a long residential lease. In these cases, we think that landlords and occupiers should be able to agree that the agreement should be capable of being passed on to their heirs.

7.34 Under the present law this would be achieved under general succession law either by being passed on by will as part of the deceased occupier's estate or failing that through operation of the intestacy rules. It should be noted that the intestacy rules only operate in favour of those who can trace a relationship to the deceased by marriage, blood or adoption; they are drawn considerably more narrowly than those who are entitled to exercise the statutory right of succession.

7.35 The statutory rules on succession, discussed below, while creating an entitlement for those within the rules, are also a limitation on the freedom of the occupier to pass on their statutorily protected interest to whomsoever they choose. The

[12] The termination under the default term would therefore similarly be automatic, without the need for a court order, and would render any non-successors liable to eviction as trespassers.

succession rules are justified because the occupier is seeking to let others take advantage of a statutory status which gives protection against the landlord. In the context of fixed term agreements, however, an occupier might well wish to pass the residue of their fixed term on to someone who did not fall within the scope of the statutory succession scheme.

7.36 We are of the view that, while the statutory succession rules should be applicable to fixed term agreements, it should be possible for the occupier and the landlord to agree that the occupier should have the freedom to pass the remainder of the term on to anyone of their choice on death. Thus we do not see why the occupier's will should not be allowed to override the statutory succession rules.[13] If the occupier dies having made no will, the rights would pass to a statutory successor.

7.37 An alternative but less flexible rule would be that the landlord and occupier should be able to provide that the agreement passes under the will or intestacy only if there are no statutory successors.

7.38 In such cases we believe it is reasonable to expect the occupiers and landlords to obtain appropriate professional advice, so that they are clear as to what they are agreeing about the priority between the will and the statutory succession rules.

7.39 **We provisionally propose that fixed term type II agreements should contain a default term providing that the agreement terminates on the death of the occupier. The statute should provide that the parties can exclude the statutory rules on succession, but only where they have replaced this default term with a term allowing for the remaining period of the agreement to pass to another under the occupier's will**.

Fixed term licences

7.40 While these principles can clearly apply to fixed term occupation agreements that can properly be classified as tenancies, there is the possibility, albeit one which we think is largely theoretical, of creating a substantial fixed-term licence. This raises the question whether such fixed-term licences could be passed on by will or on intestacy. On normal principles of land law, this would not be possible as licences are not property interests capable of being so transmitted. On that basis, only the statutory rights of succession, set out below, could apply to fixed-term licences.

7.41 **We provisionally propose that fixed term occupation agreements that are licences not tenancies should only be capable of being transferred, on the death of the occupier, under the statutory right of succession**.

A STATUTORY RIGHT OF SUCCESSION

7.42 Most people invest a great deal of their personal life histories in their homes, particularly where they have lived in one place for a long time. The home is not just a place where one exists; it is the centre of a life. It is where families are raised, and from where social circles are developed. The home is, for many people, the

[13] The free choice of beneficiaries in the will would be subject to possible challenge under the Inheritance (Provision for Family and Dependants) Act 1975.

core of their existence. Policy makers and legislators have sought to reflect this social reality by building a "right of succession" into the schemes of statutory protection for tenants.

7.43 In developing our proposals for reform we have asked ourselves whether a right of succession should be retained. We have concluded that because a right of succession has been part of the law regulating the rented sector for such a long time, it should be retained in the scheme. This would be achieved by a statutory provision which – as under the present law – prescribes the situations in which a right to succeed to a residential occupation agreement would exist.

7.44 As will be seen, the present law is framed in the context of each of the groups of tenancies to which existing protective legislation applies. In the case of secure tenancies and Scottish secure tenancies these rules apply to licences as well. It is a key feature of our proposals that they should apply to all agreements granting the right to occupy. We do not think that the lease-licence distinction needs to be introduced in the context of the right to succeed. To do this would be to introduce just the kind of complexity we are seeking to avoid.

7.45 **We provisionally propose that a statutory right of succession should be part of the proposed new scheme for the regulation of all the occupation agreements falling within the scope of our proposed scheme**.

7.46 We have discussed above[14] our proposals in relation to fixed-term agreements, which we have proposed should be capable of being left by will. We have also considered the application of the principle of survivorship.[15] Save for these two cases, and in the light of our discussion about the impact of the death of the occupier on the agreement, we have come to the view that the only means for transferring rights under an occupation agreement on the death of the occupier should be through the right of succession.

7.47 **We further provisionally propose that, save for special arrangements made in relation to fixed-term agreements, and cases where the principle of survivorship applies, the only means whereby the benefit of an occupation agreement can be passed on following the death of the occupier should be though the right of succession**.

The present position

7.48 The current law on the right to succeed is analysed in detail in the Appendix to this Paper. It will be clear from this analysis that, while the principle of the right to succeed is well established, the way in which it operates in different contexts varies widely. In our view this is another area of the law which would benefit from substantial simplification.

[14] See paras 7.31 to 7.39 above.

[15] See paras 7.7 to 7.15 above.

7.49 At the heart of the various statutory regimes governing succession is the concept of the qualifying successor (in Scotland, the qualifying person). But all four Acts provide very different ways to achieve their objective:

(1) there can be two successions under Rent Act 1977, and the Scottish Act, but only one under Housing Act 1985 and Housing Act 1988;

(2) non-spouse members of the tenant's family can succeed under Rent Act 1977, Housing Act 1985 and the Scottish Act, but not under Housing Act 1988;

(3) the phrase "member of the tenant's family" is defined by reference to a list in Housing Act 1985, but left to the courts under Rent Act 1977 and the Scottish Act;

(4) the courts have held that same sex partners can succeed as a member of the family under Rent Act 1977 and the statute includes them in the Scottish Act, but they are excluded under the Housing Act 1985 and the Housing Act 1988;

(5) under the Rent Act 1977 members of the tenant's family qualify to succeed if they have resided with the tenant for a period of two years. Under Housing Act 1985 the qualifying period is one year;

(6) there are different means of resolving differences where there is more than one qualifying successor, and they cannot agree amongst themselves who should succeed; and

(7) there are different rules in each Act on when a transfer counts as a use of succession rights.

Our provisional proposals

7.50 Our proposals are based on an amalgam of the present rules. The key issues are as follows.

(1) Who should have the right to succeed?

(2) How many successions should be permitted?

(3) What counts as a use of succession rights?

(4) When can the status of successor be lost?

(5) To what should successors succeed?

(6) Should there be separate treatment for fixed-term tenancies?

(7) Should joint succession be possible?

(8) How should disagreements about who should succeed be resolved?

7.51 In thinking about how to answer these questions, we acknowledge that the right to succeed highlights a significant tension underlying the law relating to renting homes. Those who can afford to buy a property interest in their home – whether

freehold or leasehold – have something of considerable value that they can leave to their heirs and successors. Indeed, many tenants have been given the opportunity to acquire just such an interest, either through the right to buy, (local authority tenants) or the right to acquire, (housing association tenants) or by exercising the right of first refusal (Rent Act protected tenants).

7.52 If, however, the right to succeed to rights to occupy were to be extended indefinitely, this would change the fundamental nature of the rental market, in ways which would arguably have a harmful effect on the operation of the rental housing market. It may be important for this sector of the housing market that landlords are able to regain possession of their dwellings from time to time. In the particular case of social landlords, too extensive rights to succeed might limit their ability to provide accommodation to those most in housing need.

7.53 While the present legal position is undoubtedly confusing and complex, it does attempt to achieve a balance between allowing individuals to retain a sense of security that comes from the right to occupy their homes and allowing landlords flexibility to use their housing stock as efficiently as possible. We conclude that any proposals we make should reflect this compromise.

7.54 With these observations in mind we turn to our proposals for answering the questions set out above.

Who should have the right to succeed?

7.55 Under the present law, all existing regimes extend the right to succeed to the surviving spouse (including for these purposes cohabitants, and in Scotland same-sex couples) who was living in the premises as his or her only or principal home at the time of death. Most of the existing schemes extend the right to other members of the family, though this is defined in different ways. The Scottish Act extends the right to carers.

Spouses

7.56 In view both of the existing state of the law, and the social reality which underlies the law, we think that a spouse must have the right to succeed. We think that this should embrace those who live together as husband and wife.

7.57 In the light of the decision of the House of Lords in *Fitzpatrick v Sterling Housing Association Ltd* [16] and the terms of the Scottish Act, we think the principle should also extend to same-sex couples who co-habit.

[16] [2001] 1 AC 27.

7.58 Further, we think that the same principles should apply to couples in which one or both partners has undergone gender re-assignment.[17]

7.59 **We provisionally propose that a surviving spouse should have the right to succeed. "Spouse" should be defined to include the survivor of couples who have lived together as husband and wife, or of same sex couples who have co-habited. We provisionally propose that these principles should apply whether or not either partner has undergone gender re-assignment. Any spouse should have been living in the premises as his or her only or principal home at the time of the death**.

Members of the family

7.60 There is a sharp distinction in the ways in which potential entitlements by members of the family are defined. The most detailed is the list approach adopted in the Housing (Scotland) Act 2001. The most open-ended is that contained in the Rent Act 1977.

7.61 In view of our intention that the rights and obligations of occupiers should be capable of being set out in the occupation agreement, we are attracted by the approach adopted in the Housing (Scotland) Act 2001. The details of the list might need amendment to suit the situation in England and Wales.

7.62 **We further provisionally propose that a list of those potentially entitled to succeed should be set out in the legislation, which would then be capable of being set out in the agreement**.

7.63 **We invite views on the categories that should be included in the list**.

A period of residence?

7.64 All the Acts have some residence qualification. The person with the right to succeed must, at the very least, be occupying the premises at the time of the death as his or her only or principal residence; in some cases there must be occupation12 months prior to the death; in others 24 months.

7.65 **We provisionally propose that a member of the family who wishes to exercise a right to succeed should have resided in the premises as his or her only or principal home before the occupier died**.

[17] There is a precedent in the Housing (Scotland) Act 2001, Sched 3, para 2(1)(a)(ii) which refers to a person "living with the tenant as husband and wife or in a relationship which has the characteristics of the relationship between husband and wife except that the persons are of the same sex". The Lord Chancellor's Department announced on 21st June 2002 that it would reconvene the Interdepartmental Working Group on Transsexual People, which previously reported to Parliament in July 2000. Since then the European Court of Human Rights has ruled in favour of recognition of the relationships of transsexuals in *Goodwin v UK* (2002) 35 EHRR 18 ECHR. Previously the European Court of Justice, in *P v S and Cornwall County Council* [1996] IRLR 347, had recognised transgender discrimination as sex discrimination in employment in European Community law, which led to the adoption of the Sex Discrimination (Gender Reassignment) Regulations 1999 SI 1999 No 1102. It therefore seems appropriate now to assume that references to co-habiting relationships should include transgendered people, subject to whether any different approach is recommended by the Interdepartmental Working Group.

7.66 **We invite views on what the period of occupation should be.**

Carers

7.67 Only the Scottish Act makes specific provision for carers to be considered as a category of qualifying person (successor). The reason for this development is that there will be cases where a carer has lived with the occupier so long they have effectively become a member of the family. While such a provision is not currently part of the law in England and Wales, it may be an issue on which consultees have views.

7.68 **We invite views on the question whether the right to succeed should be specifically extended to carers, on a basis similar to that set out in the Housing (Scotland) Act 2001**.

Rent Act tenants

7.69 In order for existing tenancies to be mapped onto our proposed new scheme, as we have proposed in CP 162, it will be essential that the existing rights of Rent Act protected tenants are preserved.[18]

7.70 **We provisionally propose that the rights of succession currently available to Rent Act protected tenants are preserved for that group**.

How many successions should be permitted?

7.71 As we have already seen, Rent Act tenants and Scottish secure tenants have two rights of succession; secure tenants and assured tenants have one. We have just proposed that the position of Rent Act tenants must be protected; we have already set out our proposals relating to the rights of joint occupiers to succeed by operation of the principle of survivorship.[19]

7.72 Leaving those two cases on one side, there remains a stark contrast between the approach in the Housing Acts 1985 and 1988 – both of which provide for a single right to succeed – and the Scottish Act which provides for two.

7.73 It could be argued that the law in Scotland should not be of direct concern to the Law Commission reviewing the law of England and Wales. But we think it

[18] We believe that this will largely be achieved if consultees agree with our provisional proposals as to the right of succession generally. There would be only two points on which we would see any need for special provision. The first would be that we are provisionally proposing that a detailed list of family members should be adopted, rather than the open-ended use of "family" in the Rent Act 1977 (see para 7.62 above). Secondly, in CP 162 at para 14.43 we provisionally proposed that the new scheme should make provision for existing Rent Act 1977 tenants to be converted to type I agreements, but with additional rights reflecting the right to a fair rent; and in this paper at para 8.114 where we recommend preservation of the right of first refusal under the Landlord and Tenant Act 1987. Under the current law only a spouse or cohabitant will retain Rent Act 1977 status on succession; all other successors will obtain an assured tenancy: Housing Act 1988, s 39 and Sched 4 (amending Rent Act 1977 for deaths occurring after 15th January 1989). Therefore special provision will need to be made to the effect that only spouses and cohabitants will retain the right to a fair rent on succession.

[19] See paras 7.7 to 7.15 above.

unrealistic to ignore such recent developments in Scotland. Consultees will inevitably draw them to our attention, if we do not take them into account.

7.74 Having considered the matter carefully, and bearing in mind the need to achieve the balanced approach suggested above, we have concluded that it may be most sensible to adopt an alternative approach on this matter. In some cases there would be two rights of succession, in others only one.[20]

Two rights of succession – spouses

7.75 Spouses will not, of course, need to use any statutory right of succession, if they are a joint occupier under the occupation agreement. They will then succeed automatically by operation of the principle of survivorship.

7.76 Where spouses are not joint occupiers, we still think that the position of spouses[21] is of sufficient importance to justify their having an automatic right of succession. In many cases, on the death of the second spouse, the agreement will come to an end in any event. However we consider that other members of the family should also have at least one opportunity to succeed to the right to occupy, even if a spouse had already succeeded.

7.77 Members of the family would include not only members of the family of the original deceased occupier, but also members of the family of the deceased spouse. Where a surviving (successor) spouse had him or herself acquired a new spouse, the new spouse should be regarded as a member of the family and therefore also entitled to succeed. However, following the second succession, there would be no further right of succession irrespective of whether the second successor was a new spouse or another member of the family.

7.78 **We provisionally propose that a surviving spouse should have the automatic right to succeed to a deceased occupier who was not him or herself a successor**.

7.79 **We further provisionally propose that, after succession by a spouse, there should be a further right to succeed by another member of the family of either the original deceased occupier or the successor occupier. The spouse of the successor occupier would be included in this category**.

Single right to succession

7.80 In other cases, where there is no surviving spouse, there should only be a single right of succession available to a qualifying member of the family of the deceased or such others (for instance, carers) as may be prescribed.

[20] This proposal is similar to the effect of the Rent Act 1977, as amended by the Housing Act 1988, in cases where the first death occurred before January 15 1989 and the second death occurred on or after that date.

[21] Defined in the way provisionally proposed in para 7.59 above.

7.81 Where a non-successor occupier dies without a spouse, we provisionally propose that there should be a single right to succeed by a qualifying other member of the family of the deceased occupier.

What counts as a use of succession rights?

7.82 If there are to be limits on the number of successions then there must be rules to determine whether the succession rights have been used up. The current Acts all regard operation of the principle of survivorship and succession under the statutory scheme as counting as using up a right of succession.

7.83 The implication of our proposals on the application of the principle of survivorship is that acquiring the right to occupy through the operation of survivorship should *not* count as a use of the statutory right of succession.[22] Similarly, where a fixed-term agreement was passed by will, this too would *not* count as the use of a statutory right of succession.

7.84 We think it would be simpler if only successions arising from the statutory rules counted as the use of the statutory right of succession. However, we also wish to ensure that the landlord who wanted to grant more generous contractual succession rights could do so without accidentally triggering fresh statutory rights.

7.85 **We provisionally propose that where a person succeeds to an occupation agreement through the operation of the principle of survivorship, this should not count as the use of the statutory right of succession**.

7.86 **We similarly propose that where a person succeeds by will or on intestacy to a fixed-term occupation agreement, this should not count as the use of the statutory right of succession**.

7.87 **We further propose that the exercise of any analogous contractual rights of succession should be regarded as the use of the statutory right of succession**.

When can the status of successor be lost?

7.88 Once a person has succeeded, the next question is whether this status can be lost, so that the whole chain of succession starts again.

7.89 Our view is that once a person became an occupier by succession, that status lasts so long as the person continued to occupy the same premises, whether from the same or a different landlord. The same would apply if the occupier moved to new premises as the result of exercising the right of mutual exchange.

7.90 If the agreement with the new occupier was terminated either by the landlord obtaining an order for possession which is executed, or by the occupier terminating the agreement, and subsequently that person enters a wholly new occupation agreement, either with the same or a different landlord, they should no longer be

[22] In many cases this will not make a difference. Where a spouse who has succeeded under the principle of survivorship has not remarried, there will only be a single statutory right of succession to any relevant member of the family.

regarded as a successor, but as an occupier from whom a right to succeed can be acquired.

7.91 If, on the death of a successor, there is no further right of succession, but the landlord inadvertently grants an occupation agreement to a new occupier on the mistaken view that that person was entitled as a successor, this mistake should not invalidate the agreement. It should be regarded as a new agreement, and the occupier should not be treated as a successor.

7.92 If there was any evidence that such an arrangement had been entered into as the result of fraud or misrepresentation by the new occupier, the landlord would be able to seek possession against the new occupier on the basis of that fraud or misrepresentation.[23] (This would only be necessary where the new occupier had been granted a type I agreement or a fixed term type II agreement.)

7.93 **We provisionally propose that, so long as the successor remains in the same premises under the same or a different landlord, or acquires an occupation agreement by exercise of the right of mutual exchange, that person should retain the status of successor**.

7.94 **We further provisionally propose that if that occupation agreement were terminated, and a wholly new agreement relating to different premises was made, whether by the same or a different landlord, the occupier should enter this agreement not as a successor**.

7.95 **We propose that where a landlord grants an agreement to another under the mistaken belief that the occupier was entitled to succeed, this should not invalidate the agreement, but rather the agreement should be deemed to be fully valid**.

7.96 **Where there is evidence that the occupier had sought to mislead the landlord as to his or her status as successor, this should be the basis for possession proceedings in the normal way**.

To what should successors succeed?

7.97 We think that the general principle should be that a successor should succeed to the agreement held by the deceased occupier.[24]

7.98 The terms and conditions of the agreement should be the same as those of the original agreement. Variations may of course be made at the time of the succession, or at any other time, if they are agreed between the parties or are permitted by a term in the agreement. In any event the agreement will need to be varied to take account of the identity of the new occupier.

[23] See CP 162, para 7.75.

[24] This principle cannot apply quite so simply to Rent Act tenants – spouse successors would get a type I agreement, plus the entitlement to have their rents "fair-rented"; non spouse successors would get a type I agreement without the fair rent protection, which is the current position.

7.99 **We provisionally propose that a person who succeeds under the statutory right of succession should succeed to the same agreement. (The only exception would be that a non-spouse successor of a former Rent Act tenant would not succeed to the right to a fair rent.) Save as to the identity of the occupier, the terms of the agreement will not change unless a variation is agreed or permitted by the agreement**.

7.100 It will be necessary to make clear that any rent arrears of the deceased occupier are not passed onto the successor (though they may be recovered from the estate of the deceased). Further, the existence of any such arrears would not represent a breach of the terms of the occupation agreement by the successor. Thus possession proceedings for rent arrears which were the sole responsibility of the deceased occupier could not be instituted against a successor to the rights to occupy.[25]

Should there be separate treatment of fixed-term agreements?

7.101 We have already proposed above that fixed-term agreements should be treated separately. [26]

Should joint succession be possible?

7.102 Currently the rules on succession provide that only one person can succeed to a secure, introductory, protected or assured tenancy.[27] In some cases the occupiers and the landlord would all prefer the tenancy to pass to two or more potential successors jointly, but they have to go through the procedure of choosing one person to succeed who then has to surrender so that there can be a regrant to the joint tenants. Allowing joint succession to occupation agreements would allow more sensible decisions to be made more easily. This would also be consistent with our approach to adding joint occupiers to the occupation agreement.[28] We see the force of these arguments.

7.103 **We provisionally propose that it should be possible for joint occupiers who have the right to succeed, to have the rights of occupation under the agreement transferred to them jointly**.

7.104 Where this happened, both joint occupiers would be regarded as occupiers by succession. Where one died, the remaining occupier would be entitled to remain by operation of the principle of survivorship. On the death of the second joint occupier, there would only be a further right of succession if the second joint occupier was a spouse of the first joint occupier, and there was a member of the family who was entitled to succeed under the rules proposed above.

[25] Of course, where the successor was a joint occupier, who was jointly liable for the rent under the original agreement, he or she could be the subject of proceedings for possession if any such arrears were not paid off.

[26] See paras 7.31 to 7.41 above.

[27] Housing Act 1985, s 89(2); Housing Act 1996, s 133(2); Rent Act 1977, Sched 1, para 3 (as amended by Housing Act 1988, s 39 and Sched 4) and Housing Act 1988, s 17(5).

[28] Discussed at paras 3.29 to 3.58 above.

How should disagreements about who should succeed be resolved?

7.105 In any case where more than one person might be entitled to succeed, and where those potentially entitled cannot resolve the matter between themselves, the current law offers differing solutions. The Rent Act provides the issue should go to the county court. The Housing Act 1985 and the Housing (Scotland) Act 2001 provides for the matter to be resolved by the landlord.

7.106 In most situations we do not think that having to resort to the court would be proportionate to the matter to be resolved. Rather we think that it is more sensible for the landlord to resolve the matter as it will be the landlord who will have the greatest interest in the identity of his or her occupiers.

7.107 **We provisionally propose that where there was more than one potential successor, they should seek to resolve any dispute between themselves. However, where there has been a failure to resolve the matter, it should be resolved by the landlord**.

7.108 However it has been suggested to us that there may be circumstances where access to a court might be required.

7.109 **We invite views as to whether there are special cases where the matter should be resolved by a court**.

An alternative approach?

7.110 As we acknowledged at the start of this section of the Paper, our proposals are based on the current approach. They thus provide an absolute right of succession, but one which is strictly limited in its application, both in terms of the number of successions and the class of people entitled to succeed. We did consider more radical approaches in an attempt to simplify the law still further. The essence of these was to relax the limits on numbers of successions and/or the class of potential successors, but then to compensate for that with a more restricted right to succession. There are a number of ways in which such a system might work. As an illustration, it would be possible to consider an approach with the following elements:

(1) There would be no statutory right to succeed attaching to any particular class of person.

(2) Instead, the succession system would automatically apply to any person who happened to be living in the premises at the time of the occupiers death.

(3) There would be no limit to the number of potential successions, thus avoiding all questions as to whether a succession right had been used up.

(4) The landlord would be *required* to take on as occupiers under the agreement any person who fell within the definition of "spouse".

(5) In any other case, the landlord would be entitled to take proceedings for possession against any other person where this could be justified on the grounds of good estate management. For example, the social landlord could seek possession against the millionaire son of the deceased, on the ground that he was not in the degree of housing need that would justify his

retention of the home. Possession would only be granted where the court thought this was reasonable.

7.111 While attracted by aspects of this sort of approach, we provisionally reject it. Although attractive in its simplicity, it is open to objections. We recognise that the value attached by occupiers to the right of succession is associated with its absolute nature. If succession was merely a presumption which could be defeated by a social landlord's allocation priorities, much of its value to occupiers would be lost. Further, it relies on landlords having a widely drawn right to obtain possession on "estate management" grounds. In CP 162, we left this question open, and have yet to come to concluded view on the matter.[29] Finally, the use of an "estate management" ground for possession against a non-spouse occupier could itself generate considerable argument.

7.112 **We nevertheless invite views on whether an alternative approach based on a more limited right of succession, but one which was not limited in the number of successions, and/or was open to a wider group of potential successors, is to be preferred**.

EFFECTS OF SUCCESSION ON PAST AND FUTURE RIGHTS AND LIABILITIES UNDER THE AGREEMENT

7.113 Where an occupation agreement passes to a new occupier[30] the landlord should be under the same duties relating to the provision of revised versions of the written agreement as they would be where a transfer was made while the occupier is alive.[31]

7.114 The only question will be what the starting date should be from which the landlord's duty arises, and in relation to which sanctions may be imposed. The issues are similar to those raised in considering the point at which agreements should terminate after the death of an occupier.[32] In this case it seems right that the duty should only start from the point at which the landlord is satisfied, or should reasonably be satisfied, that the succession has taken place.

7.115 **We provisionally propose that, where the agreement does not terminate following the death of the occupier, the landlord should be required to serve an amended copy of the agreement on the new occupier. The same rent and criminal penalties and time limits for non-compliance should apply as do on the creation of a new agreement. The time limit for this should run from the date on which the landlord is satisfied, or should reasonably be satisfied, that the former occupier has died and a successor has been entitled to take over the agreement without the agreement terminating**.

[29] CP 162, para 7.82.

[30] Other than personal representatives in the limited cases where the parties agree to allow devolution of fixed terms by will– see para 7.39 above.

[31] See paras 6.78 to 6.81 above.

[32] See para 7.18 above.

7.116 Where the parties have chosen to allow a fixed term agreement to be passed by will or intestacy, the law relevant to wills and intestacy will govern past and future rights and liabilities under the agreement. We do not consider those rules further here, as they are of long standing and are outside the scope of housing law.

7.117 In all other cases the agreement will pass to survivors in a joint agreement, or statutory successors in a sole agreement, or will terminate on (or shortly after) the death of the occupier.

7.118 In these cases the occupier's estate will have no ongoing liabilities or rights in respect of anything that happens after the occupier dies, or the agreement terminates without being passed on.

7.119 This leaves the question of what should happen to any liabilities and rights in respect of events happening before the occupier dies, or the agreement terminates.[33] The commonest examples would be if the occupier was in rent arrears at the time of their death, or if the occupier had suffered disrepair for which they could claim compensation from the landlord. We outline below how the liabilities and rights would fall between the deceased occupier's estate and any new occupiers under the agreement.

Survivorship in joint agreements

7.120 In relation to survivors under a joint occupation agreement, the principles of joint and several liability and survivorship can answer the question. Thus, where one joint occupier dies, the remaining occupier or occupiers continue as before. They had joint and several liability with the deceased while he or she was alive. They will therefore continue to be liable for any arrears or other liabilities accrued by the occupier while alive.

7.121 The deceased occupier's estate will also be liable jointly to the landlord. The estate can also make, or be subject to, claims for contributions in relation to the survivors, on the normal principles for those sharing joint and several liability. The estate will continue to be entitled to the benefit of the agreement in relation to the time before the death, and so could for instance sue for compensation for disrepair suffered by the deceased (but would not be able to obtain an order for repairs to be done after death).

Statutory succession

7.122 In cases where there is a statutory succession,[34] the effect of the succession should be equivalent to that of a transfer by a person who is still alive, as discussed in paragraphs 6.62 to 6.102 above. The difference is that the estate of the deceased takes the place of the former occupier.

7.123 Under the current law, tenants who succeed to a tenancy are often unsure whether that means they also inherit the former tenant's arrears. Under our scheme we

[33] Other than where a fixed term passes on will or intestacy.

[34] Including those where the contract gives more generous rights of succession (but does not allow for passing by will or intestacy) than the minimum laid down in the statute.

wish it to be clear that the statutory successor does not inherit the arrears as such. They therefore cannot be evicted for the deceased's arrears. There is no requirement for consent to a succession, so there is no opportunity, as there may be in a transfer, for the landlord to require a fresh term in the agreement obliging the new occupier to pay the old occupier's arrears.

7.124 In many cases the statutory successor will also be the sole beneficiary under the deceased's will or intestacy, and sometimes will also be the personal representative too. If so, then the estate will, as usual, be liable to pay off the arrears, and this may be before paying out to the successor as beneficiary. However, if there are not adequate funds in the estate to pay the arrears, then the case will fall to be dealt with under the general law on insolvent estates. The beneficiary cannot be saddled with a net liability as such.

7.125 The successor will not however owe the arrears to the landlord in their capacity as successor.

7.126 **We provisionally propose that, in cases of succession under our scheme, the deceased occupier's estate should retain all the deceased occupier's rights and liabilities relating to the period before the succession, and the statutory successor, as such, should neither benefit from nor be burdened by them. The statutory successor, and not the estate, should take all the rights and liabilities under the agreement in relation to the period after the succession**.

Termination of the agreement on death

7.127 Where the agreement terminates on death the effect would be similar to any other termination, but again the estate will take the place of the former occupier. If there were legal obligations that the deceased occupier had not met prior to the death, these obligations should pass to the occupier's estate. For example, if the occupier had failed to pay the rent for any period prior to the death, such rent should be paid. If the occupier had done damage to the premises in contravention of the occupation agreement, compensation for these actions should be rendered. But there should be no continuation of those obligations in relation to periods after the occupier's death.

7.128 Similarly, the occupier's estate should have the benefit of any claim arising against the landlord for breach of the landlord's obligations during the period of the occupier's occupation. Thus, for example, damages for breach of repairing obligations could be paid to the estate. Any refund of rent paid in advance would also be made to the estate. But the estate should not continue to have any rights in respect of the agreement in relation to periods after the occupier's death.

7.129 This position will apply if the agreement terminates immediately on death. However, we asked above at paragraph 7.29 whether consultees believe the termination should be delayed to some later point, to give the landlord an opportunity of finding out about the death. In that case the estate would have to take on any additional rights and liabilities that might arise under the agreement from the time of the death until the agreement terminated.

7.130 In either event, there will come a point at which the agreement will automatically terminate. This will achieve the result which we suggested above, at paragraph 7.29, that there should be termination in such circumstances, without the need for

personal representatives to serve an occupier's notice or for landlords to serve notice on the Public Trustee.

7.131 **We provisionally propose that on the date of the death of the occupier, or the date on which the agreement is terminated, if later, the rights and liabilities of the deceased occupier for events occurring before that date should be taken over by the deceased's estate. The estate should not be liable for any rights and liabilities arising after that date**.

PART VIII
OCCUPATION AGREEMENTS AND THIRD PARTIES: TRANSFERS OF LANDLORD'S RIGHTS AND OTHER MATTERS

INTRODUCTION

8.1 One of the principal features of the scheme we have proposed is that all occupation agreements within its scope should be treated in the same way, irrespective of whether – under ordinary principles of law – they would be classified as leases or licences.[1]

8.2 Insofar as rights currently exist which apply solely to tenants and not to licensees, we proposed that such rights be expanded to apply to all occupation agreements within our scheme. Thus we suggested

(1) that licensees covered by our new scheme should be capable of being subject to the same terms as tenants in relation to eviction and minimum rights, such as fitness for human habitation;[2]

(2) that licensees, even if they do not have exclusive possession, should benefit from an appropriately modified version of the covenant of quiet enjoyment under which their landlords would not be allowed to harass them, and should be burdened by an appropriately modified version of the duty to behave in a tenant-like manner;[3] and

(3) that, as we have discussed in the preceding parts of this paper, our new scheme should similarly regulate dealings with joint occupiers, sub-occupiers and other members of an occupier's household or family, irrespective of whether the agreement constituted a lease or a licence.

8.3 In this Part we consider how the proposals for our new scheme should apply in relation to others, not parties to the occupation agreement. The discussion falls into four principal sections.

(1) First we ask whether principles of land law, in particular the law of landlord and tenant, should be used to determine issues affecting third parties.

(2) Secondly, we consider certain consequences of the outcome of that discussion on cases where landlords assign their interests in properties which are subject to occupation agreements to others.

[1] Agreements which would fall outside the scope of our scheme are discussed in CP 162, Part IX.

[2] See CP 162, paras 9.21 to 9.42 and 6.108 to 6.109.

[3] See CP 162, para 6.108.

(3) Thirdly we discuss the scope of the legal responsibilities of a person who has acquired title to the premises in question in circumstances where they become the new landlord.

(4) Finally we consider a number of special circumstances in which occupiers may have rights to restrict the freedom of their landlords to dispose of their property interests.

THE NEED TO USE PRINCIPLES OF LAND LAW?

8.4 We made it clear, in CP 162, that our scheme should apply to all occupation agreements, irrespective of whether they would be classified in law as a lease or a licence. However at paragraph 9.23 we also said that "we stress that we are *not* proposing to abolish the lease-licence distinction. It will retain its significance for distinguishing between types of agreement which create interests in land, which are therefore binding on third parties, and those which do not."

8.5 The key issue to be considered in this section is the extent to which the distinction should be retained. We need to determine the basis on which third parties should be bound by the rights and obligations which arise under occupation agreements created by our scheme.

8.6 The issue may be illustrated by considering the case where a landlord wishes to sell their interest in a property to another. Historically landlords have been left largely free to deal with their property interests without any such dealing directly affecting tenants. They can usually do what they want without their tenants' consent.[4]

8.7 Where the landlord either cannot obtain vacant possession prior to sale, or chooses not to do so, the buyer takes the property subject to any tenancies. The buyer simply becomes the new landlord under the original tenancy.

8.8 Where property is only occupied under a licence, the position is different. A licence does not create an interest in the property. It is a personal right, created between the licensor and the licensee, which cannot be enforced against any other person. The licensee's legal relationship, if it continues at all after the sale, remains one with the original licensor but is not with the new owner of the licensor's interest.

8.9 The question for consideration, therefore, is whether this should remain the law, or whether the law should be changed. Should the buyer be deemed to have taken over all occupation agreements, so that in all cases they step into the shoes of the original landlord? Or should the buyer only be bound, by the application of existing rules of land law, by those interests that are characterised as property interests? Should the buyer only be bound by those interests which are registered or otherwise protected under the law relating to the registration of title to land?

[4] A lease could in theory include a prohibition against the landlord assigning, but in practice never does. Nor is "attornment" (recognition by the tenant of the new landlord) now necessary since Law of Property Act 1925, s 151(1).

Housing law and land law

8.10 Historically, housing law has been used to adapt rules of land law, in particular of landlord and tenant law, for social policy purposes. For example, housing law prescribed a vast array of circumstances in which possession could be sought, and the procedures which have to be undergone before a possession order could be obtained from a court.

8.11 Many of these statutory rules have applied equally to licences as well as tenancies.[5] While the Rent Act 1977 and its predecessors used the concept of "statutory tenancies", this was held judicially not to amount to an actual tenancy. Statutory tenancies do not create a leasehold estate in the land, but merely a "status of irremovability".[6] Much housing law has not been dependent on the lease/licence distinction, but rather on the operation of specific statutory rules operating outside or in parallel with land law.

The policy of land law

8.12 Set against this, the policy of land law has been to ensure that, so far as possible, notice of interests attaching to land is registered at HM Land Registry and thus clear to those purchasing interests in property.[7] Thus the policy behind the development of land law has been to limit the number of types of estates and interests in land, and with the development of land registration, to ensure the land register is as comprehensive as possible. Much of the policy behind the Land Registration Act 2002 was to move yet further towards a comprehensive register, in particular to aid electronic conveyancing, but generally to make the system of land registration more effective for those dealing in property.

8.13 It has always been accepted that some interests in land will not – for practical reasons – appear on the register. But the aim has been to restrict their number as far as possible. The scheme of land registration accepts that there should be certain categories of "overriding interest", which have binding effect but which do not have to be registered in the Land Registry. Again, however, the policy is to reduce and simplify the number of overriding interests that can exist. The general approach is that overriding interests should be limited to those that are necessary, and can reasonably be discovered by inspection of the property. A suggestion for the creation of a new category of "general burdens"[8] which could be protected without being registered was rejected.

8.14 The purpose of these policies is to ensure that the conveyancing market should operate as smoothly as possible. Conveyancers should not be unnecessarily burdened by the need to inspect premises, in order to check on matters not

[5] Rent Act 1977, s 19 dealt with the concept of the "restricted contract" which applied to contractual licences as well as tenancies. Protection from Eviction Act 1977, ss 1(1), 3(2b), 3A and 5(1A); Housing Act 1985, s 79(3); and Housing Act 1996, s 126 all apply to licences as well as tenancies.

[6] See R E Megarry, *The Rent Acts* (11th ed 1988) at pp 251 to 255.

[7] The same broad principle underpins transactions in land that still fall outside the scope of registered land conveyancing.

[8] See note 14 below.

recorded on the register. These policies are reflected in Land Registration Act 1925, section 5. This provides that the owner holds "free from all other estates and interests whatsoever", other than those protected under the Act.[9]

Licences

8.15 Licences present a dual challenge to the land registration system.

(1) They are often created informally, and are therefore hard for a scheme of registration to "capture".[10]

(2) More fundamentally, they do not create interests in land which can be the subject of registration. It follows that if licences covered by our scheme were to be treated as binding on successors in title to the landlord, without their being registered, this would involve making a significant change to the scope of the land registration scheme.

Statutory exceptions to the land registration scheme

8.16 There are statutory provisions which have the effect of creating special exceptions to the land registration scheme, but they have been very limited in number. Three examples may be noted.

Matrimonial home rights

8.17 The land registration system has in the past been amended to give protection to socially important statutory rights not normally recognised by land law, notably in the case of matrimonial home rights.[11]

The Mobile Homes Act

8.18 The Mobile Homes Act 1983, section 3(1) provides that "An agreement to which this Act applies shall be binding on and ensure for the benefit of any successor in title of the owner and any person claiming through or under the owner or any such successor." This is supplemented by the definition in section 5(1) of "owner" as "the person who, by virtue of an estate or interest held by him, is entitled to possession of the site or would be so entitled but for the rights of any persons to station mobile homes on land forming part of the site". In other words agreements relating to mobile homes bind the land despite not creating leasehold estates in

[9] The same wording is used in s 20 on registration of dispositions. Similarly under Land Registration Act 2002, s 11(4) the effect of registration of the freehold will be that the registered owner's "estate is vested in the proprietor subject only to the following interests", and under s 29 registration of dispositions for valuable consideration has the effect of postponing any unprotected interests.

[10] Although we require a written agreement to be given in leases and licences covered by our new scheme, we do not propose that the agreement should be rendered invalid for failure to comply with that requirement. We hope that very few agreements will not be put in writing, but it is possible that a higher proportion of licences, than of tenancies, will fail to comply with the requirement for writing.

[11] Now under Family Law Act 1996, s 31 – see S Bright "Of Estates and Interests: A Tale of Ownership and Property Rights" in S Bright and J Dewar (eds) *Land Law: Themes and Perspectives* (1998) p 529.

that land. They do so simply on the basis that the statute requires that they should.[12]

The Rent Acts

8.19 Statutory tenancies arising under the Rent Acts appear to have received special treatment, though despite many years of case-law, there is no clear answer to the question why, in land law terms, a Rent Act 1977 statutory tenancy is treated as binding on a new landlord, when it is not treated as a "tenancy" in the sense of creating a leasehold estate in land. Little of the extensive writing on the Rent Acts deals directly with this question.[13]

The exceptions and the Land Registration Act 2002

8.20 It remains the case that Mobile Homes Act licences and Rent Act 1977 statutory tenancies will survive as burdens on land even after the coming into force of the Land Registration Act 2002. However, apart from the Mobile Homes Act, neither the Rent Act 1977 nor any other housing legislation specifically provides that the landlord's successors in title will be bound by agreements covered by the legislation.[14]

Comment

8.21 The existence of these exceptions might lead to the suggestion that further exceptional cases – including occupation agreements under our scheme – might be created, and that, given our general policy of not distinguishing between leases and licences, all licenses should be deemed to be tenancies.

8.22 There could be some advantage to this bold approach, going beyond questions relating to conveyancing. For example under the current law, if a neighbouring landowner commits the tort of nuisance in relation to property which is subject to an occupation agreement, only persons with a legal estate or interest in the affected land will be able to sue.[15] The parties therefore have to look to land law principles to work out whether the occupier is a tenant, who can sue for nuisance, or a

[12] See now *Charlton v Howard* [2002] EWCA Civ 1086; [2002] All ER (D) 367.

[13] A footnote in a Law Commission report published in 1987 (Third Report on Land Registration (1987) Law Com No 158, p 12, fn 71) outlined the history of this oddity. It pointed out that the binding nature of Rent Act statutory tenancies cannot derive from any protection by actual occupation under Land Registration Act 1925, s 70(1)(g), because the Rent Acts do not always require "actual occupation". Instead it was suggested that they survive as statutory "burdens", which operate outside the Land Registration Acts because they are not "interests" or "estates", so the purchaser does not take free of them under the relevant provisions of the Land Registration Act 1925. It was further suggested that the statutory burden is imposed because the Rent Act 1977 limits the grounds on which possession can be obtained. The restriction on the ability of the landlord to seek possession is a burden which binds a new landlord.

[14] The only reference is in definition sections which refer to "landlord" as including successors in title. However, this does not directly answer the question of which arrangements covered by any Act were intended to bind successors – such gaps are not unusual in housing legislation. The other obvious one is that no housing legislation includes specific provision against contracting out of security, so the courts have effectively supplied it in the jurisprudence on "shams".

[15] See, eg *Khorasandijan v Bush* [1993] QB 727; *Hunter v Canary Wharf* [1997] AC 655.

licensee, who cannot and will have to ask the landlord to do so instead.[16] Similarly, if a stranger trespasses on the land, an occupier who is a tenant will be able to take action, whereas a licensee will not.[17]

8.23 In addition, it might be argued that successors in title to the original landlord should be required to take on the rights and obligations of the original landlord, irrespective of whether the agreement constituted a lease or a licence. Reliance on the distinction, in the important context of deciding which occupation agreements survive a change of ownership of the landlord's interest, could lead to uncertainty. This might affect not only any new owner, but also the occupiers who would not be clear what their legal position was. Removing reliance on the distinction would, from the housing perspective, avoid treating occupiers, under an occupation agreement that creates only a licence, differently from occupiers characterised as tenants.

8.24 However, the clear aim of the Land Registration Act 2002 is to ensure a reduction in the number of exceptions. The Mobile Homes Act and Rent Act exceptions remain because they are few in number and are the result of historical accident.

8.25 We have therefore provisionally concluded that the addition of another statutory exception to the land registration scheme for licences covered by our new scheme would be unacceptable. It would represent a move in the wrong direction and be a perpetuation of the anomalies of the past.

Overriding interests

8.26 An alternative approach to the protection of the rights of licensees might be to look again at the scope of overriding interests under the Land Registration scheme.

8.27 One way of protecting licensees might be by deeming their licences to be legal leases, though solely for the purposes of binding successors in title. They would thus qualify as overriding interests under Land Registration Act 1925, section 70(1)(k). However, we fear this proposal, which would involve breaking down barriers between property interests and personal rights, might raise more questions than it answered and could be a disproportionate response to a relatively modest problem.

8.28 Another initially attractive idea might be to deem such licenses to be rights which could be protected as overriding interests by actual occupation under Land Registration Act 1925, section 70(1)(g). However, problems might then arise as the requirements for occupation in that subsection are very different from those in

[16] Under the current law a tenant and a licensee could both have the same status as secure under Housing Act 1985 or introductory under Housing Act 1996, but would not have the same rights in respect of nuisance from neighbouring land.

[17] Currently tenants, but not licensees, may use claims in trespass to take action against a landlord who has illegally evicted them and is occupying the property. If the next stage of this project is authorised, we are likely to be asked to consider how to modernise and simplify the law relating to illegal eviction and harassment. We will consider this issue further there.

our scheme.[18] Not all licences covered by our new scheme would be protected under section 70(1)(g), whereas all legal leases would fall under section 70(1)(k). The objective of parity of treatment for all occupation agreements would still not be achieved as there would remain differences in treatment as between leases and licences.

8.29 We therefore think that trying to redefine "overriding interest" to include all licences under our scheme would not be an effective way to protect all licensees.

The impact on licences

8.30 How significant would it be if it were to prove impossible to assimilate the treatment of tenancies and licences? The practical effects, we consider, would be comparatively limited.

8.31 First, the scheme already excludes many situations in which licences may commonly be used, including

(1) non-contractual arrangements,

(2) agreements for use of premises other than as a home,

(3) agreements to share living accommodation with the landlord, and

(4) certain categories of supported accommodation.

8.32 Secondly, most landlords who contemplate selling their interests, particularly private landlords, will wish to bring any occupation agreement to an end prior to the sale so that they can sell with vacant possession. If the agreements are type II periodic agreements, then this will be easily achieved through use of the notice-only possession procedure. A social landlord will normally be selling to an organisation with similar objectives who would in any event issue new licences to existing licensees.

8.33 Thirdly, most occupation agreements will be classified in law as tenancies. Only a comparatively small number of licences are likely to fall within our scheme.[19] These may include the following.

(1) Accommodation which is tied to employment. Such arrangements may constitute licences even where exclusive possession is given.[20]

(2) Accommodation where the nature of the provision is not that of a tenancy. This may arise where accommodation is provided by a charity, as an act of charity.

[18] Also the Land Registration Act 2002 will no longer protect those who receive rents rather than occupying, so there would be problems if a licensee had entered a sub-agreement for the whole property.

[19] See CP 162, Part IX for discussion of the bases for exclusion from and inclusion in our new scheme.

[20] See *Westminster v Clarke* [1992] 2 AC 288 on licences with exclusive possession.

(3) Accommodation where the occupier has at least one room which is not shared with any other contracting occupier or the landlord, but where the landlord exercises such a degree of control over that room that the occupier does not have exclusive possession of it.

Licencees in multiple occupation of accommodation

8.34 A situation in which there is a genuine licence falling within the scope of our scheme is where rooms are shared by a number of people, each of whom have an individual agreement with the landlord. Such agreements do not grant exclusive possession, because of the element of sharing with the other occupiers. Arrangements with groups of students or other groups of young people often fall into this category.

8.35 This was the situation considered in *AG Securities v Vaughan*.[21] It was held that a genuine "non-exclusive occupation agreement" arises where there is not a joint tenancy of the whole house, nor separate tenancies of individual rooms with exclusive possession within the house, nor one tenant of the whole who then sub-lets to the others. Instead each occupier has a separate agreement direct with the landlord, whereby the occupiers can be moved around from room to room, and certain facilities were shared in common.

8.36 In such circumstances, a real issue will arise if the landlord chooses to transfer his interest. If the landlord were to use a periodic type II agreements in such circumstances, it is likely that he or she would in practice terminate the agreement so as to obtain vacant possession before any sale. Any difficulties are therefore likely to be confined to fixed term type II agreements. Our understanding is that these are relatively common in the student market where landlords want to keep their properties occupied for a full academic year, or for the duration of a course. Problems could, therefore, arise where the landlord's title to the property is transferred to another during the period of the agreement.[22]

Conclusion

8.37 We conclude that relatively few occupation agreements will create licences. We have reached the provisional view that we should not propose the creation of a new statutory exception, deeming such licences to be tenancies; or, more modestly, by deeming such licences to be "overriding interests". There are two reasons why we have reached this view.

8.38 First, there is no reason why licensees could not be protected to a considerable degree by the terms of their occupation agreement. It would be possible to propose a default term that the landlord guarantees that on an assignment of their

[21] *AG Securities v Vaughan, Antoniades v Villiers* [1990] 1 AC 417.

[22] Currently many landlords outside the student market are still, apparently as a matter of habit, granting six month fixed terms in assured shorthold tenancies, even though the requirement to do so was ended by Housing Act 1996, s 96. We would expect our new scheme to lead to this habit being replaced by decisions on use of fixed terms which are based on the demand in the market and the need to guarantee the income stream.

reversion, the assignee would enter into a new occupation agreement.[23] Thus licensees could have grounds for action in contract against their original landlord[24] if they are forced to leave the premises because the landlord's interest has fallen into other hands.

8.39 Second, as argued above, the policy of land law has been to reduce the number of exceptional cases, not increase them.

8.40 Where the landlord's title passes in ways other than on sale, such as on death, on insolvency, or on repossession by a mortgagee, we think the same approach should be adopted to determine the scope of the landlord's property interests that are thus transferred.

8.41 Application of the current law would broadly mean that occupiers who could be classified as tenants would have a new landlord – the landlord to whom the landlord's rights have been assigned – whereas occupiers who were classified as licensees would, as against the new landlord, become trespassers who would have to leave. Their only redress would be the possibility of an action for breach of contract against their former landlords.

8.42 **We provisionally propose that, in determining whether occupation agreements are binding on successors to the original landlord, existing principles of landlord and tenant law should continue to apply to determine whether such agreements constitute a lease or a licence**.

Rent Act 1977 statutory tenancies

8.43 This still leaves the question of how, if the matter is left to land law, existing Rent Act 1977 statutory tenancies will bind purchasers of the landlord's interest if those tenancies are converted to type I agreements on the coming into force of our new scheme. It is essential that Rent Act tenancies, virtually all of which will by now be statutory tenancies,[25] should continue to bind successors in title to their landlords. However, it is obviously undesirable that the basis for this should continue to be

[23] Under the present law, there are also criminal offences (Protection from Eviction Act 1977, s 1) of illegal eviction and harassment, and enhanced rights to damages for unlawful eviction, based on the value of the property, rather than the loss to the occupier (under Housing Act 1988, ss 27 and 28). Each of these applies to a "residential occupier" (as defined Protection from Eviction Act 1977, in s 1(1)) who can be a tenant or a licensee. They each apply where the eviction was "unlawful", but without further defining what is unlawful for these purposes. In the next stage of this project we hope to consider how to modernise and simplify the law relating to illegal eviction and harassment. It would be possible, though we cannot prejudge the issue now, to define unlawful eviction so as to include cases where the landlord terminates the right to occupy, in breach of the agreement, by passing on their interest in the property without ensuring that the new owner of that interest would grant new agreements to existing licensees covered by our scheme. There could therefore be a strong incentive on landlords to ensure that, where they cannot terminate the agreement in advance, the person who takes on their interest issues fresh agreements.

[24] We continue here our practice from CP 162 of using the word "landlord" to include "licensor".

[25] Because all surviving Rent Act tenancies are likely to have registered rents, and under Rent Act 1977, s 49(4) a statutory notice of increase of rent will convert the tenancy into a statutory tenancy.

obscure, rather than an express, and preferably consistent, part of the new legislation.[26]

8.44 This could be achieved by deeming Rent Act statutory tenants, on conversion to type I agreements, to acquire a tenancy. This would not give them any special status above other type I agreements which are tenancies, but would ensure that they were treated in the same way in relation to successors to the landlord's title. It would also give a clear basis for saying they have rights "against the world".[27] This could be justified as correcting the anomaly that currently there is no clear basis for such rights.

8.45 The alternative would be to adapt the Mobile Homes Act model and provide expressly in the statute that, only in relation to former Rent Act 1977 statutory tenancies, such tenancies should be binding on the landlord's successors in title notwithstanding that they do not amount to leases. This would preserve the status quo, but beg questions about why the same approach was not being taken in other situations.

8.46 **We provisionally propose that statutory tenancies under the Rent Act 1977 should, on conversion to type I agreements, take effect as a property interest**.

Other third party matters

8.47 Although the discussion above has focussed primarily on the use of principles of land law to determine the extent to which a new landlord becomes bound by a pre-existing occupation agreement, the discussion leads to the conclusion that the same principles of land law should also be used to determine other matters affecting third parties, where the distinction between the lease and the licence remains of importance.

8.48 **We provisionally propose that our new scheme should not interfere with land law on the determination of questions such as whether the occupier has the rights of a leaseholder in relation to third parties such as trespassers or neighbouring landowners who commit the tort of nuisance**.

APPLICATION OF THE LAND LAW APPROACH TO LANDLORDS' SUCCESSORS IN TITLE

8.49 We now discuss further the implications of the adoption of the land law approach.

Registration of title

8.50 At present, only leases for a fixed term of over twenty-one years must be registered.[28] Our scheme will not apply to such leases.[29] Licences are not registrable, even in the rare event of being for long fixed terms. Therefore at

[26] See para 8.19 and note 14 above.

[27] See *Jessamine Investment Co v Schwartz* [1978] QB 264.

[28] Land Registration Act 1925 s 8(1).

[29] See CP 162, para 9.18.

present there are no land registration requirements for agreements covered by our new scheme.

8.51 However, when Land Registration Act 2002, section 4(1)(c) comes into force all fixed term leases of over seven years will have to be registered. Under section 33(b) leases of over three years (and up to seven) will be registrable voluntarily. There is a power in section 118 for the Lord Chancellor to reduce the boundary for compulsory registration from seven years.

8.52 While periodic agreements will remain outside the scope of land registration, some fixed-term agreements covered by our new scheme, provided they are classified in law as leases, will be registrable. Most agreements for a fixed period of over seven years would be classified as a tenancy, rather than a licence. It may be that there could be more room for argument in relation to three year fixed term occupation agreements. We fully expect that the effects on residential occupation agreements will be taken into account in any decision to make any reduction in the time period which will trigger compulsory registration requirements. We therefore conclude that this possibility should not pose a significant problem for the operation of our scheme.

8.53 Legal leases which are too short to require registration in their own right are nevertheless protected as overriding interests under Land Registration Act 1925, section 70(1)(k).[30] Licences are not covered by section 70(1)(k). Given that they are personal and cannot affect successors in title to the landlord, they are not capable of qualifying as overriding interests under section 70(1)(g) as rights capable of protection by "actual occupation of the land".[31] The law on registration will therefore not affect the basic proposition that the landlords' successors in title will only be bound by those of our new agreements which count as leases rather than licences.

Informal leases

8.54 We have also considered whether our proposed requirements for writing[32] might lead to landlords neglecting the formalities for the creation of leases. This could lead to problems when the landlord's interest subsequently passes, if the successor in title claims the informal leases are not binding.

[30] Equivalent provisions will operate in Land Registration Act 2002, Sched 1, para 1 and Sched 3, para 1.

[31] There has in the past been argument, mainly promoted by Lord Denning, starting with *Errington v Errington and Woods* [1952] 1 KB 290, that some contractual licences are interests in land which can bind purchasers of unregistered land, and could be overriding interests protected by actual occupation under Land Registration Act 1925, s 70(1)(g) in registered land. It is now mostly accepted that the tide of opinion has moved back to orthodoxy and a line of cases considered on full argument, although obiter, by the Court of Appeal in *Ashburn Anstalt v Arnold and Another* [1989] Ch 1 is now commonly taken as authority ending the "heresy" that contractual occupation licences could confer interests in land capable of binding third parties and being overriding interests protected by actual occupation. See for example C Harpum, *Megarry and Wade: The Law of Real Property* (6th ed 2000) at 17–019, and Gray and Gray, *Elements of Land Law* (3rd ed 2000), pp 1127 to 1130.

[32] Which are not necessarily enough to create a lease – see CP 162, paras 6.63 to 6.71.

8.55 In many situations the occupier will obtain a legal lease by operation of law on taking possession, notwithstanding the failure to complete the proper formalities for the creation of a tenancy.[33] The agreement will thus still operate as a lease for the purposes of binding third parties in unregistered land and counting as an overriding interest in registered land. However, the implied legal lease obtained on taking possession is a periodic lease, even if what had been agreed but not adequately formalised was a fixed term.[34]

8.56 In cases where this does not happen, the rights of a person with an equitable lease will nonetheless have those rights protected as overriding interest where they are in actual occupation of the property.[35] We therefore do not believe that leases which fail to satisfy the formal legal requirements for a legal interest will cause a significant problem.

8.57 We suggest below, at paragraphs 8.74 to 8.104, that while land law should deal with the question of what agreements are binding on the successor, the question of the extent of the rights and obligations to which the successor in title is bound should be left to the agreement under our scheme.

Mortgages

8.58 Mortgagees are generally not bound by licences entered into by mortgagors, whether the licence pre-dates or post-dates the mortgage, and whether the mortgagee knew and approved of it or not.

8.59 First mortgages usually pre-date the creation of any tenancy, as they will have been used to buy the property before it was let. In practice the mortgage deed is likely to require the consent of the mortgagee for any subsequent letting. If a tenancy is granted in breach of such a requirement it will not bind the mortgagee on repossessing against the mortgagor-landlord. This can be a significant social problem, particularly at times when repossession rates rise, because so many private landlords with prior mortgages do not seek consent for their lettings and their tenants do not find out until it is too late.

8.60 The problem is that it is hard to envisage effective sanctions against borrowers. The tenant will theoretically be able to claim damages for breach of the covenant for quiet enjoyment (and occupiers under our scheme will be able to claim for breach of the equivalent term). However, in mortgage repossessions the equity in the house commonly goes to the lender and the borrower is not worth suing as they are by definition in financial difficulties. It is also hard to see how a mortgage

[33] See generally, C Harpum, *Megarry and Wade: The Law of Real Property* (6th ed 2000), 14–039 and CP 162, para 6.67.

[34] See Susan Bright's commentary on *Long v Tower Hamlets London Borough Council* [1999] Ch 197 at [1998] 62 Conv 229, which points out that tenancy agreements signed in advance of the tenancy without using a deed, would be periodic irrespective of the terms of the agreement, and would therefore have failed to qualify as shortholds under the Housing Act 1988 until that Act was amended by the Housing Act 1996.

[35] Land Registration Act 1925, s 70(1)(g), to be replaced, when brought into force, by Land Registration Act 2002, Sched 1, para 2 and Sched 2, para 2.

system could work if lenders risked being bound by tenancies to which they had not given consent.

8.61 In some cases where the creation of a tenancy pre-dates a mortgage then the tenancy will have priority, whether the mortgagee knew about it or not. In practice this would normally only be the case on second mortgages. We can understand that mortgagees would not want to have to check for the existence of licences as well as tenancies before granting second mortgages, and that they would not want to see any increase, even a small one, in the risk of being bound by them. We do not in fact believe there would be much more risk. In practice the same checks will have to be made as to whether anyone (other than the mortgagor) is paying to live there. It will be easier to check whether there is an agreement covered by our scheme than it is to check whether there is a tenancy or a licence. We do not believe a sensible mortgagee would feel they could lend safely on the strength of a belief that someone covered by our new scheme was a licensee rather than a tenant. Any problems would therefore be confined to cases where the mortgagor has concealed the existence of the occupation agreement.

8.62 In other cases, particularly "buy-to-let" schemes, the mortgage will pre-date the occupation agreement, but the mortgagee will have given consent to the letting. On repossessing against the mortgagor, the mortgagee will be bound by the agreement only if it counts as a tenancy and not as a licence. Assuming that the mortgagee will only have consented to the granting of a type II agreement, it will be possible to regain vacant possession of the premises speedily. In this case it is difficult to see, in housing law terms, why a mortgagee should not be similarly bound if they have consented to a type II agreement which happens to constitute one of the few kinds of licence which will be covered by our new scheme.

8.63 However, we can see that any mechanism for imposing the protection of such licensees onto mortgagees would be open to the same objections as those relating to other successors to the landlord's title, discussed above. In any event the difference in the level of protection is marginal. They would have had at least fourteen days warning of any repossession hearing.[36] Indeed, repossession against licensees may well be slower than against tenants. If the licensees claim in fact to be tenants, then a court hearing will be needed to determine the issue, and will have to cover the complex distinctions between the two. If the mortgagee assumes the occupiers are tenants, and therefore binding, it will be able to take accelerated possession proceedings on the notice-only basis, with no need for listing of a court hearing. Accordingly we do not believe that the discrepancy of treatment between licensees and tenants will cause disproportionate hardship.

Landlords' superior landlords

8.64 Here we consider the situation where a lessee ("the mesne landlord") under a long lease, not covered by our new scheme, enters an occupation agreement which is covered by our scheme (for instance, if A grants a 99 year lease to B and then B

[36] Under CPR, Pt 55, r 10 such warning must be given to anyone at the premises. It is to be hoped that Building Societies would voluntarily give more warning in these cases, or perhaps face costs penalties, given that they would have given consent to the licence and should know it is covered by our new scheme.

agrees to allow C into occupation as a periodic tenant, the agreement between A and B is not covered by our scheme, whereas that between B and C is).[37] The key issue is whether the head landlord will become bound by the agreement on termination of the head lease. We believe that this issue should be determined solely by the rules of general landlord and tenant law. We do not believe our scheme should reproduce current rules in housing legislation which add to the circumstances in which the sub-occupier is imposed on the head landlord.

The current law

8.65 Currently there are situations where landlord and tenant law may impose a sub-tenant, but not a sub-licensee, on the head landlord (that is, C, the sub-tenant, becomes a tenant directly of A). The general principle is that on termination of the head lease all interests granted out of it fall as well. There are two exceptions to this general rule. Both exceptions only apply to leases, and not to licences, but both apply irrespective of whether the sub-letting was lawful or unlawful. The first is where the head lease is surrendered or merged.[38] The other is where the court imposes a tenancy between the head landlord and sub-tenant on the sub-tenants' application for relief against forfeiture of the head lease.[39] Whatever the logic of these provisions, it is beyond the scope of this project to suggest changes to this area of law.

8.66 In addition, housing legislation may impose a sub-tenant on the head landlord in other circumstances where landlord and tenant law would not do so.[40] These provisions are notoriously complex and of limited application in practice. They both apply only to lawful sub-lettings. The Housing Act 1988, section 18 is the clearer of the two. It operates to burden a head landlord (A) with an assured sub-tenancy (for C) on the termination of the head tenancy (to B), irrespective of how the head tenancy came to an end and irrespective of whether the head tenancy is governed by any other statutory or common law rules.

Our approach

8.67 We have asked whether our new scheme should reproduce provisions similar to those of existing housing legislation, to supplement the number of situations in which landlord and tenant law would require head landlords to take over occupiers under agreements covered by our new scheme.

[37] There is a further issue as to what happens if the lessee-landlord assigns a head lease which is not covered by our new scheme. However, there does not appear to be any significant difference between this and the position where a landlord who is a freeholder disposes of the freehold. We deal with this above/below at paras 8.74 to 8.87.

[38] See Law of Property Act 1925, ss 139 and 150. In *Pennell v Payne* [1995] QB 192 and *Barrett v Morgan* [2000] 2 AC 264 the courts over-ruled previous case-law suggesting that tenants' notices to quit, or landlords' notices to quit which were served in collusion with the tenant, would have the same effect as surrender.

[39] See Law of Property Act 1925, ss 146(2) and 146(4), and *Escalus Properties Ltd v Robinson* [1996] QB 231. Under s 146(4) the court has a wide discretion in relation to the resulting tenancy, but that tenancy cannot be for a term longer than the sub-tenancy was.

[40] See Housing Act 1988, s 18 and Rent Act 1977 s 137.

8.68 In favour, it may be argued that it would ensure the continuation of the agreement despite any fault of the mesne landlord, and that it could protect agreements from premature termination without introducing distinctions as to whether they counted as leases or licences.

8.69 The problem with this approach is that the logic of protecting the innocent occupier would apply much more often in cases where the landlord is in breach of mortgage conditions, but in such circumstances the innocent (albeit unlawful) occupiers remain vulnerable.

8.70 We are also concerned that head landlords, whose primary interest is in commercial leases, not residential, do not become enmeshed in rules relating to residential lettings which they might reasonably assume do not apply to them.[41] Many of those landlords would be familiar with the general rules of landlord and tenant law which would apply to their head lease, under which they would not expect to be bound by their tenant's licences. They might thus agree to a residential sub-licence agreement in ignorance of the fact that licences are covered by our new scheme.

8.71 Another reason for suggesting that the head landlord should take over occupiers under agreements created by mesne landlords is to avoid sham arrangements designed to avoid the force of our scheme. It is probable such anti avoidance considerations were the motivation behind Rent Act 1977, section 137 and Housing Act 1988, section 18. However, since the creation of the assured shorthold tenancy, which we propose should be embraced by our type II agreement, sham arrangements seem largely to have died out.

8.72 We have therefore concluded that there is now no need for our new scheme to make special provisions to ensure that head landlords, under leases not covered by our scheme, are bound by occupation agreements created by mesne landlords, in cases where they would not be so bound by the general law of landlord and tenant.

8.73 **We provisionally propose that our scheme should not make any special provision, above that imposed by general landlord and tenant law, for head landlords, whose leases fall outside our scheme, to be bound by occupation agreements covered by our scheme which are created by mesne landlords.**

THE RESPONSIBILITIES OF THE NEW LANDLORD: THE EFFECTS OF ASSIGNMENT OF THE LANDLORD'S REVERSION

8.74 Where the successor in title is bound by a pre-existing occupation agreement, the next question is what should be the extent of the new landlord's rights and duties.[42]

[41] Such arrangements are actively promoted as a way to regenerate city centres by the national "Living Over The Shop" scheme. See: http://www.inlandrevenue.gov.uk/specialist/flatsovershops.htm.

[42] Two of the relevant Housing Acts define "landlord" as including anyone deriving title under the landlord. See Housing Act 1988, s 45(1) and Rent Act 1977, s 152(1). There is no equivalent in the Housing Act 1985. This is a provision which will be necessary in our new statute.

The current position

8.75 Currently under contract law the benefit of a contract can be assigned to third parties, or made available to them through the Contracts (Rights of Third Parties) Act 1999. However, third parties cannot be bound by the burden of a contract by purely contractual means. Furthermore, the parties to the original contract will remain bound by the terms of the contract unless the law otherwise provides, even though they may have assigned their rights under the contract to another.

8.76 In order to pass both the benefit and burden of the lease to a new landlord, land law principles operate. Under these principles, the doctrine of "privity of estate" applies to pre-1996 tenancies. [43] The principal difficulty with the doctrine of privity of estate is that is relates only to covenants which "touch and concern the land".

8.77 The Landlord and Tenant (Covenants) Act 1995 applies, primarily, to tenancies created on or after 1st January 1996.[44] It has three primary objectives.

(1) First, it provides that on lawful assignment of the lease, a tenant is released from those covenants in the tenancy that apply to the tenant.[45]

(2) Secondly, both the benefit and burden of covenants are passed to the new landlord (the assignee), irrespective of whether or not they touch and concern the land.[46]

(3) Thirdly, on assignment of the reversion, the original landlord, the assignor, is not released from their obligations under the tenancy, unless they go through a prescribed procedure. [47]

8.78 In addition to these primary objectives, the Act also deals with other issues that can arise. These include questions of apportionment of liability as between assignor and assignee;[48] the effect of covenants with third parties, for instance management companies;[49] and joint liability.[50]

[43] As modified by the Law of Property Act 1925, ss 141 and 142.

[44] The initial impetus of the Act was provided by the Law Commission Report, Landlord and Tenant Law: Privity of Contract and Estate (1988) Law Com No 174.

[45] Landlord and Tenant (Covenants) Act 1995, s 5.

[46] *Ibid*, s 3. Section 28 defines "covenant" for these purposes. In addition rights of re-entry are also transferred to the new landlord: s 4.

[47] *Ibid*, s 6. This involves giving notice to the tenant within four weeks either before or after the assignment has taken place. If the tenant fails to respond within four weeks from the giving of the notice, the consent of the tenant to the release is deemed to have been given. If the tenant objects, the landlord may take the matter to the county court. The court will release them from their obligation if the court thinks it reasonable to do so. The tenant may also withdraw his or her notice of objection; this also constitutes consent: s. 8. If a landlord fails to go through this procedure at the time of the original assignment, they may do so on any subsequent assignment: s 7.

[48] *Ibid*, ss 9 and 10.

[49] *Ibid*, s 12.

[50] *Ibid*, ss 13 and 14.

8.79 There are also provisions dealing with the position of a former tenant after an assignment.[51]

Our approach

8.80 We have considered whether it would be preferable for our scheme to impose its own requirements on the rights and obligations of the parties following an assignment, rather than relying on the Landlord and Tenant (Covenants) Act 1995.

8.81 Our view is that the broad policy which underpins the Act is sensible. Tenants are released from their obligations to the original landlord, from the time of the assignment. Former landlords, however, are not released unless the tenant consents.

8.82 We perceive three particular difficulties for the direct application of the Act in the context of residential occupation agreements.

(1) First, the statute is a complex one, which requires considerable legal expertise to understand. Clearly, it was drafted with assignments of business leases or long leasehold interests in mind, where it could be expected that the relevant parties would be seeking and obtaining appropriate professional advice and assistance.

(2) Secondly, it was not made retrospective. Thus, apart from a small number of provisions that apply to all tenancies,[52] it only applies to tenancies created since 1996.

(3) Third, the provisions dealing with the position of former tenants are, arguably, not required, given the proposals we have made on this matter, above in Part VI, paras 6.94–6.100.

8.83 We suggest that in relation to the first of these issues, assignments of the landlord's interest will rarely occur without legal advice. Although the legislation is complex, it is reasonable to assume that parties to assignments will be advised on it.

8.84 The second difficulty can be met, we suggest, by proposing that, on the coming into effect of our scheme, the process of converting existing tenancies into occupation agreements should be deemed to be the creation of a "new tenancy" within the provisions of the Landlord and Tenant (Covenant) Act 1995.

8.85 The third issue will be considered in the light of responses to the relevant proposals in Part VI.

8.86 **We provisionally propose that the process of converting an existing tenancy into an occupation agreement within our scheme should be deemed to be the creation of a "new tenancy" for the purposes of the Landlord and Tenant (Covenants) Act 1995.**

[51] *Ibid*, ss 16 to 20.

[52] *Ibid*, ss 17 to 20.

8.87 **We further provisionally propose that, save for sections 16 to 20, the provisions of the Act of 1995 which deal with the rights and obligations of assignors and assignees should apply to transfers of occupation agreements, classified in law as tenancies, within the scope of our scheme.**

Other matters

Notices of disrepair

8.88 A specific difficulty relates to notices of disrepair required by Landlord and Tenant Act 1985, section 11.[53] Arguably an occupier should only have to give notice of disrepair once, so that a new landlord would be fixed with any notice given to the old landlord. The new landlord would thus become liable under the provisions of section 11 from the date of acquisition of the interest in the property. Otherwise it would be hard on an occupier who did not know of the change of landlord and as a result lost out.

8.89 Although our terms of reference do not specifically extend to repairing covenants, we think that there should be a compulsory term in the new agreements that provides that notice of disrepair given to the old landlord would be effective as if given to the new landlord.

8.90 **We provisionally propose that any notice of disrepair given to a landlord should be effective as notice to a new landlord, though the new landlord's liability should only start to run from the date of acquisition of their interest in the property.**

Deposits

8.91 Problems can also arise with deposits held by the former landlord. It is beyond the scope of our project to deal with the regulation of deposits.[54] We can see the force of the argument that the law should provide that any deposits held by the former landlord should be transferred to the new landlord who will take over their administration.

New landlord's duty to give details to the occupier

8.92 In CP162 we provisionally proposed, that the "core" terms in any occupation agreement should include specific requirements for landlords to provide occupiers with information about the landlord's identity (and those of any agents) and a place of business as an address for service.[55] The landlord's successor in title will certainly be bound by agreements with tenants, if not licensees, and will become

[53] Similar problems arise in the context of the Occupiers Liability Act 1957 and the Defective Premises Act 1972.

[54] Currently the subject of a Government pilot scheme run by the Independent Housing Ombudsman for holding and regulating return of deposits – see CP 162, para 1.85. Such systems are commonly associated with housing tribunals in Commonwealth jurisdictions – see CP 162, paras 4.70 to 4.73.

[55] See CP 162, paras 6.79 to 6.82. This would reproduce the effect of Landlord and Tenant Act 1985, s 1.

their new landlord. We think the new landlord must give the occupier the same information and a name and address for service, as the original landlord gave.

8.93 The question arises what the extent of this requirement should be. There are three options.

(1) The new landlord could be required only to provide written notification of their name, address and status.

(2) The new landlord could be required to provide a new agreement with the core term changed.

(3) The notification of the new name and address could be treated in the same way as a variation of the agreement. The new landlord would be required to provide written notification only of the changed element, but the occupier would then have the right to require the new landlord to provide a revised copy of the whole agreement.

8.94 The first option is clearly the least burdensome. The risk with the second is that is may fuel misunderstandings by occupiers, who will not be familiar with distinctions between tenants and licensees, as they may think the landlord is not obliged to keep them as occupiers. The advantage of the second option is that it would help to ensure that the new landlord quickly became aware that they needed to obtain a copy of the agreement from the former landlord. Currently new landlords may not have copies of the original paperwork and may be unaware that they are bound by it or ignorant of the detail of their responsibilities. The third option provides a compromise between the other two options.

8.95 **We provisionally propose that the new landlord should have to serve written notice on the occupiers of a name and address for service for themselves and any agents (matching the requirements of the core term in the original agreement).**

8.96 **We provisionally propose that on receipt of this notification the occupier should be entitled to require the new landlord to supply a revised copy of the agreement, as happens on a variation of the agreement.**

8.97 If the new landlord does not comply with these requirements there should be some sanction. Under the current law there are criminal sanctions.[56] There is a time limit for compliance – when the rent is next due or two months from the assignment, which ever is the sooner.

8.98 In CP 162 we provisionally proposed that rent sanctions should apply where original landlords did not give their names and addresses in the core term of the agreement.

8.99 We also suggested that there was a stronger argument in this area than others for retaining criminal sanctions, but asked whether such sanctions would really constitute a useful spur to compliance, given prosecutions are so rarely taken.

[56] A summary offence, punishable by fine, under Landlord and Tenant Act 1985, s 3(3).

8.100 We believe the same principles should apply to the new landlord. They should face the same rent sanction if they fail to give notice. They should also face a criminal sanction if consultees feel that criminal sanctions should be retained despite the lack of prosecutions. We would be interested in whether consultees feel it would be worth reproducing the current time limit. We feel it would be simpler if the time limit was the same as for the original agreement, so that there would only be a period of grace of two weeks before the rent sanction bites and two months before any criminal sanction. These would run from date of the assignment instead of from the original agreement.

8.101 **We provisionally propose that if the new landlord fails to give the prescribed information to the occupier within two weeks of the assignment, the new landlord should be liable to an equivalent rent sanction as applies in the case of the original agreements. He or she should be deemed to owe the occupier the equivalent of one day's rent for each day's delay, starting with the date of the assignment, up to the date of notification or two months from the assignment, whichever is the shorter.**

8.102 **We seek consultees' views as to whether an ongoing sanction is required for cases where new landlords still fail to provide notification, despite the loss of rent. Do consultees feel that it would be useful and appropriate to create, in addition, a continuing criminal offence of failure to provide notification by the end of the first two months after the assignment?**

8.103 Further encouragement of compliance is currently found in Landlord and Tenant Act 1985, sections 3(3A) to (3B)[57] which provides that a former landlord remains liable for the new landlord's breaches until notice is given to the tenant of the change of landlord. As the former landlord remains liable jointly with the landlord for any post-assignment breaches of the agreement until the notification is given to the tenant, it is in the former landlord's interest that the new landlord complies. This would appear to be a sensible provision to reproduce in our new scheme.

8.104 **We provisionally propose that a compulsory term in occupation agreements should require the original landlord, on disposing of their interest to a new landlord, to give the occupier notice of the new landlord's identity and address for service, or ensure that the new landlord does so. The term should render the former landlord liable for any breaches by the new landlord until either the former or new landlord gives the occupier the required notice.**

WHERE OCCUPIERS CAN STOP A LANDLORD DEALING WITH THE LANDLORD'S INTEREST

8.105 Finally we consider whether our new scheme should contain any rights for occupiers to restrain landlords from selling or otherwise disposing of the landlord's interest.

[57] Inserted by Landlord and Tenant Act 1987, s 50 from 1st February 1988.

8.106 Generally the position under the current law is that neither a licensee nor a tenant is given powers to prevent a disposal by the landlord.[58] In the case of a licensee this is because the license is only a personal right. In the case of a tenant it is because the landlord's purchaser will simply step into the shoes of the old landlord and the tenancy will continue as before. However, there are important statutory exceptions to this principle which differ as between social landlords and private landlords.

Social landlords

The right to buy and the right to acquire

8.107 Secure tenants of local authorities usually have a "right to buy". Many assured tenants of registered social landlords have the "right to acquire". These are exercisable as soon as the tenant qualifies and do not depend on waiting for the landlord to propose disposing of their interest. Neither right applies to licensees, even those deemed to be secure tenancies under the Housing Act 1985. Such rights will be preserved separately for those who would qualify for them if our new scheme had not been introduced.

Consultation rights

8.108 In addition, various consultation and balloting rights are available for secure tenants and licensees of social landlords when their landlord proposes selling the reversion. The main legislative provision is Housing Act 1985, section 106A and Schedule 3A which imposes consultation requirements for "large scale voluntary transfers" under section 32 of that Act. Although there is no express requirement for a ballot, in practice one must be held because the Secretary of State may not give consent if a majority of the relevant tenants are against the disposal, and a ballot is the best evidence of this. There are similar provisions for consultation on other types of disposal,[59] and on issues of housing management generally.[60]

8.109 When local authorities dispose of their properties to registered social landlords, there is currently an effect on the tenancies, because they change from secure to assured. Under our proposals occupiers would all have type I agreements, so that the occupier's status will not change with a change of landlord. However, there will

[58] Although leases could in theory include covenants against assignment, in practice they virtually never do.

[59] For "housing action trusts" there are rules on balloting in Housing Act 1988, s 61(3) on establishment of the trust, and in s 84 on notifying, and receiving representations from, secure and introductory tenants and licensees about a trust's proposals to transfer the properties to landlords other than local authorities. There were formerly voting rules for the now defunct "tenants' choice" under that Act. There are non-statutory rules for consultation of secure tenants and licensees before the Secretary of State approves a redevelopment scheme under which Housing Act 1985, Sched 2, ground 10A can be used for evictions so that the land can be disposed of with vacant possession.

[60] Local authorities must consult secure and introductory tenants and licensees on changes in housing management under Housing Act 1985, s 105 and Housing Act 1996, s 137. The Housing Corporation's Regulatory Code and guidance, as set out in The way forward: Our approach to regulation (2002), at para 2.5 requires registered social landlords to consult with their tenants in ways similar to those for secure tenants. However, there is no specific reference to consulting tenants on a sale of the properties by the registered social landlord. Such sales are comparatively rare, but less so as registered social landlords have been engaging in mergers with each other.

still be a need for consultation. One reason is that it is publicly owned or funded land which is being disposed of. Also there are general requirements for consultation of social tenants[61] which we do not think should be disturbed.

8.110 At present, the participation rights of registered social landlord assured tenants are contractual, or in guidance, rather than statutory. Our approach to incorporating statutory provisions into the contract may help with this.

8.111 **We provisionally propose that current rights for occupiers of social landlords to consultation and participation, including those on disposals of the landlord's interest, should be retained in our new scheme for those occupiers by being incorporated as a compulsory term in the occupation agreement.**

Private sector landlords

Landlord and Tenant Act 1987

8.112 Under Part I of the Landlord and Tenant Act 1987,[62] where landlords propose to dispose of their interest, certain of their leaseholders, mainly those under long leases, will have the right of first refusal. Other than long leaseholders, this right currently only applies to Rent Act 1977 tenants. It does not apply to Housing Act 1988 assured tenants.[63] While the policy reasons why this right does not apply to tenants of social landlords are clear, as many have the right to acquire, with private landlords there is no apparent logic to the distinction between the rights of protected and assured tenants. However to cure this anomaly involves policy issues which put the matter outside the scope of our project.

8.113 Nonetheless, the right of first refusal is clearly an important right which should not be taken away from existing Rent Act 1977 tenants. It should therefore be preserved like the right to a "fair rent".

8.114 **We provisionally propose that Landlord and Tenant Act 1987, section 3(1) should be amended so as to continue to apply the right of first refusal to those type I agreement occupiers who were formerly Rent Act 1977 protected tenants.**

[61] Housing Act 1985, s 105, and the "tenant participation compacts" required for "best value" under Local Government Act 1999, Part I. The Housing Corporation expects registered social landlords to consult their tenants similarly.

[62] As amended particularly by Housing Act 1996 and Leasehold and Commonhold Reform Act 2002.

[63] Qualifying tenants are defined (without inclusion of licensees) by s 3 as excluding assured tenancies (whether shorthold or not), and protected shorthold tenancies under Housing Act 1980, s 52 (along with business tenancies, tied accommodation and assured agricultural occupancies). Under s 58(1) various public sector landlords, including local authorities and registered social landlords, are exempt from the right of first refusal. Therefore the right will not apply to Housing Act 1985 secure tenants, nor introductory tenants under Housing Act 1996. By a process of elimination this leaves Rent Act 1977 protected tenancies.

PART IX
SUMMARY OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS

In this Part, we list our provisional proposals and conclusions, and set out the other issues on which we seek consultees views. More generally, we invite comment on any of the matters raised in this paper and any other suggestions that consultees may wish to put forward. For the purposes of analysing the responses, it would be helpful if, as far as possible, reference could be made to the numbers of paragraphs in *this* part.

PART I: INTRODUCTION

Regulatory impact

1. We ask for information about the regulatory impact of our provisional proposals in this paper (paragraph 1.35).

PART II: OBTAINING CONSENT

The structure of consent requirements

2. We provisionally propose that three standard possibilities should be recognised:

   (1) no requirement for consent;

   (2) a requirement that the landlord gives consent, which can only be withheld on reasonable grounds; and

   (3) a landlord's veto.

   These will be contained in the occupation agreement as appropriate (paragraph 2.24).

3. We further provisionally propose that the relevant term in the agreement should provide that any request for consent should be made in writing and that proof of service, for example by recorded delivery, should be obtained (paragraph 2.25).

Withholding consent: reasonableness in consent requirements

4. We provisionally propose that what is meant by "reasonable" should not, in general, be statutorily defined (paragraph 2.32).

5. We invite views on whether the discretion of the court to determine reasonableness in this context should be statutorily structured, and if so what factors should be taken into account (paragraph 2.33).

Failure by the landlord to respond

6. We provisionally propose that it should be a compulsory term in the agreement that where a person whose consent to a transaction is required fails to respond within a given period to a request for consent, this should be regarded as an unreasonable refusal of consent, so that the requisite consent should be deemed to have been given (paragraph 2.38).

7. We invite views on what that appropriate period should be (paragraph 2.39).

Provision of reasons for refusal

8. We provisionally propose that where landlords think they have reasonable grounds to refuse consent, they should be required to inform the occupier of the reasons why consent was refused (paragraph 2.41).

9. We invite views on whether the landlord should be required to provide a written statement of reasons and, if so, whether this should be a universal requirement to apply in all cases or one that only arises where the occupier asks for it (paragraph 2.42).

10. We invite views on the sanction that should be applied to the landlord who fails to provide a written statement of reasons, following a request – properly made – so to do (paragraph 2.44).

Effect of transactions where necessary consents have not been obtained

11. We provisionally propose that the occupation agreement should make clear that any transaction carried out by the occupier, which was either contrary to the landlord's veto or subject to consent which has been reasonably withheld, will expose the occupier to the possibility of possession proceedings for breach of the occupation agreement, and will not bind the landlord (paragraph 2.48).

When should receipt of rent count as creation of a new agreement by the landlord?

12. We provisionally propose that after a prescribed maximum period during which the landlord should be able to take such payments without starting possession proceedings, a fresh agreement, covered by our new scheme, should be taken to have been created if, after termination of the original agreement, the landlord accepts payments from an unlawful occupier in return for delaying, or not taking, possession action against them as trespassers (paragraph 2.64).

13. We invite views on whether there should be a prescribed maximum period of time during which the landlord should be able to take such payments, without starting possession proceedings, and without being taken to have created a new agreement. Alternatively should it be left as a matter of fact to be determined by the court whether the landlord has agreed to refrain from or delay possession action in return for the payments (paragraph 2.65)?

14. We provisionally propose that, if there is to be general requirement on social landlords to use type I agreements, one of the exceptional circumstances justifying use of a type II agreement would be where the landlord wished to make a temporary arrangement with a new occupier who has been granted the right to occupy without the landlord's consent or in breach of a landlord's veto (paragraph 2.67).

PART III: CO-OCCUPATION AGREEMENTS

Joint occupation agreements – creation

15. We provisionally propose that there should be no limit to the number of people to whom joint rights of occupation may be granted, subject to the overall limit imposed by the laws against over-crowding (paragraph 3.17).

Joint occupation agreements – liability

16. We provisionally propose that, where an occupation agreement is entered into by more than one occupier, there should be a default term that liability of the occupiers under that agreement should be on the joint and several basis (paragraph 3.28).

New joint occupiers entering the agreement

17. We provisionally propose that there should be a compulsory term in the agreement that an occupier should be able to apply to the landlord for permission to have someone else brought into the agreement as a new joint occupier. The landlord should be able to refuse consent unless it is unreasonable to do so (paragraph 3.40).

18. In this context, the assessment of reasonableness should take account of all relevant circumstances including in particular any prejudice to the landlord that might arise if the new person ended up as sole occupier (paragraph 3.41).

19. It should also take account of the numbers that would reside in the premises and the landlord's interest in retaining control over those numbers (paragraph 3.42).

20. We invite views on whether the right to apply for a joint occupation agreement should be limited to particular categories of people. If so, we invite views on what those categories should be (paragraph 3.43).

21. We invite views on whether the provisional proposal should be limited to type I agreements only, or should apply to all agreements falling within our proposed scheme (paragraph 3.44).

22. We provisionally propose that where the occupier regards the refusal of consent as unreasonable, he or she should have the right to apply to the county court for a determination of the matter (paragraph 3.47).

23. We further provisionally propose that, in appropriate cases where the landlord was held to have been unreasonable, the court should have the power to add a new occupier to the agreement (paragraph 3.48).

24. We invite views on whether the court should have any wider power to vary the terms of the agreement (paragraph 3.49).

Joint occupiers seeking to withdraw from the agreement

Type I agreements

25. We provisionally propose that a joint occupier under a type I agreement should be able to terminate his or her interest in the agreement by written notice to the landlord without this bringing the whole agreement to an end (paragraph 3.82).

26. We further provisionally propose that a copy of the notice should be served on the remaining occupiers (paragraph 3.83).

27. We invite views as to whether the copy should be served by the occupier seeking to withdraw from the premises, or by the landlord (paragraph 3.84).

28. We invite views on whether, following the departure of one or more joint occupier or occupiers, the landlord of a type I tenancy should be able to seek repossession of the home, subject to reasonableness and the provision of suitable alternative accommodation, if the home is no longer suitable for occupation by the remaining occupier or joint occupiers (paragraph 3.85).

29. If there is to be a special ground of possession, we also invite views on whether the landlord should be required to make use of it within any defined time limit. If so, what should the time limit be? Should there be a period before which the landlord should not be able to take proceedings, to enable the remaining occupiers find a lodger or a replacement joint occupier (paragraph 3.86)?

Type II periodic agreements

30. We provisionally propose that a joint occupier under a type II agreement, should be able by written notice to the landlord to determine his or her interest in the agreement without this bringing the whole agreement to an end (paragraph 3.92).

Type II fixed term agreements

31. We provisionally propose that it should be a default term of fixed term type II agreements with a break clause that where one of a number of joint occupiers exercises the break clause, it will have the effect of only terminating his or her rights under the agreement and will not bring the entire agreement to an end. The remaining occupiers will be entitled to remain in occupation, having assumed all the rights and obligations under the agreement (paragraph 3.100).

Informal withdrawal of occupier

32. We provisionally propose that the procedure whereby a landlord may seek to terminate an occupation agreement, where it appears that the premises have been abandoned, should also apply where a joint occupier has abandoned the premises. If the first notice produces no response, the landlord should be required to serve a second notice giving the occupier another eight weeks in which to apply to court to challenge the finding of abandonment (paragraph 3.106).

33. We provisionally propose that, when the landlord intends to use the abandonment procedure against a joint occupier who has withdrawn from the premises, the landlord should also notify the other joint occupiers of this intention (paragraph 3.109).

34. We further provisionally propose that where a landlord has used the proposed abandonment procedure against a departed occupier, the remaining joint occupiers would continue to be jointly and severally bound by the agreement in the same way as if the removed occupier had given notice under a notice clause (paragraph 3.110).

35. We provisionally propose that, where there is a response from the departed joint occupier to the initial notice, which is equivocal as to whether the occupier has or

has not abandoned, there should be a procedure to enable the landlord to obtain an declaration from the court. If satisfied that the occupier has demonstrated an intention no longer to accept being bound by the agreement, the court should declare that the agreement has terminated in respect of that occupier (paragraph 3.112).

Non-contractual arrangements

Possession proceedings – proposals for protection

36. We provisionally propose that our new scheme should include rights for non-contracting occupiers to be notified of any possession proceedings (paragraph 3.120).

37. We invite views on whether the procedure for so doing should be modelled on the rights of "qualifying occupiers" in the Housing (Scotland) Act 2001, sections 14 and 15, or to the provisions relating to mortgage possession hearings in the Civil Procedure Rules 1998 (paragraph 3.121).

38. We further invite views as to whether the people who must be notified should also have a right to be joined as defendants, or should only be able to do so at the court's discretion (paragraph 3.122).

39. We further invite views as to whether these notice requirements should attach to all discretionary possession proceedings or only those which arise from type I agreements (paragraph 3.123).

Restricting the landlord's powers to regulate non-contractual occupiers?

40. We invite views as to whether there are – currently or potentially – significant problems arising from attempts by landlords to regulate those who may live with the occupier on a non-contracting basis (paragraph 3.127).

41. We provisionally propose that the occupation agreement should contain a default term which allowed the occupier the freedom to control who would occupy the premises on a non-contractual basis, with any departures from the default being regulated under the Unfair Terms in Consumer Contracts Regulations 1999 (paragraph 3.131).

Amending the Family Law Act 1996

42. We provisionally propose that Family Law Act 1996, section 30 be amended to refer to occupiers under our new scheme (paragraph 3.133).

43. We provisionally propose that, in relation to cases where the occupier obtains an adjournment, stay, suspension or postponement of a possession order, a partner's matrimonial home rights to occupy and tender rent should be preserved until the possession order is enforced (paragraph 3.136).

44. We further provisionally propose that the current law should be expanded so that those with matrimonial home rights are given the right to be joined to possession proceedings with the same rights as the occupier to defend themselves against the making of a possession order and to apply after a possession order for any adjournment, stay, suspension or postponement (paragraph 3.137).

PART IV: THE RIGHT TO TAKE IN LODGERS

Type I agreements

45. We provisionally propose that the right of a person to take in a lodger should be extended to all those with type I agreements, by means of a compulsory term to that effect (paragraph 4.5).

46. We provisionally propose that there should be a statutory definition of "lodger" for the purposes of the right to take in lodgers

47. We further provisionally propose that "lodger" should be defined as a person who occupies premises where there is a resident landlord who shares accommodation with the lodger, irrespective of whether the person does so under a tenancy or a licence (paragraph 4.18).

48. We invite views on whether the unprotected status of an occupier as a "lodger" should continue, even where the resident landlord no longer actually shares the accommodation with the lodger but retains the contractual right to do so (paragraph 4.19).

49. We provisionally propose that the right to take in a lodger should be exercisable without a consent requirement, as at present (paragraph 4.28).

Application to type II agreements

50. We invite views on whether or not occupiers under a type II agreement should also have the right to take in a lodger (paragraph 4.35).

51. If the answer to the question is yes, we also invite views whether the right should be an absolute one, or one that can only be exercised with the consent of the landlord (paragraph 4.36).

Should lodgers have a written agreement?

52. We provisionally propose that there be no requirement for the provision of a written agreement between a lodger and his or her resident landlord (paragraph 4.41).

The effect of a lodger on the head landlord

53. We provisionally propose that, on termination of an agreement covered by our new scheme, the head landlord should not be bound by any lodging agreement entered into by the former occupier, irrespective of whether that lodging agreement amounted to a tenancy or a licence (paragraph 4.46).

PART V: SUB-OCCUPATION AGREEMENTS

Our approach

54. We provisionally propose that the issue of whether or not an occupier should be able to enter a sub-occupation agreement of the premises should be determined by a term in the original agreement (paragraph 5.10).

Type I agreements

55. We provisionally propose that there should be a compulsory term in the type I agreement that the occupier may enter a sub-occupation agreement of part of the premises, subject to the consent of the landlord, which may not be unreasonably withheld. This right would not however be available where the occupier would have to cease to occupy the property as a home in order to grant the sub-occupation agreement (paragraph 5.18).

56. We provisionally propose that it should be a default term in the model type I agreement that there be a landlord's veto on the granting of a sub-occupation agreement which would involve the occupier moving out of the whole of the premises (paragraph 5.28).

Type II agreements

57. We provisionally propose that the principles relating to sub-occupation agreements under type I agreements should apply equally to type II agreements (paragraph 5.33).

The type and content of the sub-occupation agreement

58. We provisionally propose that the model agreements contain a default term which provides that any sub-occupation agreement should be a type II periodic agreement (paragraph 5.46).

59. We provisionally propose that landlords, on giving their consent to the creation of a sub-occupation agreement should be able to impose reasonable conditions as to the type or terms of the sub-agreement (paragraph 5.55).

60. We further provisionally propose that breach of these conditions should not invalidate the consent, but that any sub-occupation agreement created without compliance with such conditions should be deemed to be a type II periodic agreement (paragraph 5.56).

61. We provisionally propose that, where a sub-occupation agreement has been properly entered into, the same rules and sanctions relating to the provision of a written copy of the agreement by the occupier to the sub-occupier should apply as they apply to the original agreement (paragraph 5.58).

The effect on head landlords of authorised sub-occupation agreements

62. We provisionally propose that, as between the landlord and the sub- occupier, the question of what type of agreement the landlord should be bound by should be determined by the type of agreement created by the original occupier with the sub-occupier (paragraph 5.65).

63. We further provisionally propose that if the landlord has given consent, or has included a term in the agreement allowing sub-occupation agreements to be made without consent (replacing the default term), then on the termination of the original agreement:

    (1) The landlord should be bound by the sub-occupation agreement if the original occupier terminated the agreement by giving notice to quit or by exercising a break clause or surrendering. The sub-occupier should step

into the shoes of the original occupier but only under the terms of the sub-agreement.

(2) If the landlord brings proceedings for possession against the original occupier or if the landlord used the abandonment procedure, then the landlord should have to serve notice on the sub-occupier (at the premises), who should be entitled to be joined in the action. The sub-occupier should be entitled to seek an order of the court converting the sub-occupier into a direct occupier of the landlord, but, again, on the terms of the sub-agreement. The court should do so unless it would have granted possession against this person if they had already been the occupier (paragraph 5.66).

64. We provisionally propose that the new direct landlord should not take the benefit or burden of any breaches of the agreement which occurred before the change of landlord (paragraph 5.72).

65. We thus provisionally propose that the liability of the new direct landlord to the former sub-occupier should be limited to breaches of the agreement occurring after the date on which the new direct landlord became the new direct landlord. Any claims for breach of the sub-occupation agreement occurring before that date should be pursued by the former sub-occupier against the former occupier (paragraph 5.73).

66. We further provisionally propose that the liability of the former sub-occupier to the new direct landlord should be limited to breaches of the agreement occurring after the new direct landlord became the new direct landlord. Where a breach of the sub-occupation agreement occurred before the new direct landlord became the new direct landlord, the former sub-occupier should remain liable to the former occupier (paragraph 5.74).

PART VI: TRANSFERRING RIGHTS OF OCCUPATION TRANSFERS

Transfers

67. We provisionally propose that any restrictions on the ability of occupiers to transfer the whole of their rights of occupation should be by way of a term in the occupation agreement (paragraph 6.6).

68. We provisionally propose that occupation agreements should contain, as a default term, a provision stating that there is a landlord's veto against the transfer of the right to occupy by the occupier to a third party (paragraph 6.10).

69. We provisionally propose that the rights of Rent Act statutory tenants to agree with their landlord to transfer their statutory tenancy should be preserved (paragraph 6.13).

Special cases

A right to transfer by mutual exchange

70. We provisionally propose that it should be a compulsory term in any type I agreement granted by a social landlord that the occupier should have the right to exchange his or her right of occupation with another occupier granted a type I

agreement by a social landlord. The right to exchange would be subject to consent being given by the landlords affected (paragraph 6.13).

71. We provisionally propose that it should be a compulsory term in any type I agreement granted by a social landlord that the occupier should have the right to exchange his or her right of occupation with another occupier granted a type I agreement by a social landlord. The right to exchange would be subject to consent being given by the landlords affected (paragraph 6.19).

72. We invite views on the following questions:

    (1) Should private landlords be required to make any provision for a right of mutual exchange in any type I agreement they may enter into?

    (2) If the answer is yes, should this be by way of a compulsory term, or a default term?

    (3) Would private landlords who might otherwise consider using type I agreements be deterred from doing so by the existence of a right of mutual exchange?

    (4) Would the interests of social landlords be prejudiced if mutual exchanges led to their receiving type I agreement occupiers from private landlords who had never been through the allocations procedure of any social landlord (paragraph 6.26)?

73. We provisionally propose that such a clause should not be a compulsory term in any type II agreement (paragraph 6.28).

74. We provisionally propose that the right to exchange should be subject to the landlord's consent (paragraph 6.35).

75. We invite views as to whether the new scheme should reproduce the current requirements as to the landlord's consent to mutual exchange in Housing Act 1985, section 92 and Schedule 3, or whether instead a simpler, more clearly time-limited procedure should be adopted (paragraph 6.36).

76. We ask whether, in the alternative, the same criteria of general reasonableness should be adopted as we are suggesting in other cases where consent is required, based on Landlord and Tenant Act 1927, section 19 and the Landlord and Tenant Act 1988 (paragraph 6.37).

77. We invite views as to whether the current requirement for the existence of a complete chain of exchanges should be retained, or whether it should be able to be waived by the landlords concerned (paragraph 6.41).

Transfers to potential successors

78. We provisionally propose that type I agreements should contain a compulsory term allowing for the occupier to transfer his or her rights to a potential successor, subject to the landlord's consent (paragraph 6.47).

79. We provisionally propose that there should be a default term in the type II agreement giving the landlord a veto over the assignment of the agreement (paragraph 6.51).

80. We provisionally propose that it should be possible for the transfer to a potential successor to lead (subject to any terms in the contract) to the transfer to joint successors (paragraph 6.56).

Transfer by order of family courts

81. We invite views on whether Matrimonial Causes Act 1973, section 24, and Children Act 1989, Schedule 1, paragraph 1(2)(d) to (e) should be amended so that they apply to all occupation agreements falling within the scope of our new scheme, irrespective of whether they would otherwise be regarded as creating a property interest (paragraph 6.65).

82. We provisionally propose that the Family Law Act 1996 Schedule 7 should be amended to refer to any agreement covered by our new scheme (paragraph 6.70).

83. We provisionally propose that the model agreements under our new scheme should contain a compulsory term allowing agreements to be transferred by order of the court made under the Family Law Act 1996 Schedule 7 (paragraph 6.71).

Effects of the transfer of the right to occupy to another

Consent

84. We provisionally propose that a transfer should not take effect until after any necessary consent has been given by the landlord (paragraph 6.74).

Method of transfer

85. We provisionally propose that any transfer should take effect from the moment at which the intention of the transferor and transferee is confirmed either in writing, or by the transferor giving up occupation to the transferee, or by the first instalment of rent which is paid to the landlord by the transferee and not by the transferor (paragraph 6.77).

Formalities

86. We provisionally propose that the landlord should be required to serve on the transferee a written copy of the agreement, amended to show the change of occupier, within two weeks of the transfer. The same sanctions for failure to comply should be available as would be apply for failure to give a copy of the written agreement to the original occupier at the start of the agreement (paragraph 6.81).

The position of the parties after a transfer

87. We provisionally propose that the effect of a transfer to which the landlord has given consent should be to vest the rights and liabilities under the occupation agreement in the transferee. Thus the original occupier would be replaced by the new occupier as the party to the agreement with the landlord. The transfer should not of itself confer on the transferee any rights or liabilities relating to any time before the transfer took place. The former occupier should cease to have rights and liabilities for any events occurring after the transfer (paragraph 6.100).

The relationship between sub-occupation agreements and transfers

88. We provisionally propose that where a sub-occupation agreement has been lawfully created out of a head agreement which is also covered by our new scheme, and the landlord (where consent is needed), the occupier and the sub-occupier have all intended to create a sub-agreement rather than a transfer, then the sub-occupation agreement should take effect as such and should not be deemed to be a transfer even if it is for the whole of the remaining term of the head agreement (paragraph 6.112).

PART VII: THE EFFECTS OF THE DEATH OF AN OCCUPIER

The effect of the death of the occupier on the agreement

Joint occupation agreements: the principle of survivorship

89. We provisionally propose that on the death of a joint occupier, the remaining occupier(s) should take over the occupation agreement (paragraph 7.9).

90. We provisionally propose that survivorship by joint occupiers should take priority over the right of succession under other statutory rules. The statutory succession rules should only take effect on the death of a sole occupier, including the death of the last of any joint occupiers (paragraph 7.11).

91. We provisionally propose that the principle of survivorship should apply irrespective of the number of joint occupiers living in the premises at the date of the death of the occupier (paragraph 7.15).

Termination of the agreement: periodic agreements

92. We provisionally propose that there should be a compulsory term in type I and periodic type II agreements that, if the agreement does not pass to a joint occupier or to another person under the statutory rules on succession, the agreement should terminate automatically and without the need for a court order (paragraph 7.18).

93. We provisionally propose that there should be a default term which specifies the moment, after death of the occupier, at which the agreement terminates (paragraph 7.28).

94. We invite views as to whether that default term should provide that the agreement terminates immediately on death, or at the point at which the landlord does or should reasonably have become aware of the death (paragraph 7.29).

95. We invite views as to whether such provisions would cause problems where housing benefit is paid direct to the landlord, and whether any such problems should be dealt with by changes to the housing benefit system rather than to the law on relations between landlords and occupiers (paragraph 7.30).

Termination of the agreement: fixed-term agreements

96. We provisionally propose that fixed term type II agreements should contain a default term providing that the agreement terminates on the death of the occupier. The statute should provide that the parties can exclude the statutory rules on succession, but only where they have replaced this default term with a term allowing for the remaining period of the agreement to pass to another under the occupier's will (paragraph 7.39).

97. We provisionally propose that fixed term occupation agreements that are licences not tenancies should only be capable of being transferred, on the death of the occupier, under the statutory right of succession (paragraph 7.41).

A statutory right of succession

98. We provisionally propose that a statutory right of succession should be part of the proposed new scheme for the regulation of all the occupation agreements falling within the scope of our proposed scheme (paragraph 7.45).

99. We further provisionally propose that, save for special arrangements made in relation to fixed-term agreements, and cases where the principle of survivorship applies, the only means whereby the benefit of an occupation agreement can be passed on following the death of the occupier should be though the right of succession (paragraph 7.47).

Who should have the right to succeed?

100. We provisionally propose that a surviving spouse should have the right to succeed. "Spouse" should be defined to include the survivor of couples who have lived together as husband and wife, or of same sex couples who have co-habited. We provisionally propose that these principles should apply whether or not either partner has undergone gender re-assignment. Any spouse should have been living in the premises as his or her only or principal home at the time of the death (paragraph 7.59).

101. We further provisionally propose that a list of those potentially entitled to succeed should be set out in the legislation, which would then be capable of being set out in the agreement (paragraph 7.62).

102. We invite views on the categories that should be included in the list (paragraph 7.63).

103. We provisionally propose that a member of the family who wishes to exercise a right to succeed should have resided in the premises as his or her only or principal home before the occupier died (paragraph 7.65).

104. We invite views on what the period of occupation should be (paragraph 7.66).

105. We invite views on the question whether the right to succeed should be specifically extended to carers, on a basis similar to that set out in the Housing (Scotland) Act 2001 (paragraph 7.68).

106. We provisionally propose that the rights of succession currently available to Rent Act protected tenants are preserved for that group (paragraph 7.70).

How many successions should be permitted?

107. We provisionally propose that a surviving spouse should have the automatic right to succeed to a deceased occupier who was not him or herself a successor (paragraph 7.78).

108. We further provisionally propose that, after succession by a spouse, there should be a further right to succeed by another member of the family of either the original

deceased occupier or the successor occupier. The spouse of the successor occupier would be included in this category (paragraph 7.79).

What counts as a use of succession rights?

109. We provisionally propose that where a person succeeds to an occupation agreement through the operation of the principle of survivorship, this should not count as the use of the statutory right of succession (paragraph 7.85).

110. We similarly propose that where a person succeeds by will or on intestacy to a fixed-term occupation agreement, this should not count as the use of the statutory right of succession (paragraph 7.86).

111. We further propose that the exercise of any analogous contractual rights of succession should be regarded as the use of the statutory right of succession (paragraph 7.87).

When can the status of successor be lost?

112. We provisionally propose that, so long as the successor remains in the same premises under the same or a different landlord, or acquires an occupation agreement by exercise of the right of mutual exchange, that person should retain the status of successor (paragraph 7.93).

113. We further provisionally propose that if that occupation agreement were terminated, and a wholly new agreement relating to different premises was made, whether by the same or a different landlord, the occupier should enter this agreement not as a successor (paragraph 7.94).

114. We propose that where a landlord grants an agreement to another under the mistaken belief that the occupier was entitled to succeed, this should not invalidate the agreement, but rather the agreement should be deemed to be fully valid (paragraph 7.95).

115. Where there is evidence that the occupier had sought to mislead the landlord as to his or her status as successor, this should be the basis for possession proceedings in the normal way (paragraph 7.96).

To what should successors succeed?

116. We provisionally propose that a person who succeeds under the statutory right of succession should succeed to the same agreement. (The only exception would be that a non-spouse successor of a former Rent Act tenant would not succeed to the right to a fair rent.) Save as to the identity of the occupier, the terms of the agreement will not change unless a variation is agreed or permitted by the agreement (paragraph 7.99).

Should joint succession be possible?

117. We provisionally propose that it should be possible for joint occupiers who have the right to succeed, to have the rights of occupation under the agreement transferred to them jointly (paragraph 7.103).

How should disagreements about who should succeed be resolved?

118. We provisionally propose that where there was more than one potential successor, they should seek to resolve any dispute between themselves. However, where there has been a failure to resolve the matter, it should be resolved by the landlord (paragraph 7.107).

119. We invite views as to whether there are special cases where the matter should be resolved by a court (paragraph 7.109).

An alternative approach?

120. We invite views on whether an alternative approach based on a more limited right of succession, but one which was not limited in the number of successions, and/or was open to a wider group of potential successors, is to be preferred (paragraph 7.112).

Effects of succession on past and future rights and liabilities under the agreement

121. We provisionally propose that, where the agreement does not terminate following the death of the occupier, the landlord should be required to serve an amended copy of the agreement on the new occupier. The same rent and criminal penalties and time limits for non-compliance should apply as do on the creation of a new agreement. The time limit for this should run from the date on which the landlord is satisfied, or should reasonably be satisfied, that the former occupier has died and a successor has been entitled to take over the agreement without the agreement terminating (paragraph 7.115).

122. We provisionally propose that, in cases of succession under our scheme, the deceased occupier's estate should retain all the deceased occupier's rights and liabilities relating to the period before the succession, and the statutory successor, as such, should neither benefit from nor be burdened by them. The statutory successor, and not the estate, should take all the rights and liabilities under the agreement in relation to the period after the succession (paragraph 7.126).

123. We provisionally propose that on the date of the death of the occupier, or the date on which the agreement is terminated, if later, the rights and liabilities of the deceased occupier for events occurring before that date should be taken over by the deceased's estate. The estate should not be liable for any rights and liabilities arising after that date (paragraph 7.131).

PART VIII: OCCUPATION AGREEMENTS AND THIRD PARTIES: TRANSFERS OF LANDLORD'S RIGHTS AND OTHER MATTERS

The need to use principles of land law?

124. We provisionally propose that, in determining whether occupation agreements are binding on successors to the original landlord, existing principles of landlord and tenant law should continue to apply to determine whether such agreements constitute a lease or a licence (paragraph 8.42).

Rent Act 1977 statutory tenancies

125. We provisionally propose that statutory tenancies under the Rent Act 1977 should, on conversion to type I agreements, take effect as a property interest (paragraph 8.46).

Other third party matters

126. We provisionally propose that our new scheme should not interfere with land law on the determination of questions such as whether the occupier has the rights of a leaseholder in relation to third parties such as trespassers or neighbouring landowners who commit the tort of nuisance (paragraph 8.48).

Application of the land law approach to landlords' successors in title

127. We provisionally propose that our scheme should not make any special provision, above that imposed by general landlord and tenant law, for head landlords, whose leases fall outside our scheme, to be bound by occupation agreements covered by our scheme which are created by mesne landlords (paragraph 8.73).

The responsibilities of the new landlord: the effects of assignment of the landlord's reversion

128. We provisionally propose that the process of converting an existing tenancy into an occupation agreement within our scheme should be deemed to be the creation of a "new tenancy" for the purposes of the Landlord and Tenant (Covenants) Act 1995 (paragraph 8.86).

129. We further provisionally propose that, save for sections 16 to 20, the provisions of the Act of 1995 which deal with the rights and obligations of assignors and assignees should apply to transfers of occupation agreements, classified in law as tenancies, within the scope of our scheme (paragraph 8.87).

Notice of disrepair

130. We provisionally propose that any notice of disrepair given to a landlord should be effective as notice to a new landlord, though the new landlord's liability should only start to run from the date of acquisition of their interest in the property (paragraph 8.87).

New landlord's duty to give details to the occupier

131. We provisionally propose that the new landlord should have to serve written notice on the occupiers of a name and address for service for themselves and any agents (matching the requirements of the core term in the original agreement) (paragraph 8.95).

132. We provisionally propose that on receipt of this notification the occupier should be entitled to require the new landlord to supply a revised copy of the agreement, as happens on a variation of the agreement (paragraph 8.96).

133. We provisionally propose that if the new landlord fails to give the prescribed information to the occupier within two weeks of the assignment, the new landlord should be liable to an equivalent rent sanction as applies in the case of the original agreements. He or she should be deemed to owe the occupier the equivalent of one day's rent for each day's delay, starting with the date of the assignment, up to the

date of notification or two months from the assignment, whichever is the shorter (paragraph 8.101).

134. We seek consultees' views as to whether an ongoing sanction is required for cases where new landlords still fail to provide notification, despite the loss of rent. Do consultees feel that it would be useful and appropriate to create, in addition, a continuing criminal offence of failure to provide notification by the end of the first two months after the assignment (paragraph 8.102)?

135. We provisionally propose that a compulsory term in occupation agreements should require the original landlord, on disposing of their interest to a new landlord, to give the occupier notice of the new landlord's identity and address for service, or ensure that the new landlord does so. The term should render the former landlord liable for any breaches by the new landlord until either the former or new landlord gives the occupier the required notice (paragraph 8.104).

Where occupiers can stop a landlord dealing with the landlord's interest

136. We provisionally propose that current rights for occupiers of social landlords to consultation and participation, including those on disposals of the landlord's interest, should be retained in our new scheme for those occupiers by being incorporated as a compulsory term in the occupation agreement (paragraph 8.111).

137. We provisionally propose that Landlord and Tenant Act 1987, section 3(1) should be amended so as to continue to apply the right of first refusal to those type I agreement occupiers who were formerly Rent Act 1977 protected tenants (paragraph 8.114).

APPENDIX
THE EXISTING SUCCESSION RULES

A.1 The present law on the right to succeed to a residential tenancy is contained in the following legislative provisions. We include here consideration of the Housing (Scotland) Act 2001 as useful modern model, even though it does not apply to England and Wales.

(1) The Rent Act 1977.

(2) The Housing Act 1985.

(3) The Housing Act 1988.

(4) The Housing (Scotland) Act 2001.

THE RENT ACT 1977

A.2 On the death of a regulated tenant the provisions of schedule 1 (as amended) of the Rent Act 1977 determine who may succeed to the tenancy. They also determine the nature of the tenancy to which the successor may succeed. Succession is not possible if the tenancy has been determined, either by the tenant giving up possession, or because a final order for possession has been made against the tenant.

A.3 There is a complex range of possibilities which can occur.

(1) If there has been no previous succession, and the succession is to a spouse, the spouse succeeds to a (Rent Act) statutory tenancy.[1]

(2) If there has already been a previous succession and the second succession is to a spouse, the spouse succeeds to a (Housing Act 1988) assured tenancy.[2]

(3) Where there is a succession to a person other than a spouse (that is, a member of the deceased's family), the succession is to an assured tenancy.[3]

A.4 The importance of the distinction between succession to a Rent Act protected tenancy and a Housing Act assured tenancy is that more (mandatory) grounds for possession are available in the case of the latter than the former.

[1] Rent Act 1977, Sched 1, para 2 (as amended). The terms of the statutory tenancy will essentially be the same as for the previous protected tenancy. However the successor is not liable for any rent arrears incurred by the deceased; nor can such arrears be a ground for possession: *Tickner v Clifton* [1929] 1 KB 207.

[2] Rent Act 1977, Sched 1, para 6 (as amended).

[3] *Ibid*, paras 3 and 6 (as amended).

A.5 For these purposes "spouse" is statutorily defined to include not only a husband or wife but also a person living with the original tenant as husband or wife.[4] A spouse does not have to have been residing with the deceased tenant prior to the death of the tenant.

A.6 A "member of the deceased's family" has to have been residing with the deceased tenant at the time of the death and for at least two years prior to the death.[5] This test raises a number of subsidiary questions.

(1) Who is to be regarded as a member of the family?

(2) What is the nature of the residence that establishes the qualification?

Member of the family

A.7 Where there is a legal or blood relationship, there is usually little difficulty in determining whether a person is a member of the family. (There may be more difficulty determining residence.) Case law has decided that the phrase embraces: mothers and fathers, brothers and sisters, nephews and nieces, mothers- fathers-brothers and sisters-in-law, grandchildren (including adopted grandchildren), adopted children, step children, and illegitimate children.[6] Case law has gone beyond legal or blood relationships to include a number of people who would be regarded by the ordinary person as a member of the deceased person's family. However judicial views on the scope of this test have varied.[7] And while the courts have held that the phrase should be treated not as a technical legal term but in a popular sense, the courts have been the ultimate arbiter of the scope of the phrase.[8] Lodgers have not been included as a member of the family.[9]

Residence

A.8 Additionally the test of residence has to be satisfied. This has been held to be a question of fact.[10] Residence does not imply immediate presence; thus the fact that a successor was in hospital at the time of the tenant's death did not prevent "residence with" the tenant.[11] But there must be something that can be described as residence, rather than merely casual visits.

A.9 As a result of amendments in the Housing Act 1988, the period of residence is now 2 years; under the unamended Rent Act 1977, the qualifying period was 6 months.

4 *Ibid*, para 2(2).

5 *Ibid*, para 3 (as amended).

6 R E Megarry, *The Rent Acts* (11th ed 1988) pp 276 to 279.

7 See the discussion of the history of the case law in *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

8 *Dyson Holdings v Fox* [1976] QB 503.

9 *Brock v Wollams* [1949] 2 KB 388.

10 *Middleton v Bull* (1951) 2 TLR 1010.

11 *Tompkins v Rowley* (1949) 153 EG 442.

Determining priority

A.10 Given the breadth of definition of those who might be entitled to succeed, and the fact that the legislation prescribes no order of priority (other than a spouse who always takes precedence), those who might be entitled have to agree amongst themselves who should succeed. Any dispute may be resolved by application to the county court.

THE HOUSING ACT 1985

A.11 On the death of a secure tenant with a periodic tenancy, there is a single right of succession.[12] The person qualified to succeed is either the spouse of the deceased if he occupied the dwelling as his only or principal home at the time of the death; or is another member of the tenant's family who has resided with the tenant for a year before the tenant's death. [13]

A.12 Where the secure tenant occupied under a fixed term tenancy, this can be left by will or on intestacy. If the person to whom the tenancy is thereby devolved also qualifies as a successor, he takes as a secure tenant. Otherwise the successor tenant is a mere contractual tenant.[14]

Member of the family

A.13 Unlike the position under the Rent Act 1977, "member of the family" is defined by statute.[15]

Successor

A.14 In addition to succession under the above provisions, "successor" also includes the following.[16]

(1) A joint tenant who becomes the sole tenant following the death of the other joint tenant.

(2) A tenant who occupies under a periodic tenancy which arose at the end of a fixed-term tenancy.

(3) A tenant to whom the tenancy has been assigned, under the provisions enabling assignment to a potential successor.

(4) A tenant who has had the tenancy vested in him on the death of the previous tenant.

[12] Housing Act 1985, s 89.

[13] *Ibid*, s 87. Such residence need not be in the premises in question: *Waltham Forest London Borough Council v Thomas* [1992] 2 AC 198.

[14] Housing Act 1985, ss 90 (2) and (3).

[15] *Ibid*, s 113. The definition includes persons living together as husband and wife.

[16] Housing Act 1985, s 88.

(5) A tenant to whom the tenancy was assigned under section 24 of the Matrimonial Causes Act 1973, if the other party to the marriage was also a successor.

(6) A tenant to whom the tenancy was assigned under the right to mutual exchange in section 92 of the Housing Act 1985, if the tenant had been a successor in the tenancy which they assigned in exchange.

(7) A tenant who was a successor in relation to one tenancy may remain so in relation to a subsequent tenancy. This will happen, unless the new tenancy agreement otherwise provides, where within 6 months of the determination of the previous tenancy, the tenant is granted a new tenancy, either of the same dwelling or a different one from the same landlord.

A.15 The effect of a tenant being a "successor" under these provisions is that the "successor's" tenancy cannot be the subject of a further succession. If the successor obtains a new tenancy in which they do not count as a successor under these rules, then that new tenancy will be able to be passed on in turn to their successors. This can create problems where landlords wish to operate succession policies which are more generous than the statute.[17] The person who obtains a tenancy under such a policy will not count as a successor for the purposes of the Act. That person will therefore be able to pass on their tenancy under the right of succession, whereas a person who has already succeeded under the Act could not do so. This is seen as an unnecessary disincentive to operating succession policies which are cast more widely than the statutory scheme.[18]

Determining priority

A.16 Where more than one person has the right to succeed, the tenant's spouse is to be preferred to any other member of the family.

A.17 If there is no spouse and there are two or more members, priority is given to whichever member of the family is agreed to have priority. Failing agreement, the decision is to be made by the landlord.[19]

THE HOUSING ACT 1988

A.18 Under the assured tenancy scheme, where the assured tenancy was a periodic tenancy and the tenancy was a joint tenancy, the right of survivorship applies and the surviving joint tenant becomes the assured tenant. This is deemed to be a succession for the purposes of the right of succession.[20]

[17] In the sense that succession to a wider group of people is permitted than the list prescribed in the Housing Act 1985.

[18] Whether entirely voluntarily or to comply with the guidance discussed in para 3.33 above.

[19] Housing Act 1985, s 89(2)(b).

[20] Housing Act 1988, s 17.

A.19 Where the tenant was a sole tenant, there may be one succession to a spouse[21] who must be in occupation of the dwelling at the time of the death as his only or principal home.

A.20 There is no right of succession to any other member of the family.

A.21 Where the assured tenancy was for a fixed term, such tenancy may devolve by will or on intestacy. But the person to whom the tenancy is thereby devolved is deemed to be a successor, and thus precluding any further right of succession.[22]

A.22 Under sections 17(2) and (3) there are rules on when a tenant is deemed to have used up the right of succession, which differ slightly from those in the Housing Act 1985 listed above. They include not only where the tenant obtained the tenancy by statutory succession, but also where that person has succeeded under a will, by intestacy, or joint survivorship.

A.23 The rules do not contain any provision whereby the tenant retains successor status where the tenant moves to another property, whether by taking an assignment of a tenancy of that property or by taking a fresh tenancy of that property. But, under section 17(3), if the tenant is a successor, they remain so if they stay as a tenant in the same (or substantially the same) property continuously, even though they do so under a series of new tenancies and even if with a series of new joint tenants or a series of new landlords.

THE HOUSING (SCOTLAND) ACT 2001

A.24 This is the latest Act to set out rules for succession to tenancies. Under its provisions two rights of succession are permitted.[23] Succession is to a "qualified person". If there is no qualified person, the tenancy terminates.[24] The tenancy also terminates on the death of the second successor.[25] However, this rule does not apply to a tenant under a joint tenancy where such a joint tenant continues to use the house as that person's only or principal home.[26] Further, where a tenancy terminates on the death of the second successor, and there is a qualified person (other than a joint tenant) who would otherwise be entitled to succeed, that person is entitled to continue as tenant for a period not exceeding six months, but the tenancy ceases to be a Scottish secure tenancy.[27]

A.25 The striking thing about this right to two successions is that it appears that a second successor, who cannot otherwise pass on their tenancy, can nevertheless

[21] This includes persons living together as husband and wife.

[22] It is expressly provided that statutory succession pre-empts devolution under a will or intestacy.

[23] Housing (Scotland) Act 2001, s 22 (1) and (2).

[24] *Ibid*, s 22(3).

[25] *Ibid*, s 22(4).

[26] *Ibid*, s 22(8).

[27] *Ibid*, s 22(9).

obtain the right to pass it on twice more simply by obtaining a new tenancy.[28] There is no equivalent in the Act to the provisions of section 88 of the Housing Act 1985 or sections 17(2) and (3) of the Housing Act 1988. The only exception is found in section 22(10) which provides that, where the tenant moves to suitable alternative accommodation under a court order made under what we have described as the estate management grounds,[29] the new tenancy is deemed to be the same as the old one for succession purposes. By implication therefore any voluntary move to a new tenancy, even with the same landlord, will revive the right to pass on the new tenancy twice even if the tenant had been a second successor in the old tenancy.

Qualified persons

A.26 Qualified persons are defined in Schedule 3, paragraph 2 of the 2001 Act as:

(1) a person whose only or principal home at the time of the tenant's death was the house and

(a) who was at that time

(i) the tenant's spouse, or

(ii) living with the tenant as husband and wife or in a relationship which has the characteristics of the relationship between husband and wife except that the persons are of the same sex,[30] or

(b) who is, where the tenancy was held jointly by two or more individuals, a surviving tenant;

(2) a member of the tenant's family aged at least 16 years where the house was the person's only or principal home at the time of the tenant's death; or

(3) a carer providing, or who has provided, care for the tenant or a member of the tenant's family where

(c) the carer is aged at least 16 years,

(d) the house was the carer's only or principal home at the time of the tenant's death, and

(e) the carer had a previous only or principal home which was given up.

[28] It is arguable, given the wording of the Act generally, that a new tenancy of the same property would either not be a new Scottish secure tenancy or would not bring new rights, but it seems clear that a new tenancy of a different property would attract a new set of succession rights.

[29] CP 162, paras 7.77 to 7.83.

[30] In the case of a person in this category, the house must have been the person's only or principal home throughout the period of six months ending with the tenant's death: Housing (Scotland) Act 2001, Sched 3, para 2(2).

A.27 Special rules relate to the right to succeed to a specially adapted house; in essence the successor can only succeed to the same house if he or she requires accommodation of the kind provided by the house. If that is not the case, the landlord must provide suitable alternative accommodation.[31]

Order of priority

A.28 The tenancy passes to a person within paragraph (1) above unless that person declines the tenancy. If the tenancy does not pass to a person in paragraph (1), it passes to a person in paragraph (2) unless the person declines the tenancy. If that happens the tenancy then passes to a person in paragraph (3). If there is more than one person in any class, they must either agree which is to take the tenancy or, failing that, a choice will be made by the landlord.[32]

[31] Housing (Scotland) Act 2001, s 22(6).

[32] *Ibid*, Sched 3, paras 6 to 9.