The Law Commission
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RENTING HOMES
1: STATUS AND SECURITY

A Consultation Paper

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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.

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THE LAW COMMISSION

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1: STATUS AND SECURITY

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PART I
INTRODUCTION

BACKGROUND TO THE PROJECT

1.1 The background to this project may be found in comments by Lord Woolf in his report Access to Justice.[1] That report dealt primarily with how the procedures of the civil courts might be improved, with the object of increasing access to justice by reducing the cost and delay of going to court. But Lord Woolf was firmly of the opinion that in the key area of housing – in particular, where there were disputes between landlords and tenants – the law itself was so complex that this too amounted to a considerable barrier to access to justice.

1.2 At the same time, there was within the housing industry – particularly amongst local authorities and housing associations, commonly described as the "social rented sector" – a feeling that all kinds of unnecessary complications arose from the fact that the legal regulation of registered social landlords (formerly housing associations) fell within the scope of the Housing Act 1988 (as amended by the Housing Act 1996) – assured tenancies – whereas council housing came under the Housing Act 1985 – secure tenancies. This had led to calls for a "single form of tenure", at least for the social rented sector.[2]

1.3 In addition, the British Property Federation – representing private landlord interests – was working with the Chartered Institute of Housing to develop ideas for new approaches to the regulation of the private rented sector.[3]

1.4 The Labour Government had made it clear that it was not seeking fundamentally to alter the regulatory arrangements put in place by the former Conservative Government, following the passing of the Housing Acts 1988 and 1996. In particular assured shorthold tenancies, which as a result of the Housing Act 1996 had become the "default" form for private sector tenancies, were to remain.[4]

[1] Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (1996). An early comment on the effects of excessive complexity in housing law is to be found in *Parry v Harding* [1925] 1 KB 111. Lord Hewart CJ commenced his judgment (at p 114) thus: "It is deplorable that in dealing with such a matter as this, a Court, and still more a private individual, and most of all a private individual who lives in a small tenement, should have to make some sort of path through the labyrinth and jungle of these sections and Schedules. One would have thought that this was a matter above all others which the Legislature would take pains to make abundantly clear."

[2] Marianne Hood, Chartered Institute of Housing, One for All – A Single Tenancy for Social Housing? (1998). This line of argument was adopted by the Scottish Executive who have recently enacted the Housing (Scotland) Act 2001, which gives effect to these ideas in Scotland. This legislation does not, however, extend to the private rented sector.

[3] Chartered Institute of Housing and British Property Federation, Chains and Challenges? (June 2001).

[4] Department of the Environment, Transport and the Regions, Quality and Choice: A Decent Home for All, The Housing Green Paper (April 2000) at paras 5.2 and 5.21.

1.5 With this combination of judicial criticism, industry concern and (party) political consensus, the circumstances were opportune for a law reform project to be undertaken by the Law Commission.

Scoping paper

1.6 The first step in the process was that the Commission was asked to prepare a scoping paper setting out its views as to how such a project might be taken forward. The request for the scoping paper was made by the Lord Chancellor and the (then) Minister of Housing, Nick Raynsford MP, in the summer of 2000. The scoping paper was published in March 2001.[5] This set out, in outline, suggestions for a programme of work relating to the reform of housing law.

1.7 The proposals in the scoping paper were immediately approved by Ministers in March 2001 and a formal reference of the project was made to the Commission.

Terms of reference

1.8 Our overall terms of reference for the law reform work arising out of the scoping paper are:

"To consider the law relating to the existing forms of housing tenancies in the rented sector and their creation, terms and termination, with a view to its simplification and reform; and in particular to review the law on

(1) the forms of housing tenancy let by:

(a) local authorities and other social landlords, and

(b) private landlords,

with a view to providing a simple and flexible statutory regime for both the social and the private housing sectors;

(2) the remedies available in respect of harassment and unlawful eviction;

(3) tenants' statutory rights of succession; and

(4) such other aspects of Housing Law as may be agreed between the Law Commission, the Department of the Environment, Transport and the Regions[6] and the Lord Chancellor's Department."

Timetable for the project: a phased approach

1.9 It was decided at the outset that the terms of reference – which were very broad – should be implemented in two phases. Phase I, which was referred to the Commission in March 2001, would consist of a single project with two

[5] Reform of Housing Law: A Scoping Paper (March 2001); the paper is available in hard copy from the Commission and is also available electronically on the web site: http://www.lawcom.gov.uk.

[6] Now the Department for Transport, Local Government and the Regions.

"branches", undertaken simultaneously. The first would aim to develop the concept of a new type I agreement, with substantial statutory security of tenure, primarily but not exclusively for use in the social housing sector. The second would aim to develop the concept of a type II agreement, broadly based on the existing assured shorthold tenancy, primarily but not exclusively for use in the private sector. In the event work on these two branches has been fully integrated into this consultation paper.

1.10 Phase II would consist of two further projects covered by paragraphs 2 and 3 of the terms of reference, one on harassment and unlawful eviction, the other on the rights of succession to agreements.

1.11 On reflection, we considered, and the Government agreed, that the work on rights to succession was so closely linked to the issues of housing tenure that it should be brought forward. Succession was accordingly incorporated into the current reference.[7] We will be issuing a further consultation paper on this topic later in 2002. In that second paper we shall also be consulting on a number of other matters relating to the transmission of agreements, in particular assignment and sub-letting, which have been omitted from this paper. We hope to publish this second paper in the summer of 2002.

OUTCOMES

1.12 The principal outcome of this project will be a final report, to be published in the summer of 2003. This will set out our recommendations which will reflect the responses to the consultation. A draft bill will be attached to the report, which – if enacted – would give effect to the recommendations.

1.13 In the longer term, it is the hope of the Commission that this might be the first stage in the creation of a complete housing code.

LAW REFORM AND SOCIAL POLICY

1.14 Although the Law Commission has often engaged in programmes of law reform that have a very high social policy content – our work on family law may be particularly noted – we think this is the first time that we have entered an area which hitherto has been so dominated by party political debate. We are conscious that, as law reformers, our function is to analyse the existing state of the law and to make proposals for its modernization. Thus, for example, those who might wish to argue that we should include within our proposals a "right to housing", based, perhaps, on ideas to be found in the Universal Declaration of Human Rights, 1948,[8] or the International Covenant on Economic, Social and Cultural Rights,

[7] The original reference was made on 26 March 2001 (see *Hansard* (HC) 26 March 2001, col 430W). The terms of reference set out in para 1.8 above should now, following the changes relating to succession, be considered to be amended by the substitution of the words "and termination" with ", termination and the rules relating to succession", and the omission of section (3). Agreement to the amendments was indicated by Lord Falconer on 20 November 2001 and by the Lord Chancellor on 18 December 2001, in letters to the Commission.

[8] Article 25 states: "(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services …".

1966,[9] will be disappointed. Such ideas would involve the consideration of policy issues that go far beyond the scope of a law reform project that the Law Commission may sensibly carry out.

1.15 Nevertheless this project is not a simple exercise in the consolidation of the existing law. Accepting that the balance of interests between landlords and tenants should remain broadly as it now is, we are making proposals to change the details of the law in order to achieve our primary objectives of increased simplicity, flexibility and transparency. In making these proposals we have had to make choices about options for change. To that extent our proposals reflect matters of housing policy. It is on these that we shall be consulting.

1.16 In addition, we think that a law reform exercise cannot be undertaken without bearing wider social policy issues in mind. Housing policy and the law that seeks to implement it naturally relates to other areas of social policy, such as employment policy or family policy.[10] Housing may also relate to other policy issues, such as environmental policy.[11] It is not our task to make proposals relating to employment, family or environmental policy; but we need to try to ensure that the framework of housing law that we propose has the robustness and flexibility to ensure that policy objectives in these other areas can be achieved. Nonetheless identifying the precise boundary where law reform ends and the development of social policy begins is not always an easy or obvious task.

DEFINING HOUSING LAW: THE SEARCH FOR PRINCIPLE

1.17 It could be argued that a law reform project on "housing law" should extend to all that body of law which regulates the whole functioning of the housing market,[12] including owner-occupied housing. While a law reform project leading to a complete codification of housing law might ultimately be drawn as widely as this, here we are limited by our terms of reference.

1.18 Our work focuses on the law which should regulate the provision of residential lettings by local authorities, by housing associations and other social landlords, and by private landlords. Even this focus requires us to consider a wide range of matters, as the following pages make clear.

1.19 In carrying out our review of the current state of housing law, we have thought it appropriate to state and where necessary to reconsider some of the basic principles on which housing law should be based. We have identified four such principles:

[9] Article 11 provides: "(1) The states parties to the present covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."

[10] For example a flexible labour market will also require a flexible housing market. Similarly, provision of housing is a key aspect in the development of a secure family life, not only as the place where children are brought up, but also where the elderly may be cared for.

[11] For example, issues about setting standards of housing that are based on environmentally sound ideas.

[12] The approach taken, eg in A Arden, M Partington and C Hunter, *Housing Law* (2nd ed 1994).

(1) guaranteeing security of tenure;

(2) possession proceedings and the need for due process;

(3) bringing a consumer perspective to bear on housing law; and

(4) human rights.

Guaranteeing security of tenure

1.20 The principle that the State should guarantee tenants' security of tenure, irrespective of the terms of the contract, has become a central principle of housing law. These guarantees are not absolute and never have been. They operate more fully in some contexts than in others. The present legislative position[13] has been reached more through a series of political responses to particular social pressures than the acceptance of any statement of principle. This does not mean, however, that the present position *cannot* be justified in principle.

1.21 Social housing is designed to provide long-term housing for tenants who, for a variety of social and economic reasons, are particularly vulnerable within the housing market. The creation of sustainable communities relies on confidence by tenants that, if they keep to their terms of their agreement, they will keep their long term family homes. The secure tenancy regime, with a high degree of security, provides tenants with confidence in the near-permanence of their housing.

1.22 The lack of security of tenure for tenants with introductory tenancies[14] is consistent with the over-arching purpose of social housing providing sustainable communities. These tenancies provide an opportunity to identify those whose behaviour may prove to be problematic, so that any housing, and the terms on which it is provided, are appropriate to them. As the consultation paper on what became introductory tenancies published by the Department of Environment in 1995 states:

> Anti social behaviour by a small minority of tenants and others is a growing problem on council estates … the misery caused to tenants when the enjoyment of their home is spoilt by the activities of their neighbours or others can destroy their whole quality of life. Whole estates can be stigmatised by the anti-social behaviour of a few.[15]

1.23 In the private rented sector, where the provision of rented accommodation under the Housing Act 1988 is on a different basis, the long-term social dimension is now less in evidence. Landlords are, in the main, providing accommodation to niche sectors of the market who in general fall outside the scope of social housing and many of whose tenants are not seeking to be housed on a long-term basis. The private sector now exists within a market framework. Although the potential for

[13] Discussed in more detail in Part III below.

[14] See below, para 3.13.

[15] Department of the Environment, Anti-Social Behaviour on Council Estates: A Consultation Paper on Probationary Tenancies (1995) (quoted in *McLellan v Bracknell Forest*, [2001] EWCA Civ 1510 at [7], [2002] 1 All ER 899).

exploitation of tenants by landlords remains, changes in the housing market mean that, these days, there is less need for the State to guarantee long-term security of tenure. Rather the relationship between the landlord and the occupier can be mediated by the terms of the contract, a contract which under ordinary principles of consumer law must be fair, and in relation to which breaches may be remedied in the same way as other breaches of consumer contracts. Nothing in this paper will prevent private landlords from enhancing their contracts with occupiers by including a greater degree of contractual security of tenure than the minimum required by the legal framework we propose.

1.24 We are clear that housing law must retain the basic principle that there should be circumstances where the state should ensure a high degree of security of tenure, and others where it need not.

Possession proceedings – the need for due process

1.25 It is also widely accepted that, where a tenant refuses voluntarily to leave accommodation at the end of an agreement, a landlord should normally be required to go through "due process" – issuing a notice of intention to take proceedings, and establishing a ground for possession in proceedings before a court – before obtaining a court order for possession.

1.26 Such processes conform with the requirements of Article 6(1) of the European Convention on Human Rights. The system also ensures that the relevant substantive rights within the European Convention are met. In particular the measures provide protection for Article 8 rights, the right to respect for a home, and Article 1 of the first protocol, the general principle of peaceful enjoyment of property.[16]

1.27 Court scrutiny of eviction decisions within social housing serves to prevent arbitrary action against the individual. There is a particular need for scrutiny of decisions to evict taken by state authorities because of the inequality of the relationship between the individual and the state exacerbated by the social purpose of the housing and the vulnerability of tenants.[17] Originally local democratic accountability was believed to provide the necessary legitimacy.[18] However that has become increasingly unrealistic in practice. Examples of the consequences of a lack of statutory security, at a time when local authority tenants had no security of tenure and limited recourse to judicial review, can be found in the National Consumer Council discussion paper "Tenancy Agreements between Councils and their Tenants".[19]

[16] See Paras 5.5 to 5.16 and 5.36 to 5.41 below.

[17] Social housing remains overwhelmingly a matter of state provision, even where provided through the medium of registered social landlords, as a result of the state's historic role in financing social housing development, the state's financing of revenue through housing benefit, the integration of Housing Associations with local authorities via developments in policy on the allocation of social housing and the continuing expansion of the role of housing associations in the delivery of local authority housing strategies.

[18] See the comments of Lawton LJ in *Bristol District Council v Clark* [1975] 1 WLR 1443 at p 1449.

[19] National Consumer Council (1976).

1.28 The need for judicial oversight of the introductory tenancy regime was recognised in *McLellan v Bracknell Forest*[20] where the existence of the internal review procedure, governed by a rigorous regulatory framework and supervised by both the county court and judicial review were necessary to the regime being compliant with the European Convention.

1.29 The fact that a landlord has to explain the reasonableness of its decision to evict in an impartial and public forum promotes the formation of policy to minimise evictions and provides both public and tenant accountability for actions which might otherwise appear contrary to the purposes of social housing.

1.30 In the private sector the lessons of history are that without due process, landlords will be tempted to take the law into their own hands. What is needed are efficient procedures to ensure that a landlord who claims possession is entitled to do so; and that if he or she is, possession should be ordered quickly.

1.31 Acceptance of these principles does not mean that all the details of the current law should be retained. We consider in Part XII how processes, which we think still conform to these principles, might nevertheless be amended to ensure greater efficiency.

The consumer perspective

1.32 By contrast with these well-established principles, we think it is now appropriate for housing law to adopt a more consumer perspective. This is crucial, given our desire to see the contract as the key to the landlord-occupier relationship.

1.33 Hitherto, the legislative strategy has been for landlords and tenants to enter into (contractual) agreements, which are then to a substantial degree ignored, as details in the agreement are over-ridden by statute. This approach ignores the fact that over the last 30 years or so there have been increasing legislative steps taken to ensure that the terms on which consumers contract are fair. There can now be a much clearer focus on ensuring that the terms on which homes are rented are fair, from the outset, rather than suspecting that they may be unfair and creating statutory provisions to enable them to be ignored.

1.34 The latter approach has two disadvantages, in that

(1) the contractual arrangements do not reflect the true legal position between landlord and tenant; and

(2) it creates complexity and uncertainty.

1.35 We think is appropriate that our review of the law on housing tenure should reflect this consumer perspective, which puts the emphasis on making the terms of the contract fair from the outset. If accepted, we think this will lead to new ways of thinking about housing law, in particular the importance of the contractual relationship between the landlord and the tenant, and the balance of rights and obligations between both sides of the agreement.

[20] [2001] EWCA Civ 1510; [2002] 1 All ER 899.

Human rights

1.36 In addition, although the United Kingdom has long subscribed to the principles of the European Convention adopted by the Council of Europe after the Second World War, the enactment of the Human Rights Act 1998 has drawn attention to the fact that all new proposals for legislation must comply with the principles set out in the Convention. This is of considerable importance in the context of housing law.[21]

OUTLINE OF THE SCHEME

1.37 It may help the reader to have an early indication of the outline of our proposals. All the consultation questions they imply are raised in Parts VI – XIV. The key features of our proposals are

(1) adopting a consumer approach by making the agreement the key document setting out landlords' and tenants' rights and obligations;

(2) creating two types of agreement: a type I with considerable security of tenure, and a type II with much less security;

(3) making the scope of the scheme as wide as possible;

(4) retaining the principle of "due process" as a precondition to a landlord gaining possession of a property;

(5) clarifying the requirements on landlords' notices seeking possession;

(6) making other proposals relating to the law on the termination of agreements and the powers of the courts in relation to possession;

(7) making new proposals relating to anti-social behaviour; and

(8) proposing that the new scheme should apply not only to agreements created after legislation is effective, but should also embrace existing agreements, subject to appropriate safeguards.

1.38 We envisage that our scheme should, in principle, apply to any contract which confers a right to occupy premises as a home. We discuss in Part IX what the scope of the proposed scheme should be. Among issues considered there is a provisional proposal to move away from using the distinction between a tenancy and a licence as a factor determining the boundary of our scheme for regulating housing agreements.

1.39 We envisage that an agreement to rent a home should be in three parts.[22]

[21] See below, Part V.

[22] Drafting of the regulations containing the terms will raise matters of detail which do not require primary legislation. We think that this should be undertaken by the Secretary of State, following consultation with the relevant housing interest groups. The Law Commission will be happy to assist in the process to ensure that the terms meet the requirements of the proposed scheme.

(1) Part A will set out the core terms describing the subject matter and the parties (that is, the property, the landlord, the occupier, the term of the agreement and the rent).

(2) Part B will set out compulsory terms, which will be required to be in the agreement as a matter of law. These will fall into two sections. Section 1 will deal with security of tenure and state the circumstances in which the landlord will be entitled to seek an order of possession from the courts. Section 2 will contain the obligations currently implied by law, adapted to take account of the fact that under our proposed scheme they will apply to all residential occupiers, not only tenants.

(3) Part C will set out the other terms of the agreement. Part C will contain a list of matters in relation to which default terms will be drafted. It will be open to landlords and occupiers to negotiate their own equivalents of these provisions. In addition, Part C may contain additional terms agreed by the parties. Any negotiated terms must be fair under the Unfair Terms in Consumer Contracts Regulations 1999.[23]

1.40 We think that the agreement must be in writing. The landlord will be required to provide a copy for the occupier. Given the importance of the written agreement, we also think there should be sanctions imposed where the landlord fails to provide the required copy.

1.41 Regulations should also set out, in a Schedule, a number of model agreements which the parties will be able to use. Our assumption is that there would need to be at least three – one for type I agreements (for which we would want to encourage use of periodic terms rather than fixed terms), one for periodic type II agreements and one for fixed term type II agreements. Following consultation, the Secretary of State may determine that there should be a greater number.

1.42 We want agreements incorporating the required terms to be made widely available, for example, in newsagents, libraries and Citizens Advice Bureaux; they should also be able to be downloaded electronically.

1.43 A cornerstone of our provisionally proposed approach, therefore, is that the written agreement should be the place where the rights and obligations of landlords and occupiers are set out.

Focus of our proposals

1.44 One point is worth stressing. The focus of this consultation paper is primarily on questions of status and security. The written agreement will go much wider than that, to cover the full range of rights and duties on both landlords and occupiers. In this Paper, we are not setting out a full discussion of the substantive contents of the agreement. In particular, there may be further law reform work to be undertaken in relation to what are now the terms implied by law, which in our new scheme would appear as express terms in the second section of Part B of the agreement. But we are putting in place an essential building block which would

[23] SI 1999 No 2083.

enable the wider objective of a complete codification of housing law to be achieved. This is not to say, however, that this present scheme could not be legislated as it is presented in this Paper, just that future law reform work may focus on reforming the contents of the agreement, rather than re-writing statutory or common law obligations.

Limits to the contractual approach – the need for a jurisdiction for the court.

1.45 We are not proposing that agreements should be left entirely to market forces. Consumer law exists to curtail abuses of freedom of contract. But, by adopting the consumer approach, the fairness of the contract can be emphasised. We think this approach should also encourage good housing management practice.

1.46 The major limitation on the contractual approach in respect of security is that we have accepted that it is right to continue to require the landlord to obtain a court order prior to eviction. The parties cannot contract out of this protection. Indeed, in the case of local authorities and possibly other social landlords, to propose otherwise would conflict with obligations under the Human Rights Act 1998.

1.47 The contract may provide that the landlord can only evict by taking court proceedings. However, the contract cannot itself impose a requirement on the court to hear such proceedings or to make such orders. The court's jurisdiction must be confirmed by statute.

Terminology

1.48 In order to make it clear that the focus of our proposals is on the contractual relationship, we have decided to use terminology that is less linked with existing notions of landlord and tenant law. In this paper, therefore when we are discussing our proposals, we have sought to adopt the following terminology.

(1) We refer to "the agreement" or, where necessary "the housing agreement", rather than "the tenancy".

(2) A "periodic agreement" is an agreement with no predetermined length where the rent is paid on a regular (periodic) basis.

(3) A "fixed term agreement" is one where the parties contract that it should last for a predetermined period.

(4) We refer to "the occupier" rather than "the tenant".

(5) We make the subject of the agreement "the home" rather than "a dwelling" or "dwelling-house".

1.49 Perhaps slightly inconsistently we continue to refer to "landlord" and "rent" as we think these are terms which are generally understood by the public. We make it clear that these terms embrace, respectively, "licensors" as well as landlords in the technical legal sense; and any payment for the right to occupy the home, whether or not under a tenancy or a licence.

CONTENTS OF THE CONSULTATION PAPER

1.50 Housing law is impossible to understand without understanding its historical growth under the impact of social and political pressures. In **Part II: The evolution of housing law**, we give a broad over-view of how the law has come to be as it is and draw what we think are the main lessons to be learned from this history.

1.51 We do not, and could not, give a detailed account of housing law as a whole. Nonetheless, we have thought it right to provide a brief summary of the current state of the law setting out in particular the various statuses known to the law and the grounds for possession. This is the precursor to offering a short over-view of the goals of the project and indicating some of the transitional problems that will need addressing. This is found in **Part III: Housing status and security of tenure: promoting simplification.**

1.52 It so happens that recently a number of other comparable jurisdictions have taken steps towards reforming parts of housing law. Of particular importance is the recent legislation in Scotland, and the experience in a number of Australian jurisdictions. We give an overview of these developments in **Part IV: The approach in other jurisdictions**.

1.53 In housing law as elsewhere, the enactment of the Human Rights Act 1998 has had a significant effect. In a series of very recent cases, the courts have developed principles of far-reaching (and perhaps insufficiently appreciated) importance, particularly in relation to the interplay between substantive human rights and the public law duties on landlords. We consider this in **Part V: The impact of human rights law**.

1.54 As is evident from paragraphs 1.32 to 1.35 above, bringing a consumer approach to bear on housing law is fundamental to our approach. In **Part VI: The consumer approach: focusing on the agreement**, we set out what this means in practice. It is here that we set out the central position of the agreement in our scheme of regulation, incorporating the security regimes for the type I and type II agreements in the tripartite form of agreement outlined in paragraph 1.39 above. In these proposals, we draw attention to the importance of, and apply, the unfair contract terms approach to the terms of the agreement.

1.55 We set out our proposals for the high security type I agreement in **Part VII: The type I agreement: the security regime**. The substantive security rights would be modelled on the secure tenancy, in that eviction would be at the discretion of the court. This would, however, be accomplished through the medium of the terms of the agreement. The agreement would provide that eviction would result from a breach of a term of the agreement, or from the occurrence of other specified circumstances, but only if the court considered it reasonable.

1.56 The low security type II agreement, which would replace the existing assured shorthold, is set out in **Part VIII: The type II agreement: the security regime**. We consider a possible significant departure from the assured shorthold model, asking for views as to whether or not the six months' moratorium on the issue of a possession order, which is currently a feature of assured shorthold tenancies, should also apply to the type II agreement. We also consider whether the notice period for the notice-only ground for possession of a periodic type II agreement should be three months, instead of the two months under the current assured

shorthold tenancy. We propose the equivalent of a mandatory ground for non-payment of rent, and a regime similar to the circumstances in which possession may be granted on a discretionary basis to that obtaining for type I agreements, both of which would be needed for longer fixed-term type II agreements.

1.57 In **Part IX: The scope of the scheme**, we propose that the distinction between a lease and a licence should no longer be a key factor in determining which agreements come within the scheme. We also discuss the classes of agreements to which our system would apply, and those which would be excluded. The exceptions provisionally proposed include re-drawn versions of the resident landlord and hostels exclusions, holiday lets and accommodation in hospitals, nursing homes, and prisons. We also propose excluding agreements where the agreement comes under some alternative regulatory structure, such as that relating to agricultural holdings. Other residential agreements currently excluded from statutory protection would either continue to be excluded, or become type II agreements, depending on whether or not there is to be a six months' moratorium on granting possession orders.

1.58 In **Part X: Terminating agreements**, we discuss how procedures for terminating agreements might be simplified and improved. In particular, we are provisionally proposing that there should be a principle of "use it or lose it", to encourage landlords only to issue notices of intention to seek possession when they really intend to seek possession. We ask whether the rules relating to notices should be amended so that, instead of the present situation where they normally refer to the earliest date on which possession proceedings may be brought, they would refer to the earliest date on which a possession order could be given.[24] We think that this, together with other proposals to improve the transparency of notices, will make the position of tenants facing eviction clearer. We also propose the creation of a new procedure to assist landlords where a home has been abandoned.

1.59 In **Part XI: Using the new agreements**, we turn to the relationship between the agreement types and the identity of the landlord. The principal question is what restrictions should there be on the freedom of choice of agreement granted by social landlords (local authorities, housing associations and others who provide housing on a non-commercial basis). We identify two principal options – that all social landlords should have a free choice between type I and type II agreements; or that all local authorities and registered social landlords[25] should be obliged to use type I agreements, except in specified circumstances. We invite views. If the second option is adopted, we consider the exceptional circumstances in which these landlords would be allowed use of type II agreements. We also discuss the need for a general probationary agreement for social landlords. On the private sector side, we provisionally propose that the type II agreement should be the default for the sector. We emphasise that the features of the type II agreement provide a floor of rights that can be contractually enhanced, including by entering into longer fixed term agreements, if market conditions so require.

[24] The situation that currently applies where the ground for possession is nuisance.

[25] We identify registration under Housing Act 1996, ss 1 to 3 as a reasonable way of distinguishing between those non-local authority social landlords that enjoy particular state support and those that do not.

1.60 There is a widespread perception that judicial decision making on discretionary grounds is less predictable than it should be. In **Part XII: Powers of the court**, we provisionally propose that the discretion to be exercised by the court be statutorily structured, to enhance consistency of judgments. We also consider the use of suspended possession orders, and provisionally propose an alternative system designed to align better the use of court time with the real needs of fair adjudication.

1.61 Anti-social behaviour by tenants is a particular concern to all of those involved in housing and community regeneration. We consider how to address it in **Part XIII: Anti social behaviour**. We provisionally propose a new procedure for the summary eviction of anti social tenants. For type I occupiers, we provisionally propose a new procedure allowing a county court which found a breach of a relevant injunction or an anti-social behaviour order[26] to order the demotion of occupiers to type II agreements (to which the summary eviction procedure could apply), or their relocation, or their eviction.

1.62 **Part XIV: Mapping existing agreements onto the new scheme** considers the issues involved in bringing existing tenancies into the new scheme.

1.63 In **Part XV: Summary of provisional proposals and consultation questions** we bring together the questions we hope consultees will answer. We should stress that, as with all exercises of this kind, we do not expect all consultees to answer all the questions; what will assist us most is informed opinion on the issues that concern respondents.

THE CONTINUED IMPORTANCE OF THE RENTED SECTOR OF THE HOUSING MARKET

England

1.64 Despite all the attention that is given in discussion about housing to the question of owner-occupation, it is still the case that nearly a third of the population live in rented accommodation. Of 19.8 million properties in England, 5.7 million are rented.[27] Of a total of 20.6 million households in England in 1999/2000, 6.4 million were in rented accommodation.[28] Of those renting, something over two-thirds (4.3 million) rent either from local housing authorities or registered social landlords (the social rented sector), and just under one third (2.1 million) from private landlords (the private rented sector).

1.65 In the social rented sector, the largest group are homes rented by single females (1.0 million), followed by broadly similar numbers of couples with no dependent children (821,000), single males (744,000), couples with dependent children (712,000) and lone parents with dependent children (690,000).

[26] Under Crime and Disorder Act 1998, s 1. We provisionally propose certain changes to the procedures relating to these orders to allow the county court to consider breach proceedings.

[27] Department for Transport, Local Government and the Regions, Survey of English Housing 1999–2000 (August 2001) Table A 1.18. There can be more than one household in any particular unit of accommodation.

[28] *Ibid*, Table A 1.5.

1.66 In the private rented sector, the largest groups are couples with no dependent children (510,000) and single males (482,000). These are followed by "other multi-person households" (333,000), single females (316,000) and couples with dependent children (274,000).

1.67 The only group where the number in rented accommodation exceeds the number in owner-occupied accommodation is lone parents with dependent children (875,000 as against 407,000). Of those in this group who rent, the vast majority rent from the social rented sector. Approximately a quarter of all social rented households are one person households (1.7 million out of a total of 4.3 million); over a third of private rented sector households are one person households (800,000 of a total of 2.1 million).

1.68 Over 40% of privately rented units (754,000 out of 1.8 million) are in properties built before 1919 – a much higher percentage than for the social rented sector (6.5%). By contrast, 63% of rented properties in the social rented sector had been built between 1945 and 1984.

1.69 Further, in the private rented sector nearly 20% (444,000 tenancies) are described as "not accessible to the public". This is a significant group comprising mostly lettings by employers to their employees and rent-free lettings to friends or relatives of the landlord in private houses or flats.[29]

1.70 It is harder to get information about specific groups of households and their tenure patterns. However data are available on households with dependent children.[30] These show that lone parents who have not previously been married are overwhelmingly accommodated in the social rented sector (360,000 in 1999/2000 – 70% of the total). A further 331,000 (43%) of lone parents who had been previously married are also accommodated in the social rented sector.

1.71 Given the assumption that the social rented sector is principally responsible for accommodating those with children, it is perhaps surprising that 96,000 lone parents – never previously married – (19% of the total in this category) are accommodated in the private rented sector. Of lone parents who had been previously married, another 88,000 are accommodated in the private rented sector (11% of the total in this category). In total 184,000 single parent households with dependent children are in the private sector. The majority of these will be resident on short-term assured shorthold tenancies, awaiting long-term housing in the social rented sector.

1.72 Despite frequent comment about the decline of the private rented sector, figures show that, in fact, the size of the sector has held remarkably steady over the last 20 years, and indeed has in recent years begun to grow. In 1981 there were 1.9 million households (11% of all households) privately renting; in 1999/2000 this total had risen to 2.1 million (though expressed as a percentage of all households, this had

[29] This is not a legal definition but one used by the Department for Transport, Local Government and the Regions, Survey of English Housing 1999–2000 (August 2001) Appendix A p 292.

[30] Department for Transport, Local Government and the Regions, Survey of English Housing 1999–2000 (August 2001) Table A 1.14.

gone down to 10.2% of the total).[31] The vast majority of private lettings are assured tenancies (65%), the overwhelming majority assured shortholds.

1.73 There are still 154,000 protected tenancies under the Rent Acts; these numbers however are reducing by around 30,000 a year.[32] It is however doubted whether this trend will be followed through in a strictly linear way.

Wales[33]

1.74 The housing position in Wales differs in some important respects from that in England. Most obviously the total housing stock (1.27 million) is much smaller. And within that total, a higher percentage – 72% – is owner-occupied. Nevertheless, either from choice or necessity, over a quarter of the population of Wales continues to rent their dwellings. The rented sector remains a significant part of the Welsh housing market.

1.75 Unlike the situation in England, where social housing is moving to a balance between local authorities and housing associations, social renting is still dominated by local authority provision. 188,000 dwellings were rented from local authorities in April 2001, as compared with 55,000 from registered social landlords.

1.76 However, as in England, these bald figures mask other significant changes. For example, as a result of the right to buy legislation, the total number of local authority dwellings has declined sharply over the last 20 years.[34] And the housing association sector has grown, from just 11,000 dwellings in 1981 to 55,000 now. However Welsh housing has yet to experience the massive changes in landlords that the large scale voluntary transfer programme has caused in England. One reason for this may be that, by comparison with England, there are not – outside the major conurbations of Cardiff and Swansea – the huge council estates familiar in English cities. Council estates tend to be much smaller and thus managed more locally.

1.77 The private rented sector now accounts for about 9% of dwellings (a total of 111,000 properties). Although the percentage has held steady, the actual number of privately rented properties has – as in England – been rising slowly, from 97,000 dwellings in 1991, to 111,000 in 2001. As in England it seems that the bulk of the growth has been for special niche markets, such as students, and others seeking temporary accommodation, who are not generally seen as a high priority for social housing.

[31] *Ibid*, Table A 5.1; the low point in terms of both numbers and percentages was 1989, the year the Housing Act 1988 came into force. Since then numbers have gone up slowly.

[32] *Ibid*, Table A 5.2.

[33] Material for the following paragraphs is derived from The National Assembly for Wales, Welsh Housing Statistics, 2001. See: http://www.wales.gov.uk/keypubstatisticsforwales.

[34] By the end of 2000, some 176,000 claims under the Right to Buy scheme had been accepted: The National Assembly for Wales, Welsh Housing Statistics 2001, ch 6.

Comment

1.78 The present Government sees a continuing need for an active rented sector. The central argument of the recent Housing White Paper[35] was that there should be better quality in housing provision and more choice for the occupier. Specifically, the Government pointed to the need to promote a healthy private rented sector as well as promoting choice in social housing.

1.79 These tenure groupings have not always been thus; there has been dramatic change over the last 100 years. At the beginning of the 20th century, the predominant form of rented housing provision – indeed the predominant form of housing provision – was from the private sector. This was supplemented with a modest contribution from housing charities, the forerunner of the social rented sector.

1.80 Even today the balance between these groups is still shifting. For example, the role of local authorities in providing accommodation directly has been reducing. Greater reliance is being placed on other social housing landlords and private landlords to meet the needs of this sector of the housing market.

1.81 Other changes to the rented sector may also be anticipated. Whereas in some parts of the country there is very high demand for housing and thus a buoyant market for accommodation of all kinds, in other parts of the country demand is low. In these areas there may be substantial estates of residential accommodation but with low demand from potential tenants. In such areas, serious environmental problems may arise if these estates start to decay.

1.82 Any regulatory framework should take account of these pressures to ensure that local authorities and other landlords have the ability to manage their estates efficiently. In some cases this may result in proposals for the demolition of dwellings. This may be preferable to the physical decline of under-populated areas. Indeed such action may be an important key to area regeneration. The regulation of the landlord-tenant relationship must not be so inflexible that strategic plans for the benefit of an area taken as a whole cannot be implemented.

ISSUES NOT COVERED IN THIS PAPER

1.83 A number of important issues relating to the regulation of the landlord-occupier relationship are not considered in this paper.

Disrepair

1.84 The law relating to disrepair, on which the Law Commission published a report in 1996,[36] is now being taken forward within the Department for Transport, Local

[35] Department of the Environment, Transport and the Regions, Quality and Choice: A Decent Home for All, The Way Forward for Housing (December 2000).

[36] Landlord and Tenant: Responsibility for State and Condition of Property (1996) Law Com No 238.

Government and the Regions in conjunction with new proposals for the enforcement of housing standards.[37]

Tenancy deposits

1.85 Similarly, the question of whether or not tenancy deposits should be regulated, and if so how – an issue covered in the legislation of many Commonwealth jurisdictions[38] – is not considered here. It is currently the subject of pilot projects being run by the Department for Transport, Local Government and the Regions.

Specialist courts

1.86 A third issue outside the scope of this Paper, despite the fact that it has been considered in most other Commonwealth jurisdictions, is whether or not there need to be special courts or tribunals for the resolution of housing disputes. Evidence from those jurisdictions suggests that these can be a very cost-effective way of resolving residential landlord-tenant disputes. The idea of creating a specialist housing court or tribunal is also one that has been raised from time to time in this country.[39]

1.87 An alternative idea that has been advanced is that decisions on housing disputes should be adjudicated by a specialist cadre of "ticketed" housing judges, who have been given training in housing law. We anticipate that this is an issue which will need further consideration should this paper form the first stage in the codification of housing law.

Rent control and regulation

1.88 Controls on rent levels is another topic we are not considering in any detailed way. Policy on rent regulation is essentially an issue of socio-economic policy. We have therefore assumed that the present situation – where social housing is subsidised through a variety of housing finance measures (and registered social landlords operate on a not-for-profit basis) and where private sector rents are, in effect, market rents – will continue.

Housing benefit

1.89 Housing benefit is similarly excluded from our consideration, save insofar as aspects of the present administration of the housing benefit scheme impact on particular aspects of the law that clearly fall within the scope of our terms of reference.

[37] See Department of the Environment, Transport and the Regions, Health and Safety in Housing: Replacement of the Housing Fitness Standard by the Housing Health and Safety Rating System: A Consultation Paper (March 2001); the consultation period ended on 31 May 2001.

[38] See paras 4.70 to 4.73 below.

[39] See articles by District Judge Nic Madge, "Hearing Housing Cases – Who Should Be Listening?" [2001] JHL 83 and Andrew Arden QC "A Fair Hearing? The Case For A Housing Court" [2001] JHL 86.

Exempt sectors of the market

1.90 We have also not addressed sectors of the housing market subject to their own regulatory codes. These include properties leased on the basis of long-term leaseholds, which are subject to their own regulatory regime[40] and are seen in practice as quite distinct from the residential lettings/tenancies which are the primary focus of this project. We have not considered the position of people who live in mobile homes,[41] nor those who live in houseboats. Agricultural dwellings/tenancies are also outside the scope of this Paper.[42]

Right to buy

1.91 One issue which has caused us considerable difficulty is the interface of the proposals in this paper with the "right to buy". At present the right to buy is (broadly) a direct consequence of being a secure tenant, and only local authorities can grant secure tenancies. Housing association tenants (except those who have a preserved right to buy, because they were once council tenants and meet certain conditions) do not have the right to buy. If we establish a new form of housing agreement for tenants of social landlords, both local authorities and housing associations (our type I agreement), the right to buy will have to be separate from the type of agreement itself. The legal definition of those who have the right to buy will have to be distinct from the type of agreement. We have formed the view that the right to buy is not, of itself, an aspect of tenant status, which is the central focus of our work.

1.92 We acknowledge that, if our proposals are adopted, then any legislation will need to redefine the basis on which the right to buy may be exercised. For present purposes, we assume that those currently entitled to the right to buy will retain that right, and those who do not currently have that right will not acquire it. The new statutory framework will need to contain provisions to deal with this. Nothing in this Paper should be taken to imply that there will be any change to the current position in relation to the right to buy.

1.93 The same is true of the right to acquire and the right to manage. In all of these cases, we consider that the distribution of these rights is not a matter for law reform. The content of the policy must be decided by Government. The policies will then become free-standing legal structures, separate from those relating to the housing agreements we propose in this Consultation Paper. Some may see the disentangling of, particularly, the right to manage from the agreement itself as representing the loss of a more communitarian approach to tenancies. That, it appears to us, is a debate on which we must remain neutral, but from our, law reform perspective, it is important that the strict legal structures should not determine the content of these broader policies. Nothing that we propose should be seen as impacting either positively or negatively on such policy approaches.

[40] See Landlord and Tenant Act 1954 Part 1; Leasehold Reform Act 1967; and see Commonhold and Leasehold Reform Bill 2001, Part 2.

[41] The line between a mobile home and a building can be a very fine one: see the decision of the House of Lords in *Elitestone Ltd v Morris* [1997] 1 WLR 687. Mobile homes are in any event subject to a separate regulatory code: see Mobile Homes Acts 1975 and 1983.

[42] For more details on exclusions see Part IX below.

Homelessness

1.94 We have not been asked to consider the law on homelessness as part of our work. However certain matters relating to the allocation of residential accommodation do have relevance to our project and we consider these in context below. [43]

REGULATORY IMPACT

1.95 Any change of the scale contemplated in this paper will inevitably bring both benefits and costs to businesses, other organisations and individuals. The current practice in Government is to consider the impact of changes to regulatory structures on businesses, particularly small businesses, charities and other voluntary organisations in the context of regulatory impact assessments, a policy process Government Departments are required to use in relation to proposals for reform. Although the Law Commission does not provide its own regulatory impact assessments, if the Department accepts our proposals, it will be necessary to go through the process at that point. Respondents can be of the greatest assistance by providing us with their judgment as to the benefits and costs of introducing our scheme. It provides respondents with the opportunity to influence the process.

1.96 As far as the formal regulatory impact assessment process is concerned, it would be particularly valuable to hear from the small businesses involved in housing, such as small landlords and letting agencies; and from the charities and voluntary organisations involved economically in the sector, such as housing associations, housing co-operatives, and those providing hostels and other housing for vulnerable people. It would, however, also assist our consideration of the scheme proposed in this paper more generally if respondents in other categories would also indicate their view of the benefits and costs to them.

1.97 Particular areas that small business, charitable and voluntary sector respondents might like to consider include the benefits of simplification of the law in reducing litigation costs and associated management costs, savings in legal advisory costs attributable to more easily understood law and the ready availability of housing agreements, and the benefits of greater legal certainty in reducing the amount of time a property may be empty or unproductive. Costs might include the cost of producing written agreements if none are currently used (an indication of the extent to which landlords rely on oral-only agreements now would be helpful), the costs of the requirements in relation of notification of variation, any additional costs consequent on changes to the notice period required for the termination of type II agreements, and of the "use it or lose" approach to the issue of notices. We anticipate that there will be particular costs associated with the transition to the new scheme – the views of respondents would be helpful on this, too.

1.98 **We ask for information about the regulatory impact of our provisional proposals in this paper.**

[43] The Homelessness Act 2002 received Royal Assent shortly before this paper was completed.

ACKNOWLEDGEMENTS

1.99 We have been greatly assisted in our work by input from a specially constituted Advisory Group, representing a wide range of interests in the housing field.[44] Naturally none of them is responsible for the contents of this report.

[44] The members of the Advisory Group and the organisations they represent are British Property Federation (Richard Lambert); Chartered Institute of Housing (David Fotheringham); Council of Mortgage Lenders (Andrew Heywood); Department of Transport, Local Government and Regions (Duncan Campbell); Housing Corporation (Stephen Brockway); Local Government Association (Celia Tierney); Lord Chancellor's Department (John Tanner); National Assembly for Wales (Peter Owen); National Federation of Residential Landlords (Gareth Hardwick); National Housing Federation (John Bryant); Scottish Executive (Richard Grant); Shelter (Russell Campbell); Tenants and Residents Organisation of England (Richard Smallman); Tenant Participation Advisory Service (Phil Morgan); The Law Society (Sally Morshead).

PART II
THE EVOLUTION OF HOUSING LAW

INTRODUCTION

2.1 In thinking about how housing law might be developed, we must first understand how the law has evolved into the current complex body of rules so heavily criticised by Lord Woolf.[1] We do not intend to provide a detailed account of the history of housing law and policy over the last 150 years, but rather to highlight the principal issues addressed during that period and see how they have changed. We need to consider the various legislative techniques that have been used and the extent to which they have achieved the results intended for them. In short, we need to learn the lessons of history to ensure that our proposed new framework will, so far as we can predict, be able to meet future needs.

2.2 We have decided against setting out a simple chronological account. Rather we have decided to adopt a sectoral approach – looking at developments in the different sectors of the rented housing market. We divide the discussion into

(1) first legislative initiatives – the 19th century,

(2) the regulation of the private rented sector, 1915-1980,

(3) the development of the public rented sector, 1920-1980,

(4) the development of the housing association sector to 1980, and

(5) developments from 1980 to the present day.

Finally we draw out the principal lessons we think can be learned from the historical account.

FIRST LEGISLATIVE INITIATIVES – THE 19TH CENTURY

Housing conditions and public health

2.3 The Industrial Revolution led to a major restructuring of society. Significant movements of the population, from rural communities into the newly industrialised conurbations, took place. These new concentrations of populations into often very poor quality housing created major problems of disease and overcrowding.[2]

2.4 At that time, and in sharp contrast to the position today, the predominant form of tenure for residential purposes was the provision of rented accommodation. Only a small percentage of the population had the resources to enable them to buy their properties.

[1] As noted at para 1.1, note 1 above Lord Woolf was not the first judge to draw attention to this problem.

[2] Cf eg Enid Gauldie, *Cruel Habitations: A History of Working-Class Housing 1780-1918* (1974).

2.5 The accommodation was provided principally by private landlords, who dominated the market. This source of supply was modestly augmented by a number of enlightened employers and housing charities. Housing provision was not seen as a function for Government. The housing market was largely unregulated by Government legislation.

2.6 The quality of much rented housing was not high. Housing conditions and the concomitant problems of public health became the focus of criticism by many leading social reformers of the day.[3] There was no statutory security of tenure.[4] The potential for social unrest became increasingly obvious.

2.7 The first legislative interventions in the 19th century were, by modern standards, modest. Nevertheless, they laid the foundation for future developments. These initial Acts of Parliament were principally concerned with questions of public health[5] and, in particular, the development of powers for local authorities to control disease.[6]

2.8 Concerns over insanitary conditions also resulted in widespread demolition of the housing inhabited by the poor. In this context, a significant development was the enactment of the Artizans' and Labourers' Dwellings Improvement Act 1875 which entitled (but did not oblige) local authorities to arrange rehousing on these sites.

2.9 Such rehousing was largely undertaken by "model dwelling companies" and philanthropic trusts, such as the Peabody Trust. By 1914 such bodies had built 50,000 dwellings. The Housing of the Working Classes Act 1890 expanded the powers available to local authorities to build themselves and they began to do so. However, by 1914, total local authority stock was only about 28,000 new dwellings.[7]

2.10 While local authorities were given powers to regulate housing conditions, and to provide housing, little was done by government to intervene in the contractual relationship that existed between landlords and tenants. This remained a relationship whose consequences were determined by common law.[8] Problems arising from the inequality of bargaining power that existed between landlord and tenant went largely unchecked.

[3] Cf eg Sir Edwin Chadwick's, *Report to HM Principal Secretary of State for the Home Department, from the Poor Law Commissioners, on an Inquiry into the Sanitary Condition of the Labouring Population of Great Britain* HL(1842) Vol 26-28; HL (1843) Vol 32.

[4] Modest constraints on the use of the remedy of forfeiture by landlords were developed by the courts. The provisions of the Small Tenements Recovery Act 1838 also provided some limited procedural protection.

[5] Cf eg Public Health Act 1848.

[6] Resulting in eg the Artisans' and Labourers' Dwellings Act 1868, also known as the Torrens Act, and Artizans' and Labourers' Dwellings Improvement Act 1875, also known as the Cross Act.

[7] David Hughes and Stuart Lowe, *Social Housing Law and Policy* (1995) at p 9.

[8] Though the Housing of the Working Classes Act 1885, s 12 did imply into leases for low rent a term that the property should be "at the commencement of the holding in all respects reasonably fit for human habitation".

THE REGULATION OF THE PRIVATE RENTED SECTOR 1915 – 1980

Rent control, illegal premiums and security of tenure

2.11 The first major statutory interventions in the contractual relationship between landlord and tenant occurred during the First World War. Shortages of urban housing in key locations enabled landlords to increase rents significantly. While this might have been an economically appropriate/logical response to the balance between supply and demand, it created severe political problems. Munitions workers, especially in Clydeside, threatened strike action. With no alternative sources of social housing available, and no scheme for providing public subsidies to assist meeting housing costs, the Government's only practical option was to introduce legislation to restrict the right of landlords to set or alter rent levels.[9] At the same time, to prevent landlords circumventing these measures of rent control by demanding capital sums of rent in advance, requests for premiums (colloquially called "key money") were also outlawed.[10] In order to ensure that landlords would not simply evict tenants who attempted to enforce their rights, for example by complaining that they were being charged rents in excess of the legal limit, the legislation also provided that tenants should have security of tenure.[11]

2.12 Two particular points may be noted about this early legislation. First, it was originally intended only as a temporary war-time emergency measure, rather than as a long-term intervention in the freedom of landlords and tenants to contract. Second, it did not apply to all rented dwellings but only those which fell below defined "net rateable value" limits.[12] It was clear from the debates in Parliament that this early legislation was only intended to protect the poor.

2.13 Despite the fact that the legislation was conceived as a temporary phenomenon, continuing housing shortages – and the social and political pressures that resulted from them – after the end of the Great War resulted in the original legislation being retained. Over the next four decades no Government found it could afford, politically, to repeal the legislation. Instead the core legislation was subjected to frequent and detailed amendment. Successive Acts of Parliament sought to fine-tune the regulatory framework. During that period, many Committees looked at the problem and recommended specific changes to the law.[13] As a result, at some

[9] Increase of Rent and Mortgage Interest (War Restrictions) Act 1915. There had been intervention in the agricultural sector before then: Agricultural Holdings (England) Act 1875.

[10] To demand such was made a criminal offence: Increase of Rent and Mortgage Interest (Restrictions) Act 1920, s 8.

[11] Increase of Rent and Mortgage Interest (War Restrictions) Act 1915, s 1(3).

[12] £35 or below in London, £26 or below elsewhere according to the Increase of Rent and Mortgage Interest (War Restrictions) 1915, s 2(2).

[13] Cf eg M Partington and J Hill, *Housing Law, Cases, Materials and Commentary* (1991) pp 110 to 115.

stages more dwellings were brought within the scope of the legislation;[14] at other times defined categories of dwelling were moved out of it.[15]

2.14 The outbreak of the Second World War led to yet further measures being taken, covering a much wider range of dwellings.[16] By 1953 it was estimated that over 90% of dwelling-houses in England and Wales fell within the rateable value limits; most unfurnished tenancies fell within the scope of the protective legislation.[17]

Exclusions – payments for board, attendance and the use of furniture

2.15 The Rent Acts had, from an early stage, sought to exclude from protection accommodation provided on what was usually regarded as a short-term rather than a long-term basis. Thus accommodation in relation to which the rent included payment for board, attendance or the use of furniture fell outside the scope of the Rent Acts.[18]

2.16 Although this remained the position in relation to arrangements dealing with board and attendance, a new set of rules providing some limited statutory protection for lettings of furnished accommodation was introduced in 1946.[19] These rules established a system of rent tribunals to determine "reasonable" rents for furnished premises. Rent tribunals were also able to postpone the operation of notices to quit, which had the effect of giving limited security of tenure. But this fell far short of the security available under the Rent Acts. This development reflected a view that, while this sector of the housing market should be subject to some regulation, there should be special rules for more informal accommodation arrangements.[20]

Moves to decontrol

2.17 Steps to deregulate the private rented sector occurred in the 1950s. First, the Housing Repairs and Rent Act 1954 provided that any dwellings newly built or newly converted for the purpose of letting should be outside rent control. Second, and more far-reaching, the Conservative Government's Rent Act 1957 provided that all dwellings with rateable values in excess of £30 (£40 in London) should be

[14] Eg the Increase of Rent and Mortgage Interest (Restrictions) Act 1920, which brought the great majority of houses under control.

[15] Eg the Rent and Mortgage Interest Restrictions (Amendment) Act 1933 and the Increase of Rent and Mortgage Interest (Restrictions) Act 1938 automatically decontrolled more valuable houses and prevented progressive decontrol of other less valuable ones.

[16] The Rent and Mortgage Interest Restrictions Act 1939.

[17] M Partington and J Hill, *op. cit.* p 113.

[18] See proviso to s 2(2), Increase of Rent and Mortgage Interest (War Restrictions) Act 1915.

[19] Furnished Houses (Rent Control) Act 1946.

[20] It also led to the problem of landlords seeking to evade the more stringent provisions of the Rent Acts by claiming to be furnished, accommodation that was – to say the least – spartan in character. Payments for furniture had to be a "substantial proportion of the rent". For discussion of this test see *Palser v Grinling* [1948] AC 291.

decontrolled at once; and that other dwellings should be decontrolled when they became vacant.[21]

2.18 These latter measures led to acute social and political problems. Allegations were made of sharp practices by landlords eager to "encourage" their tenants to vacate their dwellings, particularly in areas of high housing demand.[22] These allegations in turn led to the establishment of the Milner-Holland Committee, which looked in particular at the effects of the de-control legislation on the housing market in London.[23]

New protective measures

Protection from unlawful eviction and harassment

2.19 The newly elected Labour Government responded to these developments by passing the Protection from Eviction Act 1964. This was the first Act to make it a criminal offence for a landlord to "harass" a tenant into vacating a property.[24] The Act, which was in any event set to expire at the end of 1965, was replaced by the Rent Act 1965 which retained the criminal offence, albeit cast in different words.

Due process

2.20 In addition, the Rent Act 1965 extended the circumstances in which a landlord was required to obtain a court order to recover possession. The Act adopted the principle that tenants should not be forced out of their accommodation without "due process". Where an occupier remained in residence after the end of the contractual term, the landlord was required to obtain an order from the court before physical possession of the premises could be regained.[25] These provisions were imposed for all tenants, not only those falling within the scope of the Rent Acts.

2.21 In addition the common law on notices to quit was modified to provide that – irrespective of the term of the tenancy – at least four weeks' notice had to be given. These provisions are now found in the Protection from Eviction Act 1977.

Fair rents

2.22 The Rent Act 1965 introduced a new regime for rent regulation. Instead of very inflexible rent controls based on tightly defined statutory formulae, it provided that rent levels should be fixed at a "fair rent" level, which sought to reflect market rent levels but discounting that element of the market rent which resulted from

[21] These provisions never came into effect in quite the way planned. The Landlord and Tenant (Temporary Provisions) Act 1958 had the effect of postponing the impact of the 1957 Act until 1 August 1960

[22] "Rachmanism" is defined by the Concise Oxford Dictionary (1990) as "the exploitation and intimidation of slum tenants by unscrupulous landlords" and is the term used to describe these practices, deriving from the activities of the notorious private landlord Perec Rachman.

[23] Report of the Committee on Housing in Greater London (1965) Cmnd 2605.

[24] Rent Act 1965, s 30. See now Protection from Eviction Act 1977, s 1.

[25] Protection from Eviction Act 1964, ss 1(1)-(3). See now Protection from Eviction Act 1977, s 3.

shortage of accommodation available for renting. Even though the rent for a dwelling had been agreed between the landlord and the tenant, these contractual rents could be referred to rent officers for determination. There was a right of appeal to rent assessment committees. There was provision for fair rents to be re-determined on a regular basis, initially every three [later every two] years.

2.23 Although the new fair rent system was more flexible than the former rent control system, it still had the effect of reducing the level of economic return available to landlords on their investment in the accommodation they were providing.

2.24 Two particular points should be noted about the changes made in 1965. First, the scope of the legislation was widened to embrace all dwellings of rateable value below £200 (£400 in London). The primary focus of the legislation was no longer on housing provided for the poor; it now embraced all rented housing, save the most expensive.

2.25 Second, for the first time, the Government enacted the Rent Act 1965 on the basis that it would be a permanent legislative measure. Earlier Acts had continued to be regarded as essentially temporary, emergency provisions to allow conditions in the housing market to stabilize; but this in practice never happened sufficiently to allow the legislation to be fully repealed.[26] The new legislation at least brought some greater certainty to this sector of the housing market.

Restricted contracts – resident landlords

2.26 As we have seen, furnished tenancies were for some time treated separately from unfurnished tenancies, and were subject to a much less stringent regime. The Rent Act 1974 made profound alterations to these provisions.

2.27 First, it brought most furnished tenancies within the full Rent Act scheme. Second, it introduced the new concept of the "resident landlord". In tenancies – not falling within a purpose-built block of flats – in which there was a resident landlord, the full Rent Act regime did not apply. Instead, an adapted version of the less stringent regime – formerly governing furnished lettings – applied. Contracts subject to this adapted regime were labelled "restricted contracts".[27]

Further measures to encourage letting

2.28 The 1974 Act also introduced new provisions designed to encourage private landlords to rent spare accommodation on a temporary/short-term basis. For example, it was provided that owner-occupiers who let their dwellings during temporary absences (for instance, where they went to work abroad) could, so long as certain procedural steps were followed, have a mandatory ground for possession, whereby they would be certain that they could get a court order for possession against any tenant who might hold over at the end of the agreed period

[26] Cf the speech of Richard Crossman, then Minister of Housing, on the second reading of the Rent Bill 1965: *Hansard* (HC) 5 April 1965, vol 710, cols 33 to 34.

[27] Under this regime, rent was subject to control by rent tribunals. Such security of tenure as was provided was achieved, not by the mechanism of the "statutory tenancy" as under the Rent Acts, but by postponing, for limited periods, the operation of any notice to quit issued by the landlord.

of the tenancy. Winter lets of accommodation used during the summer for holiday lets (outside of protection) were given similar treatment.

Succession

2.29 In addition to all these measures, the Rent Acts also provided that, in defined circumstances, there should be rights for a person who lived with a protected tenant to succeed to the tenancy on the death of the tenant. These issues are not considered here but they will be the subject of a further consultation paper to be issued later this year.

Consolidation

2.30 The Rent Act 1977 and the Protection from Eviction Act 1977 consolidated earlier legislation.

Introduction of housing benefit – rent allowances and rent rebates

2.31 A number of very important developments were also taking place outside the framework of the Rent Acts. First, the Government came to recognise that a new approach to the subsidising of the housing costs of the poor was necessary. Rent control and rent regulation have the effect of reducing rent levels below that which can be achieved in the market place, at least for those categories of dwellings which come within the scope of the protective legislation. Thus, to a degree, these measures have the effect of forcing landlords to subsidise the rents of their tenants.[28]

2.32 The forerunners of what is now known as housing benefit were initially made available only for council tenants, renting from local authority landlords. These schemes were not universal, but were introduced on a discretionary, local basis. Following an initiative taken by Birmingham City Council – which introduced a scheme of rent allowances for private sector tenants in 1968[29] – the Government expanded the scope of its thinking on rent rebates to embrace the rents of private sector tenants as well as public sector tenants. The first national scheme of rent rebates and allowances was introduced by the Housing Finance Act 1972.

2.33 This proved to be a key first step in the process which led ultimately to the refocusing on market rents, and away from statutory regulation of rents in the private sector, found in the Housing Act 1988.[30]

Housing conditions

2.34 In addition to the measures set out above, which sought to regulate the landlord-tenant relationship, further measures, which built on 19th century precedents, attempted to improve the quality of housing conditions. Since these are not central to this project they will be mentioned only briefly.

[28] This was in stark contrast to what happened in Europe, where landlords were both regulated and subsidised by Government: D V Donnison, *The Government of Housing* (1967) p 86.

[29] It was given powers to do this in the Birmingham Corporation Act 1968.

[30] See paras 2.69 to 2.75 below.

2.35 There have been four principal means by which it has been sought to achieve this objective. First, increasingly strict Building Regulations sought to improve the quality of newly-built housing.[31] Second, local authorities were given increasingly comprehensive powers to enforce housing standards where the accommodation was unfit.[32] Third, a number of terms – relating to housing conditions – were implied into tenancy agreement by statute.[33] Fourth, public health law came to be used as a means to tackle poor quality housing accommodation which amounted to a "statutory nuisance".[34]

The impact of protective legislation

2.36 A number of comments may be noted in relation to these legislative initiatives.

2.37 First, despite the fact that in the period 1915 to 1980 a considerable body of protective legislation was introduced to afford legal protections to tenants, there was nevertheless considerable evidence that either tenants did not know their rights[35] or did not seek to take advantage of those rights, either through fear of upsetting the landlord or because they were relatively content with their situation.[36] It might thus be suggested that the law did not work particularly well.

2.38 Second, despite the many changes to the legislative framework, the law was never comprehensive. There were always significant groups that fell outside the protective scope of the law, certainly as regards rent regulation and security of tenure. However, as the scope of protection expanded to wider categories of property, so too did the number of exceptions and exemptions increase. This served to increase the complexity of the law.

2.39 A third, related, effect of the expansion of the scope of the Rent Acts in particular was that they encouraged landlords to enter into agreements that they hoped might fall outside the scope of the legislation, so that their properties were not subject to rent regulation and their occupiers did not have long-term security of tenure. Most notable were the attempts by landlords to provide accommodation under licences (which fell outside Rent Act protection) rather than leases (which were clearly within the scope of the legislation). These evasive devices in turn provoked a considerable amount of litigation. Over the years the decisions of the Courts developed a jurisprudence, the broad outcome of which was that the courts were able to ensure that the primary objectives of this area of social legislation were not

[31] The latest version is in the Building Regulations SI 2000 No 2531, made under the Building Act 1984; they have a long history, which can be traced back to the Town Improvement Clauses Act 1847.

[32] Cf Housing Act 1985, Parts VI (repair notices) and IX (slum clearance).

[33] Cf Landlord and Tenant Act 1985, ss 8 and 11.These were the subject of work by the Law Commission in 1996: Landlord and Tenant: Responsibility for State and Condition of Property (1996) Law Com No 238 (HC 236, 1996).

[34] Cf the Environmental Protection Act 1990.

[35] Cf M Zander "The Unused Rent Acts" *New Society* 12 Sept 1968; recent research suggests that little has changed: H Genn, *Paths to Justice* (1999).

[36] Cf the Report of the Committee on the Rent Acts (1971) Cmnd 4609 at pp 15 to 19, chaired by H Francis.

subverted by "sham agreements".[37] But these outcomes were not always predictable, and in some instances could only be achieved by some straining of the canons of statutory interpretation. This led to uncertainty in the application of the law. It was not conducive to the development of a structured code of housing law in which landlords and tenants might know at the outset of their relationship where they stood.

2.40 Fourth, although not the sole cause,[38] there is little doubt that one consequence of all this legislation was that many private landlords voted with their feet and left the market.

THE DEVELOPMENT OF THE PUBLIC RENTED SECTOR 1920-1980

2.41 During the same period, significant changes were also occurring in the housing market. The provision of what would now be described as "social housing" – which at the start of this period was provided by a small number of housing charities – was supplemented by increasingly substantial housing provision by local authorities. In the period 1920–1980, council house provision rose from a few thousands to slightly over 5 million out of a total of 17.6 million dwellings.[39]

2.42 In contrast to the private rented sector, which became increasingly subject to detailed legislative regulation, local housing authorities were regarded as "model landlords" who were left largely free to manage their housing services as they wished. On the crucial question of security of tenure – a key aspect of how local authorities manage their estates – there was little legislative intervention.[40]

2.43 The bulk of the legislation relating to the provision of council housing had an enabling role, designed to give local authorities the basic legal powers needed to enable them to finance and build the accommodation, rather than regulate the detail of the relationship between local authorities and their tenants.

2.44 There were legal requirements to fix "reasonable" rents, but in practice this gave considerable discretion to local authorities to determine rent levels.[41] They did not amount to anything like the provisions on rent control or rent regulation found in the private sector.

2.45 In relation to the quality of the accommodation provided, local authorities were also subject to provisions relating to housing conditions, and to public health

[37] Most notable was the series of cases which culminated in the decision of the House of Lords in *Street v Mountford* [1985] AC 809; even this did not answer all the issues, as subsequent litigation shows. Cf eg *A G Securities v Vaughan* [1990] 1 AC 417. Similar issues arose in the context of holiday lets and company lets.

[38] Rising standards of living led to vastly increased demand for owner-occupation.

[39] Department for Transport, Local Government and the Regions, Housing Statistics Postcard (July 2001), see further: www.housing.dtlr.gov.uk/research/hss.index.htm.

[40] The Increase of Rent and Mortgage (Restrictions) Act 1920 conferred security of tenure on local authority tenants whose housing was constructed prior to 1919. However, the Rent and Mortgage Interest Restrictions Act 1939, s 3(2)(c) removed most local authority housing from regulation.

[41] Housing Act 1925, s 67(2), Housing Act 1936, s 83(1) and Housing Act 1957, s 111(1). Cf the Housing Act 1985, s 24.

legislation. However they were not subject to other provisions of public law on housing standards which local authorities were entitled to use against non-local housing authority landlords.[42]

Discretion v rights

2.46 A number of reports in the 1960s began to raise the question whether this rather unregulated, discretionary approach was sufficient to ensure that local authorities were in fact using the housing resources that were available to them to address questions of housing need. The culmination of these concerns was reflected in a report from the Central Housing Advisory Committee, published in 1969.[43]

Homeless persons legislation

2.47 Although there was no immediate response to this report, towards the end of the period under consideration there was one extremely significant development, which profoundly and radically affected the powers of local authorities to allocate their housing accommodation. This was the enactment in 1977 of the Housing (Homeless Persons) Act. What had hitherto been primarily a matter of policy and administrative discretion became a matter of legal duties and obligations.

2.48 The Act also had an impact on the policy of local authorities seeking possession against their own tenants, as it introduced circumstances in which, having obtained a possession order, the authority would immediately be required to provide accommodation to the dispossessed tenant.

A national rent rebate scheme – subsidising tenants

2.49 The other significant development – already mentioned in passing above[44] – which also occurred towards the end of the period under consideration, was the introduction of increasingly comprehensive schemes of rent rebates to subsidise the housing costs of the poor.

2.50 Council housing had been developed initially on the basis that housing was provided by a combination of public grants and loans – which had the effect of keeping the overall costs of council housing down. In effect there was public financial subsidy of the costs of building the accommodation.

2.51 Conservative Governments in particular came to think that this had the effect of creating substantial and undesirable differentials between the costs of private sector rented accommodation and public sector accommodation. They also felt that this method of subsidising housing costs did not target public support to those in greatest need.

2.52 The Housing Finance Act 1972 was the culmination of a process of the development of rent rebates for local authority tenants. The introduction of a

[42] *R v Cardiff City Council, ex p Cross* (1983) 81 LGR 105.

[43] Council Housing: Purposes, Procedures and Priorities (1969). The chairman of the Committee was Professor J B Cullingworth.

[44] See paras 2.31 to 2.32.

national rent rebate scheme signalled a shift from the subsidising of the costs of providing the housing to subsidising the ability of the poor to pay (with the general level of council house rents being increased).[45]

THE DEVELOPMENT OF THE HOUSING ASSOCIATION SECTOR TO 1980

2.53 A third sector – the housing association movement – also began to increase its role in the housing market. This sector has long historical roots, a consequence of which is that a wide variety of bodies describe themselves as housing associations. These include[46]

(1) almshouses founded in the Middle Ages by churches, colleges and private landowners,

(2) charitable bodies endowed in the 19th century by rich philanthropists to provide housing for the lower classes – such as the Sutton Trust, the Peabody Trust and the Joseph Rowntree Memorial Trust,

(3) commercial organisations motivated by what has been called "five percent philanthropy" – providing housing at less than cost for urban working classes by attracting investment from private sources at a low rate of return, and

(4) housing co-operatives of various kinds.

2.54 These were the forebears of the range of organisations which now describe themselves as "housing associations". Indeed the range of bodies statutorily regarded as housing associations was made very broad as the result of the wide statutory definition, which required only that the organisation be concerned in some way with the provision of housing and was, broadly, non-profit making.[47]

2.55 Thus a housing association might be a trust, a company, a mutual co-operative or a society; it might be a charity registered under the Charities Act 1993, a society registered under the Industrial and Provident Societies Act 1965 or a social landlord registered under the Housing Act 1996 or all or none of these things; it might rent out, sell, build or rehabilitate housing or simply provide advisory services.

2.56 In the period to 1980 most housing associations confined themselves to providing what is now described as "social housing", often for specific groups of individuals such as lone parents or recently released prisoners who found it hard to obtain council housing from local authorities.

[45] Under the Housing Finance Act 1972 it was intended that all council housing would be fair rented by rent officers, acting under similar principles which applied to private sector rent levels. This programme, which was to have been introduced in stages, was halted when the Labour Government was returned to power in 1974.

[46] These are identified by J Adler and C Handy, *Housing Associations: the Law of Social Landlords* (3rd ed 1997) p 34.

[47] Cf Housing Associations Act 1985, s 1.

2.57 What is notable about the history of the regulation of housing associations is how differently housing associations have been treated in the legislative provisions applicable to them at different times.

Security of tenure

2.58 Until 1954, housing associations that provided accommodation that fell within the relevant rateable value limits were subject to the security of tenure provisions of the Rent Acts. Section 33 of the Housing Repairs and Rents Act 1954 took a number of housing association tenancies outside the scope of regulation. The requirements which a housing association tenancy had to satisfy in order to be exempt altered a number of times subsequently.[48]

2.59 Under section 15 of the Rent Act 1977,[49] as amended,[50] the formal position was considerably simplified. Housing association tenancies were exempt if the housing association was registered with the Housing Corporation. Such tenancies, in that respect, were in the same position as local authority tenancies. No statutorily defined grounds for possession needed to be proved before possession proceedings could be started against the tenant. Tenants' rights to security of tenure were essentially determined by the tenancy agreement.[51]

2.60 By contrast, those housing associations that were not registered with the Housing Corporation were not excluded from the security of tenure provisions of the Rent Act 1977.[52] They were treated on a par with private landlords.

Rent regulation

2.61 Where tenancies granted by housing associations were subject to Rent Act regulation the rents they could charge were limited in the same way as private sector rents. The Housing Finance Act 1972 Part 8[53] extended the "fair rent" regime to some housing association tenancies which were not otherwise regulated.

2.62 The process of housing associations obtaining fair rent registration was particularly important at this time, as the level of subsidy provided to housing associations was then based – broadly – on the difference between the fair rent and the actual cost of running the dwelling (including the cost of servicing the loans which had provided the capital for the buildings).

Rent allowances

2.63 In accordance with other developments relating to the provision of housing rebates and allowances, tenants of housing associations were, from 1st January 1973,

[48] Cf eg Rent Act 1957, Sched 6, para 26(1); Rent Act 1968, s 5(5) and (6); Housing Rents and Subsidies Act 1975, s 17(4), Sched 5, para 1.

[49] This derived from the Rent Act 1968, s 5 which was itself derived from Housing Repairs and Rent Act 1954, s 33.

[50] Housing Act 1980, s 74; Housing (Consequential Provisions) Act 1985, Sched 2, para 35.

[51] There was a similar exclusion of housing co-operatives: Rent Act 1977, s 16.

[52] It is not known how many associations fell into this category.

[53] Now replaced by Rent Act 1977, Part 6.

entitled to rent allowances.[54] As with other sectors of the housing market, this was an important policy development, which was a precursor to other policy development.

Housing associations – a hybrid

2.64 In short, by 1980 housing associations were treated as a hybrid – in some respects on the same basis as local authorities, in others as private landlords. As with other aspects of the regulation of the housing market, this was all to change in the 1980s.

DEVELOPMENTS FROM 1980 TO THE PRESENT DAY

2.65 When the Conservative Government came to power in 1979 some might have thought that, after many years of intervention, the broad shape of the housing market and its regulatory framework would have achieved a certain stability. At that time there was: an ever increasing owner-occupied sector, a substantial housing authority sector, a modest housing association sector and a declining privately rented sector.

2.66 The experience of the last two decades shows just how misconceived such a view would have been. There have been profound changes in the housing market and the law which regulates that market. Thus:

(1) direct provision of dwellings by local authorities has fallen significantly,

(2) provision by housing associations (now labelled "registered social landlords") has increased substantially,

(3) the decline of the private rented sector has been halted, and

(4) contributing to these developments and increasing the size of the owner-occupied sector, the "right to buy" programme has transferred the ownership of large numbers of local authority homes to their (former) tenants.

2.67 These changes in the housing market have been reflected in the upheaval of the regulatory regimes governing housing, which has also occurred. Three major Housing Acts have been enacted – the Housing Acts of 1980, 1988, and 1996 – and a further major piece of legislation has just received Royal assent.[55] In addition, there was the major programme of consolidation of housing legislation, undertaken by the Law Commission, which came to fruition in 1985.[56]

2.68 Although the bulk of these changes were introduced by Conservative administrations, the present Labour Government has indicated that it does not

[54] The date when the relevant provision of the Housing Finance Act 1972 came into force. For these purposes, tenants of housing associations were specifically treated as private sector tenants: *ibid* s 19.

[55] The Homelessness Act 2002, which received Royal Assent on 26 February.

[56] Report on the Consolidation of the Housing Acts (1985) Law Com No 144; Scot Law Com No 94; (1985) Cmnd 9515 – which led to the Housing Act 1985, the Housing Associations Act 1985 and the Landlord and Tenant Act 1985.

plan to reverse these reforms but rather to build on them by promoting choice in both the public and private sectors.[57] Indeed, this position of substantial party political consensus[58] has enabled the Law Commission to become involved in this project.

The private rented sector

2.69 The Conservative Government radically altered the regulation of new tenancies in the private sector. Its priority was to increase the supply of private sector rented housing. It believed that the only way to achieve this was by relaxing the regulatory framework. Only this would encourage landlords to enter the market.[59]

2.70 The key tenure concepts – the assured tenancy[60] and the assured shorthold tenancy[61] – were introduced by the Housing Act 1988[62] and were subject to considerable amendment in the Housing Act 1996. The essential features of these tenures are that rents levels are no longer subject to fair rent regulation by the rent officer and rent assessment committee but are, in general, market rents agreed between the landlord and tenant. There was an increase in the number of grounds of possession available to landlords and a new summary procedure for obtaining possession of assured shorthold tenancies or tenancies where there were serious rent arrears was created.

2.71 The 1988 Act, as amended, contains the regime applying to most residential tenancies in the private sector entered into after it came into force on 15 January 1989. It was further amended by the Housing Act 1996, which came into force on

[57] Department for Transport, Local Government and the Regions, Quality and Choice: A Decent Home for All, The Way Forward for Housing (December 2000).

[58] There is not a total consensus – eg the new Homelessness Act 2002 reverses certain provisions enacted by the Conservative administration. Proposals for licensing schemes for housing in multiple occupation and private landlords are unlikely to have been promoted by a Conservative Government.

[59] See Housing: The Government's Proposals (1987) Cm 214.

[60] The regulation of which is governed by the Housing Act 1988, Part I, Ch 1: ss 1 to 19.

[61] In the Housing Act 1988, Part II, Ch 2: ss 19A-23. Notwithstanding the term "shorthold", there is no statutory limit on the length of any fixed term granted by an AST. Most long leases will however be excluded from the definition on the basis that the rent payable is a low rent: *ibid* Sched 1, para 3.

[62] The first steps in this direction – the protected shorthold tenancy – an be found in the Housing Act 1980, s 20 but this was a rather different concept and, being essentially of historical interest only, is not discussed here.

28 February 1997.[63] Since that date all new residential tenancies have by default been assured shortholds; the landlord must take positive steps to ensure that the (non-shorthold) assured tenancy regime applies.[64] As a result, the assured shorthold is now the usual regime governing new private sector residential tenancies. The original assured tenancy is now primarily used by social landlords other than local authorities.[65]

Rent levels

2.72 The rent payable under an assured tenancy, or an assured shorthold tenancy, is, generally, that agreed between the landlord and tenant. Assistance for those unable to pay market rents is made available through the housing benefit scheme (as rent allowances are now called) rather than by imposing a cap on rents by way of statutory rent control or regulation.[66]

2.73 Further there are now no legal restrictions on landlords charging a premium, though the question of tenancy deposits – and the degree to which they should be subject to specific regulation – is currently under separate consideration within the Department for Transport, Local Government and the Regions.

2.74 The very complex procedures for agreeing rent increases that were available under the Rent Acts have been replaced by provisions which encourage the parties to agree periodic rent reviews. In the absence of any such agreement, there is a statutory mechanism allowing for an annual rent review.[67]

2.75 The assured shorthold tenancy regime also provides a procedure which might, in theory, lead to limited regulation of an agreed rent. Under it, a tenant can ask a rent assessment committee to determine the rent "the landlord might reasonably be expected to obtain" – that is a market rent.[68] However, this right is only available in closely defined circumstances: the committee has no jurisdiction if there are not sufficient assured lettings in the locality (which can be used for purposes of comparison); the contractual rent must be "significantly higher" than the market rent and, in the case of assured shorthold tenancies entered into on or after 28 February 1989, it is only available in the first six months. These procedures may be best seen as a modest form of consumer protection applying to

[63] Housing Act 1988, s 141(3); Housing Act 1996 (Commencement No 7 and Savings) Order SI 1997 No 225. These dates can be extremely important in practice since crucial questions, particularly relating to security of tenure depend on the date on which tenancies were created.

[64] Housing Act 1988, s 19A and Sched 2A.

[65] See para 2.99 below.

[66] To prevent abuse of the housing benefit scheme, powers have been given to rent officers to make determinations which have the effect of limiting the amount of rent payable to private landlords under the housing benefit scheme: see the Housing Benefit (General) Regulations SI 1987 No 1971, Reg 11(as amended).

[67] Housing Act 1988, ss 13-14. Under this procedure the landlord may issue a notice setting out the proposed new rent; the tenant has the right to refer this notice to the rent assessment committee if he or she feels that the new rent proposed would be above the market rent level (the rent officer does not get involved in this process). The rent assessment committee can, in these limited circumstances, determine the market rent.

[68] Housing Act 1988, s 22.

a tenant who, perhaps through ignorance of local market conditions, agrees an unrealistically high rent. In practice these procedures are little used.

Grounds for possession

2.76 The number of grounds for possession – in particular mandatory grounds – was increased. There were no less than three grounds – one mandatory, two discretionary – enabling landlords to seek possession orders if the tenant did not pay the agreed rent in a timely fashion.

2.77 Furthermore, with the introduction of the assured shorthold tenancy in 1988, the landlord was given an absolute legal right to regain possession of a dwelling, whether or not there had been any default on the part of the tenant.[69]

SECURITY OF TENURE UNDER THE ASSURED TENANCY

2.78 The rights of a tenant to bring a tenancy to an end are not abrogated by the assured tenancy regime. Accordingly, a tenant may give such notice as is specified in the contract[70] or invoke a break clause or surrender the lease.

2.79 A landlord wishing to evict the tenant, on the other hand, must go to court. This is because the tenancy cannot be lawfully brought to an end without obtaining a court order.[71] A fixed term tenancy which comes to an end by effluxion of time is automatically replaced by a periodic basic assured tenancy on similar terms.[72]

2.80 There are 17 grounds on which a landlord may apply for an order for possession set out in the legislation.[73] The first eight are mandatory – if the landlord makes one of them out, the court must grant the order sought.[74] The other nine are discretionary – if the landlord makes one of these out, the court is entitled to make an order if it considers it "reasonable" to do so.[75]

2.81 A landlord invoking one of the 17 grounds must first issue a "notice of proceedings for possession" to the tenant specifying (among other things) the ground on which he intends to rely.[76] This warning notice may be dispensed with by the court (save where the ground for possession is 2 months' arrears of rent) if it would be just and equitable to do so. These provisions supplant any common law rules relating to notices to quit which now have no effect.

[69] See para 3.15 to 3.16 below.

[70] Subject to the statutory minimum of four weeks under the Protection from Eviction Act 1977, s 5(1).

[71] Housing Act 1988, s 5. Although s 5(1) allows the landlord to terminate a fixed term assured tenancy in accordance with the tenancy agreement, s 5(2) automatically creates a statutory periodic assured tenancy to take its place, which can only be terminated by a court order.

[72] *Ibid*, s 5(2).

[73] *Ibid*, Sched 2. The court may not make an order on any other ground according to Housing Act, s 7(1) and an order for possession will terminate the *statutory periodic* tenancy when it comes into force according to s 7(7).

[74] *Ibid*, s 7(3).

[75] *Ibid*, s 7(4).

2.82 The tenant and landlord's rights to terminate an assured shorthold are the same as under a fully assured tenancy,[77] with one important addition. Landlords have, in effect, an additional mandatory 18th ground on which they may rely. Where an assured shorthold, whether fixed or periodic, has come to an end[78] the landlord is entitled to a possession order, providing that (usually) two months' written notice of the intention to seek the order has been given and the notice is in the prescribed form.[79] If only possession is sought, the order can be made on the basis of a judge simply reading the relevant papers – there is no need for a hearing.

Rent Act tenancies – a residual category

2.83 As a result of the enactment of the Housing Act 1988, the Rent Act 1977 is, in general, irrelevant to any tenancy created on or after 15 January 1989. There are minor exceptions to this general rule to protect those who contracted to create a tenancy before that date or who already benefited from a Rent Act regulated tenancy and whose tenancy comes to an end in defined ways.[80]

2.84 Tenancies created before 15 January 1989 are not included in the new assured tenancy regime.[81] These provisions result in a persistent, but decreasing, number of tenancies for which the rights of the landlord and tenant remain governed by the old Rent Act regime.

The local authority sector

2.85 As we have seen, the 20th century saw a steady reduction in the availability of private sector rented housing. In the same period, the quantity of housing owned and rented out by local authorities increased enormously. By 1979 31.5% of all dwellings in Britain were owned by local authorities.[82]

2.86 As we have also seen, until 1980, the legislation which empowered local authorities to provide accommodation did not impose any substantial degree of regulation on how they should treat their tenants. Public sector landlords were assumed to be "model landlords". The primary measure which restricted local authority discretion was the Housing (Homeless Persons) Act 1977, which imposed obligations to provide housing for defined categories of person who were homeless or threatened with homelessness.

[76] *Ibid*, s 8.

[77] See paras 2.78 to 2.81above.

[78] It is important to recognise that a tenant under an assured shorthold is protected from eviction in precisely the same way as the tenant under a basic assured tenancy during the currency of the tenancy. It is only after the term of the tenancy comes to an end that the tenant becomes more vulnerable to eviction.

[79] Housing Act 1988, s 21(1) and (4).

[80] *Ibid*, s 34.

[81] *Ibid*, Sched 1, para 1 which came into force on 15 January 1989. Cf Housing Act 1996 (Commecement No 7 and Savings) Order SI 1997 No 225.

[82] David Hughes and Stuart Lowe, *Social Housing Law and Policy* (1995) p 36.

2.87 The Housing Act 1980 (consolidated into the Housing Act 1985) made fundamental changes to this position. In particular, tenants of local authorities were, for the first time, granted statutory security of tenure.[83]

Security of tenure under the secure tenancy

2.88 The mechanism by which the Housing Act 1985 grants security of tenure to a secure tenant is similar to that used for private sector assured tenancies in the 1988 Act described above. As under the private sector regime, the tenant's common law rights to terminate the tenancy are not affected, but the landlord who wishes to evict must get a court order. In the case of a periodic tenancy, the landlord is unable to bring the tenancy to an end except by obtaining an order for possession from the court.[84] If a fixed term tenancy comes to an end, either by effluxion of time or by order of the court, it is replaced by a periodic tenancy on similar terms.[85]

2.89 As under the private sector regime, the landlord is only entitled to a court order if it is able to make out one of a number of grounds set out in a Schedule to the legislation.[86] Unlike the private sector, however, there are no mandatory grounds for possession – though there are certain circumstances where possession must be ordered if the landlord authority can provide suitable alternative accommodation.

2.90 As under the private sector regime, the landlord must issue the appropriate notice of intention to take proceedings (a "notice of seeking possession") before going to court to recover possession.[87] This replaces the common law rules on notices to quit.

Rent under a secure tenancy

2.91 Public sector rents are set not by the market as such, but by local authorities which remain bound to charge "reasonable" rents. In setting rent levels, however, they must ensure that the relative rents of different local authority properties are in line with differentials in the private sector.[88]

2.92 Successive governments have sought to increase levels of council house rents to bring them closer to market rents. They have achieved this by introducing changes to the housing subsidy provisions.[89] The effect of this is that central government determines a rental figure which it "assumes" the local authority will charge. Subsidies bridge the gap between this assumed income and expenditure on

[83] These were accompanied by the creation of a range of other rights including the option of purchasing the house or flat they occupied, at a discount, under the right to buy scheme cf Housing Act 1985, Part V.

[84] Housing Act 1985, s 82.

[85] *Ibid*, s 86.

[86] *Ibid*, Sched 2.

[87] *Ibid*, s 83. Proceedings must actually be commenced within 12 months from the date stated in the notice.

[88] *Ibid*, s 24.

[89] Discussed in detail in A Arden and M Partington, *Housing Law* (2nd ed 1994) ch 4.

housing. Thus a local authority that fails to set this assumed figure as the local rent level will find that its Housing Revenue Account starts to go into deficit. The details of housing finance are beyond the scope of this Paper. The Government is currently consulting on further proposals for changing the housing subsidy regime.

2.93 Notwithstanding these developments, local authority rents still remain below market rents in most areas.

2.94 As in the private sector, financial assistance for tenants on low incomes is provided by housing benefit.

Introductory tenancies

2.95 Introductory tenancies were introduced by the Housing Act 1996; they are a mechanism by which local authorities may let dwellings without conferring security of tenure (or right to buy) on the tenant for a period of up to one year. At the end of this "trial period" an introductory tenancy becomes a secure tenancy.[90] They are particularly used by local authorities to provide tenancies, on a probationary basis, to those whom the authority suspects may need some encouragement to act as a responsible tenant. The one procedural issue is that a local authority cannot create an introductory tenancy unless it has passed a resolution in the Council to do so. The effect of passing such a resolution is that, henceforth, all new tenancies granted by that authority have to be, at least initially, introductory – not just those for whom a probationary tenancy would seem most appropriate. Introductory tenancies transform themselves into secure tenancies after they have been in existence for a year.

Security of tenure under the introductory tenancy

2.96 A landlord may only bring an introductory tenancy to an end by obtaining an order of the court.[91] There are no formal grounds on which the landlord must rely; instead the local authority must give reasons.[92] The tenant is entitled to have the decision reviewed.[93] If the local authority fails to give reasons, or its reasons or its review of them is inadequate, its decision will on general principles be vulnerable to judicial review.[94]

The housing association/registered social landlord sector

Housing Act 1980[95]

2.97 When the Housing Act 1980 created statutory rights of security of tenure for local authority tenants, these same provisions were also applied to registered housing

[90] Housing Act 1996, s 125(1)–(2).

[91] *Ibid*, s 127.

[92] *Ibid*, s 128(3).

[93] *Ibid*, s 129(1).

[94] Cf *R (on the application of McLellan) v Bracknell Forest Borough Council* [2001] EWCA Civ 1510; [2002] 1 All ER 899. Such review must take place, if it takes place at all, in the Administrative Court and not the County Court which has to make the possession order.

[95] These provisions were consolidated into the Housing Act 1985.

associations and a limited number of other housing associations.[96] Tenancies granted by housing associations which fell outside these two groups remained, as regards security of tenure, governed by the Rent Act. As regards rent regulation, however, the fair rent procedures of the Rent Acts continued to apply to all housing associations.

2.98 The effect of the 1980 Act was therefore that the tenants of most housing associations were treated on a par with the tenants of local authorities for the purpose of security of tenure, but on a par with private sector tenants for the purpose of rent regulation.

Housing Act 1988

2.99 These arrangements were altered in the Housing Act 1988. It provided that, henceforth, housing association tenancies – both registered and unregistered – were to be assured tenancies and thus were to be treated legally as private sector tenancies, rather than be linked to the public sector regime as had happened between 1980 and 1988.[97]

2.100 As a result, housing association landlords became entitled to use grounds for possession available to private sector landlords, including, most notably, the mandatory grounds for possession (for example, for rent arrears) available to private sector landlords.[98] Similarly, housing associations fell outside the rent fixing regime that applied to local authority tenancies. They sought to charge "affordable rents" – a policy concept rather than a legal concept – which reflects their position as providers of social housing.[99]

2.101 The White Paper presaging this change stated that the Government's aim was to increase access to private finance and that this would be assisted if housing associations were enabled to increase rents.[100] Interestingly, there was no suggestion that the landlord's greater power to recover possession under the assured regime would improve access to private finance.

2.102 None of these changes was retrospective. Accordingly, tenants of housing associations may, depending on the date of the creation of their tenancy, be regulated under the Rent Act regime, the secure tenancy regime or the assured tenancy regime. This is another source of complexity for tenants and managers of social housing.

[96] A registered housing association was deemed to satisfy the "landlord condition" in the Housing Act 1980, s 28 and subsequently the Housing Act 1985, s 80. The latter was amended by the Housing Act 1988.

[97] Housing Act 1988, Ch V, Sched 18.

[98] Though, in practice, the use of ground 8 by housing association landlords is limited by the ethos or constitution of the housing association itself.

[99] In the years since the Housing Act 1988 was passed many housing associations have developed their business so that they no longer exclusively provide social housing at affordable rents, but also provide some ordinary private housing at market rents. The profits from these are used to subsidise other activities and services provided by housing associations.

[100] Housing: The Government's Proposals (1987) Cm 214, p 12.

Funding and regulation by the Housing Corporation

2.103 Not all housing associations receive public funding, although for many this is a significant source of finance. The amount of public money available and the mechanism by which it reaches housing associations has altered over the years. Currently most funding from central government, both capital and revenue, is channelled through the Housing Corporation, a statutory corporation.[101] Some funding from central government is also provided directly.[102]

2.104 Public funding also comes from local authorities, which have power to fund registered social landlords directly[103] and are also entitled to assist housing associations which are not registered social landlords by lending money or subscribing for shares.[104]

REGISTRATION WITH THE HOUSING CORPORATION: REGISTERED SOCIAL LANDLORDS

2.105 In order to qualify for Housing Corporation grants, a housing association must register.[105] In so doing, a housing association submits itself to regulation and guidance issued by the Housing Corporation; further conditions and obligations are imposed on the receipt of funding.[106] In this way, the policies and behaviour of housing associations are to a great extent determined centrally.

2.106 Housing associations have a third source of finance in addition to public authorities and charitable donors, namely, commercial lenders. The Department for Transport, Local Government and the Regions estimates that, as at 4 December 2000, registered social landlords had received over £10 billion in private-sector loans.[107] It is the availability of such finance which is driving the current programme of transfers of housing from local authorities to housing associations.

Large Scale Voluntary Transfers

The development of the policy

2.107 Much more recently, a number of new housing associations have been formed specifically to receive and manage housing transferred from local authorities under section 32 of the Housing Act 1985.

[101] Funding may either come directly or from local housing authorities, acting as agents for the Housing Corporation under the Housing Act 1996, s 18(4).

[102] Under s 429A of the Housing Act 1985, the Secretary of State may provide funding directly in respect of public sector housing or housing transferred from the public sector.

[103] Under Housing Act 1996, s 22.

[104] Housing Associations Act 1985, s 58.

[105] Registration is under Housing Act 1996, s 1.

[106] Much of which can be obtained from the Housing Corporation website: http://www.housingcorp.gov.uk/

[107] Housing Factsheet No 5, *Housing Corporation and Registered Social Landlords* (December 2000). See further: http://www.housing.dtlr.gov.uk/factsheet/rsl/.

2.108 Initially, two methods to encourage transfers of housing stock from local authorities to housing associations were introduced by the Housing Act 1988 – "tenants' choice"[108] and housing action trusts.[109] The former was a procedure which allowed tenants to force the transfer of their houses to a new landlord approved by the Housing Corporation. The latter allowed the Secretary of State to set up a non-departmental government body to take over local authority housing in a particular area.

2.109 Neither of these initiatives proved popular. The "tenants' choice" provisions were repealed by Housing Act 1996[110] and although the housing action trust provisions remain in force, the last of these to be created was Stonebridge Housing Action Trust in Brent in 1994. We understand that the Department for Transport, Local Government and the Regions expects this to be the last.

2.110 However, the large scale voluntary transfer programme,[111] which has been running since 1988, has been far more effective. Under this scheme housing associations (nearly always registered social landlords) buy housing stock from local authorities. The Department for Transport, Local Government and the Regions reports[112] that, as at 7 March 2002, over 597,000 homes have been transferred under this scheme. The current Government's green paper[113] states that the Government will support the transfer of a further 200,000 dwellings a year. It has been estimated that by 2004 the majority providers of social housing will be registered social landlords.

The rationale of the large scale voluntary transfer programme

2.111 Loans taken out by local authorities to invest in public sector housing must be included in the Public Sector Borrowing Requirement calculations, and are effectively prevented by the Local Government and Housing Act 1989. Loans taken out by housing associations are, by contrast, omitted from the Public Sector Borrowing Requirement and from statutory controls. This makes large scale voluntary transfers attractive to central government and to many local authorities. Not only do they bring in capital receipts and enable local authorities to fulfil their housing duties, without having to own and manage housing stock directly, but they are the only effective way local authorities often have of increasing capital investment in the housing stock.[114]

[108] In Part IV of the Housing Act 1988.

[109] In Part III of the Housing Act 1988.

[110] It has been reported that as few as 981 homes in England took advantage of these provisions: Somerville, "Empowerment through residence" (1998) vol 13 No 2 Housing Studies at p 245.

[111] Sales under the scheme are made under the power in s 32 of the Housing Act 1985.

[112] http://www.housing.dtlr.gov.uk/transfers.

[113] Department for Transport, Local Government and the Regions, Quality and Choice: A Decent Home for All (April 2000) para 7.19.

[114] It is worth noting, however, that this increased investment is likely to be funded by what is, ultimately, public money; the interest paid to commercial lenders by housing associations are financed by rental revenue streams which, although nominally paid by the tenants, are often in practice reimbursed by the Government in the form of housing benefit.

Change of status

2.112 When a tenancy is transferred from a local authority to a housing association, the tenancy ceases to be a secure tenancy and becomes instead an assured tenancy.[115]

2.113 We have seen that the assured tenancy regulatory regime gives a somewhat lower level of security of tenure to tenants than the secure tenancy regime.[116] Tenants are in a position to block a proposed large scale voluntary transfer.[117] However, they do not tend to do so.[118] There appear to be four reasons for this:

(1) the proposal will often involve immediate capital investment in the tenants' properties which is attractive to tenants,

(2) the proposal will often include a rent guarantee, usually limiting rent increases for the first five years,

(3) tenants' right to buy is statutorily protected,[119] and

(4) housing associations typically undertake to transferring tenants not to take advantage of the mandatory grounds for recovering possession available under the assured tenancy regime.[120]

2.114 Most lenders interviewed for research conducted by the Chartered Institute of Housing stated that they would be as happy to lend on secure tenancies as on assured tenancies.[121] Research elsewhere has suggested that lenders are most interested in a steady rental stream, an adequate asset base and staff expertise.[122] It appears therefore that the availability of commercial loans does not depend on the change of regulatory status involved in large scale voluntary transfers. We welcome views and information on the extent to which lenders financing large scale voluntary transfer of housing stock from local authorities to registered social landlords are influenced by the fact that tenants of such stock change from secure tenants to assured tenants (with a protected right to buy).

[115] By virtue of Housing Act 1988, s 38. Cf the position with tenancies entered into by housing associations after the Housing Act 1980 came into force and before the Housing Act 1988 came into force. As we have seen, these were subject to the secure tenancy regime on creation, and this status was not altered by the Housing Act 1988. Seen para 2.97 to 2.98 above.

[116] See paras 2.80 and 2.89 above.

[117] Local Councils are obliged to consult affected tenants on transfer proposals and the Secretary of State will not consent to a transfer if a majority of tenants object: Housing Act 1985, s 106A and Sched 3A.

[118] Mullins, Niner and Riseborough, *Evaluating Large Scale Voluntary Transfers of Local Authority Housing* (1995) reported that two thirds of the ballots which had taken place under large scale voluntary transfer rules were in favour of transfer.

[119] Housing Act 1985, s 171A to 171H.

[120] Though whether such an undertaking would be legally enforceable by the tenant is doubtful. See *Rogers v Hyde* [1951] 2 KB 923 at p 931, *per* Lord Asquith: "Parties cannot of their own volition oust or reduce the jurisdiction of the courts to grant orders for possession".

[121] Chartered Institute of Housing, Marianne Hood, One for All – A Single Tenancy for Social Housing? (1998), p 21.

[122] R Chaplin et al, *Rents and Risks: Investing in Housing Associations* (1995).

Judicial review

2.115 A local authority is subject to public law and its housing decisions may, accordingly, be vulnerable to challenge by way of judicial review. On the other hand, whether a housing association is subject to public law will depend on the nature of the activity under scrutiny.[123]

2.116 In *Poplar Housing and Regeneration Community Association Ltd v Donoghue*[124] the Court of Appeal held that, for the purposes of section 6 of the Human Rights Act 1998, the role of the housing association in providing accommodation for the defendant and then seeking possession was so closely assimilated to that of the local housing authority that it was performing public functions and was, to that extent, a functional public authority. Although the decision did not relate to judicial review, the court stated that it had adopted a similar approach.

2.117 In arriving at its decision the court attached importance to the fact that the tenancy in question had been transferred to the defendant housing association and also suggested that its decision might have been different if the regulatory regime governing the tenancy in question had been different.

2.118 Although it is not within our remit, or power, to alter the circumstances in which the decisions of housing associations are subject to judicial review, we must be alert to the effect of our tenure proposals on this issue.

CONCLUSIONS: LESSONS OF HISTORY

The need for regulation

2.119 Perhaps the first conclusion to draw from this account is that the history of the last 150 years demonstrates that there are potential imbalances in the relationship between landlords and tenants which cannot be corrected solely by the operation of market forces. There is a role for the Government in the regulation of that relationship. Indeed, it is not only in the context of tenancies of residential accommodation that Governments have intervened.

2.120 History also suggests that if the legislative framework changes too frequently or is not perceived as striking a fair balance between the interests of landlords and the interests of tenants then this introduces considerable uncertainty into the legal environment in which housing services are provided. This uncertainty may well reduce the willingness of investors to invest in this sector of the economy.

2.121 Three key issues have emerged as the subjects for regulation. First is what mechanisms should be used to ensure that the rent that may be charged for rented accommodation can be afforded by those who wish or need to rent their accommodation. Second is what are the circumstances in which and the procedures by which landlords may regain possession of the accommodation they

[123] For a discussion cf J Alder and C Handy, *Housing Associations: The Law of Social Landlords* (3rd ed 1997) p 30 to 32. Cf also *R v Servite Houses, ex p Goldsmith* [2000] EWHC Admin 338; [2001] LGR 55.

[124] [2001] EWCA Civ 595; [2002] QB 48. The case is further discussed at Part V paras 5.46 to 5.52 below.

have rented. Third is what means should be adopted to ensure that accommodation that is rented is in a condition that is fit for human habitation. Although the principal focus of this consultation paper is on the second of these issues, the other two must not be forgotten.

Legislative strategies

2.122 The legislative strategies for attempting to redress imbalances between landlord and tenant have varied over the years, as the context within which housing regulation has operated has changed. Early legislation, developed in relation to the private sector, placed the emphasis on using detailed statutory provisions to over-write contractual provisions set out in tenancy agreements. This has resulted in a vast body of law, of considerable complexity which is largely inaccessible to the majority of landlords, tenants and even their advisers. In addition, it has meant that terms appearing in tenancy agreements have not been a true reflection of the legal position as between landlord and tenant. Complexity and opacity have been two of the main reasons why the Law Commission has been asked to undertake this project.

2.123 The justification for this approach, in the early days, was that the predominant provider of rented accommodation was the private landlord; there were no alternative suppliers. Owner-occupation was not, 100 years ago, a realistic option for the bulk of the population; and there was no social rented sector as we know it today.

2.124 The dominant place of private landlords in the housing market gave them the ability to exploit shortages in housing provision and where – as happened in the First World War – this led to accusations of profiteering, the political pressure for the Government to intervene proved irresistible. Arguably, capping rent levels and increasing security of tenure for tenants at the poorer end of the market was then both justifiable and, indeed, the only form of regulatory response – at least in the short-term.

Changing contexts 1: the private sector

2.125 That context has changed dramatically in the interim: nearly two-thirds of the population now own their housing, there is a very substantial social rented sector and the provision of housing by private landlords is currently much more limited. Their power in the market place has therefore changed. However the essential legislative strategy established in 1915 remained the same until the major changes introduced in 1988.

2.126 From then, the attempt to make private sector dwellings affordable through the use of rent regulation was largely abandoned.[125] Instead, subsidising rents by means of a national housing benefit scheme has come to be acknowledged as a better way to

[125] The role of rent officers in determining maximum rents for housing benefits purposes can be said to represent a new form of rent regulation: see M Partington, "The Re-Introduction of Rent Control?" (1997) 1 JHL 8.

achieve this policy objective.[126] And landlords know that if their rent levels are at or above the levels at which mortgage finance can be secured, potential tenants will often prefer to buy rather than rent.

2.127 Statutory security of tenure has also been severely reduced. While the principle of possession not being granted without a court order remains, in many cases private landlords are entitled to regain possession by means of a summary procedure only – without the delay and expense of a court hearing.

Deregulation

2.128 The scope of this de-regulation, arguably, means that many of the justifications for the extensive exclusions from the regulatory framework – which has been the source of much of the complexity of housing law – now fall away. We shall be seeking consultees views on this issue in context below.

2.129 Much of the justification for this de-regulation of the private rented sector can be said to derive from the role which the private landlord now plays in the rental market. There are considerable numbers of people who seek accommodation on a relatively short-term basis, for whom renting remains a preferable option.

2.130 At the same time, however, there is a part of the private sector that is having to deal with some of very difficult categories of tenant – in particular, those who have been removed from the social rented sector (for example, because they have failed to pay their rent or have engaged in anti social behaviour) or who for other reasons fall outside the scope of the social rented sector. One of the challenges for the future is to see how, within the private rented sector, such groups may be encouraged to develop a more socially responsible approach to meeting their housing needs. If the private sector focuses too much on those seeking short-term accommodation, how will those who need stability in their lives – which security of tenure may provide – obtain it?

Future developments?

2.131 Three possibilities immediately spring to mind. The first is that, as has occurred in other sectors of the economy, more encouragement should be given to the suppliers of rented housing to work together. There are groups, such as the British Property Federation and the Small Landlords Association, which are seeking to develop standards of good letting practice. But the fragmentation of the supply side is such that their impact has, to date, been limited.

2.132 Second, the new strategic role of local housing authorities provides them with opportunities to agree practices with landlords at the local level. The recent Department for Transport, Local Government and the Regions paper on local accreditation schemes gives an indication of a way forward, particularly if appropriate incentives can be put in place to encourage private landlords to sign

[126] Although there is great concern in Government about the current housing benefit scheme, and options for radical change are being considered, there are no suggestions that the re-introduction of rent control is one of the options.

up to the scheme.[127] However these issues fall outside the scope of the detailed proposals we shall be making in this paper.

2.133 A third possibility is that the Housing Corporation – which has, historically, had the task of setting standards for the housing association/registered social landlord sector – might develop a more universal role in the establishment of standards of good practice for all providers of rented housing. Again this idea goes far beyond our terms of reference, but is we think part of the changing context within which our own proposals should be considered.

Changing contexts 2: the local authority sector

2.134 In relation to public sector housing, Governments began by creating a legislative framework that empowered local authorities to provide residential accommodation to the poor at affordable prices. Subsidies of the costs of providing the housing have been replaced by housing benefit, which is now used to subsidise individual tenants' housing costs where necessary.

2.135 The earlier discretion as to how local authorities should manage the estates has, however, been replaced by statutory codes, in particular relating to the allocation of housing and security of tenure. Indeed legislative trends in relation to the public sector have been the reverse of those seen in the private sector.

2.136 Although there may be those who would wish to return to the days before statutory security of tenure, this is not currently regarded as a serious political option. Indeed, the impact of the Human Rights Act – another of the ways in which the context for regulating housing has significantly changed – might even undermine attempts to repeal statutory protections relating to security of tenure and possession proceedings.

Changing contexts 3: housing associations

2.137 Housing associations have, as noted above, somewhat fallen between the private and public sectors – being treated at some times analogously to local authorities, at other times to private landlords and at yet other times simultaneously to both. The changing context here, too, is of importance. The large-scale transfers of local authority housing to registered social landlords suggest to us that the time has come to develop a single regulatory framework which would apply across the social rented sector;[128] but this will mean some important adjustments of detail on which consultees will be asked to comment.

The rise of a consumer perspective

2.138 Developments in the housing market cannot, however, be seen in isolation. The last 30 years has seen a revolution, throughout the service economy, in attitudes

[127] Department for Transport, Local Government and the Regions, Developing a voluntary accreditation scheme for private landlords: A guide to good practice (August 2000). Cf http://www.housing.dtlr.gov.uk/information/voluntary/index.htm.

[128] We remain anxious to ensure that those private landlords who are not registered social landlords but who wish to adopt letting policies akin to registered social landlords and local authorities should be enabled to do so, should they so wish.

towards consumers, designed to protect them from unfair trade practices and unfair contractual provisions. Historically, the provision of housing has not been widely regarded as a sector of the economy to which principles of consumer protection would naturally apply. However we are not convinced that, for example, the principle that something should be "fit for purpose" (which applies in the context of the sale of goods) should not equally apply to the provision of housing. We have already developed arguments on these lines in the work we did on the landlord's liability to repair.[129]

2.139 We note that in the United States, case law has gone even further down this path through the development of a "warranty of habitability".[130] This approach has played a very significant part in the development of tenants' rights in the US. The use of contract law to bring actions for breach of tenancy obligations has also been a significant feature of housing law practice in this country, especially in the area of disrepair.

2.140 We see much advantage in conceptualising housing law as a branch of consumer law, albeit a specialist one. In this paper, therefore, we shall be developing arguments that the importance of the contract between the landlord and tenant – which earlier housing law, particularly the Rent Acts, perhaps rather diminished – should be reasserted, but with the proviso that such contracts must comply with the essential principles of fairness that underpin key parts of consumer law. We will therefore be asking consultees to comment on proposals for the adoption of agreements which comply with the Unfair Terms in Consumer Contracts Regulations 1999.[131]

2.141 Nevertheless, we think that greater reliance on the contractual relationship between landlord and tenant, albeit mediated by provisions on unfair terms, would do much to stress the fact that *both* landlords *and* tenants have duties as well as obligations in relation to the premises they rent. It is important that proper recognition is given to the balance of interests to both sides of the contract.

Other issues

2.142 There may also be other issues which we have not taken fully into account. We are, for example, very aware of the sharp distinctions there are in the housing market in different parts of the country. Severe pressures on the housing market in one area are balanced by the opposite in other areas. We think that a new framework of housing law should reflect these differences and should be flexible, rather than act as a straightjacket to apply in all cases irrespective of local factors.

2.143 Similarly, there may be environmental issues. Rigid rules on security of tenure, for example, may hamper the further development of an area in ways which would be socially beneficial to that community.

[129] Landlord and Tenant: Responsibility for State and Condition of Property (1996) Law Com No 238 paras 8.34 – 8.59.

[130] *Javins v First National Realty Corp* (1970) 138 App DC 369.

[131] SI 1999 No 2083. These apply in any event to residential tenancy agreements: cf Office of Fair Trading, Guidance on Unfair Terms in Tenancy Agreements (November 2001) Cf also http://www.oft.gov.uk/News/Publications/Leaflet+Ordering.htm under the Reports link.

2.144 There are also broader issues of social policy to be considered. There are significant demographic changes to be taken into account. The fact that people live longer and that more people are living alone obviously impacts on the housing market in general, but will also have more specific impact on the rented sector and the regulatory framework of that sector.

2.145 The present Government is developing a number of measures in its Supporting People programme which have implications for the regulation of the housing market.[132] We need to be sure that our proposals fit with these ideas.

2.146 More generally, the Government is committed to addressing the question of social exclusion. The provision of accommodation and the ability of individuals to take responsibility for their housing needs is a key element in assisting the inclusion of the socially excluded.

2.147 Not all these issues are directly related to the specific exercise which is the focus of this paper. And while we must be aware of the broader picture, our proposals have been developed independently of the Government and its priorities. But if the structure we propose is to be robust enough to meet the challenges of the coming years, we must take into account not only how the context has already changed but how it may change in the future.

[132] For guidance on the programme cf http://www.supporting-people.dtlr.gov.uk/.

PART III
HOUSING STATUS AND SECURITY OF TENURE: PROMOTING SIMPLIFICATION

INTRODUCTION

3.1 Part II provided an overview of how housing law has developed over the last century, and identified some lessons to be drawn from the approaches that have been adopted in the past. Here we set out in summary form

(1) a statement of the statutory schemes for residential tenancies that exist in the current law;

(2) a statement of the types of arrangement excluded from the three principal schemes;

(3) the statutory provisions relating to security of tenure; and

(4) a summary of ways in which the statutory schemes differ.

3.2 This provides the essential backdrop against which our proposals for change can be set. The impact of the Human Rights Act 1998 is discussed separately in Part V below.

3.3 As will be seen, the current position is extremely complex. The project's principal objective is simplification. Indeed that objective is central to the statutory function of the Law Commission. As a preliminary issue we consider the challenge of simplification.

THE CHALLENGE OF SIMPLIFICATION

3.4 In proposing simplification, it is important to recognise the reasons why the current law is so complex. Legal complexity is in large part the result of political decisions taken at different stages in the development of housing law about which categories of agreement should or should not fall within the scope of any regulatory scheme. Legislators have in the past thought it right to make a large number of special provisions for particular situations. We do not seek to challenge the validity of those past decisions. But we do need to make clear the consequences of those decisions. They have resulted in the complexity that now confronts us.

3.5 If there is to be a radical simplification of the current position, the differences in the present law must be significantly reduced. While accepting the government's view that the broad balance of rights as between landlords and tenants should remain, there will need to be adjustments – on both the landlords' and the tenants' side – to the current position.

3.6 In addition, if there is to be real simplification of the present position, as opposed to the creation of yet more complexity by the addition of yet another layer of regulatory legislation onto the existing statutory schemes (and the exemptions and exclusions therefrom), we have to find a way of mapping existing tenancies onto the new framework so that from the date any new legislation is effective, all residential tenancies are covered by the new scheme.

3.7 To that extent, and reflecting a general comment we made in Part I,[1] in making our proposals, we have to make choices that will change the details of the existing package of rights and obligations. We think that our proposals do reflect the view that the broad balance between the rights of landlords and the rights of tenants should not be disturbed. To that extent, while our proposals necessarily involve policy choices, we are confident that they fall within the proper constraints of a law reform project.

3.8 Furthermore, we accept that there is a general disinclination to legislate with retrospective effect. We think, however, that objections rightly raised in the context of the criminal law have less force in the area of civil law. We are also very conscious that were retrospective legislation to substantially damage existing rights this might anyway attract challenge under the Human Rights Act 1998.

3.9 However, if we are to satisfy our statutory function to simplify and modernise the law, we think we should put forward proposals which seek to cover existing residential agreements as well as future ones. It will of course be for consultees in the first instance, and at a later stage government, to consider whether – in developing our proposals for a simpler structure – we have gone too far by proposing that our scheme should have retrospective effect.

3.10 We also accept that, even if the general principle that our proposed new scheme should apply to all residential tenancy agreements, not just ones entered into after any new legislation comes into effect, is broadly agreed, there will need to be transitional provisions to protect essential rights available under existing arrangements. We consider below in Part XIV how existing tenancy schemes might map onto our proposals.

HOUSING STATUS: THE STATUTORY SCHEMES

3.11 The current position is that the occupiers of residential accommodation may either fall into one of the following statutorily defined housing status categories or may fall outside these statutory schemes.

Secure tenancies

3.12 Secure tenancies are created under the provisions of the Housing Act 1980, as consolidated into the Housing Act 1985.[2] Two specific conditions must be satisfied: a landlord condition[3] which restricts the secure tenancy regime local housing authorities; and a tenant condition.[4] In addition, tenancies created by registered housing associations between 1980 and before 15 January 1989 are

[1] See paras 1.14 to 1.16 above for a discussion of the border between law reform and social policy.

[2] Housing Act 1985, s 79.

[3] *Ibid*, s 80.

[4] *Ibid*, s 81: "The tenant condition is that the tenant is an individual and occupies the dwelling-house as his only or principal home; or where the tenancy is a joint tenancy, that each of the joint tenants is an individual and at least one of them occupies the dwelling-house as his only or principal home."

secure tenancies for the purposes of security of tenure;[5] though they are also "housing association tenancies", and thus in effect treated as Rent Act protected tenancies, for the purpose of fair rent regulation.

Introductory tenancies

3.13 Introductory tenancies are also created by local authorities under the provisions of the Housing Act 1996.[6] They can only be created in those authorities that have elected to adopt the introductory tenancies scheme; but once such election has been made, *all*[7] new tenancies created by the authority must be introductory, irrespective of whether such a tenancy is really appropriate for a particular tenant or not. Introductory tenancies usually last for a year, after which they become secure tenancies. The provide only very limited security of tenure to tenants.

Assured tenancies

3.14 Assured tenancies are tenancies created by private landlords and registered social landlords which have been entered into on or after 15 January 1989.[8] Assured tenants have a high degree of security of tenure, similar to but not identical with secure tenants (above) and Rent Act protected tenants (below).

Assured shorthold tenancies

3.15 Assured shorthold tenancies are, strictly, only a type of assured tenancy. Tenants have only limited security of tenure, apart any contractual period that may be agreed between the landlord and tenant. Initially they could only be created if the landlord adhered to a number of qualifying conditions;[9] from 28 February 1997, these conditions have been removed, and they are the "default" tenancy for the private rented sector.[10]

3.16 All new private sector tenancies will be assured shorthold tenants, unless a landlord decides to opt into the fully assured tenancy. The category of landlord most likely to make such a choice is that of registered social landlords (housing associations) who provide social housing with long-term security of tenure. A small number of private housing charities and other private landlords who are not registered with the Housing Corporation are also thought to have made such a choice.

[5] Housing Act 1985. The same principle applies to tenancies created by the Housing Corporation and housing charities. Housing associations registered both with the Housing Corporation and with the Registrar of Industrial and Provident Societies fell outside the scope of these provisions; thus tenancies created by such bodies were wholly under the Rent Act scheme.

[6] Housing Act 1996, ss 124 to 125.

[7] There are a few technical exceptions to this proposition.

[8] Housing Act 1988, s 1.

[9] *Ibid*, s 20.

[10] *Ibid*, s 19A (introduced by the Housing Act 1996).

Rent Act protected tenancies

3.17 These are tenancies created by private landlords before the Housing Act 1988 came into force on 15 January 1989. No new Rent Act tenancies have been created since then.[11] But there is a significant number of tenants who retain Rent Act protection, either because they were the tenants under the original protected tenancy, or because they have the statutory right to succeed to the Rent Act protected tenancy.[12] As with assured and secure tenants, Rent Act tenants have a high degree of security of tenure.

EXCLUDED TENURE GROUPS

3.18 A large number of different groups of tenants and other occupiers are excluded from these principal statutory categories.

Tenancies falling within other statutory schemes

Mutual exclusions

3.19 First, tenancies within one of the three principal regimes listed above are mutually excluded from coverage by another regime (for example, assured tenancies cannot be secure tenancies and *vice versa*).

3.20 Tenants can however change tenure groups. For example, secure tenants will become assured tenants, when the "landlord condition" – that secure tenancies can only be created by local housing authorities – is no longer satisfied. This frequently occurs where local authority dwellings are transferred to registered social landlords. Similarly Rent Act protected tenants could become secure tenants, should a local housing authority purchase a dwelling formerly owned by a private landlord.[13]

Other statutory schemes

3.21 Other categories of tenancy which fall outside the three principal regimes listed above include

(1) business lettings,[14]

(2) agricultural holdings,[15]

(3) dwellings let with a substantial quantity of other land,[16]

[11] *Ibid*, s 34; there are – as usual – a small number of technical exceptions to this proposition.

[12] See para 1.73 above.

[13] To this extent, mapping existing tenancies onto our proposed scheme may not be as quite as novel a step as might first be thought.

[14] Housing Act 1985, Sched 1, para 11and Housing Act 1988, Sched 1, para 4. These are covered by the Landlord and Tenant Act 1954 Part II.

[15] Housing Act 1985, Sched 1, para 8 and Housing Act 1988, Sched 1, para 7. These are covered by the Agricultural Holdings Act 1986.

[16] Rent Act 1977, s 6.

(4) long leases,[17] and

(5) mobile homes.[18]

Lettings for particular purposes

3.22 A number of types of letting for particular purposes have also been largely excluded from the three principal regimes. These include

(1) lettings by educational institutions to students,[19]

(2) holiday lettings,[20]

(3) tied accommodation,[21]

(4) licensed premises,[22] and

(5) lettings of accommodation required by a minister of religion.[23]

3.23 In addition, under the former Rent Acts, lettings by resident landlords (formerly, tenancies where furniture, board or attendance was provided), where the assumption was that lettings were likely to be on a short-term basis, were largely excluded from statutory protection.[24]

Tenancies which have been left outside the schemes

3.24 There is a number of categories of tenancy which have been left outside the schemes, principally because the original focus of the schemes was on the dwellings of the poor and less well-off. In this category are excluded

(1) properties above certain rateable value levels,[25]

(2) properties above certain rental levels,[26] and

(3) properties below certain rental levels at no or low rents (these are usually the subject of leasehold arrangements rather than shorter tenancy arrangements).[27]

[17] Housing Act 1985, Sched 1, para 1.

[18] These are covered by Mobile Homes Act 1973 and 1983.

[19] Housing Act 1985, Sched 1, para 10 and Housing Act 1988, Sched 1, para 8.

[20] *Ibid*, Sched 1, para 9.

[21] *Ibid*, Sched 1, para 2.

[22] *Ibid*, Sched 1, para 9 and Housing Act 1988, Sched 1, para 5.

[23] This is a mandatory ground for possession: Housing Act 1988, Sched 1, Ground 5.

[24] Rent Act 1977, s 12. These were known as "restricted contracts" under the Rent Act 1977, s 19.

[25] Housing Act 1988, Sched 1, para 2.

[26] The abolition of the domestic rating system has led to considerable complexity in ascertaining whether a property is within the scope of the Housing Act 1988.

Only or principal home

3.25 In addition, there is a general principle that if a tenant already has a tenancy which falls within one of the principal schemes,[28] then the same tenant cannot have another tenancy falling within the same category. Protections are limited to the accommodation in which the tenant has his "only or principal home".

Other exclusions from the secure tenancy regime

3.26 Three categories of lettings/licences fall outside the secure tenancy scheme. These include

(1) almshouse licences,[29]

(2) dwellings on land acquired for development,[30] and

(3) accommodation provided for temporary purposes, including housing for the homeless,[31] for asylum seekers,[32] persons taking up employment,[33] certain other accommodation provided on a short-term basis[34] and temporary accommodation provided during the carrying out of works.[35]

Other exemptions: Crown tenancies

3.27 The position of residential lettings by the Crown has always been treated as a special case outside the statutory schemes.[36]

Licensees

3.28 Those with licences to occupy premises are outside the basic statutory framework, apart from the limited category of secure licences which fall within the Housing Act 1985.[37] They do not fall entirely outside statutory protection. The Protection from Eviction Act 1977 applies to licences, unless they fall within a special sub-group of "excluded licences".

Protection from Eviction Act 1977

3.29 The Protection from Evictions Act 1977 provides that rights to occupation cannot be brought to an end without a notice to quit of at least 28 days from the landlord,

[27] Housing Act 1988, Sched 1, para 3.

[28] Or, indeed, is the owner of a dwelling elsewhere which is his principal home.

[29] Housing Act 1985 Sched 1, para 12.

[30] *Ibid*, Sched 1, para 3.

[31] *Ibid*, Sched 1, para 4.

[32] *Ibid*, Sched 1, para 4A and Housing Act 1988 Sched 1 para 12A.

[33] *Ibid*, Sched 1, para 5.

[34] *Ibid*, Sched 1, para 6.

[35] *Ibid*, Sched 1, para 7.

[36] Housing Act 1988 Sched 1 para 11.

[37] *Westminster City Council v Clarke* [1992] 2 AC 288.

and without the landlord obtaining an order from the court. This is a general rule that covers all occupiers of homes that fall outside one of the three principal schemes. Thus it can be more procedurally complex to obtain a court order for possession of a tenancy falling outside the principal regulatory regimes than for one within it. In particular, the summary procedures for obtaining possession of premises let under assured shorthold tenancies[38] are not available to landlords of premises wholly outside the protective framework.

3.30 These provisions do not apply to "excluded licences and tenancies". Exclusions are not determined by the legal status of the occupiers as tenants or licensees, but are the result of factual characteristics set out in section 3A. A tenancy or licence is excluded if

(1) the landlord or licensor shares accommodation[39] with the occupier and occupies the property as his only or principal home;[40]

(2) a member of the landlord's or licensor's family[41] shares accommodation with the occupier and occupies the premises as his only or principal home;

(3) it is granted as a temporary expedient to a person who entered the premises in question or any other premises as a trespasser;

(4) it grants the tenant or licensee the right to occupy the premises for a holiday only;

(5) it is granted otherwise than for money or money's worth;

(6) it is granted in order to provide accommodation under Part VI of the Immigration and Asylum Act 1999; or

[38] A landlord under an assured shorthold tenancy, seeking possession, can do so by means of an accelerated possession procedure that can be completed on the papers and does not required attendance at court.

[39] Shared accommodation in this context means not only shared living accommodation but also includes the right to share any accommodation other than storage, staircase, passage, corridor or other means of access: Protection from Eviction Act 1977 ss 3A(4)–(5).

[40] Only or principal home has the same meaning as in Housing Act 1988, s 1 and Housing Act 1985, s 81.

[41] Someone is a member of a person's family if it is a relationship listed in the Housing Act 1985, s 113: "(a) he is the spouse of that person or he and that person live together as husband and wife, or (b) he is that person's parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew or niece."

(7) it confers rights of occupation in a hostel within the meaning of the Housing Act 1985[42] where the landlord is listed in section 3A(8) of the Protection from Eviction Act 1977.[43]

Social Housing

3.31 The Protection from Eviction Act applies to social landlords as much as private landlords. Therefore there is a requirement on the social landlord to obtain a court order to evict an occupier even if a particular occupancy arrangement is excluded from the Housing Act 1985 or the Housing Act 1988. This applies regardless of the lease/licence distinction.

3.32 It is clear to us that there is a great deal of confusion amongst social housing providers about the law particularly in relation to the legal rights of occupiers of supported provision, provided for vulnerable groups. This confusion operates to limit tenants' rights, distorts housing management decisions and ultimately brings the law into disrepute.[44]

Total exclusion from statutory regulation

3.33 Where a tenancy (or licence) falls outside the principal regulatory regimes and is also excluded from the Protection from Eviction Act 1977, the legal relationship between landlord and occupier is governed by the common law and the terms of the agreement between the parties, plus any statutorily implied terms.

Criminal Law Act 1977, Part II

3.34 The consequence of exclusion from the Protection from Eviction Act 1977 is that there is no need for the landlord/licensor to obtain a court order to evict the occupier and there is no need for the landlord to give 28 days' notice to quit.[45] The process of determining the tenancy will be as provided for in the tenancy agreement; in the case of contractual licences, reasonable notice must be given if the contract does not deal with the issue.

3.35 However, Part II of the Criminal Law Act 1977 may indirectly provide some statutory protection to the occupier.[46] Section 6 provides that any person who, without lawful authority, uses or threatens violence for the purpose of securing

[42] A hostel is defined in the Housing Act 1985, s 622 as "a building in which is provided, for persons generally or for a class or classes of persons:

(a) residential accommodation otherwise than in separate and self-contained sets of premises and

(b) either board or facilities for the preparation of food adequate to the needs of those persons, or both."

[43] These can be summarised as public sector hostel providers.

[44] See Helen Carr, "The Sorting of the Forks from the Spades: an Unnecessary Distraction in Housing Law?" in D Cowan (ed) *Housing: Participation and Exclusion* (1998) p 107.

[45] As required by the Protection from Eviction Act 1977, s 5.

[46] Here "occupier" simply means someone present on the premises. Their legal status as occupier, or indeed their lack of legal status is irrelevant.

entry into any premises for himself or for any other person is guilty of an offence, provided that

(1) there is someone present on those premises at the time who is opposed to the entry which the violence is intended to secure; and

(2) the person using or threatening the violence knows that that is the case.

3.36 There is an exception to the offence, set out in section 6(1A), available to the person seeking entry who is a displaced residential occupier or a protected intending occupier of the premises or someone who is acting on behalf of such an occupier. Protected intending occupiers are defined in section 12A of the Criminal Law Act 1977 and include someone with a freehold interest or a leasehold interest with not less than two years to run who requires the premises for his own occupation as a residence. The risk of exposing a protected intending occupier of premises to proceedings under the Criminal Law Act 1977[47] can be avoided if the person obtains an interim possession order[48] from the court.

3.37 The complexity of these statutory provisions means that evictions without court orders, even if prima facie permitted by law, run the risk of criminal sanctions. Landlords are always well advised to seek the security of court orders.

SECURITY OF TENURE AND GROUNDS FOR POSSESSION

3.38 We now set out, in summary form, the statutory grounds for possession that attach to each of the three principal schemes of protection. They are as follows:

Secure tenancies

3.39 In relation to secure tenancies there are 18 grounds for possession.[49] They fall into three broad categories.

(1) Those where the court has a discretion to order possession on the grounds that it is reasonable to do so.

(2) Those where the court may order possession where suitable alternative accommodation is available.

(3) Those where the court may order possession where it thinks this would be reasonable and where suitable alternative accommodation is available.

3.40 Although we do not set out the full detail of each ground, we think that the reader may find it helpful to bear the following summary of the grounds in mind, particularly when we come to discuss how our proposed scheme for security of tenure may operate.

[47] Criminal Law Act 1977 Part II.

[48] Interim possession orders are made under County Court Rules Order 24, still operative despite the general reform of procedures for obtaining possession of land found in the CPR Pt 55.

[49] Housing Act 1985, Sched 2.

3.41 The circumstances falling into category (1) are set out in table 1; those in category (2) in table 2, and those in category (3) in table 3.

Table 1

Secure tenancies: grounds where the court thinks it reasonable to order possession

Ground number	Ground
1	Rent arrears or breach of tenancy agreement.
2	Tenant or other person residing in or visiting causing a nuisance or being convicted for immoral/illegal use or for an arrestable offence in locality.
2 A	Domestic violence by the tenant, and victim is driven from the premises and unlikely to return.
3	Acts of waste or neglect by the tenant or other resident causing deterioration of dwelling.
4	Ill-treatment of furniture by tenant/resident causing deterioration.
5	False statement made to obtain tenancy.
6	Premium has been paid for a mutual exchange made under Housing Act 1985, section 92.
7	Tenant or other person residing in the premises has been guilty of conduct which makes it no longer right for him to retain job-related accommodation.
8	Secure tenant decanted to property while works done on main home and these works are now complete.

Table 2

Secure tenancies: grounds where suitable alternative accommodation is available

Ground number	Ground
9	The premises are statutorily over-crowded.
10	Landlord intends demolition or reconstruction or other works requiring possession.
10 A	Dwelling in area approved by the Secretary of State or the Housing Corporation for a redevelopment scheme.
11	Conflict with objects of charity, where landlord is a charity.

Table 3

Secure tenancies: grounds where suitable alternative accommodation is available and the court thinks it reasonable to order possession

Ground number	Ground
12	Tenant is ex-employee in job-related accommodation required for another person.
13	Specially designed property required for physically disabled person.
14	Landlord is specialist housing association or trust which requires the property for person in its client group.
15	Property is situated close to special needs provision, and is required for person with such special needs.
16	Tenant has succeeded to the premises, but they are now larger that reasonably required. Proceedings under this head cannot take place before six months after the previous tenant's death, or more than 12 months after it. Special factors – age, time there, support to previous tenant – are to be taken into account.

Assured tenancies

3.42 Under the assured tenancy regime there are now also 18 grounds for possession.[50] These are divided into two broad categories.

(1) Mandatory grounds: where the court must order possession if the ground alleged is proved.

(2) Discretionary grounds: where the court may order possession where it thinks it is reasonable so to do.

3.43 The circumstances under category (1) are summarised in table 4, those in category (2) in table 5.

Table 4

Assured tenancies: grounds where the court must order possession

Ground number	Ground
1	Premises which are let are the landlord's former or future principal home.
2	Mortgagee repossessing premises let by the landlord under ground 1.
3	Former holiday let which has been let for no more than eight months in the off season.
4	Fixed term tenancy of not more than 12 months of premises formerly let by an educational institution to a student.
5	Premises are held to be available for occupation by a minister of religion and the court is satisfied that they are actually required for occupation by a minister of religion.
6	Demolition or reconstruction or substantial works by original landlord, requiring possession.
7	Inherited periodic tenancy, where proceedings are started within 12 months after death or the date on which the landlord became aware of the death.
8	Rent arrears, eight weeks both at the date of the notice seeking possession and the date of the hearing.

[50] Housing Act 1988, Sched 2.

Table 5

Assured tenancies: grounds where the court thinks it reasonable to order possession

Ground number	Ground
9	Suitable alternative accommodation.
10	Rent arrears at the date of the notice seeking possession and at the issue of the proceedings.
11	Persistent delay in paying the rent, even if no arrears now.
12	Any other breach of the tenancy agreement.
13	Waste or neglect by the tenant or other resident causing deterioration of dwelling.
14	The tenant or a person residing in or visiting the premises is guilty of conduct causing a nuisance or has been convicted for immoral/illegal use of the premises or for an arrestable offence committed in the locality.
14 A	(Registered social landlords only): tenant guilty of domestic violence, and victim is driven from the premises and is unlikely to return.
15	Ill-treatment of furniture by tenant or another resident causing deterioration.
16	Tenant is ex-employee of landlord living in accommodation needed for another employee.
17	False statement by the tenant to obtain the tenancy.

Rent Act protected tenancies

3.44 As with assured tenancies, the 19 statutory grounds for possession (technically called "cases"[51]) are divided into two categories.

(1) Discretionary, where the court may order possession if the ground alleged is proved and the court thinks it reasonable to make the order.

(2) Mandatory, where the court must order possession if the ground alleged is proved.

[51] Rent Act 1977, Schedule 15.

3.45 In addition, and unlike the codes for the secure and assured tenancy regimes, the ground for possession on the basis that the landlord is able to provide suitable alternative accommodation does not fall within the list of cases, but is found in a separate statutory provision in the body of the legislation.[52]

3.46 The cases falling into category (1) are set out in table 6, those in category (2) in table 7.

Table 6

Rent Act tenancies: cases where the court thinks it reasonable to order possession

Case number	Case
1	Rent arrears or other breach of the tenancy agreement.
2	Where the tenant or person residing or lodging with him or a sub-tenant is guilty of nuisance (more narrowly defined than for assured or secure tenancies) or has been convicted for immoral or illegal use of the dwelling.
3	Waste or neglect by the tenant or other resident causing deterioration of the dwelling.
4	Ill-treatment of furniture by the tenant or other resident causing deterioration.
5	Notice to quit issued by the tenant, where the landlord plans to sell the premises.
6	There has been an unauthorised assignment or sub-letting of the premises.
8[53]	The tenant is an ex-employee of the landlord and the premises are needed for a new employee.
9	The landlord or a member of his family reasonably requires the premises for their own home.
10	The tenant is over-charging a sub-tenant.

[52] *Ibid*, s 98.

[53] Case 7 was repealed by the Housing Act 1980.

Table 7 **Rent Act tenancies: cases where the court must order possession**	
Case number	**Case**
11	Premises are the landlords' former or future home.
12	Premises are a home bought by the landlord in anticipation of retirement.
13	Letting is for a fixed period of no more than eight months of a dwelling used for holiday lettings.
14	The letting is for a fixed term of no more than 12 months of premises formerly let by an educational institution to students.
15	The premises are held for use by a minister of religion and are now required for a new incumbent.
16-18	Lettings of accommodation to former agricultural employees.
19	Protected shorthold tenancies.
20	Dwelling owned by a member of the armed forces now returning to live in it.

Occupiers outside the principal schemes

3.47 Occupiers of residential accommodation who do not fall within one of these schemes have their rights determined principally by the contractual terms of their tenancy agreements. In addition, they come within the scope of the Protection from Eviction Act 1977, unless their agreement is an "excluded tenancy or licence".[54]

THE ASSURED TENANCY, SECURE TENANCY AND RENT ACT TENANCY SCHEMES COMPARED

Use of mandatory grounds

3.48 In the case of grounds 1 to 5 under the assured tenancy regime, and cases 11 to 20 under the Rent Act regime, the ability of the landlord to use the ground is not absolute, but is contingent upon the landlord issuing a notice at the start of the tenancy informing the tenant that he might seek to use the mandatory ground for possession.

[54] See para 3.30 above.

3.49 In the case of grounds 1 and 2 and cases 11, 12 and 20, the court has a discretion to dispense with this notice if that would be "just and equitable".

3.50 In the case of assured shorthold tenancies created before 28 February 1997, specific formalities were required as a pre-condition to the valid creation of the tenancy. These were

(1) that a notice that the tenancy was an assured shorthold tenancy had to be served on the tenant by the landlord;

(2) that the tenancy was for an initial fixed-term of six months; and

(3) that the landlord did not have the power to determine the tenancy during that six months' period.[55]

For assured shorthold tenancies created after that date, no such formalities are required.

3.51 No mandatory grounds are available for secure tenancies, though the requirement that the court must find it reasonable to make the order for possession does not apply to grounds 9 to 11 where there is suitable alternative accommodation available.

Notices seeking possession

3.52 Under the Rent Act scheme, it was always necessary to bring the contractual tenancy to an end before possession proceedings could be brought.

3.53 Under the secure and assured tenancy schemes, this requirement has been replaced by a requirement that, before proceedings can be taken, notice that the landlord intends to bring proceedings must be given to the tenant.

Secure tenancies

3.54 In the case of secure tenancies, the basic notice requirement may be waived by the court if the court thinks that it would just and equitable to do so.[56]

3.55 Where the tenancy is a periodic tenancy and the ground specified is ground 2 (nuisance or anti-social behaviour), the notice must state that proceedings may be brought immediately, and specify the date on which the landlord seeks to ensure that the tenant gives up possession of the dwelling. The court cannot grant possession before that date.

3.56 In the case of any other ground being used in relation to a periodic tenancy, the notice must state the date after which proceedings may be begun – which cannot be earlier than the date on which a valid notice to quit would have taken effect.[57]

[55] Housing Act 1988, s 20; the landlord remained entitled to bring proceedings for forfeiture of the tenancy for breach of a term or a condition in the tenancy; *ibid* s 45(4).

[56] Housing Act 1985, s 83 (1).

[57] *Ibid*, s 83(5). Usually the date on which the rent is due; but the notice must be at least four weeks; Protection from Eviction Act 1977.

The notice must state that it will cease to be effective 12 months after the date specified in the notice.

3.57 Where ground 2A is being used, the landlord must show that he has served or taken all reasonable steps to serve notice on the partner who has been driven from the dwelling by the domestic violence.[58]

3.58 If the tenancy is a fixed term tenancy, the notice does not have to specify a date; nor is there any date after which it lapses.

Assured tenancies

3.59 As with secure tenancies, the basic notice requirement may be waived if the court thinks this would be just and equitable. This exception does not, however, apply, where possession is sought under ground 8.[59]

3.60 Where the ground on which possession is sought is ground 14, proceedings cannot be started before the date on which the notice was served. The earliest date on which possession will be sought does not have to be stated in the notice.

3.61 In the case of proceedings brought under grounds 1, 2, 5 to 7, 9 and 16, the date before which proceedings can be brought must be at least two months from date of service of the notice, and, where the tenancy is periodic, the earliest date on which a valid notice to quit could become effective.[60]

3.62 In any other case, the date is two weeks from service of the notice.[61]

3.63 Proceedings must be brought within a year from the date specified in the notice.[62] This applies both where the tenancy is periodic and where it is fixed-term.

Assured shorthold tenancies

3.64 There are distinct notice requirements which apply when the landlord seeks possession of an assured shorthold tenancy on the "notice-only" basis, without any particular ground for possession being specified. The notice requirements differ depending on whether the tenancy in relation to which possession is sought is a fixed-term tenancy or a periodic tenancy.[63]

Drafting differences

3.65 Suitable alternative accommodation grounds are found listed in the grounds for possession in both in the secure tenancy regime and the assured tenancy regime.

[58] *Ibid*, s 83A.

[59] Housing Act 1988, s 8(1) and 8(5).

[60] *Ibid*, s 8(4A). Thus this second part of the test will only apply to periodic tenancies where the rent is payable at intervals greater than two months.

[61] *Ibid*, s 8(4B).

[62] *Ibid*, s 8(3)(c).

[63] *Ibid*, s 21.

In the Rent Act it comes within a separate statutory provision and does not appear in the cases listed in the Rent Act Schedule of grounds for possession.

3.66 In both the assured tenancy and Rent Act schemes, the right of the landlord to seek possession on the suitable alternative accommodation ground is expressed as a general ground. In the secure tenancy scheme, the circumstances in which the landlord may use the ground are defined with great precision.[64]

3.67 Rent arrears and other breaches of the tenancy agreement are treated as one in the secure tenancy and Rent Act tenancy schemes; they are given separate treatment in the assured tenancy scheme.

3.68 The renovations grounds (ground 8 in secure and ground 6 in assured) are respectively discretionary and mandatory.

3.69 Overcrowding is only a specific ground (ground 9) in the secure tenancy scheme.

3.70 The mortgagee ground is exclusive to the assured tenancy scheme (ground 2).

3.71 The tenant's notice to quit ground is only available in the Rent Act tenancy scheme (case 5).

3.72 There are numerous other differences which largely derive from the fact that, as currently drafted, the grounds are designed to reflect the different interests of different classes of landlord.

Differences not relating to security of tenure

3.73 Other important differences between the schemes include

(1) a tenancy of a single room, with shared living accommodation, may be an assured tenancy;[65] it may not, however, be a secure tenancy;[66]

(2) a licence may be statutorily treated as a secure tenancy.[67] Licences fall completely outside the assured tenancy regime, as they did under the Rent Act scheme;

[64] Grounds 9 to 16 inclusive, see para 3.41, tables 2 and 3.

[65] Housing Act 1988, s 3. This does not apply where the sharing is with the landlord. A similar principle applies to the Rent Act scheme.

[66] Because of the requirement of a separate dwelling under Housing Act 1985, s 79: *Central YMCA Housing Association Ltd v Saunders* (1990) 23 HLR 212.

[67] Housing Act 1985, s 79(3). However, following *Westminster City Council v Clarke* [1992] 2 AC 288, in which it was held that a licensee could only qualify as a secure tenant if he had been granted exclusive possession of a separate dwelling house, it appears that this subsection will only apply to a very small number of licences.

(3) rents under a secure tenancy are set by the local authority; rents under an assured tenancy are market rents or, in the case of registered social landlords, "affordable" rents;[68] and

(4) tenants under a secure tenancy may qualify for the right to buy. Tenants under an assured tenancy do not in general qualify for such a statutory right unless they were formerly secure tenants in the public sector.[69]

THE PROJECT GOAL

3.74 The principal objective of this project is to develop proposals for law reform which simplify the current position, and to increase transparency and flexibility. This may be the first step in the creation of a comprehensive code of housing law which would codify all the law affecting the renting of housing.

3.75 To repeat the point made in Part I[70] and anticipate the argument made more fully in Part VI, we think that the adoption of a consumer approach to housing law is a key building block for this long-term objective as well as forming a central part of the present project.

3.76 As the first step, we argue that any simplification of the law must involve a reduction in the number of housing statuses and the existing differences between them. It must also seek to reduce the numbers of particular cases which are treated differently by being kept outside the basic legislative scheme.

3.77 To achieve this goal, we have adopted a number of criteria which underpin our thinking which we set out here.

Two agreement types

3.78 The first is that, to reduce the number of statuses, the regulatory framework should recognise only two statuses: the type I and the type II agreement.[71]

Inclusion not exclusion

3.79 In order to achieve these goals we shall also be proposing that the numbers of types of agreement that currently fall outside the statutory schemes should be greatly reduced. While we acknowledge that a small number of situations may

[68] These are typically below full market rents but above secure tenancy rent levels. There are currently proposals to align these two sets of rent levels, although there are also proposals under discussion designed to bring the rents of registered social landlords in different parts of the country more into line with each other. Although many registered social landlords let exclusively at affordable rents which are below market rates, they may also let properties at market rates. In other words, although housing associations must be non-profit making overall, this does not preclude them from making a profit on an individual property which they can use to subsidise their other activities. The Housing Corporation allows registered social landlords to rent up to 49% of their properties in this way; cf The Housing Corporation's policy, Regulating a Diverse Sector (May 2000) para 27

[69] Housing Act 1985, s 171A–H.

[70] See paras 1.32 to 1.35 above.

[71] The details of our proposals are discussed below Parts VII and VIII.

need to fall outside these, we think the number of exceptions should be markedly reduced.[72]

Landlord neutrality

3.80 While the fundamental aims of current legislation are much the same – the delineation of rights and responsibilities as between landlords and tenants – much of the specific detail in the law differs for no other reason than the separate landlord identity. In our proposals we seek to ensure that, so far as possible, the definition of the key concepts used in our proposals are "landlord-neutral" and do not turn on the identity of particular landlord types.

3.81 While ensuring that questions of definition are landlord-neutral, we accept that *usage* of the two types of tenancy will differ as between social landlords and private landlords. We anticipate that social landlords will usually use the type I tenancy, and private landlords the type II agreement. We shall be consulting on the degree to which social landlords should be *able* to use the type II agreement.[73]

The emphasis on the contract

3.82 We are proposing that all agreements should be put into writing. The agreement will provide an accurate statement of the rights and obligations of the parties to the agreement, including a detailed statement of the circumstances in which a landlord may go to court to seek an order for possession.

3.83 Imbalances in bargaining power between the parties will be mediated by the application of the principles set out in the Unfair Terms in Consumer Contracts Regulations 1999[74] to the agreement. To assist landlords, a number of model agreements[75] will be prescribed in a Schedule to regulations which will, by definition, be compliant with the requirements of the 1999 Regulations. Their use will enable landlords and tenants to avoid any uncertainty that may arise from the concept of "fairness" and protect landlords and tenants from those whose task it is to regulate consumer contracts.

Due process

3.84 As indicated in Part I, nothing in these proposals is designed to weaken the principle that, in order to obtain possession, there should be due process, comprising both the need to warn a tenant – in writing – that proceedings are in contemplation, and the need to obtain an order from the court.[76]

[72] These are discussed below Part IX.

[73] See paras 11.13 and 11.14 below.

[74] SI 1999 No 2083.

[75] One for periodic type I agreements, one for periodic type II agreements, a third for fixed-term type II agreements.

[76] See para 10.7 below.

Dispute resolution

3.85 The courts will retain a key role to ensure that possession is not ordered without the satisfaction of due process. In addition, our scheme will be flexible enough to encourage appropriate alternative modes of dispute resolution. These may be particularly helpful in the context of nuisance and anti-social behaviour; as well for matters – outside the scope of this paper – such as disrepair.[77]

Incorporation of existing schemes and transitional provisions

3.86 Finally we shall be seeking to address the issue that has led to so much of the complexity of the current law. Past practice has been to add new layers of law onto old. We seek to create a scheme which will not only apply to all new tenancies, but which will also embrace existing tenancies.[78]

3.87 We accept that this may be controversial. However, even under the present system, individual tenants can find that their tenure category can change, for example where a local authority transfers its estates to a registered social landlord. We accept that there will need to be transitional provisions to ensure that important existing rights are not removed. For example, although we would like Rent Act protected tenants to be brought within our proposed type I tenancy, they would need to have their right of access to the rent officer and rent assessment committee maintained.

3.88 Particular issues on the right to succession will be dealt with in our second consultation paper to appear later this year.

[77] See further paras 6.176 to 6.186 below.

[78] We set out in Part XIV our ideas on how existing tenancies can be mapped onto the scheme we propose.

PART IV
THE APPROACH IN OTHER JURISDICTIONS

4.1 As background to our work, we have given careful consideration to the new regulatory framework for social housing in Scotland which is set out in the Housing (Scotland) Act 2001.

4.2 We have also explored the various approaches adopted in a number of other common law countries for the regulation of residential tenancies. The countries selected for this purpose were Australia, Canada and New Zealand. Within their federal structures, in both Australia and Canada, this form of regulation is the responsibility of the state/provincial government. We have looked at models in the Australian Capital Territory, New South Wales, Victoria and South Australia (Australia) and in British Columbia and Ontario (Canada).

4.3 The following discussion concentrates on provisions within the Scottish and the Commonwealth legislation most closely related to the scope of this consultation paper.

HOUSING (SCOTLAND) ACT 2001[1]

4.4 The recent reform of social housing law in Scotland contained in the Housing (Scotland) Act 2001 is particularly relevant. Not only do the two jurisdictions share a history of statutory provision for residential lettings; they also share a commitment to social housing and a concern with social exclusion.

4.5 In Scotland, as in England and Wales, social housing is provided mainly, if not exclusively, by local authorities and housing associations. Social housing in Scotland plays an important role in the provision of affordable housing.

4.6 The nature of this provision is, however, changing. The Scottish Executive's consultation paper[2] described the position thus:

> Over the past thirty years the social rented sector in Scotland has become progressively smaller, and it now accounts for less than a third of housing across the country. At the same time as it has diminished in size, however, it has become more diverse. In particular the last quarter century has seen the growth of community-based housing associations as important players in the housing scene, and more recently we have seen increasing interest in exploring other innovative forms of social landlord.

[1] For a helpful summary, see Simon Halliday, "Lessons from North of the Border: a Brief Commentary on the Housing (Scotland) Act 2001" [2001] JHL 79.

[2] Scottish Executive, Better Homes for Scotland's Communities – The Executive's Proposals for the Housing Bill (5th July 2000) at para 3 of "The Executive's strategy and legislative proposals". Cf http://www.scotland.gov.uk/consultations/housing/bhsc-00.asp

4.7 Until the changes to housing law in England and Wales, introduced by the Housing Act 1996 (which did not apply to Scotland[3]), the legal framework for social housing in Scotland was substantially the same as that of England and Wales.[4] Following the Housing (Scotland) Act 1988 two different forms of legal tenure existed within the social rented sector:

(1) the secure tenancy, provided by the local authority landlord, governed by Part III of the Housing (Scotland) Act 1987; and

(2) the assured tenancy, provided by the housing association landlord, governed by Part II of the Housing (Scotland) Act 1988.

The two forms of tenancy provided different rights to tenants. The right to buy was limited to secure tenants[5] who also enjoyed greater security of tenure. Only assured tenants could be evicted under a mandatory ground – ground 8 – when they owed at least three months arrears of rent.[6]

4.8 The implications of two forms of tenure existing within the social rented sector were made explicit in the consultation paper.[7]

> This situation is confusing to tenants, and results in anomalies whereby, for example, two tenants in identical accommodation owned by the same housing association can have significantly different rights and obligations. We believe that there should be a uniform set of rights and obligations across the socially rented sector, so that tenants and landlords know where they stand. In essence, all types of social landlord are providing the same range of services for tenants. The fundamental similarities of the service and the current inequalities in tenancy rights will become even clearer as local authorities and local communities contemplate the merits and implications of transferring houses into community ownership.

4.9 The primary purpose of the Housing (Scotland) Act 2001 is to create one form of tenancy for all social housing – the Scottish secure tenancy. The Act also simplifies and modernises the existing law, makes new provision for anti social behaviour, extends secure tenants' rights and creates the short Scottish secure tenancy. In addition the Act includes provisions – not considered here – relating to homelessness and creates a unified regulatory framework for social landlords.

[3] Save for the provisions in the Housing Act 1996, Part IV relating to housing benefit: Housing Act 1996, s 231.

[4] For a useful explanation of Scottish housing law cf Peter Robson and Simon Halliday, *Residential Tenancies* (2nd ed 1998).

[5] Housing (Scotland) Act 1987, s 61. The right to buy was further preserved for tenants who became assured tenants as a consequence of a voluntary transfer; cf the Housing (Scotland) Act 1987, s.81A, as inserted by Housing Act 1988, s 128.

[6] *Ibid*, s 18 and Sched 5, Ground 8. Housing Act 1996, s 101 – which reduced the amount of arrears under the equivalent ground in England and Wales to two months – does not apply in Scotland.

[7] Scottish Executive, Better Homes for Scotland's Communities – The Executive's proposals for the Housing Bill (5th July 2000) section 1, para 3.

Creating one form of social tenancy

4.10 The Scottish secure tenancy is based upon the former secure tenancy scheme. The definition in section 11 of the Housing (Scotland) Act 2001 is broadly similar to sections 79 to 81 of the Housing Act 1985,[8] but is extended to include registered social landlords. The categories of excluded tenancies set out in Schedule 1 of the Act largely overlap. The structure and content of the grounds for possession in Schedule 2 are a modified and updated version of the grounds in Schedule 2 of the 1985 Act.

4.11 Registered social landlords are therefore returned to their pre-Housing (Scotland) Act 1988 position. The rights of their tenants have been aligned with those of local authority tenants. Registered social landlords no longer have available to them the mandatory rent arrears – ground 8 – which was a feature of the assured tenancy scheme.[9]

4.12 There are a number of notable differences between the old and the new schemes. First, the right to succession to a Scottish secure tenancy is extended in section 22 to a second successor.[10] Secondly, there is no ground for possession for under-occupation by a spouse successor as in Ground 16 of Schedule 2 of the Housing Act 1985. Thirdly, once a tenancy is a Scottish secure tenancy it will continue as one even if the landlord and/or tenant ceases to comply with the conditions set out in section 11(1) (b), (c) and (d) of the Act.[11]

Simplification and modernisation

4.13 The Housing (Scotland) Act 2001 has provided a vehicle for the simplification of the law relating to the social tenancy sector. Primarily this has been achieved by reducing two forms of tenure to one. However there have been other modifications.

Tenant termination and abandonment

4.14 Difficulties have been caused by the failure of the Housing Act 1985 to prescribe a statutory mechanism for a tenant wishing to terminate the tenancy. The tenant is able to use the common law methods of notice to quit or surrender. But it is not always easy for a landlord to know whether there has been a surrender of the

[8] Comparisons are made between the Housing (Scotland) Act 2001 and the Housing Act 1985 because of the greater familiarity of our readership with the statutory framework within England and Wales. However readers should note that the provisions governing secure tenancies in Scotland despite being largely identical to the English provisions were actually contained within the Housing (Scotland) Act 1987.

[9] In "Rights and Security in Housing: the Repossession Process in the Social Rented Sector" (1999) 62 MLR 11, Mullen et al point out that in general Scottish housing associations have issued to their tenants a model assured tenancy agreement published by the Scottish Federation of Housing Associations rather than taking full advantage of the Housing Act 1988. The model is designed to give contractual rights for housing association tenants which are as close as possible to existing secure tenants' rights. Despite this a significant number of housing associations retained and used the mandatory rent arrears ground.

[10] We shall be discussing the question of rights of succession in a later consultation paper: see para 1.11 above.

[11] Section 11(8). Section 11(1)(b) to (d) sets out the landlord and tenant conditions.

property.[12] Nor did the law provide a simple means for the landlord to regain possession of a property it believes has been abandoned.

4.15 Section 12 of the Housing (Scotland) Act 2001 restricts the termination of the tenancy by either landlord or tenant to the statutory provisions. Under these a tenant must either give four weeks' notice to the landlord, or enter into a written agreement with the landlord to terminate the tenancy.

4.16 Two separate devices have been included in the Act to deal with the situation where the tenant fails to comply with section 12 and the property appears to have been vacated.

4.17 First, the landlord is given a ground for possession (ground 5 of Schedule 2) when the tenant and, where relevant, the tenant's spouse or co-habitee have been absent from the house without reasonable cause for a continuous period exceeding six months or have ceased to occupy the house as their principal home.

4.18 Secondly, sections 17 to 21 set out a procedure for the landlord to regain possession by service of four weeks' notice on the tenant of its intention to terminate the tenancy where it has reasonable grounds for believing that the house is abandoned. The process only requires the court to become involved if a tenant aggrieved by this procedure applies to court for a remedy[13] within six months of the termination of the notice period.[14]

Notice requirements

4.19 The notice requirements, which must be complied with by a landlord before it starts possession proceedings, are set out in section 14(4). They apply to all grounds of possession set out in Part 1 of Schedule 2. The section provides that the notice must contain a date on or after which the landlord may raise proceedings for recovery of possession which is not earlier than the later of four weeks from the date of service of the notice or the date on which the tenancy could have been brought to an end by a notice to quit, had it not been a Scottish secure tenancy.

4.20 This contrasts with the requirements of section 83 and section 83A of the Housing Act 1985.[15] These provide for different (and shorter) notice periods where possession is sought on anti social behaviour or domestic violence grounds. Finally

[12] Eg *Zionmor v Islington LBC* (1997) 30 HLR 822. Here the tenants notice addressed to those "who have written graffiti on the walls of my flat" left on the tenants notice board was held not to be conduct that amounted to surrender of his tenancy. The note had not been addressed to the landlord and did not evidence an unequivocal intention to relinquish possession, especially in the context of his continuing right to buy application.

[13] Section 18(3) provides that, where a tenancy has been terminated in accordance with that section, the landlord may take possession of the house without any further proceedings. Section 19(3) outlines the remedies available to a tenant who successfully challenges the termination of a tenancy under s 18(2).

[14] This procedure is a re-enactment of the provisions in the Housing (Scotland) Act 1987, ss 49 to 51. There is no equivalent procedure in the Housing Act 1985.

[15] Much of the complexity is caused by the amendments made under Housing Act 1996, s 147.

section 83 of the Housing Act 1985 allows the court to dispense with the notice requirements when it considers it just and equitable to do so. There is no parallel provision in the Scottish legislation.

4.21 The validity of a notice of intention to take proceedings is limited to six months under the Housing (Scotland) Act 2001 in contrast with the 12 months period of validity under the Housing Act 1985.

Other provisions

4.22 The Scottish secure tenancy regime contains several provisions which modernise the framework of social housing to reflect a greater variety of domestic lifestyles and living arrangements. The overarching duty – set out in section 106 of the Housing (Scotland) Act 2001 – on the Scottish ministers, local authorities and registered social landlords to consider equal opportunities in exercising their functions is amplified by more detailed provisions.

4.23 There are also provisions enabling individuals occupying or intending to occupy the house as their only or principal home to apply jointly with the tenant in writing to the landlord to be included as a joint tenant under the tenancy; and enabling "qualifying occupiers"[16] to be joined as parties to possession proceedings.

Anti social behaviour

4.24 The Scottish Executive has given priority to the need to provide social landlords with the means to respond effectively to anti social behaviour both by tenants and others.[17]

4.25 The grounds for possession most relevant to anti social behaviour had already been amended to provide provisions similar to ground 2 of Schedule 2 of the Housing Act 1985 as amended by the Housing Act 1996. The Housing (Scotland) Act 2001 further enhances the mechanisms available to social landlords to respond to the problem.

4.26 The Act re-enacts the existing law. In addition, ground 8 – a management ground for which there is no equivalent in the Housing Act 1985 and which enables a landlord to move a tenant who is causing nuisance or annoyance to other accommodation – has been extended to cover the same range of alleged perpetrators of anti social behaviour as provided for in the Housing Act 1985, Schedule 2, ground 2.

[16] "Qualifying occupier" is defined in the Housing (Scotland) Act 2001, s 14(6) as "a person who occupies the house as that person's only or principal home and who is (a) a member of the tenant's family aged at least 16 years, (b) a person to whom the tenant has, with the landlord's consent under section 32(1), assigned, sublet or otherwise given up possession of the house or any part of it, or (c) a person whom the tenant has, with such consent, taken in as a lodger".

[17] See for instance the introduction to the Scottish Executive's paper, Housing and Anti social Behaviour: The Way Ahead (14th Jan 2000). Available at http://www.scotland.gov.uk/ library2/ doc10/hasb-00.asp.

4.27 The most innovative measure for the control of anti social behaviour is the short Scottish secure tenancy. The Act does not follow the model which allowed local authorities in England and Wales to elect to use introductory tenancies as probationary tenancies for all new tenants. Instead Scottish social landlords can – where the prospective tenants have within the last 3 years been evicted on conduct grounds, or where the prospective tenant or a person who it is proposed will reside with the prospective tenant is subject to an anti social behaviour order under section 19[18] of the Crime and Disorder Act 1998 – let the property on a short Scottish secure tenancy.

4.28 The Act also enables the landlord to convert an existing Scottish secure tenancy to a short Scottish secure tenancy when the tenant or a person residing or lodging with the tenant is subject to an anti social behaviour order under section 19 of the Crime and Disorder Act.

4.29 The short Scottish secure tenancy is defined in section 34 of the Act. It is similar to the original form of the assured shorthold tenancy. It must be for a term of six months or more and the prospective tenant must be served a notice that it is to be a short Scottish secure tenancy. The tenant can be evicted without reason on two months' notice. Notable differences however are that the tenancy will, in certain circumstances set out in section 37 of the Act, be converted or re-converted into a Scottish secure tenancy. Furthermore there is a duty on the landlord to provide the tenant and other occupiers with support services to enable the conversion to take place.

4.30 This provides a flexible tool to manage anti social behaviour at any time during the lifetime of a tenancy and to encourage changed (and improved) behaviour on the part of tenants and their families.[19]

4.31 A landlord can only evict for anti social behaviour when the court decides that it is reasonable to do so. In English law, judges have considerable discretion under the Housing Act 1985 to determine reasonableness[20] and this may lead to a lack of predictable outcomes for both the landlord and the tenant.[21] The Housing (Scotland) Act 2001 structures this discretion. Section 16 (3) sets out the matters which must be taken into account when deciding reasonableness in possession proceedings involving conduct grounds.

4.32 This means the court must take into account the extent to which someone other than the tenant was responsible for the anti social conduct, the effect which the conduct has had on people other than the tenant and any action taken by the landlord, prior to issuing proceedings, to try to stop the conduct.

[18] The English and Welsh equivalent to this section is found in the Crime and Disorder Act 1998, s 1.

[19] Cf Rebecca Cattermole, "Introductory Tenancies and the Human Rights Act: *R (on the application of Johns and McLellan) v Bracknell Forest District Council*" [2001] JHL 27 and "Introductory Tenancies and the Human Rights Act" [2002] JHL 7.

[20] Though there is a certain amount of case law on the exercise of discretion: see paras 12.13 and, in connection with anti social behaviour, 13. 72 below.

[21] Cf Jonathan Manning, "Reasonableness: A New Appoach" [1998] JHL 59.

4.33 The interface and overlap between the grounds for possession and the offence of harassment is made explicit by providing that harassment is to be construed in accordance with section 8 of the Protection from Harassment Act 1997.[22]

Tenants' Rights

4.34 In "Better Homes for Scotland's Communities: the Executive's proposals for the Housing Bill" it is made clear that the Housing (Scotland) Act 2001 is intended to strengthen secure tenants' rights. There is also, however, a recognition of the value of the flexibility that the assured tenancy regime provided; so the rights given in the Act are described as core statutory rights which can be supplemented locally, with agreement between the landlord and tenant, by additional contractual rights.

4.35 Section 23 of the Housing (Scotland) Act 2001 sets out the tenant's right to a written tenancy agreement and information, and provides a power for the Executive to issue guidance as to the form and content of a tenancy agreement. The Scottish Executive has now published a model Scottish Secure Tenancy which is clearly structured and written in plain English.[23]

4.36 The Housing (Scotland) Act 2001 provides important extensions to the core rights of social tenants.

Repairs

4.37 The Housing (Scotland) Act 2001 includes, in Schedule 4, a statutory statement of the landlord's repairing obligations, replacing and extending the former mix of common law and statutory duties. In particular, paragraph 1 states that

> The landlord in a Scottish secure tenancy must-
>
> (a) ensure that the house is, at the commencement of the tenancy, wind and watertight and in all other respects reasonably fit for human habitation, and
>
> (b) keep the house in such condition throughout the tenancy.

4.38 In addition, regulations will set out the extent of the Scottish secure tenant's right to repair.

Variation

4.39 Section 24 of the Housing (Scotland) Act 2001 sets out the mechanisms by which the tenancy agreement may be varied. It requires either that the variation is by written agreement between the landlord and the tenant or that the relevant statutory procedure is complied with.

4.40 Section 25 provides that the landlord must give at least four weeks' notice of an increase in rent and that, prior to giving notice, it must consult with its tenants and have regard to the views expressed by those consulted.

[22] Housing (Scotland) Act 2001, Sched 2, ground 7(2).

[23] Cf http://www.scotland.gov.uk/library3/housing/msst-00.asp

4.41 Other terms can only be varied by the landlord with the consent of the tenant. Where the landlord cannot obtain the consent of the tenant the proposed changes must by ratified by a court.

4.42 A tenant also has the right to vary terms of the tenancy (other than those relating to rent) on the grounds:

(1) that there have been changes in the character of the house of the neighbourhood or other circumstances making the term either unreasonable or inappropriate,

(2) that the term is unduly burdensome compared with any benefit resulting from its performance, or

(3) that the existence of the term impedes some reasonable use of the house.

4.43 If the landlord does not agree the variation the tenant may apply to the court.

Short Scottish secure tenancies

4.44 As well as being used in the context of anti social behaviour, short Scottish secure tenancies may be used to grant security of tenure for at least six months to certain tenants who would otherwise be excluded from statutory protection. The grounds for granting short Scottish secure tenancies are set out in Schedule 6 to the Act. They include

(1) temporary lettings to persons moving into the area in order to take up employment there, and for the purpose of enabling that person to seek accommodation in the area;

(2) temporary lettings pending development;

(3) temporary accommodation for homeless persons;

(4) temporary accommodation for persons requiring housing support services; and

(5) accommodation in property not owned by the landlord.

COMMONWEALTH LEGISLATION

4.45 We have also considered statutory regulation of residential tenancies in a range of Commonwealth jurisdictions. The housing policy framework underpinning the legislative provisions in each jurisdiction will vary depending upon the housing market, the extent of provision of social housing and the existence and nature of subsidies for housing costs. The most recent Commonwealth statutes were an explicit attempt to reform and modernise their existing law.

4.46 For example, in Australia – in contrast to the United Kingdom – the general common law principles of landlord and tenant had traditionally applied to residential tenancies, with only minimal intervention by statute in the development of the law. Even those few developments that had occurred had applied equally to all types of tenancy. In the mid-1970s two major reports of the Commonwealth Commission of Inquiry into Poverty concluded that the general common law had failed to adapt to modern residential tenancy needs. New legislation specifically

directed to residential tenancies was then mooted in Australia.[24] Over the next 20 years, such legislation was drafted in most Australian States. Despite being politically controversial and strongly contested by landlord interest groups at the time,[25] these reforms are now considered the norm in most Australian States. We have been able to draw some useful conclusions from our analysis.

Consumer perspective

4.47 First, one very important theme that emerges from the analysis is that landlords' and tenants' rights and responsibilities are set within a consumer protection framework.[26] Key features of this approach are that

(1) parties retain their freedom to contract within statutory constraints;

(2) market rents prevail, but with statutory controls on excessive rent increases; and

(3) the statutes contain comprehensive and comprehensible provisions regulating the whole relationship between landlord and tenant.

4.48 Most jurisdictions provide a mechanism enabling tenants to challenge the terms of their agreement. For instance, section 28 of the Residential Tenancies Act 1997 (Victoria, Australia) allows the tribunal to declare invalid or vary a term of the tenancy agreement if it is satisfied that the term is harsh or unconscionable.

Comprehensible provisions

4.49 Most of the statutes considered were remarkable for the clarity of their language. In particular the New South Wales legislation – the Residential Tenancies Act 1987 and the Residential Tribunal Act 1998 – contains readily comprehensible provisions.

Administrative support

4.50 Most of the jurisdictions provide integrated administrative support with information and research functions underpinning the regulatory framework. In addition there is an emphasis on mechanisms to avoid disputes or to provide cheap and informal resolution of disputes where necessary.

4.51 It is also worth noting the internet resources dedicated to residential lettings maintained by the relevant state administration. These provide a range of useful information, including tribunal decisions and help-lines for both landlords and tenants.[27]

[24] A Bradbrook, "Residential Tenancies Law – The Second Stage of Reforms" (1998) 20 Sydney Law Review 402, 402 to 3.

[25] *Ibid*.

[26] Eg the Director of the Office of Fair Trading and Business Affairs administers the Residential Tenancies Act 1997 (Victoria, Australia) as provided by s 486 of that Act. Further, s 486(a)(ii) provides that complaints about excessive rent are made to the Director.

[27] Eg http://www.minhousing.govt.nz/tenancy and http://www.pssg.gov.bc.ca/rto/index.htm.

Comprehensive provision

4.52 In general the statutes are comprehensive in that they cover all residential occupancies with no requirement of exclusive possession[28] and no requirement that the occupancy is as the occupier's "only or principal home". This is despite the fact that most of the statutory frameworks include provisions that operate to give residential occupiers exclusive occupational rights, for instance the covenant of quiet enjoyment.

4.53 Some jurisdictions have a single regulatory framework for both social and private residential lettings. Social housing is then exempt from certain provisions, such as rent increases, but additional grounds are given for possession, such as ceasing to be financially eligible for public housing.

4.54 Whilst none of the statutes claims that they provide a residential lettings code, it does appear that there is a move towards codifying residential letting provisions in several of the jurisdictions. In particular the Residential Tenancies Act 1997 (Victoria, Australia) contains a comprehensive set of statutory provisions relating to both public and private lettings.[29]

Exclusions

4.55 There is a wide variety in the scope of the exclusions, which probably reflects both the history of and contemporary housing arrangements in the jurisdictions concerned. Holiday lets and lodgings where there is a resident landlord are always excluded. Several jurisdictions exclude long lets – generally fixed terms of more than five years.

4.56 The Residential Tenancies Act 1987 (New South Wales, Australia) also gives a wide-ranging power to exclude certain types of occupancy by regulation. This has been exercised to exempt, amongst others, premises used for aged persons' accommodation, leases of certain leasehold strata scheme properties and premises subject to certain equity purchase agreements.[30]

Issues addressed

4.57 A full range of issues that may cause conflict between landlords and tenants during the lifetime of the arrangement is regulated. For instance, the landlord's right of access to the property is set out in detail in several of the statutory frameworks; so,

[28] The fact that there is no requirement of exclusive possession in these statutes brings licences within their ambit, and thus makes it unnecessary to distinguish between leases and licences for the purposes of residential lettings in many Commonwealth jurisdictions.

[29] Section 1 of the Act sets out a broad remit which includes defining the rights and duties of landlords and tenants of rented premises, providing for the regulation of caravan parks and moveable dwellings, providing for inexpensive and quick resolution of disputes and for a centralised system for the administration of bonds.

[30] Residential Tenancies (Residential Premises) Regulation 1995, Part 5 (NSW, Australia).

too, are the responsibilities of the landlord for the condition and repair of the premises.[31]

4.58 Sections 14 to 16 of the Residential Tenancy Act 1996 (British Columbia, Canada) not only specify the landlord's right of access, it also allows the court to authorise the tenant to change the locks if it is satisfied that the landlord is likely to contravene those rights. It also allows an arbitrator to suspend any of the landlord's rights of entry and/or order that a right of entry of the landlord be exercised only on conditions ordered by the arbitrator.

Procedures

4.59 In addition a range of procedural matters are set out in detail. For instance, section 42 of the Residential Tenancy Act 1996 (British Columbia, Canada) contains clear provisions detailing the formal requirements for a notice of end of tenancy agreement, the consequences of failure to comply with these requirements and the powers of courts to amend defective notices. Section 43 deals with the common failure to give the correct effective date for the end of the tenancy by deeming the notice to be effective on the earliest date permitted under the Act.

Notice-only possession proceedings

4.60 The majority of the jurisdictions permit the termination of the letting agreement without cause as long as there is compliance with notice and other procedural requirements.[32] However most of the jurisdictions (including all of the Australian statutes considered) also seek to prevent "retaliatory evictions", that is to say evictions which are simply a response to a tenant exercising or proposing to exercise a statutory right or a power.[33]

Requirements for writing

4.61 There is a variety of arrangements for ensuring that the parties to the agreement are fully aware of the provisions. Sections 13 and 13(B) of the amended[34] Residential Tenancies Act 1986 (New Zealand) require that the agreement and any variations be in writing and signed by both the landlord and the tenant. Section 13(A) prescribes a relatively extensive minimum of information that must be included in the tenancy agreement. Section 13(C) sets out the default provision that tenancy agreements are not unenforceable on the grounds that they are not in writing.

[31] A useful example is s 48 of the Residential Tenancies Act 1986 (New Zealand), as amended by s 21 of the Residential Tenancies Amendment Act 1996 (New Zealand), which sets out in detail when and with what notice the landlord may enter the premises.

[32] Eg the Residential Tenancies Act 1997, s 263 (Victoria, Australia) provides that the landlord is able to give notice to the tenant to vacate rented premises without specifying a reason. The notice period must be at least 90 days.

[33] Eg the Residential Tenancies Act 1997, s 266(2) (Victoria, Australia) provides that a no reason notice or a notice terminating a fixed term tenancy before the end of the fixed term is of no effect if it is given in response to the exercise or proposed exercise, by the tenant, of a right under the Act.

[34] Amended by the Residential Tenancies Amendment Act 1996, s 6 (New Zealand).

4.62 Section 26 of the Residential Tenancies Act 1997 (Victoria, Australia) provides that if tenancy agreements are in writing then they must be in the prescribed standard form. Section 66 of the Act prescribes the written information which must be given to the tenant by the landlord on or before the occupation day.

4.63 One of the more extensive sets of provisions is contained in the Residential Tenancies Act 1997 (Australian Capital Territory). Section 7(a) provides that a residential tenancy agreement must contain, or will be taken to contain, terms to the effect of the prescribed terms. There are no less than one hundred prescribed terms set out in the Schedule to the Act, governing all aspects of the landlord and tenant relationship. Section 7(b) provides that a residential tenancy agreement may contain any other terms provided that either they are consistent with the prescribed terms or, if inconsistent, have been endorsed by the Tribunal. Similar mechanisms exist within the Residential Tenancies Act 1987 (New South Wales, Australia).

4.64 In contrast, the Tenant Protection Act 1997 (Ontario, Canada) contains no requirement for a written agreement and no prescribed terms. Information that the landlord must give to the tenant is limited to the legal name and address for the purpose of giving notices or documents under the Act.[35]

Dispute resolution

4.65 All but one of the jurisdictions considered here have a specialist tribunal system. The tribunals have extensive powers, including the power to make possession orders, monetary compensation orders, orders requiring a party to undertake designated work, orders reducing a rent the tribunal finds to be excessive, restraining orders, the power to waive defects in notices and to shorten the term of fixed term tenancy agreements in certain circumstances.

4.66 The tribunal system has been very successful in many of these jurisdictions. The caseload of the Australian tribunals has exceeded all expectations, with applications in the large state of New South Wales reaching 20,000 per year. The cases are heard very cheaply; filing fees are extremely low and legal representation is only allowed in exceptional cases. Cases are also heard speedily with applications for compensation usually determined within a month, applications for termination within two weeks and in cases of alleged vandalism or damage to the rental property within a matter of hours.[36]

4.67 The Residential Tenancies Act 1997 (Victoria, Australia) also includes "fast-track" procedures, which enable landlords to obtain an order for rental arrears or a possession order without a hearing by the Tribunal. There is also a "fast-track" procedure to enable tenants to get a prompt order requiring the landlord to carry out "urgent" repairs.

[35] Tenant Protection Act 1997, s 8 (Ontario, Canada).

[36] A Bradbrook, "Residential Tenancies Law – The Second Stage of Reforms" (1998) 20 Sydney Law Review 402, 414.

Alternative dispute resolution

4.68 All the jurisdictions considered provide for alternative dispute resolution. For example, full and detailed provisions for the arbitration of tenancy agreements are contained in Part 4 of the Residential Tenancy Act 1996 (British Columbia, Canada). By section 18 of that Act a landlord and tenant are deemed to have agreed to submit to an arbitrator a large number of matters including repairs, rent reduction, the right to assign or sublet and security deposit return.

4.69 The New Zealand legislation differs from its Australian counterparts in that it requires most applications to the tribunal to first be referred to mediation.[37] Mediated agreements constitute a binding and legally enforceable order. This system of mediation is advantageous to the disputants in that it is paid for by the interest from rental deposits.[38] Thus disputes can be resolved at no cost to the parties in a process which may help to improve future relations between them.[39] It also reduces pressure on the tribunal system; two-thirds of residential tenancy disputes in New Zealand are now resolved by mediation without ever coming before the tribunal.[40]

Deposits

4.70 Deposits can be a major source of tension between landlords and tenants. More than half of the jurisdictions considered provide for the centralised holding of deposits by the state. In general, upon receipt of the deposit the landlord must lodge it with a state-run trust account until the termination of the tenancy agreement. The tribunal or the state administration resolves disputes arising from the return of deposits.[41]

[37] Mediation is a process used for dispute resolution whereby an impartial third party acts as a facilitator to help the parties to come to a mutually acceptable, workable and reasonable settlement of the issues in dispute.

[38] See para 4.71 and note 41 below.

[39] M Slatter, "Landlord and Tenant Disputes in New Zealand: Jaw Jaw not War War" (1988) Conv(NS) 89, 94. Cf also H Wilkinson, "Quicker Routes to Justice? Residential Tenancy Tribunals in New South Wales" (1992) Conv (NS) 141-145.

[40] P Skinner, "Judicial Independence and Residential Tenancy Tribunals" (1998) 7 J Judicial Admin (Aust) 130.

[41] The development of the regulation of deposits in the state of Victoria, Australia provides an interesting example. The Residential Tenancies Act 1980 required landlords to lodge bond moneys in a trust account with an approved financial institution. However, in response to concerns about unsatisfactory interest returns on bond moneys, lack of compliance with the legislation and the perception that the landlord and his agent had control of the bond moneys, a new system was established by the Residential Tenancies Act 1997. The Act set up the centralised and streamlined administration of rental bonds by a new independent body called the Residential Tenancies Bond Authority, which is responsible for the collection, investment and refund of bond moneys. Like the 1980 Act, the 1997 Act sets maximum bond limits, sets out the specific circumstances in which the landlord is entitled to retain an amount of bond money and requires the landlord to give the tenant a signed "condition report", which provides evidence of the state of the premises at the start of the lease. However, the Residential Tenancies Bond Authority must not pay out an amount of bond money unless the landlord and tenant make a joint application for a refund or in accordance with a determination of the Residential Tenancy Tribunal

4.71 The interest from the deposit holding accounts is used by the state to finance the regulation of residential lettings, to cover the running costs of the tribunal system (where applicable) and to fund information and research functions.

4.72 It is not just the return of deposits that causes problems. Financial matters such as the amount of the deposit; requests for "holding deposits" (that is a sum required by the landlord to hold the property for the tenant prior to the tenancy being agreed); rent in advance or responsibility for the payment of legal fees also provide potential for dispute or exploitation. Most of the jurisdictions considered have made provisions to regulate these matters. For instance, section 18 of the Residential Tenancies Act 1997 (Australian Capital Territory, Australia) prohibits the lessor from requiring a "holding deposit", as does section 36 of the Residential Tenancies Act 1987 (New South Wales, Australia). Section 50 of the Residential Tenancies Act 1997 (Victoria, Australia) permits "holding deposits" but sets a short time limit for their refund.

4.73 In general the statutes provide that landlords must keep accurate records of rent paid and provide receipts.

Anti social behaviour

4.74 All the statutes make explicit the duties of the tenant to behave appropriately. A typical example is section 23(1) of the Residential Tenancies Act 1987 (New South Wales, Australia), which provides that "it is a term of every residential tenancy agreement that: (a) the tenant shall not use the residential premises, or cause or permit the premises to be used, for any illegal purpose, (b) that the tenant shall not cause or permit a nuisance, and (c) that the tenant shall not interfere, or cause or permit any interference, with the reasonable peace, comfort or privacy of any neighbour of the tenant."

4.75 All of the jurisdictions make the tenant responsible for the actions of others. The Residential Tenancies Act 1995 (South Australia) contains a statement of the tenant's vicarious liability for the acts or omissions of any person on the premises at the invitation or with the consent of the tenant.

4.76 Section 41 of the Residential Tenancies Act 1986 (New Zealand) provides that the tenant shall be responsible for anything done, or permitted to be done, by any person who is on the premises with the tenant's permission, if the act or omission would have constituted a breach of the tenancy agreement had it been the act or omission of the tenant. It also includes a rebuttable presumption that the tenant will have permitted a person who caused damage to the property to be in the premises.

4.77 In addition the New Zealand legislation places a duty on the landlord in respect of protecting the tenant from the anti social behaviour of the landlord's other tenants. Section 45(1)(e) provides that the landlord shall "take all reasonable steps to ensure that none of the landlord's other tenants causes or permits any interference with the reasonable peace, comfort or privacy of the tenant in the use of the premises."

4.78 The statutes contain a variety of mechanisms to allow the landlord to respond quickly to anti social behaviour. For instance, sections 243 to 244 of the Residential Tenancies Act 1997 (Victoria, Australia) allow the landlord to give immediate notice where the tenant or a visitor of the tenant has caused malicious

damage to the property (including common parts) or has endangered the safety of occupiers of neighbouring premises.

4.79 A particularly interesting method of regulating hostel and other managed accommodation is contained in the Residential Tenancies Act 1997 (Victoria, Australia). In sections 367 to 377 managers of managed premises – including buildings with two or more rented premises and an on-site manager, rooming houses and caravan parks – can give residents or their visitors notice to leave the managed premises if the manager reasonably believes that a serious act of violence has occurred or the safety of someone on the premises is in danger from the resident or a visitor. It is a criminal offence to remain on the premises if notice to leave has been given. The notice operates to suspend the tenancy agreement for two days during which time the landlord may apply to the tribunal for an order to terminate the tenancy. The application must be heard by the tribunal within two days.

4.80 The New South Wales legislative framework contains two useful mechanisms which reflect the additional responsibilities of social landlords.

4.81 First, it provides an additional ground for possession for social landlords. Section 64(6) of the Residential Tenancies Act 1987 allows the tribunal to make an order for possession immediately if the breach of the agreement involves the use of the premises, or any property adjoining or adjacent to the premises, for the purposes of the manufacture or sale of prohibited drugs or subjects persons or property to unreasonable risk.

4.82 Secondly, section 64(4) provides that the tribunal, in considering the circumstances of a case concerning social housing premises, must – in addition to having regard to the circumstances of the tenant and other circumstances of the case – have regard to other matters. These are

(1) any serious adverse effects the tenancy has had on neighbouring residents or other persons,

(2) whether the breach of the residential tenancy was a serious one and whether, given the behaviour or likely behaviour of the tenant, a failure to terminate the agreement would subject, or continue to subject, neighbouring residents or any persons or property to unreasonable risk,

(3) the landlord's responsibility to its other tenants,

(4) whether the tenant, wilfully or otherwise, is or has been in breach of an order of the Tribunal, and

(5) the history of the tenancy concerned.

4.83 Sections 62 to 65 of the Tenant Protection Act 1997 (Ontario, Canada) contain four grounds for the termination of the tenancy in response to anti social behaviour but also contains provisions that allow the tenant to remedy the situation within seven days, thus rendering the notice void. However, under section 67 of the Act, a repetition of the activity within six months of the notice becoming void is a ground for termination on 14 days' notice.

Minors and tenancies

4.84 The Residential Tenancies Act 1986 (New Zealand) contains a useful provision that provides a mechanism to balance the need of a minor to have a tenancy agreement against the potential exploitation arising from a lack of understanding of the responsibilities involved. Section 14 provides that minors who are or have been married are bound by the tenancy and in other cases an application can be made to the tribunal to approve a tenancy with a minor. The tribunal may also enquire into the fairness of an arrangement where approval has not been sought and approve it if reasonable to do so.

CONCLUSION

4.85 Both the Scottish and the Commonwealth approaches to the reform of residential lettings have provided examples which have potential for our project.

4.86 Although the Housing (Scotland) Act 2001 is limited to the social rented sector, it contains some useful models for solutions to particular legal and practical problems within that sector, such as the procedure for the recovery of abandoned premises and the statutory structuring of discretion.

4.87 Certain concerns, such as the eradication of anti social behaviour and the need to minimise areas of conflict between landlord and tenant, are clearly universal and we have much to learn from comparative approaches.

4.88 All of the legislation we have considered has concentrated on providing comprehensive provisions which are transparent and comprehensible to the landlord and tenant. It is clear that this has to be the basis for a consumer approach to housing law. However it is also clear that simplicity is not necessarily consistent with this approach,[42] and a careful balance has to be achieved between detailing the respective rights and responsibilities of landlords and tenants and overwhelming the parties with prescriptive and technical provisions.

[42] See for example the provisions of the Residential Tenancies Act (ACT), above para 4.63.

PART V
THE IMPACT OF HUMAN RIGHTS LAW

INTRODUCTION

5.1 As with other areas of law, the coming into force of the Human Rights Act 1998 has had a significant impact on housing law. A number of challenges to substantive housing provisions on the basis of Articles 8 or 6 of the European Convention on Human Rights have been made in the UK courts. To date none has succeeded, in the sense that the provisions have been declared incompatible, or even required the deployment of the special interpretational duty on the courts in Human Rights Act 1998, section 3.[1] On the other hand, a series of cases have raised procedural issues within which housing law must operate.

5.2 In this Part, we first consider the Convention case law, principally relevant aspects of Articles 6 and 8. We then chart how they have been dealt with in the domestic courts since the Human Rights Act 1998 came into force in October 2000. Finally we offer some conclusions about the implications of these decisions for our project.

5.3 At the outset it should be noted that the European Convention is concerned mainly with civil and political rights and not social and economic rights. Thus the Convention does not provide a right to housing, either directly by the state or via other mechanisms indirectly (for instance income support), nor does it require housing to be of a certain standard.

THE RELEVANT CONVENTION ARTICLES

5.4 The provisions of the Convention of most significance to housing law are Articles 8 and 6, which we deal with in detail below. In addition, Article 1 of the first protocol guarantees a right to property, although it has not featured significantly in the domestic case law.

Article 8

5.5 Article 8, which includes substantive protection for the right to respect for the home, provides that:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[1] Section 3(1) provides that "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

Definition of "home"

5.6 The word "home" includes any premises or shelter used by an individual as his home and in which he has a lawful interest. It can also extend to premises or shelter which an individual is occupying unlawfully, but this would appear to depend on the occupier having *some* legal interest either in the premises or in the land on which it stands.[2] In general "home" is where one lives on a settled basis.[3] Accordingly, it appears that holiday homes and work hostels fall outside this definition. This is consistent with the English law on security of tenure under the Rent Acts and Housing Acts which exempt certain categories of occupation, including holiday homes, from protection.

5.7 However the notion of "home" is not restricted to the physical confines of the property. It also connotes the ability (facilitated by the state) to live freely in it and enjoy it, not merely as a property right.[4]

No right to a home

5.8 The jurisprudence of the Strasbourg Court is clear that Article 8 does not establish the right to a home.[5] In *X v FRG* an East German refugee was unable to establish there was a breach of Article 8 due to the West German Government's failure to provide him with a decent home. The application was ruled inadmissible.[6]

5.9 In *Velosa Barreto v Portugal* the European Court of Human Rights held that

> effective protection of respect for private and family life cannot require the existence in national law of legal protection enabling each family to have a home for themselves alone.[7]

5.10 Under Portuguese law the termination of a residential lease was possible only when the landlord needed the property to live there. The Court held that this clause "pursues a legitimate aim, namely the social protection of tenants, and that it thus tends to promote the economic well-being of the country and the protection

[2] Thus, in *Wiggins v UK* (1978) 13 Decisions and Reports 40, where the applicant owned a house but had no legal permission to occupy it, the Commission held that it qualified as a "home within the meaning of Article 8(1)". See also *Gillow v UK* Series A (Judgments and Decisions) vol 109 (1986), 11 EHRR 335; *Buckley v UK* Reports of Judgments and Decisions vol 1996 part IV p 1271; 23 EHRR 101, for cases in which Court and Commission respectively have found some such legal interest to justify a finding that the applicant had a "home", and *S v UK* Application no 11716/85 (1986); 47 Decisions and Reports 274, where the Commission found that the absence of contractual relations between applicant and owner rendered the flat no longer the applicant's "home".

[3] Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights* (1995) p 317.

[4] *Howard v UK* 52 Decisions and Reports 198 (1985); 9 EHRR 116.

[5] However, other Human Rights conventions do contain a positive obligation to provide adequate housing, eg Convention on Economic, Social and Cultural Rights, Article 11(1).

[6] (1956) 1 YB 202. T hough see the recent decision in *Chapman v UK*, Application no 27238/95 (2001); 10 BHRC 48. Here, seven dissenting judges took the view that there may be circumstances where the refusal of the authorities to take steps to assist in housing problems could raise an issue under Article 8 (see further *Marzari v Italy*, Application no 36448/97 (1999); 28 EHRR CD 175.)

[7] Series A (Judgments and Decisions) vol 334 (1996) para 24; [1996] EHRLR 212.

of the rights of others". In applying this national provision, the Portuguese courts had not acted arbitrarily or unreasonably, nor had they failed to discharge their obligations to strike a fair balance between the respective interests. Restrictions on a landlord's rights of repossession can be justified as being in the public interest where they are designed to protect the well-being of tenants.

Article 8(1)

5.11 Article 8(1) protects the right to *respect* for the home. As Harris, O'Boyle and Warbrick point out, "This makes it clear that not every act of a public authority which has an impact on the exercise of the interest will constitute an interference with the Article 8(1) right".[8]

5.12 The interference itself may be in the nature of a personal invasion that takes place at home, for example a forcible entry or arrest at home;[9] alternatively it might be directed at the home itself, as in a denial of a right of access to the home,[10] requisition or compulsory occupation/purchase,[11] destruction or removal of property,[12] eviction or expulsion. It has extended to include environmental blighting or pollution by third parties, where the state had failed to use its powers to protect the homes of applicants from the effects of the pollution.[13]

5.13 A home may be taken away through compulsorily purchase procedures and authorities can also take action to close or demolish properties which are unfit for human habitation.[14] Where the applicant lives in the home, such actions may engage Article 8.[15]

Justification under Article 8(2)

5.14 Often the state does not dispute that there has been an interference with an Article 8(1) right. The real question is whether the interference can be justified under Article 8(2). To be justified, an interference must be in accordance with the law, for a legitimate aim, and necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The test of necessity involves deciding whether there is a "pressing social need" for the interference. That in

[8] Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights* (1995) p 320.

[9] *Niemitz v Germany* Series A (Judgments and Decisions) vol 251–B (1992); 16 EHRR 97.

[10] *Cyprus v Turkey* Application no's 6780/74 and 6950/75 (1976); 4 EHRR 482.

[11] *Howard v UK* 52 Decisions and Reports 198 (1985); 9 EHRR 116.

[12] *Buckley v UK* Reports of Judgments and Decisions vol 1996 part IV p 1271; 23 EHRR 101.

[13] *Lopez Ostra v Spain* Series A (Judgments and Decisions) vol 303–C (1994) paras 51 to 58; 20 EHRR 277.

[14] Housing Act 1985 Part IX. To the extent that this deprives owners of their property right this may be considered an infringement of Article 1 of the first protocol.

[15] *Howard v UK* 52 Decisions and Reports 198 (1985); 9 EHRR 116: the Government accepted that the compulsory purchase of a home was an interference with the applicants' rights under Article 8(1), but contended, and the Court agreed, that it was justified under Article 8(2).

turn, in the established case law of the Strasbourg organs, brings in the important concept of proportionality. To be justifiable, the means employed must be proportionate to the legitimate aim pursued. In conducting this examination, it is the nature, context and importance of the right affected and the extent of the interference that must be balanced with the nature, context and importance of the public interest asserted as justification.[16]

5.15 The meaning of these requirements appears to be:[17]

(1) The phrase "in accordance with law" means that any interference with a private/family right and/or right of an individual to respect for his home must have a basis in domestic law;

(2) The aims deemed legitimate under Article 8(2) that are most relevant in the housing context are "the protection of health" and the "protection of the rights of others";

(3) Relevant to any assessment of necessity and proportionality will be:

(a) Whether "relevant and sufficient reasons" can be advanced for the action taken;

(b) Whether the rights of all interested parties have been taken into account properly; and

(c) Whether safeguards exist to prevent, or at least check, any abuse of power.

The European Court has emphasised the importance of the individual's right to respect for his home in view of its impact on personal security and well-being.[18]

5.16 Therefore where the notion of a home overlaps heavily with property rights and the interference stems from the operation of general planning, environmental or health regimes, the difficulties in showing a disproportionate action are substantial. However, *Gillow v UK* clearly demonstrates the important need to distinguish between the legitimacy of the general legislation and the manner of its application to particular facts. Here the Court was able to hold that whilst the Guernsey residence legislation was not objectionable per se, nevertheless there was on the facts a violation, the action taken being disproportionate to the legislation's legitimate aims.[19]

[16] See the discussion in Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd ed 1998) pp 537 to 9.

[17] Keir Starmer, *European Human Rights Law* (1999) at pp 581–2.

[18] See *Gillow v UK* Series A (Judgments and Decisions) vol 109 (1986), para 55; 11 EHRR 335. *Buckley v UK* Reports of Judgments and Decisions vol 1996 part IV p 1271, para 130; 23 EHRR 101.

[19] Series A (Judgments and Decisions) vol 109 (1986) para 58; 11 EHRR 335.

Article 6

5.17 Article 6 is the key procedural provision of the Convention. The object of Article 6 is "to enshrine the fundamental principle of the rule of law".[20] In a democratic society, the right to the fair administration of justice holds such a prominent place that a restrictive interpretation of the article would not correspond to the aim and purpose of the Convention. Accordingly, the article is to be given a broad and purposive interpretation.[21]

5.18 The phrase "civil rights and obligations" has an autonomous meaning within the convention. The core meaning, historically, related to rights and obligations which arise in private law.[22] However, the Court has now accepted that Article 6(1) can have application to administrative decisions, where they can determine or affect rights in private law.[23] The question has been approached on a case by case basis, and the European Court has not developed a general definition. This has involved looking at the nature or character of the right or obligation, rather than the manner in which it is determined. However, where the rights involved concern property rights, Article 6 will clearly be applicable.

5.19 Article 6(1)[24] provides for the right to a fair and public hearing, within a reasonable time, and before an independent and impartial tribunal established by law. It reads as follows.

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

5.20 In *James v UK*,[25] the applicants had been deprived of their ownership of certain properties by the exercise of tenants of a right to acquire the properties given to them by the Leasehold Reform Act 1967. The applicants had no remedy in court

[20] *Salabiaku v France* Series A (Judgments and Decisions) vol 141–A (1988); 13 EHRR 379. The rule of law is, moreover, expressly referred to in the preamble to the Convention: see *Klass v Federal Republic of Germany* Series A (Judgments and Decisions) vol 28 (1978) para 55; 2 EHRR 214.

[21] See *Delcourt v Belgium* Series A (Judgments and Decisions) vol 11 (1970) para 25; 1 EHRR 355.

[22] *Konig v Federal Republic of Germany* Series A (Judgments and Decisions) vol 27 (1978), para 95; 2 EHRR 170.

[23] See the discussion of the development of the Strasbourg jurisprudence in Lord Hoffman's speech in *R v Secretary of State for the Environment, Transport and the Regions ex p Alconbury Developments Limited* [2001] UKHL 23 at [77] to [88]; [2001] 2 All ER 929, and cases cited therein.

[24] The other two paragraphs of Article 6 apply only to criminal matters.

[25] (1986) Series A (Judgments and Decisions), vol No. 98; 8 EHRR 123.

by which to challenge the exercise of this right once the terms of the statute were satisfied. Although the case concerned the right to property, which was a civil right, the absence of a remedy was not a breach of Article 6. Thus if a state's law simply deprived a landowner of his right to his property, Article 6 would not apply; there would be no basis for ruling that such rights must be restored or provided.[26] If there is no actionable domestic claim as a matter of substantive national law, then the Article will not apply – Article 6(1) "does not in itself guarantee any particular content for (civil) 'rights and obligations' in the substantive law."[27]

5.21 By contrast, however, Article 6(1) may apply where there are procedural, rather than substantive, bars preventing or limiting the possibility of bringing a domestic claim to court.

> it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6(1) – namely that civil claims must be capable of being submitted to a judge for adjudication – if … a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons.[28]

5.22 For Article 6 purposes, it is the character of the right at issue, rather than that of the parties (whether private or public bodies), the governing legislation or the authority invested with jurisdiction in the matter, which is relevant.[29]

Right of access

5.23 The right includes a right of effective access to court.[30] The right also requires that a person be given personal and reasonable notice of an administrative decision which interferes with his civil rights and obligations, so that he has an adequate opportunity to challenge it in court.[31]

[26] The absence of a substantive right may, however, be an infringement of another Convention right.

[27] *H v Belgium* Series A (Judgments and Decisions) vol 127-B(1987), para 40; 10 EHRR 339.

[28] *Fayed v United Kingdom* Series A (Judgments and Decisions) vol 294–B (1994), para 65; 18 EHRR 393; *Tinnelly and McElduff v United Kingdom* Application no 20390/92 (1998), para 62; 27 EHRR 249 (operation of national security certificates barring further proceedings in Fair Employment Tribunal fell to be examined under Article 6(1)). The high water mark of reading into Article 6 substantive rights was reached in *Osman v UK* Application no 23452/94 (1998); 29 EHRR 245, where the Court was accused of misinterpreting as a procedural block what was in fact a rule of substantive English law. *Osman* was, in effect if not in terms, overruled by *Z v UK* Application no 29392/95 (2001). In that case, the British judge (Arden LJ) emphasised that Article 6(1) did not guarantee any particular content of substantive rights. For discussions of the issues raised by Osman, see Conor Gearty, "Unravelling *Osman*" 64 MLR (2001) 159; M Lunney, "A Tort Lawyer's View of *Osman v United Kingdom*" [1999] KCLJ 238; P Craig and D Fairgrieve, "Barrett, Negligence and Discretionary Powers" [1999] PL 626; G Monti "*Osman v UK* – Transforming English Negligence Law into French Administrative Law?" (1999) 48 ICLQ 757.

[29] *Stran Greek Refineries and Stratis Andreadis v Greece* Series A (Judgments and Decisions) vol 301–B (1994), para 39; 19 EHRR 293.

[30] *Golder v UK* Series A (Judgments and Decisions) vol 18 (1975); 1 EHRR 524.

[31] *De La Pradelle v France* (1992) Series A (Judgments and Decisions) vol 253–B, para 34.

5.24 The right of access is not absolute but may be subject to limitations, since the right "by its very nature calls for regulation by the state, regulation which may vary in time and place according to the needs and resources of the community and of individuals".[32] States enjoy a margin of appreciation in laying down such regulation. Nonetheless, the limitations applied to the right of access to court must not be such that the very essence of the right is impaired; they must, moreover, pursue a legitimate aim and comply with the principle of proportionality;[33] and should be legally certain.[34] Hence, restrictions have been held to be in breach of the Convention where, for example, certain bodies were prevented by statute from bringing proceedings in respect of their property.[35]

Time

5.25 In civil cases, time usually begins to run for the purposes of the reasonable time guarantee from the initiation of court proceedings,[36] although it may start to run even before the issue of proceedings in certain situations, as for example where an applicant is required to exhaust a preliminary administrative remedy under national law before having recourse to a court or tribunal.[37]

5.26 In determining what constitutes a "reasonable time" for the purposes of the article, regard is to be had to the particular circumstances of each case including, in particular, the complexity of the factual or legal issues raised by the case; the conduct of the applicant and of the competent administrative and judicial authorities; and what is at stake for the applicant.[38]

5.27 There is no absolute time limit. A fair balance is to be struck between the requirement that judicial proceedings should be conducted expeditiously and the more general principle of the proper administration of justice (also derived from Article 6(1)).[39]

5.28 The state is not responsible for delay that is attributable to the applicant. The state is, however, responsible for delays by its administrative or judicial authorities. In a civil case, these might include the adjournment of proceedings pending the outcome of another case, delay in the conduct of the hearing by the court or in the

[32] *Belgian Linguistic Case (No 2)* Series vol 6 (1968), para 5; 1 EHRR 252.

[33] *Ashingdane v United Kingdom* Series A (Judgments and Decisions) vol 93 (1985), para 57; 7 EHRR 528.

[34] *Société Levage Prestations v France* Application no 21920/93 (1996), paras 40 to 50; 24 EHRR 351.

[35] *Holy Monasteries v Greece* Series A (Judgments and Decisions) vol 301–A (1994), para 83; 20 EHRR 1.

[36] *Guincho v Portugal* Series A (Judgments and Decisions) vol 81 (1984), para 29; 7 EHRR 223.

[37] *König v Federal Republic of Germany* Series A (Judgments and Decisions) vol 27 (1978), para 98; 2 EHRR 170.

[38] *Zimmerman and Steiner v Switzerland* Series A (Judgments and Decisions) vol 66 (1983), para 24; 6 EHRR 17.

[39] *Pafitis v Greece* Application no 20323/92 (1999), para 97; 27 EHRR 566.

presentation or production of evidence by the state, or delays by the court registry or other administrative authorities.[40]

An independent and impartial tribunal

5.29 The adjectives 'independent' and 'impartial' are the expression of two different concepts. The notion of independence refers to the connection between the judge and the administration whereas impartiality must exist in relation to the parties to the suit. However the court has not always drawn a clear borderline between the two concepts.[41]

INDEPENDENCE

5.30 In *Langborger v Sweden*, the Court stated that

> In order to establish whether a body can be considered independent regard must be had, inter alia, to the manner of the appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence.[42]

5.31 These categories of the notion of independence fall into three categories.[43]

(1) The tribunal must function independently of the executive, and base its decision on its own free opinion about facts and legal grounds.

(2) There must be guarantees to enable the court to function independently.

(3) Even a semblance of dependence must be avoided.[44]

IMPARTIALITY

5.32 This requires that the court is not biased with regard to the decision to be taken, does not allow itself to be influenced by information from outside the court room, by popular feeling, or by any pressure whatsoever, but bases its opinion on objective arguments on the ground of what has been put forward at the trial.[45]

[40] *König v Federal Republic of Germany* Series A (Judgments and Decisions) vol 27 (1978), paras 104 to 105; 2 EHRR 170.

[41] As in *Sramek v Austria* Series A (Judgments and Decisions) vol 84 (1985); 7 EHRR 351. Here the court held that where a member of the court was hierarchically subordinate to one of the parties to the suit this created a legitimate doubt about his independence. However this aspect no longer refers to the independence but to the impartiality of the court.

[42] Series A (Judgments and Decisions) vol 155 at p 16 (1990); 12 EHRR 416.

[43] Van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Right* (3rd ed 1998) at p 452.

[44] In the case of *Bryan v UK* Series A (Judgments and Decisions) vol 335–A (1996); 21 EHRR 342, the Court held that the very existence of the power of the Secretary of State to revoke the power of an inspector to decide an appeal under the Town and Country Planning Act, was enough to deprive the inspector from the appearance of independence.

[45] *Boeckmans v Belgium* (1963) 6 YB 370 at paras 416 to 20. Here the complaint concerned a judge who in his indignation about a specific defence uttered a warning that its upholding might lead to an increase of the penalty. The case was later settled.

5.33 The court distinguishes between subjective impartiality – the existence of actual prejudice on the part of the judge or tribunal – and objective impartiality – whether a judge offers guarantees sufficient to exclude any legitimate doubt in this matter.[46] The personal impartiality of a judge is to be presumed until there is proof to the contrary.[47]

Administrative decision making and a fair hearing

5.34 Where what is at issue is an administrative decision, as will importantly be the case in certain circumstances in housing law, the European organs have developed two alternative approaches to the requirement for a fair hearing. The key development was in the case of *Albert and Le Compte v Belgium*, in which the court held that

> the convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6(1), or they do not so comply but are subject to subsequent control by a judicial body, which has full jurisdiction and does provide the guarantees of Article 6(1).[48]

5.35 The term "full jurisdiction" has led to some confusion, and may be said to be misleading, in that it now appears clear that it does not require that the reviewing court should be capable of conducting a full appeal on the merits, both legal and factual. Rather, the requirement is for "full jurisdiction to deal with the case as the nature of the decision requires."[49] In relation to the British town and country planning system (a particularly important source of law on this aspect of Article 6), the limited scope of judicial review of administrative decisions in the High Court has been held to be sufficient to satisfy Article 6.[50]

Article 1 of the first protocol

5.36 Article 1 of the first protocol guarantees a right to property. The Article consists of three distinct but connected rules.[51] The first rule is a general principle of peaceful enjoyment of property.[52] The second rule prohibits deprivation of possessions, subject to the public interest and the law. The third rule allows states to control the use of property in accordance with the general interest. It has been pointed out that the second and third rules are just particular instances of interference with the right to peaceful enjoyment of property and should be construed in the light of that general principle. In practice the second and third rules tend to be considered first. The concepts that the Article contains are, in common with others contained

[46] *Piersack v Belgium* Series A (Judgments and Decisions) vol 53 (1983), para 30; 5 EHRR 169.

[47] *Le Compte v Belgium* Series A (Judgments and Decisions) vol 43 (1982), para 58; 4 EHRR 1.

[48] Series A (Judgments and Decisions) vol 43(1982), para 29; 4 EHRR 1.

[49] *R v Secretary of State for the Environment, Transport and Regions, ex p Alconbury Developments Limited and conjoined appeals* [2001] UKHL 23 at [87]; [2001] 2 All ER 929, per Lord Hoffman.

[50] *ISKCON v UK* 76–A Decisions and Reports 90 (1994); *Bryan v UK* Series A (Judgments and Decisions) vol 335–A (1996); 21 EHRR 342.

[51] *Sporrong and Lonnroth v Sweden* Series A (Judgments and Decisions) vol 52 (1983); 5 EHRR 35.

[52] *Marckx v Belgium* Series A (Judgments and Decisions) vol 31 (1979), para 63; 2 EHRR 330.

in the Convention, autonomous, and are not simply to be interpreted according to the principles of the domestic law of the state.[53]

5.37 The range of economic interests recognised as "property" under the Article is wide, certainly wide enough to encompass the interests of both landlord and tenant in a rented property.

5.38 The article acknowledges the need for states to deprive citizens of their property in the public interest, however. It is clear that this formulation is significantly wider than the limit on interference with the rights contained in Articles 8 to 11, where interference with a right must be "necessary in a democratic society". The Court has held that, in addition to the normal margin of appreciation given to national authorities in decision making,

> the notion of "public interest" is necessarily extensive. In particular ... the decision to enact laws expropriating property will commonly involve considerations of political, economic and social issues on which opinion within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgement as to what is "in the public interest" unless that judgement be manifestly without reasonable foundation.[54]

This may remain the case where the legislation in question transfers property from one private individual to another.[55]

5.39 In *James v UK*, the Court held that the right given to the leaseholder to expropriate the landlord's entire interest in a property (leasehold enfranchisement) by legislation passed after the landlord acquired his interest was not a breach of the Article. In other cases in the housing field, the Court has found rent controls[56] and the suspension of eviction orders[57] to be compliant with the Convention.

5.40 Following the Human Rights Act 1998, the question would fall to be determined by the national courts, but it is clear that a margin of discretion, similar in effect to the Strasbourg court's margin of appreciation, will be afforded by the courts to the legislature.[58] It would be very surprising if the additional breadth of the margin in respect of this Article was not also reflected at national level.

[53] For a general account of Article 1 of the first protocol, see Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (1995), ch 18; Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd ed 1998) pp 618–43 or Lester and Pannick, *Human Rights Law and Practice* (1999) pp 247–53.

[54] *James v UK* Series A (Judgments and Decisions), vol 98 (1986); 8 EHRR 123.

[55] *Ibid*.

[56] *Mellacher v Austria* Series A (Judgments and Decisions) vol 169 (1990); 12 EHRR 391.

[57] *Spadea and Scalabrino v Italy* Series A (Judgments and Decisions) vol 315–B (1996); 21 EHRR 482.

[58] *R v Secretary of State for the Environment, Transport and Regions, ex p Alconbury Developments Limited and conjoined appeals* [2001] UKHL 23; [2001] 2 All ER 929.

5.41 Article 1 of the first protocol has not to date featured significantly in the application of human rights law in England and Wales since the Human Rights Act 1998. Given the breadth of the definition of property, it might have been thought that significant changes to the rights of either landlord or tenant would be a violation of the article. However, as this brief account of the Article shows, both the structure of the article and the Strasbourg case law thereon suggest otherwise. In particular, it seems highly likely that the adjustment of the relative interests of landlord and tenant in pursuit of better regulation of the rented sector would not amount to a violation of the Article.

THE IMPACT OF THE CONVENTION IN DOMESTIC LAW

The nature of registered social landlords

5.42 The purpose of the Human Rights Act 1998 is to apply the principal articles of the European Convention on Human Rights to the acts of "public authorities". Section 6(1) of the Human Rights Act 1998 provides that "It is unlawful for a public authority to act in a way which is incompatible with a Convention right." This is amplified by section 6(3)(b), which provides that a public authority includes "any person certain of whose functions are functions of a public nature".

5.43 To determine at the least the primary application of the Human Rights Act,[59] therefore, courts must decide whether or not a particular party to litigation is a public authority or not. This decision has a double application, because the same considerations will apply to a determination of whether or not a body is subject to the public law procedure of judicial review.[60]

5.44 Local housing authorities are clearly public authorities for these purposes.

5.45 Housing associations and other registered social landlords are in essence voluntary organisations. Many are charitable. As such, it would be expected that legally, they would be characterised as private bodies. Before the coming into effect of the Human Rights Act, the courts had not treated them as public bodies for the purpose of judicial review.[61] It was the policy of the Housing Act 1988 to consider them as private bodies for all purposes, hence the assimilation of their tenancy structure to that of the private rented sector. However, and despite the enormous increase in private investment in registered social landlords in recent years, they

[59] It has been argued that, because courts themselves are "public authorities" (s 6(3)(a)), the Act also requires courts to make judgments in accordance with Convention rights when considering disputes between private persons – the doctrine that the Act gives the Convention rights "horizontal effect". This approach appears to have been endorsed, obiter, by Waller LJ in his judgment in *McLellan v Bracknell Forest* [2001] EWCA Civ 1510 at [42];[2002] 1 All ER 899. This is an important jurisprudential issue, which we do not consider necessary or appropriate to consider in detail in this paper. We simply note here that if Convention rights do indeed have horizontal effect, the approach of the courts as described 5.54 below may mean that procedural space would have to be found at some level for considerations of proportionality in respect of applications by *private* landlords for possession orders.

[60] *R (Heather and Others) v The Leonard Cheshire Foundation* [2001] EWHC Admin 429 at [65]; [2001] All ER (D) 156 (Jun).

[61] *Peabody Housing Association v Greene* (1978) 38 P & CR 644; *R v Servite Houses, ex p Goldsmith* [2000] EWHC Admin 338; [2001] LGR 55.

have historically relied significantly on state funding for housing development, and continue to do so (they are *registered* social landlords because of registration with the Housing Corporation, to facilitate such support). In addition, the major component of the growth in the percentage of social housing owned by registered social landlords recently has been attributable to the policy of large scale transfers of council owned housing, much of which is to purpose-created registered social landlords. Thus it may be said that they occupy a shadowy territory between the public and private sectors.[62]

5.46 The courts were confronted with the problem of determining the proper categorisation of a housing association in the case of *Donoghue v Poplar Housing and Regeneration Community Association*.[63] Ms Donoghue, who had been a tenant of the local authority, became, on the large scale transfer of Tower Hamlets Borough Council's housing stock to Poplar, an assured shorthold tenant of the housing association, pending the determination of her application to be treated as homeless. That determination went against her, and Poplar terminated the tenancy. Before considering her contention that the procedure for notice-only termination of assured shorthold tenancies interfered with her human rights under the Human Rights Act, the court had to decide whether or not the housing association was a "public authority" for the purposes of the Act. Poplar was a housing association created by Tower Hamlets for the purpose of taking a transfer of its housing stock. Five of its members were also members of the local authority and it was subject to local authority guidance as to how it acted towards its tenants.

5.47 The Court of Appeal held that Poplar was acting as a functional public authority.[64] This was based on a contextual approach focusing upon the close connection in the matrix of the particular case between Poplar and Tower Hamlets, and including factors relating personally to Ms Donoghue.

5.48 The following generalisations seem to emerge from *Poplar*:

(1) A registered social landlord is certainly not a public authority for all purposes.

(2) The test is context specific and focuses on the particular act that is being challenged. The matter is one of fact and degree depending on an accumulation of indications.

[62] See generally, Alder and Handy, *Housing Associations: The Law of Registered Social Landlords*, (3rd ed 1997).

[63] [2001] EWCA Civ 595; [2001] 3 WLR 183.

[64] Within s 6(3)(b) of the Human Rights Act 1998. The dichotomy between standard and functional authorities reflects the Government's view – as expressed in Parliamentary debate during the passage of the Bill (see the Lord Chancellor, *Hansard* (HL) 24 November 1997, vol 583, col 811, and the Home Secretary, *Hansard* (HC) 17 June 1998, vol 314, cols 409–10) – and was subsequently approved, albeit without much discussion, by the Court of Appeal in *Poplar* [2001] EWCA Civ 595 at [63]; [2001] 3 WLR 183.

(3) The analogy with judicial review cases is important. The most significant factor seems to be the extent to which the act in question is enmeshed with the acts of government. This requires a generous interpretation.[65]

5.49 The decisive factor in *Poplar* itself was stated as:

> Taking into account all the circumstances … in providing accommodation for the defendant and then seeking possession, the role of Poplar is so closely assimilated to that of [the local authority] that it was performing public and not private functions.[66]

5.50 The result leaves determining the status of housing associations deeply uncertain. A housing association may be a public authority for some purposes, but not others. Indeed, the relevance of factors relating to the history of Ms Donoghue's tenancy indicates that they may be public authorities in respect of some tenants, but not others.

5.51 Nevertheless, it would appear that housing associations created purposely to receive large scale voluntary transfers are more likely to be "public authorities". They have been set up in a variety of forms (usually companies limited by guarantee or industrial and provident societies).[67] The local authority which established the association generally has the power to appoint individuals to the board.

5.52 By contrast, traditional associations will not have these key ingredients present to the same degree. Such associations assume a wide variety of forms, including companies, charitable trusts, industrial and provident societies, and both part and fully mutual co-operatives. They may have been set up at any time since the nineteenth century. However, some of the relevant ingredients may be present. Some existing associations have taken stock transfers of properties from local authorities. Traditional associations may have taken on activities which were previously undertaken by local authorities such as the day to day administration of applications from the homeless. So each activity and set of circumstances relating to an activity will need to be considered on its merits to determine whether the key ingredients identified by Lord Woolf are present or whether additional equally relevant ingredients are present which pitch the activity into the public sector.

5.53 An example of a decision going the other way is provided by *R (Heather and Others) v The Leonard Cheshire Foundation*.[68] Here the Court found that a charity providing residential care for local authorities was *not* a functional public authority. In coming to its conclusion, the Court considered the differences between Leonard Cheshire and Poplar, and concluded that "the decision in *Donaghue* that Poplar is a public authority depended on the close assimilation of its role to that of Tower Hamlets, and its integration with the functions of Tower Hamlets". There was also

[65] [2001] EWCA Civ 595 at [65]; [2001] 3 WLR 183.

[66] *Ibid*, at [66].

[67] These tend to have the "three thirds" model of governance: a third resident, a third councillors and a third independent members of the general membership and the board of management.

[68] [2001] EWHC Admin 429; [2001] All ER (D) 156 (Jun).

no equivalence of the proximity of the tenant to Tower Hamlets, in that she had previously been its tenant.

The approach to Article 8(1)

5.54 In *Lambeth London Borough Council v Howard*,[69] Sedley LJ assumed that any eviction of a tenant fell within Article 8(1);

> Respect for a person's home is neither an absolute concept, nor, given Article 8(2), an unqualified right…It seems to me that any attempt to evict a person, whether directly or by process of law, from his or her home would on the face of it be a derogation from the respect, that is the integrity, to which the home is prima facie entitled.

5.55 The Court came to the same conclusion in *Poplar Housing and Regeneration Community Association Ltd v Donoghue*[70] and *McLellan v Bracknell Forest*,[71] but it was only in the latter that the point seems to have been seriously argued by counsel.[72]

The assured shorthold regime

5.56 In *Poplar*, Ms Donoghue sought to challenge the procedure for the termination of her assured shorthold, on the basis that the fact that the court had no discretion to deny the landlord an order for possession breached her rights under Article 8. It is important that the decision under appeal was an order of a district judge granting the landlord possession. The Court of Appeal concluded that the eviction did impact on her family life and therefore engaged Article 8(1).[73] Accordingly the question was whether it could be justified under Article 8(2). The availability of a procedure for the orderly recovery of possession at the end of a tenancy was a legitimate aim. The question was whether or not it was proportionate. The court recognised that

> This is an area where … the courts must treat the decisions of Parliament as to what is in the public interest with particular deference. The limited role given to the court under section 21(4) is a legislative policy decision. The correctness of this decision is more appropriate for Parliament than the courts and the HRA does not require the courts to disregard the decisions of Parliament in relation to situations of this sort when deciding whether there has been a breach of the convention.[74]

5.57 There were several factors which appear to have influenced the decision.

(1) The defendant's lack of security was due to her low priority under the legislation because she was found to be intentionally homeless.

[69] [2001] EWCA Civ 468 at [30]; (2001) 33 HLR 58.

[70] [2001] EWCA Civ 595 at [67]; [2001] 3 WLR 183.

[71] [2001] EWCA Civ 1510 at [42]; [2002] 1 All ER 899.

[72] *Ibid*, at [34] to [42].

[73] [2001] EWCA Civ 595 at [67]; [2001] 3 WLR 183 at p 202.

[74] *Ibid*, at [69].

(2) She was aware from the outset of the temporary nature of the accommodation.

(3) For someone in her position it was understandable that Parliament would provide an expedited procedure to obtain possession, and that the landlord should use that procedure.

(4) The defendant also had other remedies she could use, in particular, appeal against the "intentionally homeless" decision, and reference to the ombudsman.

Accordingly, the legislation did not conflict with Article 8. Article 6 did not feature significantly in the judgment.

Alconbury and the requirements of Article 6

5.58 In May 2001, the House of Lords gave judgment in the important case of *R v Secretary of State for the Department of the Environment, Transport and the Regions ex p Alconbury Developments Ltd*.[75] The case concerned the compliance with Article 6 of procedures in which the Secretary of State, who was clearly not an independent and impartial tribunal, took certain planning decisions, subject only to a statutory form of judicial review. The House of Lords found that the provisions were compliant by applying the second of the two alternative approaches to Article 6 from *Albert and le Compte* set out in paragraph 5.34 above. All of the members of the House agreed that this was the right approach, and that in the case of the procedures under consideration, judicial review did amount to "full jurisdiction" to decide the relevant matters.

5.59 However, the members of the House disagreed as to *why* judicial review was adequate. Lord Slynn laid particular emphasis on the fact that the procedures imposed various procedural safeguards on the Secretary of State's decision making process, including the fact that there was a planning inquiry, which allowed for a quasi-judicial procedure. On the other hand, Lord Hoffman considered the safeguards to be irrelevant if the question was one of policy, as opposed to the finding of facts. Rather, the reason was the proper democratic deference due to policy decisions by the Secretary of State.[76] Lord Hutton identified both elements as strands within the Strasbourg jurisprudence, but gave greater emphasis to the need for democratic deference.[77]

Introductory tenancies

5.60 In *Mclellan v Bracknell Forest* the Court of Appeal considered the compatibility (or otherwise) of the introductory tenancy regime and the review procedures it contains with the Human Rights Act 1998 under Articles 6 and 8 of the

[75] [2001] UKHL 23; [2001] 2 All ER 929. For commentary on Alconbury, see Mark Poustie, "The rule of law or the rule of lawyers: Alconbury, Article 6(1) and the role of courts in administrative decision making" [2001] EHRLR 657 and Paul Craig, "The courts, the Human Rights Act and judicial review" (2001) 117 LQR 589.

[76] *Ibid*, at [117].

[77] *Ibid*, at [187] to [189].

Convention. The decision in this case confirms the position that any eviction will now be considered to infringe Article 8(1) and require to be justified under Article 8(2).

5.61 In relation to the Article 8 issue, the Court of Appeal stated that there were two issues to be considered. The first, or "macro", question asked whether the procedure *as a whole* was Article 8 compliant. The court dismissed the tenants' appeal and held that whilst Article 8(1) was engaged, the recovery of possession from introductory tenants under the Housing Act 1996 was justified under Article 8(2). This was because

(1) the provision corresponded to a pressing social need, having regard to the interests of other tenants and neighbours in relation to problems of rent arrears and anti social behaviour;

(2) the interference was of a limited nature; and

(3) the difficulties involved in other methods of legal enforcement meant that the interference was proportionate.

5.62 However, there remained a second, or "micro", question. The Court found that the tenant was entitled to argue that in his or her particular case, it was unnecessary for the local authority to enforce the scheme against him. Clearly, the internal review procedure provided for in the introductory tenancy scheme did not constitute an Article 6 compliant means by which that assertion by the tenant could be determined. However, the court went on to find, essentially following the lead of *Alconbury*, that that procedure combined with judicial review was adequate.

5.63 The court resolved the apparent difficulty that an accusation of anti social behaviour (one basis for seeking possession under the introductory tenancy regime) would appear to involve the finding of primary facts of some difficulty by re-casting the issue as one of reasonableness or proportionality –

> If the council in providing reasons alleges acts constituting nuisance, and if the allegations themselves are disputed that at first sight seems to raise issues of fact. But under the introductory tenancy scheme it is not a requirement that the council should be satisfied that breaches of the tenancy agreement have in fact taken place. The right question under the scheme will be whether in the context of allegation and counter-allegation it was reasonable for the council to take a decision to proceed with termination of the introductory tenancy. That is again a matter which can be dealt with under judicial review either of the traditional kind or if it is necessary so to do intensified so as to ensure that the tenant's rights are protected.[78]

5.64 The method of integrating judicial review with the possession proceedings had already been provided by a pre-Human Rights Act case, *Manchester City Council v Cochrane*.[79] That case established a procedure by which, if it was arguable that

[78] [2001] EWCA Civ 1510 at [97]; [2002] 1 All ER 899.

[79] [1999] 1 WLR 809.

permission for judicial review would be granted, the county court judge before whom the case came up for the possession hearing should adjourn proceedings for an application for judicial review to be made.

5.65 In *Bracknell Forest*, then, it appears that the procedural safeguards imposed by the internal review and judicial review *cumulatively* render the whole procedure fair in Article 6 terms. One obvious link between the two is the Administrative Court's role in supervising the review. This aspect led the Court to impose on local authorities a further duty at the stage of seeking possession. The Court considered that

> it should be the norm for the council to spell out in affidavits … how the procedure was operated … dealing with the degree of independence of the tribunal … the way the hearing was conducted and the reason for taking the decision to continue with the proceedings.[80]

Fact finding and review: continuing developments

5.66 The question of the relationship between fact finding and "full jurisdiction" has continued to exercise the courts. Where fact finding *is* essential to the determination, the Administrative Court has suggested that judicial review is not enough. In the comparatively early case of *R (Husain) v Asylum Support Adjudicator*, a case decided before *Bracknell Forest*, the court considered that

> where the decisions of a tribunal are likely to depend to a substantial extent on disputed questions of primary fact, and the tribunal is clearly not independent, judicial review should not suffice to produce compliance with Article 6. The scope for review of findings of primary facts is too narrow to be considered a "full jurisdiction" in such a context. Fact-dependent decisions must be made by fully independent tribunals: the scope for judicial review of primary findings of fact, and particularly of findings as to the credibility of witnesses, is generally too narrow to cure a want of independence at the lower level.[81]

5.67 In *Fardous Adan v London Borough of Newham*,[82] the Court of Appeal considered that the system for determining homelessness applications[83] was non-compliant with Article 6, despite the availability of a judicial review type procedure,[84] where disputes may arise over findings of primary fact. The local authority officer conducting the statutory review of the local authority's initial decision was not

[80] [2001] EWCA Civ 1510 at [103]; [2002] 1 All ER 899.

[81] [2001] EWHC Admin 852 at [78]; [2001] All ER (D) 107 (Oct). The statement is obiter, the court having found the asylum support adjudicator to be independent for the purpose of Article 6.

[82] [2001] EWCA Civ 1916; [2002] 1 All ER 931.

[83] Under Housing Act 1996, Part VII.

[84] The County Court jurisdiction under Housing Act 1996, s 204 are akin to those of the Administrative Court on judicial review: *Nipa Begum v Tower Hamlets London Borough Council* [2000] 1 WLR 306.

independent of the local authority, and, given the fact-finding necessary, the court did not have "full jurisdiction".

5.68 The conclusions of the Court of Appeal in *Adan* were not technically authoritative, however, which allowed a differently constituted division of the Court of Appeal to come to a contrary conclusion in *London Borough of Tower Hamlets v Begum*.[85] Having reviewed the authorities, Laws LJ said that the critical question in what he described as "two tier" cases was "what are the conditions which determine whether the court process at the second tier, taken with the first instance process, guarantees compliance with Article 6(1)?" He went on:

> … the extent to which the first instance process may be relied on to produce fair and reasonable decisions is plainly an important element. But it is not to be viewed in isolation. The matter can only be judged by an examination of the statutory scheme as a whole … Where the scheme's subject-matter generally or systematically involves the resolution of primary fact, the court will incline to look for procedures akin to our conventional mechanisms for finding facts: rights of cross-examination, access to documents, a strictly independent decision-maker. To the extent that procedures of that kind are not given by the first instance process, the court will look to see how far they are given by the appeal or review; and the judicial review jurisdiction (or its equivalent in the shape of a statutory appeal on law) may not suffice. Where however the subject-matter of the scheme generally or systematically requires the application of judgment or the exercise of discretion, especially if it involves the weighing of policy issues and regard being had to the interests of others who are not before the decision-maker, then for the purposes of Article 6 the court will incline to be satisfied with a form of inquisition at first instance in which the decision-maker is more of an expert than a judge (I use the terms loosely), and the second instance appeal is in the nature of a judicial review. It is inevitable that across the legislative board there will lie instances between these paradigms, sharing in different degrees the characteristics of each. In judging a particular scheme the court, without compromise of its duty to vindicate the Convention rights, will pay a degree of respect on democratic grounds to Parliament as the scheme's author.[86]

5.69 As is indicated by the terms of this passage ("the court will *incline*", "judicial review … *may* not suffice"), however, it may still be misleading to suggest that there is a simple dichotomy, such that a primary fact finding exercise (even in the context of a legislative scheme which requires fact finding "generally or systematically") absolutely requires the jurisdiction of the court to encompass a full hearing of the merits of the issue, whereas judicial review type procedures will only be adequate where the question is one of policy or reasonableness. In *Bryan v UK*,[87] the Strasbourg Court considered that judicial review did amount to "full

[85] [2002] EWCA Civ 239; [2002] All ER (D) 55 (Mar). In *Adan*, the appeal was technically decided by a finding of the Court unrelated to the Article 6 issue. The Court went on to consider Article 6 at the urging of counsel.

[86] [2002] EWCA Civ 239 at [40]; [2002] All ER (D) 55 (Mar).

[87] Series A (Judgments and Decisions) vol 335–A (1996); 21 EHRR 342.

jurisdiction" in relation to a factual dispute arising in connection with planning enforcement proceedings, laying particular emphasis on the "safeguards" involved in decision making by planning inspectors, and the "quasi-judicial" nature of the decision making procedures involved (albeit that they lacked independence). *Bryan* was relied on by both Lords Slynn and Hoffman in *Alconbury*,[88] and the possibility of a compliant non-independent (but "safeguarded") fact finding exercise followed by judicial review of the legality of the process underpins particularly Lord Hoffman's speech. *Bryan* itself could be explained using Laws LJ's approach – although there was a central issue of fact in the case, planning decisions "generally or systematically" involve the weighing of competing policy and personal interests. It remains to be seen how the case law will develop.

HUMAN RIGHTS AND HOUSING LAW: SOME CONCLUSIONS

5.70 We consider that the way that the case law has developed since October 2000 makes a significant difference to the availability of any procedure by which a public authority landlord can recover possession without a court being able to consider the reasonableness or proportionality of evicting the tenant. In short, any procedure which automatically leads to possession being granted without a court having to exercise its discretion must be accompanied by some other procedure adequate to determine the question of proportionality.

5.71 This was the result in *Bracknell Forest*, in respect of the landlord's decision to use one automatic possession procedure, introductory tenancies. But in our view, once it is accepted, as it now clearly is by the Court of Appeal, that *any* eviction engages Article 8(1), the conclusion follows from the general principles of administrative law equally in respect of other automatic possession procedures. Those include the decision to terminate an assured shorthold without grounds, or the decision to use a mandatory ground of possession.

5.72 It is unlawful for a public authority to act in a way which is incompatible with a Convention right. Since the successful use of an automatic possession procedure necessarily engages Article 8(1), it is only lawful for a public authority to use it if it can be justified under Article 8(2). It would only be justifiable to use an automatic process if it was, in the circumstances of the case, proportionate. A decision to use an automatic possession procedure unjustifiably would be unlawful, and amenable to judicial review.

5.73 But once a state provides for a procedure to determine a question such as this, that procedure must itself be compatible with Article 6. While the Court of Appeal has found that judicial review was compatible in the case of introductory tenancies, that was in the context of an extensive, statutory set of safeguards to ensure that the local authority's own fact finding and review exercise, while of course not independent and impartial, nevertheless otherwise matched Article 6 norms. In an appropriate case, it is not obvious that it would necessarily so find in relation to the other automatic possession procedures.

[88] [2001] UKHL 23; [2001] 2 All ER 929.

5.74 The implication of this in practice is that something similar to the *Cochrane* procedure will become a (minimum) necessity in respect of any use by a public authority landlord of an automatic possession procedure.

5.75 These developments will also effect housing associations and other registered social landlords. As we have seen, it will often not be clear in advance whether a particular registered social landlord is a functional public authority for the purposes of both the Human Rights Act and judicial review in respect of any particular tenant. Accordingly, the tenant of such a landlord will have the right to test the character of the landlord (insofar as it relates to him or her) by the same route that is available to the tenant of a local authority. While it is true that the landlord will have an additional argument in the litigation against the tenant, the point of automatic possession proceedings is generally to provide a quick and reliable way of evicting tenants. Judicial review and a *Cochrane* type procedure are inimical to such a purpose.

5.76 Two final points. First, the case law is still in a process of development. In particular, the whole approach taken by the courts up to the Court of Appeal is based on the conclusion that Article 8(1) is always engaged by an eviction. Should the House of Lords conclude that lawfully conducted evictions do not engage Article 8(1) per se, then the procedural consequences we have discussed above would not necessarily arise.

5.77 Second we are very concerned about the uncertainties which surround the application of Human Rights Act principles to registered social landlords. While this may be an issue that should also be resolved by further decisions of the courts, **we invite views on whether it should be made clear by statute that registered social landlords should be deemed to be public authorities for the purposes of the Human Rights Act 1998, in relation to their not-for-profit housing activities.**

PART VI
THE CONSUMER APPROACH: FOCUSSING ON THE AGREEMENT

INTRODUCTION

6.1 We have already indicated that we want to develop a consumer approach to the regulation of the residential housing relationship. Whilst not a new idea,[1] it has not until recently attracted a great deal of attention in the housing context. As the discussion in this Part will show, consumer law should now be seen as an integral part of modern housing law.

6.2 We see considerable advantage in this approach. It should ensure that the terms of agreements are fairly balanced, rather than having unfairly balanced contracts which have to be overridden by other statutory rules. Furthermore, the Office of Fair Trading and other bodies acting on behalf of the Director-General of Fair Trading[2] can require suppliers (landlords) to change the terms of the contract itself without reference to an individual consumer (occupier). In addition, undertakings can be required as to future use of similar contractual terms.

6.3 We build on the recent extension of consumer protection legislation in the UK to housing. The provisions of the Unfair Terms in Consumer Contracts Regulations 1999[3] now apply to tenancy agreements and we think would equally apply to contractual agreements under our proposed scheme.

6.4 The discussion which follows is divided into a number of sections.

(1) The need for a contract.

(2) The application of the law on unfair contract terms to housing agreements.

(3) The need for a written agreement.

(4) The terms of the agreement.

(5) Sanctions.

(6) Variation of agreements.

(7) Ensuring respect for the contract.

(8) Alternative dispute resolution.

[1] See eg the paper by A Murie et al, "The Consumer Implications of the Housing Act 1988" (1988) SAUS Working Paper 77, University of Bristol.

[2] Principally local authorities with trading standards departments.

[3] SI 1999 No 2083.

THE NEED FOR A CONTRACT

6.5 At the moment, the rights and duties of landlords and occupiers are arbitrarily distributed between statute, the common law and the agreement. Most agreements are positively misleading in some respects, opaque in others. This is because, as we explained in Part II, statute has overridden contracts. The essence of our proposal is to relocate the regulatory provisions within the agreement. Neither the landlord nor the occupier should have to look outside the agreement between them to know where they stand.

6.6 **We provisionally propose that the agreement between the landlord and the occupier should be the place where their respective rights and obligations are definitively set out**.

6.7 As already stated, our approach to the reform of housing law is based upon treating the occupier as a consumer. It is logical therefore that the existence of a contract should be required to trigger statutory regulation. This means that for an agreement to fall within our proposed scheme it will have to fulfil normal contractual requirements. In particular there must be consideration and there must be intention to create legal relations.

6.8 **We provisionally propose that our scheme should, subject to the discussion in Part IX, apply to any contract for rent which confers a right to occupy premises as a home**.[4]

6.9 Among issues considered in Part IX is a provisional proposal to move away from using the distinction between a tenancy and a licence as a factor determining which agreements come within and which agreements fall outside our proposed scheme. If adopted, this would have the effect of including contractual licences in our scheme.

6.10 Equally it would exclude from our scheme those agreements where no rent is payable and there is no other consideration.[5] It will also exclude those family and other arrangements which are clearly designed to operate informally. Therefore acts of generosity in allowing someone to occupy property rent-free would operate outside the proposed scheme.

[4] In considering this approach we have considered statutory provisions in a number of Commonwealth countries. The New Zealand Residential Tenancies Act 1986 applies, except where specifically excluded, to every tenancy for residential purposes. The South Australian Residential Tenancies Act 1995 states its purpose as regulating the relationship of landlord and tenant under residential tenancy agreements. Similarly the New South Wales legislation focuses on the residential tenancy agreement. Section 3 of the New South Wales Residential Tenancies Act 1987 defines this as "any agreement under which a person grants to another person for value a right of occupation of residential premises for the purpose of use as a residence: whether or not the right is a right of exclusive occupation, whether the agreement is express or implied, and whether the agreement is oral or in writing, or partly oral and partly in writing, and includes such an agreement granting the right to occupy residential premises together with the letting of goods". A tenancy is defined as "the right to occupy residential premises under a residential tenancy agreement". This definition makes the agreement the key to statutory rights and avoids the lease/licence distinction.

[5] For example, the provision of money's worth. To a large extent, this replicates the current law. Paragraph 3 of Schedule 1 to the Housing Act 1988 excludes tenancies for no rent.

THE APPLICATION OF THE LAW ON UNFAIR CONTRACT TERMS TO HOUSING AGREEMENTS

The purpose of applying a consumer law approach to housing

6.11 The Office of Fair Trading states that their Guidance on Unfair Contract Terms in Housing aims "to help ensure fair and equitable relations between landlords and tenants".[6] Historically, governments have intervened in the housing market to provide a legislative counter-balance to the inequalities of bargaining power that exist there. Contractual terms have been over-ridden by statute law. This has been a source of confusion, as documents do not have the legal effects that they appear to have; and landlords and tenants have often failed to understand how statute law affects their position.

6.12 The more recent emphasis on ensuring that the terms of consumer contracts are appropriately balanced from the outset suggests that the modernisation of housing law must also reflect this consumer approach. We recognise the need to ensure that the unfair contracts approach is suitably adapted for the housing market, and the need for reciprocity of fairness as between the interests of landlords and occupiers.

Focussing attention on the contract

6.13 A consumer approach will focus the attention of both the parties and the courts on the terms of the contract. We believe the benefits of this include

(1) greater clarity, given that the two parties will have in front of them a single document with all the relevant terms in plain English[7], rather than having to find and understand various statutory provisions;

(2) the ability to translate such a document into other languages for the benefit of those whose first language is not English;

(3) additional flexibility in what can be agreed;

(4) an appreciation that being a residential landlord – whether on a large or small scale – is as much about providing a service to customers as it is about temporarily granting a right to occupy land; and

(5) a clearer recognition of the role of consumer protection in housing.

6.14 We propose to increase this emphasis on the contract in two principal ways.

6.15 First, we propose that all agreements should be put into writing. This will be backed up by setting out, in statutory form, default terms which will apply either where the parties choose to use them or to cover gaps in a written contract that does not use the default terms. To assist, we propose the provision of easily

[6] Office of Fair Trading, Guidance on Unfair Terms in Tenancy Agreements (November 2001) Part I para ii. Cf http://www.oft.gov.uk/News/Publications/Leaflet+Ordering.htm under the Reports link.

[7] One of the tests of fairness is that drafting should be in plain English.

accessible model agreements for general use. The issues arising from this proposal are discussed in this Part.

6.16 Second, we propose that the written agreement should set out clearly the circumstances in which possession may be recovered by the landlord.[8] Our detailed proposals on security are set out in Parts VII and VIII.

Objections to the consumer approach?

6.17 Some may object that a consumer approach is not appropriate for renting homes. For example, a defective house cannot simply be returned to the landlord for a cash refund[9] (although of course the same could be said of services). We intend to be guided rather than led by the consumer approach, to ensure that it is applied appropriately in the housing context.

6.18 It may also be suggested that a consumer approach will not be effective, in that many – both landlords and occupiers – may not understand the documents that are generated by the approach. This may be a problem for some, but we think there are advantages in having their rights and obligations set out in a single document. The fact that occupiers may be given a longer and more complex document than they are now is, we think, a small price to pay for the advantages the new scheme offers. They should have access to one of the most important contracts they enter into. It should certainly be a great deal easier for those – both lawyers and others – who advise on housing matters to provide clear advice, to both parties.

6.19 Others may argue that it would be preferable if the statement of landlords and occupiers rights appeared in a clearly drafted statute than a contract. Although styles of drafting legislation have changed over the years, we do not think that the lay person would find a statute any easier to comprehend than a contract. It is not a realistic alternative to expect the parties to consult the statute themselves. We still think it desirable that the contract should provide as definitive statement as possible of the parties' rights and obligations. In any case, the terms will actually emanate from a statutory instrument.

6.20 Finally, some may suggest that the consumer approach is not appropriate for social housing provision. However, unlike many other areas of social welfare provision, housing provision has long relied on contractual agreements. We think that a consumer approach to social housing provision is therefore a very appropriate means to ensure that landlords and occupiers focus on their individual rights and responsibilities. We see no inconsistency between this and the desirability for other aspects of social housing management to be developed on a more communitarian, less individualistic, basis.

[8] These will replace the existing statutory grounds for possession, set out in the tables in paras 3.41 to 3.46.

[9] Though see *Hussein v Mehlman* [1992] 2 EGLR 87 where it was held that tenants can accept landlords' repudiatory breaches as terminating tenancy under normal contract rules despite the property nature of a tenancy.

Unfair contract terms law: the legislative background

6.21 The European Council of Ministers passed the Directive on Unfair Terms in Consumer Contracts in 1993.[10] It applies a test of "fairness" to standard terms in consumer contracts. The Directive was first implemented in the UK by the Unfair Terms in Consumer Contracts Regulations 1994, but it was not clear whether they covered housing. This uncertainty was removed by the 1999 Regulations[11] of the same name, which revoked and replaced the 1994 Regulations. They make it clear that the EU Directive applies to housing contracts.[12]

6.22 Enforcement action started to be taken on such agreements from the time the new Regulations came into effect.[13] The impact of this has become clearer since November 2001, when the Office of Fair Trading published its Guidance on Unfair Terms in Tenancy Agreements. This interprets[14] the Regulations as they apply to terms in assured tenancy agreements which have come to the attention of the Office.[15] The guidance reflects the Office of Fair Trading's view of the law; there have been no definitive judicial statements on the correctness of their views.[16]

Further developments

6.23 In April 2000 the European Commission published a report on the implementation of the European Directive in its first five years. It raised a number of questions relating to suggestions for improving the Directive, and threw these open to EC wide consultation. In February 2001, after public consultation throughout the UK, the British Department of Trade and Industry published the UK Government's answers to these questions. Whilst they do not deal specifically with housing agreements, any changes would be likely to affect such agreements along with other consumer contracts.

6.24 The Law Commission is working on proposals to create a new unified and simplified unfair contracts regime to replace the two distinct regimes which currently operate under the Regulations and the Unfair Contract Terms Act 1977[17] ("UCTA").

[10] Council Directive 93/13/EEC.

[11] The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999 No 2083.

[12] This was achieved by removing the words "goods and services" from the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994 No 3159.

[13] This has been documented on the Office of Fair Trading's website; cf the unfair contract terms bulletins at http://www.oft.gov.uk/News/Publications/Leaflets+Ordering.htm under Reports and then Unfair contract terms categories.

[14] The Office of Fair Trading, Guidance on Unfair Terms in Tenancy Agreements (November 2001) Part II para i makes it clear that the courts will have the final decision as to whether any term is unfair.

[15] In particular, to pre-formulated assured and assured shorthold tenancies and pre-tenancy agreements in England and Wales.

[16] So far as we are aware there are no cases currently pending before the courts.

[17] The 1977 Act differs, for our purposes, from the Regulations in that does it not apply to interests in land; it deals, in the main, with terms such as exclusions clauses and it applies to both negotiated and non-negotiated forms of such terms.

Relationship with our proposed default terms

6.25 The Regulations do not apply to terms that reflect "mandatory statutory or regulatory provisions".[18] Recital 13 of the Directive states that the phrase "mandatory statutory or regulatory provisions" includes "rules which, according to the law, shall apply between contracting parties provided no other arrangements have been established" on the basis that such mandatory (and default) provisions "are presumed not to contain unfair terms".[19] The exemption therefore applies to default rules intended to apply in the absence of any express contractual provisions, but which may be excluded by agreement, and to terms which attempt to reflect such default terms. This appears to cover our proposed default terms and any express terms in an agreement which reflect our default terms, provided they are in plain intelligible language and are not significantly different from our default terms to the detriment of the consumer.

6.26 Terms "required" by competent authorities – such as an industry regulator – acting in the course of their statutory jurisdiction or function may also be excluded as "mandatory statutory or regulatory provisions", although it is likely that terms which are merely "approved" by the regulator are not excluded.

(1) This may therefore apply to some requirements imposed on registered social landlords by the Housing Corporation.

(2) It could also apply to terms required of a private landlord by the local authority under a licensing scheme[20] (such as, that for houses in multiple occupation under Housing Act 1985, or the Department for Transport, Local Government and the Region's proposed selective licensing of private landlords in areas of low demand).

(3) The residential management codes produced by the Royal Institute of Chartered Surveyors do have statutory authority[21] but are probably not covered, in that they do not impose mandatory requirements on the terms of a tenancy agreement.

[18] SI 1999 No 2083, reg 4(2)(a).

[19] These words from the Recital are not repeated in the Regulations but we believe – as does the Consumer Affairs Directorate of the Department of Trade and Industry – that they should be used to interpret the Regulations. The Department's Response following the European Commission's consultation recommends redrafting the Regulations to apply clearly to "terms which in substance are simply the 'default rules' which would apply were there no express clause on the subject". Cf Department of Trade and Industry, Commission Review of Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts (February 2001) para A1(b)(i); cf also: http://www.dti.gov.uk/CACP/ca/consultation/uct.htm.

[20] Cf Housing Act 1985, Part XI and Department for Transport, Local Government and the Regions, Selective Licensing of Private Landlords – A Consultation Paper (November 2001). Cf also: http://www.housing.dtlr.gov.uk/information/consult/licensing/.

[21] Under the Leasehold Reform, Housing and Urban Deve7lopment Act 1993, s 87.

Requirements of transparency and fairness

6.27 The aspects of the Regulations most relevant to housing agreements are those relating to transparency and fairness, procedural and substantive.[22]

Transparency

6.28 The Regulations require all relevant terms to be expressed in "plain, intelligible language."[23] The Guidance stresses that terms must be in plain language so that they are intelligible to occupiers without legal advice, that occupiers must have an adequate chance to read them before becoming bound by them and that important terms should be drawn to occupiers' attention. The Guidance objects to legal terminology such as "indemnify".[24]

6.29 The Regulations provide that if a term is ambiguous, the interpretation which is most favourable to the occupier will prevail.[25]

6.30 The Guidance takes the view that excessive lack of clarity in a term can be a source of unfairness in itself. The significance of this is that the whole term is rendered invalid.

Procedural Fairness

6.31 The Regulations prohibit procedural unfairness. Thus terms which are substantively fair may be rendered unfair in light of the surrounding circumstances at the time of the conclusion of the contract.[26] Recital 16 to the European Directive states that the relevant circumstances include the respective bargaining strength of the landlord and occupier, any inducement provided by the landlord to enter the contract, unfair surprise and whether the contract was entered into fairly and equitably. However, these circumstances have not been set out in the Regulations. One relevant circumstance could be any previous enforcement action taken against that landlord's use of related terms. The Guidance suggests it will consider factors such as the length and complexity of the contract and whether the occupier was given adequate time to read the terms.

Substantive unfairness

6.32 The main aim of the Regulations is to eliminate substantive unfairness. Under the Regulations, a term will be unfair if its substance causes a "significant imbalance" in the parties' rights and obligations, to the detriment of the consumer (in our case, the occupier).[27] There need not be a particular imbalance to a particular

[22] In the following paragraphs we use the term "occupier" rather than "tenant" to reflect the terminology we have adopted in this paper; the Guidance itself refers to "Tenancy Agreements".

[23] SI 1999 No 2083, reg 7(1).

[24] The Office of Fair Trading, Guidance on Unfair Terms in Tenancy Agreements (November 2001) Part 2, para vii and Part 5. The Department of Trade and Industry Response at para A3 recommends that such requirements should be spelled out in the European Directive.

[25] SI 1999 No 2083, reg 7(2).

[26] *Ibid*, reg 6(1).

[27] SI 1999 No 2083, reg 5(1)

occupier. A term will be unfair simply if it is has the potential to cause detriment to occupiers. The Guidance stresses that a term can be unfair irrespective of the landlord's intention in drafting it, and whether or not it is actually used in a way that is detrimental to the occupier.

6.33 The Regulations contain a long, non-exhaustive indicative list of terms – known as the "Grey List" – which may be regarded as unfair in consumer contracts. The Guidance applies the Grey List to current housing agreements, taking a broad view and listing an extensive range of terms which it sees as potentially unfair. The Guidance also goes beyond the Grey List and sets out other terms found in UK housing agreements that are considered to be potentially unfair. This reflects the view of the Office of Fair Trading (based on evidence from complaints received) that by using pre-formulated standard agreements, landlords are in a stronger bargaining position than occupiers.

6.34 In applying the test of fairness, the Guidance emphasises the breadth of the requirement of good faith[28] and focuses on terms which give power to the landlord that the landlord would not otherwise have or protect the landlord in a way that puts the occupier at a disadvantage.[29] The general starting point for the Office of Fair Trading is to ask what would be the position for the occupier if the term did not appear in the contract.

6.35 The Guidance generally objects to terms which give the landlord sole discretion to impose obligations on the occupier, beyond the requirements of good estate management. The Guidance stresses that, even if a term is actually ineffective, because it is unenforceable at common law or under some other statute, it is still unfair because its presence in the contract is misleading and could cause the occupier to agree to things that they otherwise would not. Therefore, many standard terms commonly used in agreements are likely to fall foul of the Guidance.

Consequences of unfairness

6.36 Under the Regulations, if a court finds a term to be unfair then it will not be binding on the occupier and the landlord will not be able to rely on it.[30] This means the occupier will have a defence against any action taken by the landlord to enforce the term, whether by repossession, injunction, damages or otherwise.

6.37 The rest of the contract will continue if it is able to exist without the unfair term.[31] The effect of removal of the term is that the general housing law, both common law and statute law, will apply to regulate the parties' obligations in the area that

[28] The Office of Fair Trading, Guidance on Unfair Terms in Tenancy Agreements (November 2001) Part II para iii – emphasising that it should not be possible to use a term in a deceitful way, whether it is so used or not.

[29] *Ibid*, Part II para iv.

[30] SI 1999 No 2083, reg 8(1).

[31] *Ibid*, reg 8(2).

was covered by the unfair term.[32] In the context of our scheme, this means that the appropriate default term is substituted for the unfair term.

6.38 It is less clear whether occupiers can take their own court action to have unfair terms struck out. Under current housing legislation, each of the three principal Acts confers a power on the county courts to make declarations. However, they are inconsistent and unclear.[33] In particular, none of them appears to give the courts the power to make declarations as to what are the express terms of the original tenancy agreement. (This can be contrasted with section 1 of the Employment Rights Act 1996, which gives an employee a right to receive a written statement of the terms of the employment contract and to go to the Employment Tribunal to provide a declaration as to the terms, if none is forthcoming.)

6.39 The Regulations require various enforcement agencies,[34] including the Director General of the Office of Fair Trading and local authorities with trading standards functions,[35] to consider all complaints about unfair terms (except frivolous or vexatious ones[36]) and to give reasons[37] if they do not take the matter further. The enforcement agency may apply for an injunction[38] which the court may grant on such terms as it sees fit.[39] The court may grant an injunction not just against the use of the particular unfair term in question but also against any similar term or terms having like effect, used or recommended for use by any person.[40] Alternatively, the enforcement agency may seek an undertaking from the landlord that the term will no longer be used.[41] Office of Fair Trading cases are usually resolved by the Director General accepting informal undertakings in lieu of court proceedings.

[32] We provisionally propose in our consultation paper on Unfair Terms in Contracts (forthcoming) that the new legislation should provide that a term which is unfair should be of no effect to the extent that it is detrimental to the consumer, so that the court can strike out only that part of a clause that is unfair, leaving the rest intact. The contract would continue to bind the parties if it was capable of continuing its existence without the unfair term.

[33] The clearest is Housing Act 1985, s 110 which includes an express power to make declarations even where this is the only remedy sought. Narrower is Rent Act 1977, s 141 which has a specific list of issues. Declarations are not mentioned in Housing Act 1988, s 40 but s 6 gives the rent assessment committee power to decide on variations of the terms of a statutory tenancy, while s 20A merely creates a criminal offence of failing to provide a written version of the terms.

[34] SI 1999 No 2083, Sched 1 lists the Qualifying Bodies – including eg the Consumers' Association.

[35] Defined by the Weights and Measures Act 1985, s 69 to include county, metropolitan district and London borough councils.

[36] SI 1999 No 2083, reg 10(1)(a).

[37] *Ibid*, reg 10(2). According to reg 3(1) "court" in relation to England and Wales and Northern Ireland means a county court or the High Court.

[38] *Ibid*, reg 12.

[39] *Ibid*, reg 12(3).

[40] *Ibid*, reg 12(4).

[41] The Director is entitled, if he considers it appropriate to do so, to take into account such – and any other – undertakings in deciding whether or not to apply for an injunction: SI 1999 No 2083, reg 10(3).

Limitations

6.40 The Regulations contain three key limitations. They are

(1) limitation to cases where landlords are 'suppliers' and occupiers are 'consumers';

(2) limitation to cases where terms are not individually negotiated; and

(3) exclusion of "core" terms.

6.41 We believe that the first two limitations should be specifically waived in housing legislation because of special circumstances in housing, and that the third should be dealt with by consumer legislation.

Limitation to cases where landlords are "suppliers" and occupiers are "consumers"

6.42 The Regulations define a "supplier" as "any natural or legal person who… is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned." The definition of "supplier" appears to include letting and estate agents, local or public authorities, Government departments and housing associations.[42] The Regulations define a "consumer" as "any natural person who… is acting for purposes which are outside his trade, business or profession".

6.43 The Guidance assumes that, in general, a landlord should be considered a "supplier" and an occupier (tenant) should be considered a "consumer" within the meaning of the Regulations. Private landlords will be covered by the Regulations where they are "acting for purposes relating to their trade, business or profession." The Regulations do not explain this any further. The Office of Fair Trading has indicated that there will be circumstances under which private landlords will not be considered to be acting for such purposes. These presumably include where landlords are not making their living out of letting, but have some other business and are only letting their home temporarily while waiting for a better opportunity to sell it or while working in another area.

6.44 There are persuasive arguments for applying the requirements of the Regulations to housing without limitation to those falling within the definition of "supplier" and "consumer".

(1) There has never been any limitation of housing rights to cases where the landlord is acting in the course of a business. Housing law has sought to make housing contracts fair to occupiers of even the casual or small landlord.

(2) We are also anxious not to distinguish between different categories of landlord. "Landlord neutrality" is one of the goals of the reform we are

[42] In our consultation paper on Unfair Contract Terms, we provisionally recommend that the new legislation should make it quite clear that contracts between consumers and government departments, local or public authorities may count as consumer contracts.

suggesting. We would want to see the new housing scheme applying to any agreement covered by it.

6.45 **We provisionally propose that all those who enter into contractual agreements within the scope of our proposed scheme should be deemed to be suppliers and consumers within the scope of the Regulations, and thus the requirements of fairness and transparency should apply to all agreements covered by our new scheme.**

Limitation to cases where terms are not individually negotiated

6.46 At present, the Regulations are designed to target unfair terms in pre-formulated standard contracts only. They do not apply to terms that have been individually negotiated.[43] The onus is on the landlord to demonstrate that a term has been individually negotiated.[44] A term will always be regarded as not having been individually negotiated where it has been drafted in advance[45] and the occupier has thus not been able to influence its substance.[46]

6.47 This position may change in future in general consumer law. The Department of Trade and Industry Response supports bringing individually negotiated terms within the scope of the European Directive, though with the express qualification that such terms should not be regarded as unfair if the supplier has taken reasonable steps to ensure that the particular consumer understands both what has been agreed and its foreseeable implications for him or her.

6.48 The Law Commission will be provisionally proposing that the new unified regime of unfair contract terms should extend the Regulations to both negotiated and non-negotiated terms.[47] If this happens, all terms in housing agreements, other than core terms, will be subject to the test of fairness, whether they have been negotiated or not.[48]

6.49 We wish to promote fairness and transparency in the terms of housing contracts. We also wish to encourage negotiation of terms, but not at the expense of fairness and transparency. We believe that the whole agreement should be fair and transparent (except that the idea of fairness does not apply to core terms[49]). This logic applies as much to the negotiated terms as to the new default terms

[43] SI 1999 No 2083, reg 5.

[44] *Ibid*, reg 5(4).

[45] *Ibid*, reg 5(2). This means that if a term was drawn up before any negotiations and was not itself negotiated, it will be covered by the Regulations.

[46] *Ibid*, reg 5(2). Where the standard terms remain untouched by any negotiations (eg where one party has tried to negotiate an improvement to the contract but has failed to obtain it) then the final deal will be considered to have been made on the defendant's standard terms: cf *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481.

[47] Law Commission, Unfair Terms in Contracts (forthcoming).

[48] At present the enforcement authorities do not have power to take action against such terms; the Law Commission will be consulting on whether these authorities should have power to act against particular practices of negotiating unfair terms.

[49] See paras 6.51 and 6.52 below on the exclusion of core terms from the requirement for fairness in the Regulations, though not from the requirement for transparency.

(proposed at paragraph 6.117 below). The default terms will be designed to be fair and transparent, even though they fall outside the scope of the Regulations.[50] The only way to make negotiated terms fair and transparent is to subject them to the Regulations test.

6.50 **We provisionally propose that, in relation to agreements covered by our scheme, the requirements of fairness and transparency should not be limited to non-negotiated terms, and should cover negotiated terms as well.**

Exclusion of "core" terms

6.51 The test of fairness in the Regulations does not apply to terms which relate to the "definition of the main subject matter of the contract" or to the "adequacy of the price or remuneration".[51] The extent of the "core" is thus not precisely defined. The Guidance explains that – in the context of housing agreements – these "core terms" include those stating the rent, the details of the property and the length of the agreement. It may well be the case that a requirement for payment of a deposit would be regarded as a core term. (On the other hand a term dealing with the return of a deposit at the end of the agreement would probably not be part of the core.)

6.52 Core terms are only excluded from the fairness test if they are in plain and intelligible language. Thus they are subject to the requirements of transparency but not of fairness. We do not propose to impose any regulation on the issues covered by the core terms.

6.53 **We provisionally propose that the definition of core terms should be left to consumer legislation rather than being included in a Housing Act.**

6.54 Where a core term, or other term – not being a compulsory term – has been agreed orally, there needs to be a system to enable corrections to be made if the landlord attempts to issue a written contract which does not accurately reflect these orally agreed terms. One solution would be to use the existing law on rectification. But we are not sure whether this is a remedy that would be easily available to occupiers.

6.55 **We invite views on whether a special jurisdiction should be created, for example in the rent assessment committee, or the county court, to amend written agreements that do not accurately reflect previous oral agreements.**

[50] See para 6.25 above on the relationship of the default terms to the Regulations.

[51] SI 1999 No 2083, reg 6(2).

OTHER FACTORS MAKING TERMS INVALID

Principles of contract law

6.56 Aside from the Regulations, other areas of law can also render a purported contractual term invalid. Terms agreed, rather than implied, must comply with the ordinary rules of contract law on, for example, certainty and illegality.

Shams

6.57 The courts have been robust under previous security of tenure regimes in disregarding "sham" terms, which the parties did not mean to be taken literally but were intended by the landlord to avoid statutory provisions. Shams have faded in importance as landlords have been able to use assured shorthold tenancies, without the uncertainty of avoidance devices. However, one landlord recently sought to enforce a term allowing a rent increase sufficient to take the tenant outside of the scope of the Housing Act 1988.[52] Following other decisions on shams, this was held invalid by the Court of Appeal. It is reasonable to assume that the courts will continue to declare obviously sham terms invalid.

Discrimination law

6.58 Another area of law which may render contract terms invalid is discrimination law. Identical provisions exist in section 77 of the Sex Discrimination Act 1975 and section 72 of the Race Relations Act 1976, with similar provisions in section 26 of the Disability Discrimination Act 1995, which render void any contract term which is discriminatory. An example of the effect would be that if a landlord decided to negotiate more restrictive nuisance clauses for single mothers than other occupiers (in particular single fathers) or tougher restrictions on making noise for black occupiers than white occupiers. Such terms would be void.[53]

Human Rights Law

6.59 When drafting the compulsory terms and the statutory default terms, the Secretary of State will need to ensure that such terms are drafted so as not to be in breach of human rights. If a default term is incompatible then an occupier of a landlord which is a public authority could rely on human rights arguments to challenge the validity of the default term adopted by the landlord.

THE NEED FOR A WRITTEN AGREEMENT

6.60 One of the foundations of our scheme is that agreements should be committed to writing. This is to ensure both parties can be as clear as possible about their legal position. Contracts for the renting of residential accommodation are, in our view, just as important as contracts of employment, where a requirement to provide a written version of the contract has existed for many years. If there is no written agreement then a statutory agreement should be imposed.

[52] *Bankway Properties Ltd v Penfold-Dunsford and another* [2001] EWCA Civ 528; [2001] 1 WLR 1369.

[53] The statutes allow the victim of the discrimination to apply to the county court to remove or modify the offending term .These provisions do not apply to "small landlords".

6.61 We do not believe that agreements as a whole covered by our scheme should be rendered invalid if they are not put into writing. Instead we believe that if no written agreement is used then, the agreement will still exist, but the *terms* will be those provided as the statutory default terms (as well as the compulsory terms which apply to all agreements). These will also replace any orally agreed terms which are not included in the written agreement. We also propose that the landlord should be subject to sanctions for any significant delay in providing a written agreement.

6.62 At present there are four sets of requirements relating to writing. They are

(1) requirements relating to initial validity;

(2) requirements for provision of information about the terms of the agreement;

(3) requirements for provision of information about the landlord; and

(4) requirements relating to rent books.

We believe these should be made much more coherent.

Requirements for validity

6.63 The scheme which we provisionally propose is firmly based on the contract between the landlord and the occupier. As between those parties, that contract should be valid and enforceable whether or not it is in writing. As we will explain in due course, the landlord is to be under a legal obligation to reduce the agreement to writing, but we believe it is necessary, in order to protect the interests of the occupier, to confirm that an oral contract is valid (and that it will be so even though the occupier has not yet gone into occupation of the property).

6.64 The contract between the landlord and the occupier may comprise a lease or a licence. A lease is, in most cases, an estate in land, and is therefore potentially binding on persons outside the landlord-tenant relationship (third parties). Whether the lease has this proprietary impact will depend on its compliance with statutory formality requirements and on its registration.[54]

6.65 As the application of our scheme is not dependent upon the contract being a lease, it is immaterial for these purposes whether the contract complies with the requirements as to formality or registration. It may of course *become* highly significant, in the event of third party involvement, to determine whether a contract within our scheme does comprise a lease or a licence, and whether it has proprietary effect. But it is not a question which will require to be answered as between landlord and occupier. Thus we are able to propose that a contract which purports to grant a lease but which does not satisfy the statutory formalities so to do can nevertheless be subject to the regulation effected by our proposed scheme.

[54] See generally C Harpum, *Megarry and Wade: The Law of Real Property*, (6th ed 2000) at 14–029 to 14–053. These requirements date back to the Statute of Frauds 1677.

6.66 **We provisionally propose that a housing agreement which is made orally or which otherwise fails to comply with statutory requirements as to formality or registration of leases shall nevertheless be treated as a valid agreement between the landlord and the occupier and shall be subject to the regulation of our new scheme**.

6.67 These proposals do however raise a further question: at what point should the agreement become fully effective? On land law principles, oral agreements only take effect when the tenant enters into possession.[55] Were our scheme to apply only to leases, this might be the preferred approach.

6.68 However we have suggested that all housing agreements should come within the scope of our proposed scheme. Given our emphasis on the importance of the contract, it might be thought that questions of validity of the agreement should be determined by principles of the law of contract. In that case, the agreement would become effective when the oral agreement was made, even if entry into possession was delayed.

6.69 It is possible to imagine, however, that the parties enter an oral agreement but then one discovers something about the other, short of a misrepresentation, which makes them want to think again. On this view, it might be preferable that the moment when the agreement becomes binding on both parties is when one or both of the parties acknowledge the existence of the agreement, say by confirmatory letter; or indeed by the completion of the written agreement prior to the occupier moving in.

6.70 **We invite views on whether an oral agreement should become effective as soon as the oral agreement was made; or only after there has been written acknowledgement of the agreement in a letter; or by completion of the written agreement prior to the occupier going into occupation; or, assuming that a written agreement has not been provided, only after the occupier has entered into possession.**

6.71 We also propose that default terms should be imposed if the oral agreement is not put into writing within a defined period of time.[56] In addition we propose that the landlord who fails to provide a copy of the written agreement should be subject to the sanction of loss of rent (and possibly criminal sanctions).[57]

[55] An oral agreement to create a fixed term tenancy may take effect as a periodic tenancy. Cf *Long v Tower Hamlets London Borough Council* [1996] 2 All ER 683 and the commentary on the issue by Susan Bright, "Beware the Informal Lease" [1998] 62 Conv (NS) 229, 229 to 235. Until that case it was generally thought that tenancy agreements could be signed in advance of the tenancy without using a deed, but there does not appear to have been any significant subsequent move to use deeds or to sign agreements only on the day of the start of the tenancy.

[56] See below para 6.117.

[57] See below paras 6.126 and 6.128.

Requirements for provision of information about the terms of the agreement

6.72 Under the current law there are three different provisions requiring landlords to give written information about the terms of the tenancy.

(1) Assured shorthold tenancies. Following amendments to the assured shorthold tenancy regime in 1996, it is now provided that a tenant who has not been given a written statement of certain key provisions[58] in the assured shorthold tenancy agreement may require the landlord to provide that evidence.[59] Failure to provide this information is a criminal offence.[60]

(2) Accelerated possession proceedings.[61] The rules relating to the accelerated possession procedure[62] provide that the procedure cannot be used unless the claimant is able to provide a written copy of the tenancy agreement available for the court to peruse. This amounts, in practice, to a further requirement that the terms of the tenancy be set down in writing, which particularly impact upon private sector landlords.

(3) Secure tenancies. Landlords letting secure tenancies are under an obligation to provide written details of the express terms of the secure tenancy,[63] the provisions relating to the Right to Buy, and the provisions of sections 11 to 16 of the Landlord and Tenant Act 1985, which relate to the landlord's repairing obligations.[64] Local authority landlords are required to provide the latter two elements of this information annually.[65] There is no obvious sanction for failure to comply with these provisions, though no doubt any such failure would be regarded as maladministration by the Local Government Ombudsman.

[58] These provisions are: the date on which the tenancy began or, if a statutory periodic tenancy, the date it came into effect; the rent payable under the tenancy and the dates on which it is payable; any term providing for review of the rent. Cf Housing Act 1988, s 20A (2)(introduced by Housing Act 1996, s 97).

[59] Housing Act 1988, s 20A (1) (introduced by Housing Act 1996, s 97); it applies only to assured shorthold tenancies created after the 1996 amendments came into effect (28 February 1997).

[60] In the light of *Shaw v Groom* [1970] 2 QB 504 (see note 71 to para 6.83 above) it is unlikely that failure to comply would render rent irrecoverable.

[61] See para 8.13 below.

[62] CPR Pt 55, r 12.

[63] The specific requirement for provision of copies to individual tenants only relates to those terms which are not implied by law and are not already contained in any written lease – cf Housing Act 1985, s 104(2)(b). There is also a duty to provide tenants with a copy of general information; the authority must publish it in such form as it considers best suited to explain in simple terms, and so far as it considers it appropriate, the effect of the express terms of its secure tenancies – cf s 104(1)(a) and s 104(2)(a).

[64] Housing Act 1985, ss 104 (1) and (2).

[65] Housing Act 1985, s 104(3), inserted by the Leasehold Reform, Housing and Urban Development Act 1993, s 123.

6.73 This collection of statutory provisions is a clear example of the fragmentation of the current law. We believe that all occupiers should have a written statement of the terms under which their right to occupy a home has been created.

6.74 **We provisionally propose that all agreements covered by our new scheme should be put into a written form.**

6.75 **We further provisionally propose that the duty to put the agreement into writing should fall on the landlord; that the landlord should be required to provide a copy for the occupier; and that in any court proceedings that might arise under the agreement, the landlord should be required to produce a copy of the written agreement**.[66]

6.76 We do not propose to impose any requirement that the agreement should be signed, but we would assume that landlords would wish to obtain a signature on the agreement or a receipt for it as proof that they had complied with the duty.

6.77 The model agreement should include a warning to the occupier to keep the contract in a safe place. If the occupier loses his or her copy of the contract, we would not want to see occupiers having to issue claim letters about possible breaches of contract just to make landlords show them their copy.

Residential arrangements excluded from our proposed scheme

6.78 The requirement for writing will be limited to those agreements covered by our new scheme. We deal in Part IX below with the question of what categories of agreement should be excluded from it. Generally we do not consider that there is any need to extend the requirement for writing to them. Most are less formal arrangements with fewer rights and less scope for disputes. If there are particular circumstances in which a written contract would be desirable, for example for people living in accommodation provided by social landlords on a hostel or supported housing basis, there is nothing to prevent landlords in such cases voluntarily providing occupiers with a written agreement. The terms of the written contract in these cases will, however, depend upon the nature and purposes of the provision. We therefore consider that written contracts for supported housing should be negotiated with the occupiers as part of the development of the provision and not be statutorily prescribed.

Requirements for provision of information about the landlord

6.79 Occupiers need to be able to be sure who their landlord is in case of problems. It may be unclear who is legally liable to meet the landlord's obligations. Although the occupier will know the identity of the person to whom they pay the rent that person may only be an agent and the occupier may not have an address or even a name for the landlord. There are currently several overlapping and inconsistent provisions on this, enforced in a variety of ways.

[66] Under the CPR Practice Direction 16, para 7.3(1) requires a claimant suing on a written agreement to attach a copy of it to their particulars of claim. There is no mention of what happens when the claimant has lost their copy, but the purpose of the requirement does not seem to be to stop someone being able to sue in that case.

(1) On assignment – where a landlord assigns his interest in premises, which includes a dwelling, to a new landlord, then the new landlord is to give any tenants notice in writing of the assignment and of his or her name and address.[67] Failure to do this is a summary offence, punishable by fine.

(2) On request – a tenant has the right to make a written request for the landlord's name and address to the person who demanded or who last received the rent payable, or to any other person acting as agent for the landlord, and that person must provide a written reply within 21 days.[68] Again failure to do this is a criminal offence, punishable by fine.

(3) Service of notices – there is an obligation on landlords to provide tenants with an address in England and Wales at which notices, including notices in proceedings, may be served on them by tenants.[69] Failure to comply with these requirements renders any rent or service charge not due until the requirements have been satisfied. While this does not make the rent irrecoverable from the tenant, such failure does mean a tenant who delays paying is not in arrears. Thus there may be delay in the payment of the rent, to the temporary benefit of the tenant and to the detriment of the landlord. However, tenants may not understand they are still liable for the rent which may lead to a problem with arrears once the details are provided.

(4) Service charges and demands for rent – there is a general requirement that any written demand for rent or other sums due under the tenancy must include the name and address of the landlord and, if that address is not in England and Wales, an address in England and Wales at which service of notices on the landlord by the tenant may be made.[70] However, there is no specific sanction for failure to comply unless part of the amount demanded is a service charge, rather than rent. If so, then the service charge element – but not any rent element – will be treated as not being due until the details are provided, in a similar fashion to that described above.

6.80 We believe that these examples demonstrate even more incoherence and the need for simplification. In line with our general approach, we feel that any requirement for information on a landlord's identity should be contained in a single provision.

6.81 We take the view that such information should be available to occupiers. Agents frequently refuse to act in relation to premises without instruction from the landlord but refuse to give the occupier the landlord's name and address. Without this information, occupiers may have the greatest difficulty in dealing with the day-

[67] Landlord and Tenant Act 1985, s 3.

[68] Landlord and Tenant Act 1985, s 1. Under s 2, where the landlord is a corporate body, there is a separate right to obtain the names and addresses of the directors and the secretary of the landlord company.

[69] Landlord and Tenant Act 1987, s 48.

[70] Landlord and Tenant Act 1987, s 47.

to-day issues that inevitably arise. It is also a key issue in the quick resolution of disputes about alleged unlawful eviction.

6.82 **We provisionally propose that the rules relating to the core terms in Part A of the agreement should include specific requirements for providing occupiers with information about the landlord's identity (and those of any agents) and a place of business as an address for service.**

Recording rent payments

6.83 Under the current law there is a requirement that in situations where rent is payable weekly the landlord must provide a rent book. Failure to do so is a criminal offence.[71] However the limitation that the rent be "payable weekly" means that in many situations where a rent book might be thought appropriate, for example where rent is payable fortnightly or monthly, these requirements do not apply. Also the statute does not define a rent book.

6.84 We appreciate the benefits of ensuring that rent accounts are clearly documented. However, there are problems with the current law.

(1) The importance of the issue does not vary according to whether the rent is weekly, fortnightly or monthly.

(2) We are not convinced that criminal sanctions are appropriate or effective in this area.

(3) These provisions go back to a time when rent was usually collected personally in cash. They do not reflect the increase in payment methods which are automatically documented, such as cheques and direct debits.

The problem appears to be essentially one of evidence and perhaps the discouraging of fraud, when rents are collected in cash.

6.85 **We provisionally propose there should be a new evidential rule, to be used in any claims for arrears, that – in the absence of a system for recording rent payments – there will be a statutory presumption that the rent has been paid. The presumption would be rebuttable.**

6.86 The question then arises of what form such a recording system should take. Rent books no longer appear to be widely used in the private sector, particularly where payment is not in cash. In the public sector entries are normally computerised, but rent books tend not to be updated weekly where the rent is paid by housing benefit. It is important that an occupier have access to evidence of rent payments, but imposing a uniform requirement for rent books does not seem to be the solution.

[71] Landlord and Tenant Act 1985, s 4. Sections 5 and 6 require certain prescribed information to be printed in rent books. Cf also the Rent Book (Forms of Notice) Regulations, SI 1982 No 1474. However rent due is still recoverable despite the failure to provide the rent book: *Shaw v Groom* [1970] 2 QB 504.

6.87 Where payments are made automatically by the occupier, copies of his bank statements should suffice. Where payments are made by the occupier in cash or by a third party, for example housing benefit, the system must afford the occupier an opportunity to verify the entries.

6.88 **We provisionally propose that the current rules on rent books should be replaced by a compulsory term in the agreement that, in the absence of the occupier having a record of payments made, the landlord should provide a system of payment which is documented, whether in a paper rent book or computer equivalent, and in such a way that the occupier can verify entries.**

THE TERMS OF THE AGREEMENT

6.89 We think housing agreements should contain three sets of terms: core terms, setting out the essential information about the agreement; compulsory terms, setting out provisions about security and other compulsory obligations; and default/negotiable terms containing the other obligations on the parties.

6.90 **We provisionally propose that the structure of the contract should be prescribed by Act of Parliament. The details of the contents of each part of the contract should be set out in delegated legislation.**

6.91 The format of written agreements is a key issue in consumer law. It is essential that important contractual obligations are not hidden in the "small print". We envisage the regulations containing a Schedule which sets out a full model agreement[72] including the core and compulsory terms, as well as the default terms.

6.92 For the avoidance of argument we think that it will be essential that the regulations which set out the details of the structure of the agreement and set out the clauses to appear in the agreement are drafted in a way that enables them to be incorporated directly into the model agreement.

6.93 This model agreement would be capable of being copied for direct use by a landlord. It could also contain marginal notes and instructions.

6.94 **We provisionally propose that the statutory instrument setting out the terms would also set the requirements as to the format and presentation of the written agreements.**

6.95 **We also provisionally propose that the regulations are drafted in such a way that the terms of the agreement set out in the regulations can be translated, verbatim, into the model agreement.**

6.96 The core, compulsory and default terms should enable both the landlord and the occupier to have a clear picture of what they have agreed are their rights and responsibilities. Use of terms set out in the regulations will also ensure that

[72] There could be more than one model agreement eg one for type I, one for type II fixed terms and one for type II periodic.

agreements are compliant with the Unfair Terms in Consumer Contracts Regulations.

6.97 **We provisionally propose that the Secretary of State should be obliged to consult relevant interests in the housing industry to ensure that the model agreement terms are fair and clear and that, so far as possible and practicable, terms should be drafted in plain English.**

6.98 Assistance with drafting the model agreements can be gained from the range of model contracts currently available, particularly for housing associations. Models from other legal systems such as the Scottish model secure agreement[73] may also assist.

6.99 The Scottish model agreement is accompanied by a summary which the guidance anticipates will be explained to tenants before they sign the full agreement, on the basis that the full agreement is too long to be understood before signing. We can see the virtue of having a synopsis available to occupiers and potential occupiers. However, we would not propose making it a requirement on all landlords to provide one.

6.100 **We invite consultees' views on whether it would be appropriate to require landlords to provide occupiers with summaries of their agreements**.

Part A – the core terms

6.101 The core terms are those which go to the heart of the agreement and cannot be determined in advance. These include

(1) the names and addresses of the parties;

(2) the address and details of the property;

(3) the rent and the frequency of its payment;

(4) the date of commencement of the tenancy; and

(5) the length of any fixed term.

6.102 **We provisionally propose that the core terms should be included in the written agreement.**

6.103 **We invite views on whether other terms, for example the amount of any deposit, should be included as a core term.**

6.104 We believe that the written agreement must set out these terms on its face and in clear terms. They will need to be included in the requirement for writing and in

[73] See para 4.35 above. The model agreement is produced under the Housing (Scotland) Act 2001, s 23(3) along with guidance. It is published as the Scottish Executive, Housing (Scotland) Act 2001: Model Scottish Secure Tenancy Agreement (October 2001) and is available at http://www.scotland.gov.uk/library3/housing/msst-00.asp, along with guidance.

any model agreement. The terms will have to be drafted with gaps which will require completion by the parties with the details of each individual agreement.[74]

6.105 These terms will also be the "core" terms as defined in regulation 6(2) of the Unfair Terms in Consumer Contracts Regulations. As such they will not be subject to the requirement of fairness, as long as they are expressed in plain and intelligible language.[75]

Part B – compulsory terms

6.106 These are terms which cannot be over-ridden by agreement. They must be reproduced in full, without amendment. They fall into two sections: the terms relating to security of tenure, and the legally implied terms.

Section 1: The security terms

6.107 The security terms are those which, under our proposals, set out the circumstances in which the landlord can go to court to seek an order for possession. These are discussed in detail in Parts VII and VIII.[76]

Section 2: Legally implied terms

6.108 Terms implied by common law currently include those such as the covenant of quiet enjoyment, the obligation not to derogate from grant and the covenant to behave in a tenant like manner which currently only apply to tenancies. These will have to be adjusted to ensure they apply to all the agreements (licences as well as tenancies) covered by our scheme. They also need to be restated in up-to-date language which sets out transparently the nature of the parties' obligations.

6.109 The statutorily implied terms as to repairs and fitness in section 8 and section 11 Landlord and Tenant Act 1985 would be included here if they are to be retained. (The Law Commission[77] has proposed that any new lease of a dwelling should include a requirement on the landlord that the dwelling should be fit when first let, and maintained in a fit condition thereafter. The Government supports this general approach,[78] but the Department for Transport, Local Government and the Regions is developing a new system for the fitness standards for rented housing. The exact delineation of the implied terms will therefore depend on the outcome of those changes.) In any event these terms are likely to require some revision if they are to apply to all residential occupancy agreements – licences as well as tenancies – covered by our proposals.

[74] An example might be " … the rent will be £ [insert figure here] per [insert period here, for example, week, fortnight, calendar month] … "

[75] See above paras 6.51 and 6.52.

[76] Many years ago Professor A A Nevitt, the distinguished housing policy scholar, described the Rent Act grounds for possession as "the poor man's lease" for they do, in effect, set out in statutory form the conditions for bringing a tenancy to an end that would in practice be found in a privately drawn contractual lease.

[77] Landlord and Tenant: Responsibility for State and Condition of Property (1996) Law Com No 238.

[78] Department for Transport, Local Government and the Regions, Quality and Choice: A Decent Home for All, The Housing Green Paper (April 2000), para 5.29.

6.110 **We provisionally propose that terms relating to security and other legally implied terms should be compulsory terms, which will need to be included in the agreement as fully written out terms, and not be subject to amendment.**

6.111 If a landlord wishes to contract to do more than is required by the compulsory terms, for example offering to undertake a greater commitment to repair the property, then supplementary terms will be able to be included in Part C of the agreement.

Part C – negotiable/default terms

6.112 We envisage that regulations should prescribe for Part C a list of other issues that will determine the rights and obligations of the parties. They will include matters such as the obligation to pay the rent, the obligation to use the home properly and not use it for illegal or immoral purposes and obligations as to insurance. The exact extent of the list will be determined by the Secretary of State, following consultation with interests in the housing industry.

6.113 We further envisage that, in relation to each of these issues, the parties should be free to negotiate their own terms (subject to the overriding requirement that any such term is fair).

6.114 In addition, the regulations will contain default terms covering each of these issues. They will be there for two main purposes.

(1) The parties will be able to adopt the default terms expressly, and by doing so will be guaranteed that those terms are compliant with the Unfair Terms in Consumer Contract Regulations.

(2) They will also fill the void that would be caused by the failure of the landlord to provide a written agreement, or, where a written agreement is provided, a failure to deal with all the issues listed.[79]

6.115 Where the landlord decides to adopt the default terms, the agreement should still set out the terms in full, rather than simply referring to the statutory instrument.

6.116 If the landlord does not provide a written version of any oral agreement made before the occupier moves in, the default terms will apply instead of the orally agreed terms from the end of the 2 week period of grace.[80]

6.117 **We provisionally propose that**

(1) **the regulations should prescribe a list of items relating to the parties' rights and obligations under the agreement which must be covered by a term in the agreement and which will be set out in Part C of the agreement;**

[79] This will also apply to the compulsory terms.

[80] See para 6.126 below.

(2) **that in relation to each item there will be a default term which takes effect in default of an express term but can be overridden by an express term**;

(3) **that the agreement should set out the terms in full, not just by reference to the regulations; and**

(4) **that the default terms will be applied either where the landlord has failed to provide a written agreement, or where the agreement fails to address all the prescribed matters.**

6.118 **We invite views on the issues which should properly be prescribed in Part C of the agreement.**

6.119 It will in addition be open to the parties to include in their agreements terms relating to matters not included within the list of items prescribed in the regulations.

Default terms and express written terms

6.120 Normally express written terms will displace the default terms. However, if an express term is found to be unfair, so that under the Unfair Terms in Consumer Contract Regulations it is rendered invalid, it will replaced by the relevant default term.

6.121 **We provisionally propose that legislation should make clear that the appropriate default term will apply where an express written term has been ruled unfair under the Unfair Terms in Consumer Contracts Regulations 1999.**

SANCTIONS

6.122 As indicated above, the central importance of the written agreement to our scheme means that we do believe some sanction is necessary for failure to provide one, or to provide one that inaccurately or incompletely records what the parties have agreed.

6.123 In making our proposals we have borne the following factors in mind.

(1) We are not convinced that criminal sanctions are, on their own, a realistic or appropriate way to enforce writing requirements. We understand that landlords are only rarely prosecuted under the existing offences, and they do not seem to be well known, which makes their efficacy open to doubt. A civil sanction should be the primary sanction, and should be serious enough to motivate landlords.

(2) While failure to provide a written agreement means that default terms will be imposed and will apply instead of any relevant terms agreed orally,[81] this is not sufficient to enforce the requirement for writing.

[81] See para 6.117 above.

(3) We are not convinced that the sanction currently available for the landlord's failure to provide an address for service,[82] which renders the rent not due until the address for service has been provided, is in the occupier's interest. It may well lead to an occupier already in financial difficulty getting further into debt, as the liability accumulates and the whole rent becomes due once the address for service is provided.

(4) While occupiers may be able to apply to the rent assessment committee or the court[83] for an order that the landlord should provide an accurate or corrected written copy of the agreement, this might not be sufficient to cover the whole of the writing requirement.

6.124 We consider first sanctions in relation to the provision of the agreement; second we give special consideration to the issue of the provision of information about the landlord.

Failure to provide an agreement

6.125 We think landlords (some of whom may be former owner-occupiers letting only one property) should be given a period of grace, perhaps two weeks from when the occupier moves in, in which to put the agreement in writing if they have not done so already.[84] We would then propose that, if they fail to do so, they should be deemed to owe the occupier an amount equivalent to the rent for each day of delay – starting with the day on which the occupier went into possession of the dwelling and continuing up to a maximum of, say, two months' rent. The occupier would be entitled to sue for this money or – more practically – to withhold rent[85] in order to recover it.[86]

6.126 **We provisionally propose that where a landlord fails to provide a written agreement within (say) the first two weeks of the occupier taking possession, the landlord should be deemed to owe the occupier an amount equivalent to one day's rent for each day's delay, starting with the date of entry into possession. There would be specific provision for the occupier to be able to withhold rent as one way of recovering this amount. The amount due would be calculated by the number of days starting on the date on which the occupier entered into possession of the dwelling under the terms of the agreement (not from two weeks later) and ending on the date the written agreement was provided, subject to an upper limit of the equivalent of (say) two months' (or such other period as may be agreed) rent.**

[82] See para 6.79(3) above.

[83] Depending on the response to the issue raised in para 6.55 above.

[84] We would also see this as catering for cases where there are legitimate reasons for starting a tenancy while negotiations are still ongoing, although we would not be keen to encourage the idea that doing so is a sensible approach given the scope for disputes.

[85] Whether this sum was the first two months' rent or the rent of any later period, subject to the normal limitation rules.

[86] This might be difficult in housing benefit cases.

6.127 After the two months' period (or whatever other period is determined), there would be no continuing financial incentive for the landlord to comply. We are reluctant to impose criminal sanctions where these are inappropriate or ineffective. There are very few prosecutions for the current criminal sanctions in this area. However, we are interested in hearing from those involved as to why this is. If consultees feel that criminal sanctions are appropriate and useful then we would see them as an addition to the civil sanctions, rather than as a replacement.

6.128 **We seek consultees' views as to whether an ongoing sanction is required for cases where landlords still fail to provide a written agreement, 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 a written agreement by the end of the first two months of the agreement?**

Incomplete written agreements

6.129 There remains the question of what constitutes failure to provide an agreement. We want to ensure that all the necessary points have been covered in the agreement. We want to encourage the parties to use the readily accessible model agreements to do this. We therefore think the sanctions above should apply even if a written agreement is provided but is incomplete, in the sense of not including all the terms required under the scheme.

6.130 We explained above that default terms will be implied into an agreement where either no term has been agreed or a term has been agreed but not put into writing.[87] In some cases landlords may want to adopt these terms wholesale; in others they will be forced to rely on them, because of their failure to put them into writing before the end of the two-week period of grace.

6.131 Our aim is that both parties should be able to see, in one document, a statement of their rights and obligations, and thus be aware of what they are agreeing. Thus we have proposed that landlords should not merely refer to the statutory provisions in the contract, but write them out in full. Model agreements should be readily available in newsagents, Post Offices, advice agencies, libraries, the world wide web and so on. Landlords may also be assisted by their trade associations – a development we seek to encourage.

6.132 Where the landlord has provided a written agreement that meets all the statutory requirements but contains a provision that turns out to be invalid (for example, due to unfairness) our view is that the landlord has complied with the requirement for writing. Any sanctions should arise from consumer law provisions relating to unfairness.

6.133 **We provisionally propose that the rent sanction should also apply wherever a written agreement is provided but which omits any of the issues prescribed in Part B and Part C of the agreement, but that this should not apply where all such terms are included in a written agreement but one or more term is found to be invalid.**

[87] See para 6.117 above.

6.134 **We also provisionally propose that the written agreement should set out all the terms in full. A mere reference to the statutory provisions containing the relevant terms would not be enough to meet the writing requirement.**

6.135 **If there is to be a criminal sanction, we invite consultees' views as to whether it should be limited to cases of complete failure to provide a written agreement, rather than including cases where an agreement is provided but is incomplete**.

Failure to provide information about the landlord

6.136 As this information is particular to each landlord, it must be a core term. No default term can cover it.

6.137 **We provisionally propose that provision of information about the landlord should be treated as one of the matters on which written information must be provided, so any failure will attract the rent sanction we provisionally propose.**[88]

6.138 Whether or not consultees feel there should be criminal sanctions for failure to provide a written agreement, there is clearly a stronger case for criminal sanctions where landlords do not provide an address for service. However, we would be equally in need of evidence that criminal sanctions are effective given that prosecutions are so rarely taken.

6.139 **We invite views as to whether the threat of potential criminal proceedings in such circumstances might constitute a useful spur to compliance**.

VARIATION OF AGREEMENTS

6.140 Like the employment relationship, housing relationships can last for many years. There may be good reasons why the parties might wish to vary the terms of the agreement. The question is how variations of the agreement can be made which avoid unnecessary procedural complexity, but at the same time are not unfair.

6.141 The main variation which landlords normally wish to make is to increase the rent. Landlords may also wish to vary other terms of the tenancy. Occupiers currently have no statutory rights to insist on variations and are rarely given any contractual rights.

6.142 At common law any attempt, in the absence of a variation clause or agreement between the parties, to vary the contract will be ineffective. Our emphasis on the written contract suggests that variations made in the absence of a variation clause should not be allowed. To avoid the problem of landlords forgetting to cover the question in their agreements, variation could be one of the matters prescribed for Part C of the agreement (default terms).

6.143 We note that the Unfair Terms in Consumer Contracts Regulations require variation clauses to be fair to the occupier. The way that types of variation clause

[88] See para 6.126 above.

are covered in the "grey list" suggests that there are limits on how they can be seen as fair.[89]

6.144 We now consider in more detail provisions relating to varying the rent, and provisions relating to other variations.

Rent variations

6.145 Housing statutes have long had provisions dealing with variations as to the amount of rent. They have both limited the use of variation clauses and allowed variations where there is no clause. As with other issues, the rules have not been consistent.

6.146 A particular problem has arisen from section 13(1)(b) of the Housing Act 1988 which removed any control from contractual rent variation clauses. Some registered social landlords have complained that the timing requirements in the section make it too difficult to use and that the alternatives are also awkward, leading to widespread problems over potentially invalid rent increases.[90] Recently the Court of Appeal struck down a sham use of a rent variation clause.[91]

6.147 Our view is that, given the effects of inflation, the default terms should make provision for a rent variation clause. It is quite appropriate that the tenancy agreement should provide for the review and variation of rents, at least on an annual basis.

6.148 **We provisionally propose that the list of matters prescribed for the default terms in Part C of the agreement should make provision for a clause allowing rent to be reviewable and revisable on an annual basis**.

Non-rent variations

6.149 Two distinct situations need to be taken into account: variation of statutorily implied terms; and variation of other terms.

Variation of statutorily implied terms

6.150 Statutorily implied terms are listed in Part B of the agreement.[92] We envisage that any change to these terms should be reflected in an amendment to the statutory instrument which prescribes the terms of the agreement. There should be a term in section B of the agreement which warns the parties that statutorily implied

[89] Cf the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999 No 2083 Sched 2, paras 1(j) to (l) – as limited in scope by paras 2(b) to (d). Cf also the Office of Fair Trading, Guidance on Unfair Terms in Tenancy Agreements (November 2001) Part 3, Groups 10 to 12. In particular, it should be noted that although the clause setting the original price or rent would appear to be a "core" term, and therefore not covered by the requirement of reasonableness, nevertheless para 1(l) of Sched 2 makes it appear that the regulations treat a rent variation clause as not being a core term.

[90] Cf Andrew Arden, "The Section 13 Debacle – A Job for Government" [2001] JHL 61.

[91] *Bankway Properties Ltd v Penfold-Dunsford and another* [2001] EWCA Civ 528; [2001] 1 WLR 1369.

[92] See paras 6.108 to 6.110 above.

terms may be subject to change by Parliament. Any sidenotes to such provision could refer to any website where up-to-date information could be found.

Variation of other terms

6.151 In the current secure tenancy scheme there is an effective bar in section 102(1) of the Housing Act 1985 on the use of contractual variation clauses.[93] Instead a statutory procedure is prescribed, as an alternative to agreement, which involves consultation of tenants over the changes. Challenges as to the adequacy of the consultation can therefore be made by judicial review.

6.152 Other landlords who fail to include a variation clause (or who include one which is wholly invalid under the Unfair Terms in Consumer Contracts Regulations) will have no power to vary non-rent terms without agreement.[94]

6.153 Our approach is that the parties should be able to know their rights and obligations by reading their contracts. We therefore envisage that agreements should contain a contractual variation clause.

6.154 This could be achieved either by including variation of non-rent matters in the list of items to be covered in Part C of the agreement. Or it could be left as an issue wholly to be negotiated by the parties, subject to the fairness requirements of the Unfair Terms in Consumer Contracts Regulations.

6.155 **We invite views as to a whether non-rent variation clause should be included in the list of items prescribed for the default terms in Part C of the agreement or left wholly to negotiation between the parties.**

Effect of a variation

6.156 It is central to our proposals that agreements should be written. In relation to variations to the agreement we equally think that they must be written and should not become effective until notified by the landlord to the occupier in writing. We have considered whether, after a variation has been made the landlord should be required to issue a completely new agreement including the revised term, but we have concluded this would be an unnecessary burden. We do think that, following a variation, the occupier should have the right to ask the landlord for a copy of the agreement as varied.

6.157 **We provisionally propose that, to be enforceable, any variation to the agreement must be notified in writing by the landlord to the occupier.**

6.158 **We further provisionally propose that, following notification of a variation, the occupier should be entitled to require the landlord to supply a revised copy of the agreement.**

[93] "The terms of a secure tenancy may be varied in the following ways, and not otherwise …"

[94] Councils' use of variation is subject to judicial review and the Human Rights Act 1998. Registered social landlords who do include a variation clause can be subject to Housing Corporation and Independent Housing Ombudsman controls over their use. Private landlords on the other hand are not generally subject to such controls.

ENSURING RESPECT FOR THE CONTRACT

The potential problem

6.159 Where landlords are able to seek an order for possession, without the need to prove any occupier default, but simply by giving notice,[95] the occupier's lack of security may make it hard to enforce the landlord's contractual obligations. Depending on the state of the local housing market, a landlord may feel able simply to look for a more compliant occupier. The ability to evict without reason limits the extent to which a landlord will comply with a term he or she does not like; the same could be true of occupiers in areas of low housing demand.

6.160 The problem is less serious with local authority landlords in that any such threat could be challenged by judicial review. A registered social landlord could be made the subject of a complaint to the Independent Housing Ombudsman or possibly the Housing Corporation. But with private landlords, who we would expect to be the main users of type II agreements, there is normally no redress, save a possible action for breach of contract.

6.161 This is a problem which applies not just to our proposals on a written agreement, but to any statutory implied terms even under the current law. An occupier's adviser will always check the degree of security before going on to advise as to whether it is worth exercising rights such as those to have repairs done.

6.162 One of the arguments in favour of retaining the six months' moratorium on the power of the court to order possession is that occupiers may need a period of protection against notice-only eviction so that they can enforce their rights to repairs, although it is open to question how realistic this protection is in practice.[96]

6.163 We feel that this issue needs to be considered here as well. It would be of concern if the effort spent on setting out rights for landlords and occupiers covered by our proposed type II agreement proved nugatory. This could lead to the conclusion that type II occupiers should have no contractual rights at all. We would regard this as unacceptable. Rights are not completely useless in all cases. Even an occupier who leaves or is evicted can still sue for damages for the period of time he or she had to endure living in a property in disrepair.

Possible approaches

6.164 Though the issue not yet been tackled in English housing law, it is one familiar in other jurisdictions.

6.165 A regular feature of housing law in the Commonwealth and the United States is protection against "retaliatory eviction".[97] When landlords take possession proceedings where they do not need to prove occupier default, occupiers can defend the eviction – and possibly claim damages – if they can prove the eviction is

[95] This currently applies to assured shorthold tenancies and would apply to our type II agreement.

[96] See paras 8.15 to 8.28 below, where we consider whether the moratorium should be a feature of the type II tenancy.

[97] See para 4.60 above.

motivated solely by the occupier's assertion of a statutory or contractual right. In some jurisdictions there is a presumption of such a motive if the eviction comes within a certain time of the occupier claiming the right (for example, by reporting a problem to the relevant enforcement agency).

6.166 It should be noted, however, that in those countries, much more rented accommodation is provided by the private sector. Here long-term security is provided by the social rented sector; the private sector caters much more clearly for those seeking short-term housing. To adopt retaliatory eviction as a defence would enable occupiers to slow possession proceedings brought against them. It would seriously undermine the usefulness of the type II agreement.

6.167 In any event, there would be serious problems in proving the landlord's motivation.

6.168 In UK discrimination law, which also applies to housing, there are separate protections against "victimisation" for asserting rights against discrimination.[98] It does not appear that these could be used as a defence to an eviction but might form the basis for a claim for damages, the prospect of which may deter the landlord from acting in such a retaliatory fashion. It would only apply in a context where the anti-discrimination legislation operated.

6.169 In UK employment law no detriment can be imposed on an employee for claiming any of a set of statutory rights.[99] Normally an employee must have a year's service to qualify for rights against unfair dismissal. But where a dismissal can be shown to be motivated by the employee's assertion of a statutory right, then it will be automatically unfair and the employee will be protected even before completing a year's service.[100]

6.170 In each of these examples, actions otherwise lawful are made unlawful if the motive is to dissuade someone from exercising statutory rights. It is one thing to say that landlords should be able to evict without reason, but it is another to say that they should be able to evict with impunity for positively bad motives.

Problems

6.171 Despite any initial attractiveness, such ideas also have significant drawbacks. First, they would, if adopted, tend to undermine the effectiveness of the procedures for seeking possession on the notice-only basis. This might dissuade potential private landlords from entering the market.

6.172 In addition, type II occupiers will know from the outset that their security is to be limited; many will only want limited security. More emphasis should be put on improving standards of property management, rather than re-introducing longer-term security of tenure to a sector of the market where only restricted security is appropriate.

[98] Sex Discrimination Act 1975, s 4; Race Relations Act 1976, s 2 and Disability Discrimination Act 1995, s 55.

[99] Eg Employment Rights Act 1996, Part V.

[100] Employment Rights Act 1996, ss 99 to 105.

6.173 **We seek the view of consultees on the following questions**:

(1) Should the landlord's desire to evict an occupier who has sought to assert his contractual or statutory rights be the basis of a defence to possession proceedings, as is common in the Commonwealth and the USA?

(2) Should a former occupier be able to use the landlord's "improper motive" as the basis of a claim for damages after the eviction?

(3) Where the landlord's improper motive could be shown, should the court have power to order reinstatement of the occupier in the premises, notwithstanding the complications that might arise, particularly where premises had been re-let?

6.174 Various accreditation schemes are now being developed to offer private landlords advantages – whether in referrals of potential clients or in priority processing of applications and so on – if they sign up to agreed standards of service. Those who use such accreditation schemes, for example local authorities and universities, might include in their accreditation scheme measures to deal with worries about landlords taking their contractual obligations seriously.

6.175 **In the alternative, we invite views on whether consultees believe that a better approach would be to rely on promoting good practice**.

ALTERNATIVE DISPUTE RESOLUTION

6.176 One issue which we think that the consumer approach to housing law can encourage is a new approach to the resolution of disputes. Central to the Woolf reforms of the civil justice system is the notion that, in resolving civil disputes, the courts should be used as the forum of last resort.

6.177 In the specific context of possession proceedings, we are currently of the opinion that there will only be limited scope for use of the various forms of alternative dispute resolution. Indeed we have adopted the fundamental principle that orders for possession should be made by a court.[101]

6.178 In other housing contexts, such as neighbour disputes or disputes about repairs, we think alternative approaches may have much to offer. Particularly in the context of public and social housing, it does not seem sensible for large sums of public money to be spent, by both landlord and occupier, on litigation which could be put to better use repairing or improving the property in question.

6.179 Another argument in favour of seeking alternatives to litigation is the notable feature of housing relationships that they have the potential to be long lasting. Avoiding the inherently adversarial proceedings of the court proceedings may be critical to maintaining long-term relationships. Therefore in housing law, generally, we think alternative dispute resolution has a great deal to offer. We support the

[101] Whether it needs to be a court, as currently constituted, or a new type of housing court or tribunal is not considered here.

powerful steer of the Civil Procedure Rules and the recent comments of Lord Woolf in *Cowl v Plymouth City Council*.[102]

6.180 During the last decade a number of mechanisms have become available which provide alternatives to litigation as a means of resolving disputes between landlords and occupiers.

(1) The Independent Housing Ombudsman[103] deals with disputes between registered social landlords and their occupiers, and has extended his scope to private landlords that wish to subscribe to his services.

(2) The tenancy deposit scheme is a pilot scheme run by the Independent Housing Ombudsman, which holds the deposits of private sector tenants and provides a speedy resolution of disputes about the return of deposits.

(3) The Office of Fair Trading and local authority tenancy relations officers are increasingly using persuasion to get landlords to adhere to the law, without having to start proceedings for civil and criminal sanctions against landlords to enforce compliance.[104]

(4) Community mediation can play a very significant role in resolving neighbourhood disputes, although it is seriously constrained by insecure funding and its availability is limited.[105]

6.181 There may be some scope for mediation to avoid possession proceedings in the social rented sector where discretionary grounds are being considered by the social landlord or where there is a dispute about the alternative accommodation that is being offered to an occupier. It may also be of value in highly disputed cases to assist in the identification of the facts and issues to be determined by a court.

6.182 We think that considerable encouragement should be given to the appropriate use of alternative dispute resolution processes in the resolution of disputes about housing matters.

6.183 One way in which this could be achieved would be by providing for this in the terms of the tenancy agreement. We do not think that this is an issue on which there should be a compulsory term in the agreement, but we think it might be included in the list of issues covered in the default terms. Such a term might provide that, should particular types of problems arise – for example, relating to repairs, or noise nuisance – the parties should attempt to resolve the matter by mediation prior to considering taking proceedings in court.

[102] [2001] EWCA Civ 1935; [2002] WLR 803.

[103] Established under the Housing Act 1996, s 51.

[104] David Cowan and Alex Marsh, "There's regulatory crime and then there's landlord crime: from 'Rachmanites' to 'Partners'" (2001) 64 MLR 855; and Dermot McKibblin, "Unfair contract terms in tenancy agreements"(January 2001) Legal Action 6.

[105] Nuffield Foundation, Linda Mulcahy and Lee Summerfield, Keeping it in the Community: An Evaluation of the Use of Mediation in Disputes Between Neighbours (2001).

6.184 **We invite views on whether encouragement should be given to the appropriate use of alternative dispute resolution in the resolution of disputes about housing matters.**

6.185 **If the answer is yes, we also invite views on whether alternative dispute resolution processes should be included in the issues to be covered by the default terms and in relation to what types of dispute alternative dispute resolution might be particularly relevant.**

6.186 In the next two Parts, we consider what the terms relating to security should be in relation to the type I agreement (Part VII) and the type II agreement (Part VIII).

PART VII
THE TYPE I AGREEMENT: THE SECURITY REGIME

INTRODUCTION

7.1 We have already stated that at the heart of the reforms we propose there should be created two types of agreement. We propose that the type I agreement will give long-term security of tenure and, broadly, replace the current secure[1] and assured[2] – as opposed to assured shorthold – tenancies. The type II agreement will have much less security of tenure guaranteed by law (though security may be enhanced by the terms of the agreement). This will, broadly, replace the assured shorthold tenancy. We consider, in Part XIV below, how existing residential tenancies might map onto the new scheme.

7.2 We have considered, in Part VI above, how the two types of agreement we propose should be created and put into writing. We have also considered the contents of the agreements.

7.3 This Part discusses

(1) the proposed type I agreement;

(2) whether there should be any circumstances in which the court should be *required* to order possession of a type I agreement without exercising its discretion;

(3) the terms in the agreement relating to security setting out the circumstances in which the landlord may seek and order and the powers of the court; and

(4) other provisions, outside the formal grounds for possession, which allow for possession to be ordered, sometimes known as the "ghost" grounds for possession.

The approach builds on our proposals relating to the agreement and the terms and conditions to be found therein, set out in Part VI.

7.4 Two preliminary points should be noted. First, the proposals we make in this part will also broadly apply to the type II agreement, considered in Part VIII. Second, we deal with the specific issue of possession on the basis of anti social behaviour in Part XIII.

[1] For a description of secure tenancies, see paras 3.12 and 3.39 to 3.41 above.

[2] For a description of assured (non-shorthold) tenancies, see paras 3.12 and 3.42 and 3.43 above.

THE TYPE I AGREEMENT

7.5 As noted in Part II, a century ago the primary providers of rented accommodation – both long- and short-term – were private landlords. Now the situation is transformed. Long-term rented housing is now primarily provided by local authorities and other social landlords.

A single social tenancy

7.6 One option would have been to create a single social tenancy to cover tenancies provided in the social rented sector. This idea is not new. In 1998, the Chartered Institute of Housing proposed it.[3] It would have had the effect of bringing together tenancies granted by local authorities and registered housing associations which, since the Housing Act 1988, have been governed by different legislative codes. In Scotland, this is what has been done by the creation of the Scottish Secure Tenancy under Part 2 of the Housing (Scotland) Act 2001.

A single long-term agreement

7.7 We have thought it desirable to go further. We think it right to create a system that can be used by private as well as social landlords. There are already a number of social landlords who fall outside conventional statutory definitions of registered social landlord because they have not registered with the Housing Corporation. We are also aware of a number of other private landlords who let on a long-term basis. We see no reason for not allowing private and unregistered social landlords to let on the same basis as local authorities and registered social landlords, should they so wish.[4] This would encourage the social inclusion the Government seeks to achieve, by providing type I occupiers with the security necessary for a stable life-style.

7.8 Such a proposal would also provide greater flexibility for the future. For example, a local authority – in carrying out its housing functions – might wish to contract for the provision of housing with a private landlord, but on the basis that agreements will be long-term rather than short-term.

7.9 One of our underlying principles[5] is that, so far as practicable, both types of agreement should be defined in a way that is landlord-neutral; that is, there should be nothing about their legal characteristics which makes it impossible for them to be used by both social landlords and private landlords. In this we are departing from previous practice which has made the identity of the landlord a key factor in defining the scope of each type of status.[6]

[3] Marianne Hood, Chartered Institute of Housing, One for All – A Single Tenancy for Social Housing? (1998).

[4] Such an approach would also facilitate the possibility of our new scheme embracing existing Rent Act protected tenancies: see paras 14.26 to 14.43 below.

[5] See paras 3.80 and 3.81 above.

[6] We have already mentioned that the existing right to buy, entitlement to which is dependent on the identity of the landlord, will be preserved in legislation specifically designed for that purpose: see paras 1.91 and 1.92 above.

7.10 **We provisionally propose that there should be created a type I agreement, providing long-term security of tenure. It should be defined adopting the landlord-neutral approach.**

Use of the type I agreement

7.11 Although we propose that the definition of the type I agreement should be landlord-neutral, we recognise that there may be circumstances in which it will be appropriate for use of the type I agreement to be prescribed. This is discussed in Part XI.

Fixed term type I agreements?

7.12 Although it may seem to run counter to our aim of trying to ensure that the legal structure for renting housing should be as flexible as possible, we have considered whether the scheme we propose should provide that type I agreements should only be able to be created on a periodic basis. The reason for this is that the very concept of the type I agreement provides security of tenure. A contractual term which specifies a fixed period of tenure only adds unnecessary complexity and indeed could be misleading.

7.13 Under the present secure and assured tenancy schemes, it is possible for a landlord to enter into fixed term agreements. However, the provisions for bringing such fixed term tenancies to an end prior to the end of the period of the agreement, and even where there is default on the part of the tenant, are extremely complex.[7] It seems to us that, if retained, these are provisions which we should seek to simplify.

7.14 At the same time we wonder how significant they are. We are not aware that landlords who provide lettings with a high degree of statutory security are supplementing this with a high degree of contractual security.

7.15 Against this, it may be argued that most landlords who let on type I agreements would not want to let on a fixed term basis and that therefore we should allow the issue to be determined by housing management practice.

7.16 **We invites views on the question whether type I agreements should only be able to be created on a periodic basis.** For the purpose of discussion, we assume that type I agreements will only be available on a periodic basis.

7.17 The arguments in relation to type II agreements – where there is very little statutory security of tenure – are quite different. We discuss this in Part VIII.[8]

COURT ORDERS FOR POSSESSION: DISCRETIONARY OR MANDATORY?

7.18 Given that the type I agreement will be able to be used both by social landlords and by private landlords acting on a similar basis to provide long term agreements, we have considered whether there should be circumstances in which the court should be *required* to make an order for possession or whether the court should

[7] Housing Act 1985, s 82; Housing Act 1988, s 7.

[8] See paras 8.47 to 8.59 below.

always exercise its discretion before an order for the possession of a home subject to a type I agreement can be made.[9] We note that, under the Housing (Scotland) Act 2001, no mandatory grounds attach to the Scottish secure tenancy.

7.19 At present no mandatory grounds for possession attach to local authority secure tenancies.[10] Nor did they to housing association tenancies created prior to 15 January 1989 which, for security of tenure purposes, were treated on a par with local authority tenancies. Eight mandatory grounds attach to assured tenancies.[11]

7.20 There are two major arguments against the idea of requiring the courts to order possession of a home subject to a type I agreement without the exercise of their discretion.

7.21 First if our argument in Part V about the impact of human rights law is correct,[12] then the scope for public authorities using mandatory grounds has been reduced. Evicting an occupier engages his or her right to respect for the home under Article 8(1) of the European Convention on Human Rights, and will only be justifiable under Article 8(2) if it is proportionate to the legitimate end in view. A public authority must not act in a way that is incompatible with the occupier's human rights. It must therefore only decide to use the mandatory ground if to do so would be proportionate. The proportionality of the decision will be subject to judicial review. We would expect the courts to extend the existing procedure established in *Manchester City Council v Cochrane*[13] of an adjournment of the possession proceedings to allow for an application for judicial review.

7.22 If an occupier did seek judicial review of the decision to use the mandatory ground, we would expect the process to be at least no quicker than establishing an equivalent discretionary ground. While it is true that not all occupiers against whom the ground was used would be expected to apply for judicial review, those that are well advised would and the practice, if successful, would no doubt become more common over time. We also do not believe it is sensible for a new system to include this sort of complexity and circularity, which would needlessly overload the Administrative Court.

7.23 Although the decision in *Poplar Housing and Regeneration Community Association v Donoghue*[14] leaves open the question of how far registered social landlords are public authorities for the purposes of the Human Rights Act 1998, it may be anticipated that challenges will be made by occupiers of registered social landlords on similar grounds, which, if successful, will further undermine the efficacy of any mandatory basis for seeking possession.

[9] We discuss below, Part XII, our proposal that the discretion should be structured.

[10] See paras 3.39 to 3.41 above.

[11] See paras 3.42 and 3.43 above.

[12] See paras 5.70 and 5.71 above.

[13] [1999] 1 WLR 809.

[14] [2001] EWCA Civ 595; [2002] QB 48.

7.24 Second, those who are currently secure tenants could object if their tenancies, to which no mandatory ground currently attaches, were – on the enactment of the measures we propose – to be converted to type I agreements which contained circumstances where a court was obliged to order possession without exercising its discretion. Quite apart from its inherent undesirability, there could be a challenge that this amounted to a deprivation of a possession[15] contrary to Article 1 of Protocol 1 to the Convention. The existing Strasbourg jurisprudence, as applied by the UK courts, gives a considerable "margin of appreciation" so as to allow changes to protective legislation that can be clearly justified on social policy grounds. Thus it is far from certain that such a change would be regarded as incompatible with the Human Rights Act 1998. Nevertheless, it is an argument that would have to be clearly anticipated and met.

7.25 We accept that one of the fears that landlords have is that judges exercise their discretion inconsistently. We consider this matter further in Part XII where we discuss the powers of the courts. We think that at least some of those fears may be allayed by the creation of a more structured discretion, to be applied when judges come to decide whether or not it is reasonable to order possession against a defaulting occupier.[16]

7.26 **We provisionally propose that, subject to the discussion on serious rent arrears and mortgage default, below, there should be no circumstances in which a court should be mandatorily required to make an order for possession in relation to a type I agreement**.

Serious rent arrears

7.27 In the assured tenancy regime, ground 8 is a mandatory ground for possession, whereby the court is obliged to order possession where it is proved that there were at least two month's arrears of rent,[17] both at the date on which the notice of intended proceedings [18] was served on the occupier and at the date of the hearing itself. It is currently available to housing associations. It has never been available to local authorities.

7.28 When housing associations first began to grant assured tenancies, the Housing Corporation included in its "Tenants' Guarantee" guidance[19] to the effect that associations should not use this ground. We have been told that this guidance has now lapsed, and housing associations have a much greater degree of discretion as

[15] The jurisprudence of the European Court of Human Rights has extended the concept of "possession" to embrace a "legitimate expectation"; cf *Pine Valley Developments Ltd v Ireland* Series A, vol 222 (1991); 14 EHRR 319.

[16] See para 12.27 below.

[17] The rent must be lawfully due. Where the rent is payable weekly or fortnightly, the period is actually eight weeks; where the rent is payable monthly, the period is two months and where quarterly or yearly, the period is three months.

[18] Issued in accordance with Housing Act 1988, s 8.

[19] Housing Corporation, The Tenant's Guarantee (1989) circular 48/89; this was a non-legally binding document designed to ensure that, so far as possible, housing associations would continue to treat their tenants in the same way as they had done prior to the coming into effect of the Housing Act 1988.

to whether or not they will use this ground. Nevertheless we understand that many still do not as a matter of principle use ground 8 and many others do not in practice use ground 8.

7.29 The issue we address here is whether, in relation to the type I agreement, the court should be *required* to order possession on a basis akin to what is currently ground 8.

The arguments in favour

7.30 There are arguments in favour of the court having such a power.

7.31 First, notwithstanding our hope that private landlords might wish to use the type I agreement, most would not be willing to do so if it were not mandatory to order possession for serious rent arrears. Such landlords will always have the option of using a type II agreement, where we will be proposing that it would be mandatory for a court to grant a possession order in such circumstances. The type II agreement is flexible enough to allow the landlord to offer the occupier many of the benefits of the type I agreement. In particular, if they wish to provide security over a longer period then they can grant the agreement on an extended fixed term basis. Indeed we would wish to encourage this.

7.32 Second, private investors have increasingly provided finance to the housing association sector in recent years. It has been suggested that the existence of ground 8 may have been one of the factors which has encouraged this. Investors may be reluctant to contemplate measures – such as the loss of a mandatory basis for possession – which might increase their financial risk or reduce the level of security for the loans they had made. Were this to be the case, this might lead to less investment in social housing.

7.33 Third, the process of local authority stock transfer is now moving to the large scale voluntary transfer of inner city housing stock. In some areas, the open market values of the stock is low and insufficient to secure the loan. In such cases, it is the revenue stream which secures the loan. The removal of ground 8 might be thought to increase the level of risk for such transfers and therefore raise the cost of funding.

7.34 Fourth, we are aware that the existence of a mandatory ground for eviction for rent arrears would be attractive to some social landlords, particularly when they may be seeking to assess whether an occupier is willing/able to undertake their responsibilities as occupier.

The arguments against

7.35 We think that each of the arguments set out above can be answered.

7.36 First, to introduce a mandatory basis for possession into the type I agreement would be to undermine its social purpose.[20] To modify it in this way, in order to make it slightly more attractive to the private landlord, would start to reintroduce

[20] See para 1.21 above.

into our scheme some of the complications of the existing law we are seeking to remove. They will be able to achieve much the same outcome by letting on the basis of fixed term type II agreements, or even by contractually excluding reliance on mandatory possession orders.

7.37 In relation to the second point, we have no clear evidence of the extent to which private sector investors have wanted or been able to insist on the availability or use of ground 8, nor evidence of how, in practice, they have seen ground 8 as protecting their investments. We accept that they may think that it is important, but we wonder whether in practice it is as significant as they might claim. We have asked elsewhere for information on the real use of ground 8.[21]

7.38 On the third point, we have been told that it is a common feature of large scale voluntary transfers that the new social landlord agrees with the former local authority landlords and occupiers, prior to the transfer, that ground 8 will not be used. Therefore this argument does not appear to carry a great deal of force.

7.39 On the fourth point, we accept that there are particular considerations to be taken into account where a landlord is seeking to deal with anti social behaviour. We discuss our proposals on this matter below in Part XIII. However, we do not think that the whole structure of the type I agreement should be dictated by the small – although admittedly very important – number of cases involving anti social behaviour. We think there are other ways of dealing with this issue.

7.40 There are two other arguments which must also be taken into account. First, there are already a number of practical problems associated with the operation of the present mandatory ground. District Judges, who deal with the bulk of possession proceedings, tell us that on many occasions the real reason for the accrual of the rent arrears – which triggers the use of ground 8 – is failure in the administration of housing benefit, rather than any unwillingness on the part of the occupier to pay the rent. It seems to us harsh and unjust for the law to provide that possession could be granted mandatorily in cases where the true reason for the default was not the occupier's but administrative error or inefficiency outside the occupier's control. This particular difficulty could be solved by an amendment to the ground[22] rather than a complete abandonment of the mandatory basis for possession. However, such a solution would undermine the simplification of the current law we are seeking to achieve. In any event, the introduction of a defence that the arrears were not the fault of the occupier would mean that there would have to be a hearing; it would be unlikely that possession could be obtained any more quickly if a mandatory ground was available than it would be if all the grounds were discretionary.

7.41 Further, practitioners tell us that some courts attempt to circumvent the mandatory nature of ground 8 by using their case management powers to avoid giving possession. Because of its unfairness, some judges refuse to hear evidence in these housing benefit problem cases that would compel them to grant possession

[21] See para 14.5.

[22] To the effect that where it was proved that the sole cause of the arrears was the maladministration of housing benefit, the mandatory ground would be disapplied.

under ground 8. Therefore, the ground is currently working rather artificially. The removal of this basis for possession from the type I agreement might not have the detrimental impact that defenders of the present legal position might claim.

Conclusion

7.42 We find the arguments against the inclusion of a requirement on the courts to order possession akin to ground 8 in the type I agreement more compelling than the arguments in favour. Without it, type I agreements will enable landlords to offer occupiers secure long term housing which will be particularly appropriate both for the social rented sector and for private landlords who wish to let on an equivalent long-term basis. Further, the absence of such a ground will not compromise our aim of landlord-neutrality.

7.43 Local authorities, housing associations and private landlords would all be able to seek possession orders on the same basis. The default terms in the agreement relating to the payment of rent can be drafted to cover both failure to pay rent lawfully due and persistent failure to pay rent on time.[23] Private landlords who wish to be able to obtain possession against their occupiers automatically should be able to use a type II agreement instead. Indeed there will be circumstances in which it will be appropriate for social landlords to let on the basis of a type II agreement.[24]

7.44 **We provisionally propose that it is not appropriate that the court should be required to order possession without the exercise of its discretion, even where there are serious arrears of rent, where a home is provided on the basis of a type I agreement**.

Mortgage default

7.45 The assured tenancy regime also includes a ground 2 which is available where a landlord is defaults on a mortgage. It can only apply where the tenancy was granted after the creation of the mortgage and with the consent of the lender. It is notoriously unclear as to whether it is only available to landlords who were formerly owner-occupiers of the property in question.[25] If this is correct, it limits its usefulness for private landlords and makes it unavailable in its current form to registered social landlords. It is an unusual ground in that it relates to the landlord's default rather than the occupier's. It is there to protect the innocent lender rather than the landlord.

7.46 The following points may be noted

(1) The ground is not needed where the mortgage post-dates the tenancy; the tenancy will take priority and the lender should have checked for its existence.

[23] See para 6.112 above.

[24] See paras 11.14 and 11.16 to 11.56 below.

[25] This is because the ground unhelpfully requires that "notice was given as mentioned in ground 1 above". This appears to mean that ground 2 will only apply where ground 1 does, but could mean that the notice only has to refer to ground 2 instead of ground 1.

(2) It is similarly not needed in the more common situation where the mortgage pre-dates the tenancy but the tenancy is unlawful due to being granted without the lender's permission. Then the lender is entitled to repossess against the landlord without being stopped by the unlawful occupier.

(3) It might be of value in cases where landlords have purchased property to let under a "buy-to-let" scheme. [26]

The arguments in favour

7.47 Ground 2 has the potential benefit of encouraging landlords to ask permission of lenders before letting. It might also encourage the growth of the private rented sector by allowing lenders to feel safe in giving permission without the risk of the value of the security for the loan being depressed by an occupier with security of tenure, should the landlord default on the loan.

The arguments against

7.48 First, today most landlords who have borrowed money on the security of a mortgage and wish to let will do so on the basis of a type II agreement instead of a type I. Second, as the ground only applies in the minority of cases where the lender was aware of and approved the letting, there is a strong argument that the lender should not have approved letting on a type I agreement if it was not confident in the borrower, and should either have refused consent or only consented to a periodic type II letting instead. Third, it therefore seems reasonable to treat this ground as redundant on the basis that it adds nothing to the notice-only basis[27] for possession available in type II agreements. Fourth, in any event ground 2 seems of little use in practice because a defaulting landlord is hardly likely to spend money on helping the lender to repossess.

7.49 **We invite views as to whether lenders have found themselves able to take eviction proceedings themselves on ground 2**.

7.50 **We also invite views on whether lenders are in practice insisting on registered social landlords using ground 2, whether any money has been lent on that basis and whether it would cause problems if money was in future not lent to registered social landlords because of abolition of a basis for possession akin to ground 2**.

7.51 In Scotland, provisions have been made to enable creditors of registered social landlords to take steps to enforce their security on the insolvency of registered social landlords.[28] This seems to us to be a more appropriate way to protect the interest of the lender.

[26] However, most of the industry literature indicates that assured shortholds are the tenancy of choice for renters under buy-to-let schemes.

[27] See para 8.34 below.

[28] Housing (Scotland) Act 2001, Sched 8.

Conclusion

7.52 **We provisionally propose that it is not appropriate that the court should be required to order possession without the exercise of its discretion where the landlord has defaulted on a mortgage**.

7.53 **We further suggest that consideration should be given to a scheme to enable lenders to enforce their security on the insolvency of a registered social landlord**.

Other mandatory grounds

7.54 Six other mandatory grounds for possession are currently available to landlords under the assured tenancy regime.[29] Ground 1 is available to owner-occupiers; ground 3 is for off-season letting of holiday accommodation; ground 4 is for educational institutions' vacation lettings. In each of these cases, landlords would be expected to use a type II agreement, possibly for an appropriate fixed term.

7.55 Ground 5 deals with accommodation held for letting to ministers of religion. Insofar as the landlord may wish to let – on presumably a relatively short-term basis to a non-minister – pending the arrival of a minister, we think that landlords should use a type II agreement. Insofar as the accommodation has been let to a minister and the landlord seeks to remove that person in order to accommodate a new minister, we think this should be treated in the same way as other forms of tied or employment-related accommodation, if necessary with a provision deeming ministers to be employees for this purpose. A type II agreement (or an agreement excluded altogether from the scheme) will be appropriate here.[30]

7.56 Ground 6 is a complex ground enabling possession to be ordered where major reconstruction is contemplated. Where, at the start of a letting, a landlord can foresee a definite need for such work we would regard use of the type II agreement as more appropriate than type I. Where such need is not foreseen, our view is that social and private landlords who have granted type I agreements of property that is now in need of major renovation, development or improvement, should use the equivalent of the estate management grounds for possession we propose below.[31] Although this would be discretionary rather than mandatory, we think that in practice there is likely to be little difference in outcome, particular if our proposals for structured discretion[32] are accepted.

7.57 Ground 7 covers a tenancy which has devolved under a will or intestacy (where the right of succession does not apply). While we do not think this is an issue that arises all that frequently in practice,[33] nevertheless it is an issue we have to deal with. However, we think that the sensible place to consider this is in our review of

[29] Housing Act 1988, Sched 2.

[30] See 9.130 and 9.161 below.

[31] See para 7.81 below.

[32] See para12.27 below.

[33] Though see now *Shepping v Osada* (2001) 33 HLR 13.

the law on the right of succession.[34] We therefore make no recommendations here, beyond expressing a hope that a solution can be found which does not involve requiring a court to order possession without the exercise of discretion. We will return to this issue in the consultation paper on succession and the transmission of agreements.

SECURITY OF TENURE: THE TERMS IN THE AGREEMENT

7.58 We have proposed that all the circumstances in which the landlord will be entitled to go to court to obtain an order for possession should be set out in Part B (compulsory terms) of the agreement. Here we consider in more detail the scope and content of these terms.

7.59 Currently grounds for possession can be categorised under three broad headings:

(1) Occupier default grounds

(2) Social policy grounds

(3) Estate management grounds.

We think that this provides a helpful classification for the purpose of drafting the terms of the agreement.

Occupier default

7.60 Under our proposed scheme, the first of the circumstances in which the landlord will be entitled to seek an order for possession will be that the occupier has breached any term of the agreement which imposes an obligation on the him or her. Examples will include failing to pay the rent, or using the premises for illegal or immoral purposes.

7.61 It will be important to ensure that each relevant term of the contract is drafted to provide that, where appropriate, it covers not only actions by the occupiers themselves, but also actions by members of their household and indeed by visitors to the home.

7.62 In relation to rent arrears, the present assured tenancy regime has three grounds of possession available. We think these should be amalgamated into a single term of the contract which would provide that rent should not only be paid, but paid on time; thus persistent delay in paying would be a circumstance in which the landlord could take proceedings.

7.63 Putting all these terms in the agreement has the advantage that each party should know from the start of the agreement what the occupier's obligations are, breach of which can lead to proceedings for possession being taken. While not all occupiers may fully understand the terms of their agreement, we think that there will be a better chance of understanding them than exists under the complex mix of

[34] This is the subject of a separate consultation exercise; a paper will be published in late summer 2002.

contract and statute law which currently regulates the housing relationship. It should also help advisers.

7.64 This approach may appear novel. But it should be remembered that, even under the present law, breach of any term of the contract can be the basis for a landlord taking possession proceedings [35]

7.65 As discussed in Part VI, terms in agreements that contravene the Unfair Terms in Consumer Contracts Regulations 1999 will not be enforceable, whether by possession proceedings or otherwise.[36] Terms which sought to prevent trivial activities by occupiers might be unfair on that basis alone.[37] Landlords wishing to impose obligations on occupiers which are not contained in the prescribed list of default terms, which will be Regulations compliant, will have to be confident that those terms do not fall foul of the Regulations.

7.66 **We provisionally propose that breach of the agreement by the occupier should be the first of the circumstances in which the landlord may take possession proceedings**.

Social policy

7.67 In addition to direct breach of the agreement, there are other circumstances, based in social policy, where the landlord should be able to take possession proceedings. Based on the current law, we have three sets of circumstances in mind:

(1) anti social behaviour;

(2) domestic violence;

(3) false statements.

7.68 Our general approach is that, as with breaches of the terms of the agreement, the other circumstances in which the landlord may be entitled to take proceedings for possession of his or her property should also be contained within the agreement.

Anti social behaviour

7.69 We discuss this is detail in Part XIII.

[35] Cf Rent Act 1977, Sched 15, case 1; Housing Act 1985, Sched 2, ground 1 and Housing Act 1988, Sched 2, ground 12.

[36] See para 6.36 above.

[37] The Office of Fair Trading, Guidance on Unfair Terms in Tenancy Agreements (November 2001) Part IV para 18.8.5 (see para 6.11 above), suggests a general ban on pets would be unfair because it is too broad in that it could be used to prevent something as unobjectionable as keeping a goldfish. More specific limitations on keeping particular categories of pet that might cause a nuisance to others might, however, be regarded as fair.

Domestic Violence

7.70 The Housing Act 1996 amended both the secure and assured tenancy regimes to provide[38] that where a dwelling was occupied by a married couple or a couple living together as husband and wife, and one (usually the woman) was driven from the accommodation as the result of the violence of the other (usually the man) who was also the (sole) tenant, it should be possible to seek an order for possession against the violent (tenant) partner.

7.71 The ground only applies where the victim is unlikely to return to the property. It cannot be used to grant a new agreement to the victim. It will therefore be of more use to the landlord who finds the man left living in accommodation designed for family use, while the woman has to be re-housed as homeless, creating an inefficient use of housing resources.

7.72 **We seek information on whether this ground is used in practice, whether it is seen as useful and what drawbacks are associated with it**.

7.73 If it is to be retained, then even though private landlords may well not wish to get involved in attempting to tackle domestic disputes, it is our preliminary view that the limitation of this ground to registered social landlords, charitable housing trusts and local authorities is not necessary. Rather it should be made generally available.

7.74 **We provisionally propose that there should be a provision in the agreement stating that proceedings may be taken against an occupier whose violence has driven his or her spouse or partner from the home.**

Obtaining agreement by false statements

7.75 Under both the secure tenancy regime,[39] and, more recently, the assured tenancy regime,[40] it is possible to take proceedings against a tenant who has obtained a home by making false statements. Since many social landlords provide housing for specific groups, and since local housing authorities also have to ensure that their allocation of housing is done on a fair basis,[41] we think it is necessary to retain this as a basis for seeking possession of a type I agreement.

7.76 **We provisionally propose that the agreement should contain a provision which enables landlords to seek repossession where they can prove that the agreement was obtained on the basis of false information**.

[38] Housing Act 1985, Sched 2, Ground 2A; Housing Act 1988 Sched 2 Ground 14A. In the case of assured tenancies, the ground only applies where the landlord is a registered social landlord or a charitable housing trust: Housing Act 1988, Sched 2, ground 14A(b).

[39] *Ibid*, Sched 2, ground 5.This has now been expanded to person's acting at the tenant's instigation; cf Housing Act 1996, s 146.

[40] Housing Act 1988, Sched 2, ground 17 – as amended by Housing Act 1996, s 102. Compare the way in which the domestic violence ground was drafted, where use was limited to registered social landlords; cf Housing Act 1988, Sched 2, ground 14A(b).

[41] Cf Housing Act 1996, Parts VI and VII as amended by the Homelessness Act 2002.

Estate management.

7.77 We accept the proposition that the rules on security of tenure should not be so drafted that landlords are prevented from making reasonable changes to use of their buildings and the allocation of housing resources. To do so would result in an unacceptable rigidity in the operation of the housing market.

7.78 At present there is a marked difference as between the assured tenancy and secure tenancy schemes on this issue.

7.79 In relation to assured tenancies there is the very general, suitable alternative accommodation ground 9,[42] supplemented by the very complex, mandatory ground 6, relating to the redevelopment of premises. In the case of secure tenancies, there are nine separate grounds where either possession will be granted if suitable alternative accommodation is available, or may be granted if suitable alternative accommodation is available and it is reasonable for the court to make the order.[43]

7.80 Examples include: where the accommodation is statutorily overcrowded; where the landlord intends to redevelop or substantially refurbish; where the landlord is a charity and the continued occupation by the occupier would be in breach of the objects of the charity; [44] where the home is designed for use by the disabled and the present occupier is not disabled or where the home house is part of a sheltered housing scheme and there is no occupier with special needs.

7.81 **We provisionally propose that the agreement should contain a provision which would enable landlords to seek possession on estate management grounds where this would be reasonable**.

7.82 **We invite views on whether the provision should be a broadly drafted term, modelled on the suitable alternative accommodation ground; or whether the circumstances in which possession could be ordered should be more precisely defined, as in the secure tenancy scheme**.

7.83 Our preliminary view is that the latter approach may be clearer to occupiers. It may also be clearer to landlords who will know the circumstances when they might be able to seek possession for estate management reasons. On the other hand, listing a number of detailed examples may mean that the unpredictable situation is not addressed and this might bring unnecessary rigidity to the use and development of housing stock.

The powers of the court

7.84 In addition to the agreement setting out the circumstances in which the landlord may seek possession, we are also of the view that it should provide a summary of

[42] See para 3.43 (table 4 and 5). This is modelled on the approach found in the Rent Act 1977, s 98(1)(a).

[43] See paras 3.39 and 3.41(tables 2 and 3)above.

[44] Eg this might arise where a former tenant, who was living in sheltered accommodation, has died and the present tenant, who does not need the protection of the sheltered accommodation, has acquired the tenancy by the right of succession.

what powers the court has in relation to proceedings for possession. We discuss the powers of the court in relation to possession proceedings in Part XII.

7.85 In relation to the type I agreement, we think the agreement should make clear

(1) that the courts will only exercise their power to order possession where they regard this as reasonable. Powers will therefore remain available to the courts to refuse possession for non-serious breaches of the agreement or otherwise where it would be unreasonable to make an order;

(2) that the discretion of the court is a structured one, and provide an indication of the factors the court will be required to take into account in exercising its discretion;

(3) what procedural steps the landlord must take before seeking a possession order;

(4) that the agreement will not be lawfully terminated until the court has made an order for possession;

(5) that an occupier who receives a landlord's notice of intention to take proceedings should seek advice; and

(6) that it is in the occupier's interest to appear at any court hearing.

7.86 **We provisionally propose that the agreement should contain a statement about the powers of the court and the steps the occupier should take when threatened with possession proceedings**.

THE "GHOST" GROUNDS FOR POSSESSION

7.87 General housing law provides for a number of other circumstances which have the effect of terminating assured and Rent Act tenancies, effectively providing more grounds for possession. We refer to provisions in the Housing Act 1985 which disapply the protections of the Housing Act 1988.[45] These are sometimes generically referred to as the "ghost grounds for possession".

7.88 The circumstances are

(1) where an undertaking not to use a dwelling for human habitation has been entered into;[46]

(2) where a demolition order has been made;[47]

(3) where a closing order has been made; [48]

[45] Thus these provisions will only bite on assured tenancies; this is because local authorities cannot take enforcement proceedings against themselves. They also apply to Rent Act protected tenancies.

[46] Housing Act 1985, s 368(6).

[47] *Ibid*, s 270(2) to (3).

(4) where special occupancy directions relating to a housing in multiple occupation are in force;[49] and

(5) where a home has been acquired by a local highway authority for development and is held for that purpose, and the Secretary of State certifies that possession is required immediately.[50]

7.89 There are also means of gaining possession of homes that are statutorily overcrowded. Under the secure tenancy scheme, overcrowding is a discretionary ground for possession where the landlord must provide suitable alternative accommodation.[51] Under the former Rent Act scheme landlords were given a special statutory right to bring possession proceedings.[52] The assured tenancy scheme has no special provisions. In addition, the local authority can bring proceedings for possession.[53]

7.90 In one sense these grounds for possession could be seen as further examples of the social policy circumstances, mentioned above, which might justify the landlord bringing proceedings for possession. On the other hand – with the exception of the overcrowding ground, where breach of the overcrowding rules will usually be the result of the occupier allowing more than the statutorily permitted number of person to reside in the premises – it could be argued that enforcement of the orders or undertakings should be undertaken directly by the relevant enforcement agency, rather than indirectly by the landlord.

7.91 **We provisionally propose that Part C of the agreement (the default terms) should contain a term prohibiting overcrowding, breach of which would be a basis for the landlord taking proceedings for possession in the normal way.**

7.92 **We provisionally propose that enforcement of housing orders and undertakings should be undertaken directly by the authorities that made the orders or accepted the undertakings, not by the landlord**.

7.93 **If consultees are against this provisional proposal, we ask whether the possibility of action being brought against an occupier in any of these circumstances should be stated in the agreement**.

7.94 We are aware that there are various other enforcement powers which allow agreements to be terminated and might fall outside our new scheme.[54]

[48] *Ibid*, s 276.

[49] *Ibid*, s 348D(5).

[50] Cf New Towns Act 1981, s 22.

[51] See para 3.41 (table 2) above.

[52] Rent Act 1977, s 101. This was effectively a mandatory ground as the court had to order possession if the overcrowding was proved.

[53] Housing Act 1985, s 338.

[54] Eg Fire Precautions Act 1971, s 28.

7.95 **We invite views as to whether these are of enough significance in practice (particularly to the relevant enforcement agencies) to be worth bringing into the type I agreement scheme, along the lines suggested above**.

MAPPING EXISTING AGREEMENTS ONTO THE NEW SCHEME

7.96 One of the principal objectives of our project is to create a scheme which will not only apply to new agreements but also be able to absorb existing agreements. It should be clear from the discussion in this part that our proposals have evolved from the present law. We discuss further in Part XIV how existing agreements might map on to our proposed scheme, and indicate the transitional provisions that might be needed to achieve this.

SUMMARY

7.97 The new type I agreement will be available to any landlords who wish to let on a long-term secure basis. We anticipate that it will primarily be used by social landlords.

7.98 It will be created on a periodic basis.

7.99 The landlord will be entitled to seek a discretionary order of possession

(1) where the occupier has breached the agreement;

(2) where the occupier has driven their spouse or partner from the home by domestic violence;

(3) where the agreement has been obtained on the basis of false information; and

(4) where there are estate management grounds.

7.100 There will be no circumstances in which it will mandatory for a court to grant a possession order.

PART VIII
THE TYPE II AGREEMENT: THE SECURITY REGIME

INTRODUCTION

8.1 Our proposals for the type I agreement are considered in Part VII. Here we discuss

(1) the proposed type II agreement;

(2) the court's powers in relation to them, raising the question of whether the six months' moratorium on the making of an order for possession should be retained;

(3) the circumstances in which landlords should be able to seek an order for possession of a type II agreement;

(4) the use of break clauses; and

(5) what should happen on the expiry of a fixed term agreement.

THE TYPE II AGREEMENT

8.2 To complement the type I agreement, which has a high level of statutorily guaranteed security of tenure, we think there should also be a type II agreement with only very limited statutory security. It is modelled on the assured shorthold tenancy.[1]

8.3 We envisage that the type II agreement will share the following characteristics with the type I agreement:

(1) It will be defined using the same landlord-neutral approach adopted for the type I agreement;

(2) All the requirements for a written agreement considered in Part VI will apply;

(3) The circumstances in which the landlord can seek possession will be set out in the terms of the agreement.

(4) All the circumstances in which a landlord may seek possession in relation to a type I agreement, discussed in Part VII, will be available to the landlord in relation to the type II agreement.

[1] See para 3.15 and 3.16 above.

8.4 Unlike the type I agreement, we anticipate there will be circumstances in which the court will be mandatorily required to order possession of a home the subject of a type II agreement without the exercise of discretion. These will be

(1) where the landlord has served a notice stating that he or she requires possession – which we refer to as the "notice-only basis"; and

(2) where there are serious arrears of rent.

8.5 Where the landlord is seeking possession on the notice-only basis, we envisage that he or she will be able to use an accelerated procedure that does not involve a court hearing.[2]

Periodic and fixed term agreements

8.6 In relation to the type I agreement we asked whether they should be created only as periodic agreements, given that they attracted a high degree of statutory security of tenure.[3] By contrast, the fact that the type II agreement will have only very limited statutory security of tenure makes it imperative, in our view, that the type II agreement should be able to be created on both a periodic and fixed term basis. This will enable landlords who wish to let on a more long-term basis, but outside the scope of the type I agreement, to do so.

8.7 The essential difference between the two types of agreement is that where a fixed term agreement is used, the landlord would not be able to seek an order for possession from the court on the notice-only basis until the period of the agreement had come to an end.[4]

8.8 **We provisionally propose that there should be created a type II agreement, modelled on the existing assured shorthold tenancy, which should be able to be created on both a periodic and fixed term basis.**

Use of the type II agreement.

8.9 We anticipate that the type II agreement would remain the *de facto* default agreement for private landlords.

8.10 We discuss in Part XI below whether the circumstances in which social landlords could use type II agreements should be prescribed in law or left unregulated. We also discuss there the need for a general probationary agreement. We anticipate that local authorities might be able to use type II agreements in circumstances in which they are now use introductory tenancies. In Part XIII we discuss the relationship between the type II agreement and strategies for dealing with occupiers' anti social behaviour.

[2] CPR Pt 55 II.

[3] See para 7.16 above.

[4] See para 8.34 below.

THE COURT'S POWERS TO ORDER POSSESSION

8.11 The principal users of the type II agreement will be private landlords. Changes in the housing market have resulted in long-term housing being provided primarily by social landlords. Mandatory grounds for possession have been available to private landlords for nearly 30 years. In the light of these factors, we think that there must be circumstances in which the landlord can seek an order for possession of premises subject to a type II agreement where the court is required to order possession without the exercise of discretion. To propose otherwise would amount to a fundamental change in housing policy.

8.12 **We provisionally propose that, in relation to the type II agreement, there should be circumstances in which the court would be mandatorily required to order possession.**

Accelerated possession proceedings

8.13 The existence of mandatory grounds for possession, where the court must make an order if the circumstances justifying the order are proved, has resulted in the procedural innovation of the accelerated possession procedure. Where a landlord seeks possession on the notice-only basis, possession may be ordered after a judge has read the papers, without the need for a hearing.[5] This procedure is a key feature of the current assured shorthold tenancy.

8.14 **We provisionally propose that, on the assumption that our recommendation for a notice-only basis for seeking possession is agreed** (see paragraph 8.34 below), **a landlord employing it should be able to use an accelerated procedure, not involving a hearing.**

The six months' moratorium

8.15 Consideration of the powers of the court in relation to the type II agreement does raise one issue of considerable difficulty. At present, where a landlord seeks possession on the notice-only basis, a court cannot make an order for possession of an assured shorthold tenancy before the end of the first six months of the tenancy. Here we raise the question of whether or not the moratorium should be retained.

8.16 Given the importance of the matter we have decided not to make a provisional proposal, but rather invite the views of consultees. We discuss in Part IX the issue of the extent to which categories of agreement currently excluded from the three existing regulatory schemes could be brought within our proposed scheme. The view expressed there is that the number of excluded categories should be substantially reduced if we are to achieve the radical simplification of the law to which we aspire. It is implicit in this discussion that significantly reducing the number of excluded categories will be more easily achieved if the six months' moratorium is removed. Before responding to the invitation mentioned above, therefore, we ask consultees also to consider the arguments advanced in Part IX.

[5] It should not be thought that the county court merely rubber-stamps cases put before it. The *Judicial Statistics 2000* show that orders were made without a hearing in only 55% of the cases started. 22% were referred to a full hearing in court.

Background

8.17 Analysis of the history of housing law suggests that there has long been a tendency for short-term or relatively informal arrangements to be excluded from the schemes of protection. Thus lettings of furnished accommodation were originally wholly outside the scope of the early Rent Acts, and attracted only limited protection in the Furnished Houses (Rent Control) Act 1946.[6]

8.18 When the Housing Act 1980 began to move private rented tenancies away from traditional forms of rent regulation, it introduced the concept of the protected shorthold tenant. The Act required that any such tenancy had to be for a fixed term of between one to five years – with no provision for earlier termination other than through use of a forfeiture clause. These conditions were complex and proved unattractive to landlords. Only small numbers of protected shortholds were created.

8.19 It was, however, central to the concept of the protected shorthold that – so long as the formalities had been fully observed – the landlord was guaranteed to be able to obtain an order for possession from the court. This could be achieved merely by issuing a notice to the tenant that the landlord would be seeking an order of possession from the court, irrespective of any default on the part of the tenant. However the tenant was guaranteed at least 12 months' occupation because of the initial fixed term.

8.20 The basic concept was further developed in the Housing Act 1988. In its original form the assured shorthold tenancy also had to be of an initial fixed period, though the length of the fixed term was reduced from one year to six months (the upper limit of five years was removed. Again, landlords were able to seek possession on the notice-only basis, without having to prove any default on the part of the tenant, but not until the end of the initial fixed term.

8.21 In the Housing Act 1996 all formal requirements, including the requirement that an assured shorthold tenancy must be for an initial fixed term, were dropped. Landlords retained the right to seek an order for possession solely on the basis that they had notified the tenant that they planned to seek such an order.

8.22 The requirement for an initial fixed term of six months was however replaced by a provision providing that a court could not order possession to take effect in the first six months of the tenancy.[7] This is the six months' moratorium to which we have referred above.

8.23 It should be stressed that there was nothing to prevent a landlord from agreeing a fixed term period, which could be of any length. However if he or she did so, then

[6] See paras 2.15 and 2.16 above.

[7] Housing Act 1988, s 21(5), as inserted by the Housing Act 1996, s 99.

he or she would not be able to obtain an order for possession on the notice-only basis until the contractual period of the tenancy had come to an end.[8] He or she would, however, be able to seek possession on a number of the other grounds available to landlords under the assured tenancy scheme.

The arguments in favour of the moratorium

8.24 A number of arguments can be made in favour a six months' moratorium.

(1) The six months' moratorium is not actually very long; it does provide a minimum guaranteed period of occupation during which occupiers can assert their rights against their landlord without fear of eviction. Removal of the moratorium might encourage landlords to issue notices that they required possession almost as soon as the occupier moved in.

(2) The single largest category of applications for assistance under the homeless persons provisions of the Housing Act 1996 is those leaving shorthold tenancies, having been given notice or having been served with a court order. Removing the six months' moratorium may introduce greater volatility into the private rented sector and thus place even greater pressure on local authorities.

(3) Some local authorities now use the private sector to house homeless families. It has been put to us that such families should be allowed an initial period of security (perhaps even extended to one year) in which to settle into their new accommodation and to bring some stability to their lives.

(4) In some areas, the administration of housing benefit applications takes such a long time that guaranteeing occupation for at least six months gives the authority a chance to get the application processed before the claimant has to move on.

The arguments against a moratorium

8.25 Against these points it may be suggested:

(1) The six months' moratorium, though not long, introduces an unnecessary inflexibility into the housing market. Accommodation that could be let for a shorter period is not brought to market. Further, while tenants should be able to enforce their rights under the agreement – including their rights to repair – we wonder whether the six months' moratorium in practice

[8] Housing Act 1988, s 5(2) provides that on the ending of a fixed term tenancy, unless the landlord grants a replacement fixed term tenancy, the tenancy becomes a statutory periodic tenancy. Where the initial tenancy is longer than six months, the statute does not deal expressly with whether the landlord can serve notice under a contractual break clause after the first six months but before the end of the fixed term, or use forfeiture to end the fixed term early, so as to convert the tenancy into a periodic tenancy and then be able to serve two months' notice to use the notice-only repossession procedure. For our proposals on this see para 8.71 below.

encourages many occupiers, who find problems at this early stage, to take action against their landlords.[9]

(2) In relation to the second point above, we are not convinced that removal of the six months' moratorium would make a significant difference. In any event, if the period of notice for the notice-only basis for possession were to be increased to three months, as we suggest below,[10] any additional pressures could thereby be mitigated.

(3) Where local authorities use private landlords to accommodate homeless families, there is nothing to prevent the local authority contractually agreeing with the landlord that any letting to a homeless family will be for a minimum period, which might be six months but could be longer.

(4) Questions of housing status should not be determined by problems with the administration of housing benefit, however intractable.

8.26 There are the following additional arguments.

(1) When private landlords were the sole providers of rental housing it might have been essential to ensure that at least part of that market was subject to statutory security of tenure. As noted above, these days long-term housing is available principally through the social rented sector. Many of those occupying privately rented accommodation require it for short periods. The six months' moratorium does not offer any significant measure of protection and thus could be abolished.

(2) Despite the point made in the preceding paragraph, type II agreements will not necessarily be short-term; instead they may be subject to less *statutory* security than type I agreements. There is nothing to stop a type II agreement running on for many years if both parties so wish. This can be achieved contractually either by the granting of a fixed term, or by allowing a periodic agreement to roll on.

(3) Landlords have argued against the six months' moratorium on the basis that they need the notice-only basis for possession to be available as soon as possible to deal with anti social behaviour. We make detailed suggestions about anti social behaviour in Part XIII. Here we note that we do not consider the notice-only basis to be primarily a tool for combating anti social behaviour.

Conclusion

8.27 **We invite views on the question: should the six months' moratorium on a court granting a possession order, currently a feature of the assured shorthold tenancy, be a feature of the type II agreement?**

[9] See the discussion in paras 6.159 to 6.175 above.

[10] See paras 8.37 and 8.38 below.

8.28 **We would particularly welcome evidence about the benefit tenants currently derive from the six months' moratorium in the assured shorthold tenancy.**

8.29 In providing answers to these issues, consultees are also invited to consider the suggestion for increasing the period of notice that the landlord intends to seek possession on the notice-only basis[11]. We also ask consultees to bear in mind the arguments for reducing the number of exclusions from the type II agreement (below Part IX).

SECURITY OF TENURE: THE TERMS IN THE AGREEMENT

8.30 As we have argued, in relation to the type I agreement, the circumstances in which a landlord is entitled to seek an order for possession should be set out in the terms of the agreement. We propose that the same principle should apply to the type II agreement.

8.31 **We provisionally propose that the circumstances in which a landlord may seek an order for possession of premises subject to a type II agreement should be set out in the terms of the agreement.**

Circumstances justifying a mandatory possession order

8.32 As we anticipated above, we think the type II agreement should contain two sets of circumstances in which a landlord may be able to seek an order for possession where, if proved, the court is required to order possession.

The notice-only basis for seeking possession

8.33 The Housing Act 1980 introduced the principle that possession of a protected shorthold tenancy could be regained simply on the basis that a notice requiring possession had been issued to the tenant, without proof of any default on the part of the tenant. This notice-only basis was developed for the assured shorthold tenancy and is a key feature of the assured shorthold tenancy. It should be stressed that it is only available where there is a periodic agreement or any fixed term period has expired.

8.34 **We provisionally propose that the periodic type II agreement should provide that the landlord may seek an order for possession from the court merely on the basis of having issued an appropriate notice to the occupier**.

8.35 The fact that the type II agreement would allow possession to be ordered on the notice-only basis means that it is important that the law relating to the notice is clear. We make a number of suggestions about notices generally, which will apply equally to these.[12] These include that notices should be straightforward and clear and they should give notice of the date on which proceedings will be started. They should become ineffective if not used within an appropriate time.

[11] See paras 8.37 and 8.38 below.

[12] See paras 10.3 to 10.48 below.

THE PERIOD OF THE NOTICE

8.36 We consider here the specific question of the period of the notice. The current assured shorthold tenancy notice period is two months. Under the Housing Act 1980 the protected shorthold required three months' notice. If the six months' moratorium on the court granting an order for possession were not to be a feature of the type II agreement, there is a good argument for an increase in the notice period from two to three months.

8.37 **If the six months' moratorium on granting possession is not to be a feature of the type II agreement, we provisionally propose that the statutory minimum period of notice required for seeking possession on the notice-only basis should be three months, rather than the two months' notice (generally) required in assured shorthold tenancies.**

8.38 **We invite views on whether the period should be two or three months, if there is to be a six months' moratorium in the type II agreement.**

Serious rent arrears

8.39 Ground 8 is the ground available in the assured tenancy regime for seeking possession where two months' arrears of rent are in existence at the time the landlord serves notice that it intends to take proceedings and at the date of the hearing. We have argued that it should not be a mandatory basis for seeking possession in relation to the type I agreement. We think there are good arguments for making it available for type II agreements.

8.40 Although the notice-only basis for seeking possession may be the simplest procedure for the landlord to use, we want to encourage landlords to provide type II agreements not simply on a periodic basis but also on a fixed term basis. Where an agreement has been provided on a fixed term basis, then it becomes essential that – should the tenant start getting into rent arrears – the landlord can take steps to determine the agreement even before the fixed term has expired. We do not anticipate landlords being willing to let on fixed term type II agreements without this.

8.41 **We provisionally propose that the type II agreement should contain a term which provides that, where the occupier has accrued two months arrears of rent at the date of the notice of intention to seek possession and at the date of the court hearing, the landlord is entitled to seek an order for possession which the court is required to make without the exercise of discretion**.

Other circumstances justifying a mandatory order?

8.42 We do not think there are any other circumstances – currently found in the assured tenancy regime – which should be included in the type II agreement which should entitle the landlord to a mandatory order for possession.[13]

[13] For the current grounds in tabular form, see para 3.43.

8.43 Owner-occupiers who might have used ground 1 when the Housing Act 1988 was passed now let on the assured shorthold tenancy basis. The owner will therefore have the notice-only ground for possession available, which we have discussed above. Ground 1 is effectively redundant. We have discussed the mortgagor default ground – Ground 2 – in Part VII.[14] Again, so long as a fixed term has not been agreed, landlords should be able to rely on the notice-only procedure. The mortgagee should be able to use their existing rights as mortgagees to ensure that they can get access to the property which has provided the security for the loan they have made.

8.44 In relation to the other mandatory grounds for possession which currently attach to assured tenancies, we argued in Part VII above,[15] that they were no longer required in the case of type I agreements. Equally, given our proposals relating to the notice-only and serious rent arrears being mandatory grounds for possession in relation to type II agreements, we see no reason for including the remaining mandatory grounds – which were created before the assured shorthold tenancy concept was created – in the type II agreement scheme. The landlord can achieve the same result more quickly by use of the notice-only basis for seeking possession.

8.45 We leave to one side the question of ground 7,[16] but will return to that in the next consultation paper on succession and transmission of agreements.

8.46 **Subject to later consideration of ground 7, we provisionally propose that there should be no other circumstances set out in the type II agreement which should entitle the landlord to seek a mandatory order for possession.**

Circumstances justifying a possession order on a discretionary basis

Periodic agreements

8.47 It might be argued that, given that we are proposing that a landlord should have the ability to seek an order for possession on the mandatory notice-only basis discussed above, no other basis for seeking possession is needed.

8.48 But even in the case of periodic agreements there may be circumstances in which a landlord may need to take steps to seek possession from a tenant more quickly than can be achieved by use of the notice only basis for seeking possession. This will be the more so if our suggestion that the period of the notice be extended from two months to three is adopted.

8.49 **We provisionally propose that all the circumstances entitling the landlord to seek a discretionary order for possession, available in the type I agreement, should also be available to landlords in the periodic type II agreement**.

[14] See paras 7.45 to 7.50 above.

[15] See paras 7.18 to 7.57 above.

[16] See paras 3.42 and 3.43 (table 4).

8.50 As with the type I agreement, the circumstances in which the landlord should be able to seek an order for possession would be set out in the terms of the agreement.

Fixed term agreements

8.51 We want to encourage landlords to give a degree of contractual security of tenure to occupiers through the use of fixed term type II agreements. It would not be sufficient for the landlord only to have available the notice-only ground for possession, which could only be used once the fixed term had ended. The question arises: what should the circumstances be in which the landlord under a fixed term agreement is able to seek an order for possession, before the contractual period has come to an end.

8.52 Although the current law on the termination of fixed term assured tenancies is complex, the underlying principle is clear. During the period of the fixed term, only the grounds for possession we have classified as "occupier default" and "social policy"[17] can be used.[18] In other words the contractual term must be allowed to run its course, unless the tenant has behaved in such a way as to justify premature termination of the agreement.

8.53 **We provisionally propose that the terms of a fixed term type II agreement should provide that, during the contractual period, the landlord is entitled to bring proceedings for possession before the end of the fixed term if the circumstances we have classified as occupier default or social policy arise. Such an order for possession would only be made where court thought it reasonable in the exercise of its discretion.**

8.54 **For the avoidance of doubt, we provisionally propose that the procedures for seeking possession in these circumstances should be those provided for within the scheme we propose, and that the law and procedures relating to forfeiture of tenancies should not apply.**

8.55 It should be made clear – perhaps in the statute or with the co-operation of the Office of Fair Trading – that any traditional forfeiture clauses appearing in a housing agreement within our scheme would be inherently misleading and thus liable to enforcement action under the Regulations

8.56 This leaves the question of whether landlords should be prohibited from using other non-occupier-default bases during the fixed term.

8.57 In relation to tied accommodation, a periodic type II agreement would normally offer landlords appropriate protection. If a landlord needed to offer fixed term accommodation to attract applicants to a fixed term employment contract, then the agreement could classify misconduct at work as a breach of the agreement

[17] See paras 7.60 to 7.76 above.

[18] This is the effect of Housing Act 1988, s 7(6). There is no equivalent in the Housing Act 1985, which only allows use of grounds 2, 8 and 10 to15 during an assured fixed term. Ground 2 is not a tenant default ground, but we believe it should be replaced by lenders requiring landlords to grant agreements in which the notice-only basis will be available.

given the tied nature of the accommodation.[19] Breach of the agreement would then be the circumstance in which the landlord could seek possession, even though the fixed term had not expired.

8.58 In relation to circumstances we have classified as estate management,[20] it could be argued that these should not entitle the landlord to seek an order for possession during a fixed term type II agreement. The parties should be regarded as having committed themselves to an agreement for a fixed term so long as there are no breaches of the agreement by the occupier. On the other hand, it can be argued that not all the circumstances relating to estate management issues can be anticipated in advance. This might lead to the conclusion that the fixed term type II agreement should contain a provision which entitled the landlord to seek a discretionary order for possession from the court, notwithstanding the fact that the fixed term had not run its course.

8.59 **We invite views on whether the landlord under a fixed term type II agreement should be entitled to seek a discretionary order for possession in the circumstances falling within the scope of estate management**, as discussed above in paragraphs 7.77 to 7.83.

BREAK CLAUSES

8.60 In fixed term commercial leases, it is common for the lease to provide a break clause – a clause which, notwithstanding the fixed term nature of the agreement enables the parties to bring the agreement to an end without any default on either side. Two types of break clause are found: unconditional break clauses, which permit the parties to terminate the agreement at a particular point in time; and conditional break clauses, which allow the parties to terminate the agreement if particular circumstances arise.

8.61 We see no reason in principle why similar clauses should not be able to be included in fixed term housing agreements.

8.62 **We provisionally propose that terms analogous to break clauses in fixed term commercial leases should be able to be included in fixed term housing agreements.**

8.63 The Unfair Terms in Consumer Contracts Regulations 1999 would apply to such terms. Thus any break clause would have to be fair. Guidance from the Office of Fair Trading suggests that break clauses that are available to one party only would not be fair; there must be an equal opportunity for either party to use a break clause.

[19] This term would be subject to the fairness test in the Regulations and the court's discretion on repossession. If the employer is concerned to be able to end the fixed term employment contract early for reasons other than misconduct, and wants also to be able to repossess the housing at the same time, then a fixed term is probably not appropriate for the housing contract.

[20] See paras 7.77 to 7.83 above.

8.64 Although in relation to periodic agreements we shall be proposing that where the occupier wishes to terminate the agreement he or she should be able to do so simply by issuing a notice to quit the agreement, without the necessity of going to court,[21] it could be argued that where an occupier seeks to take advantage of a break clause, he or she should be required to get court approval in the same way that the landlord is required to do. We think this would be too onerous a burden to place on the occupier.

8.65 **We provisionally propose that while a landlord who seeks to take advantage of a break clause must be required to obtain an order for possession from the court, occupiers should not be required to obtain a court order, so long as they have notified the landlord that they intend to take advantage of the break clause.**

8.66 Since the circumstances in which break clauses would be triggered would not be the result of any default on the part of the parties, but simply because the circumstances contemplated by the break clause had arisen, it could be argued that no order for possession should be made by a court without the exercise of its discretion. On the other hand, it could be argued that if the break clause is in the agreement the landlord seeks to take advantage of it, then the court should be required to order possession.

8.67 **We invite views on whether courts should be required to order possession where the landlord seeks an order on the basis of an unconditional or conditional break clause, or whether any order should only be made following the exercise of discretion by the court.**

8.68 The Unfair Terms in Consumer Contracts Regulations 1999 also require that any break clause should not be used to mislead. For example a five year fixed term agreement that can be brought to an end after three years should make clear that the occupier has only three years' contractual security of tenure, even though there may be an intention to allow the agreement to run for five years.

EXPIRY OF FIXED TERM TENANCIES

8.69 It has long been the law that, where a contractual fixed term tenancy expires, it is replaced by a periodic tenancy unless there is a further grant of another fixed term period.[22] We think this well-established principle should be retained in relation to the fixed term agreements covered by our scheme. It avoids problems of uncertainty where a tenant holds over after the end of a fixed term and offers clarity as to the status of the occupier and the ways in which the tenancy may be brought to an end.

8.70 The practical effect of the switch in relation to a type II agreement is that once it has become periodic, both sides can bring the agreement to an end without having to have a reason. The landlord can use the notice-only basis for seeking possession.

[21] See paras 10.49 to 10.51.

[22] Currently Rent Act 1977, s 2(1)(a); Housing Act 1985, s 86 and Housing Act 1988, s 5(2).

8.71 **We provisionally propose that, on the expiry of the period of a fixed term agreement, a periodic agreement should automatically come into being, unless the parties have agreed to enter a further fixed term agreement**.

8.72 Although the initial creation of the periodic tenancy is the result of the operation of a statutory rule, we are anxious that the new agreement should be put into writing in the same way that periodic agreements created directly by the parties are to be put into writing.[23] There seems to be no good reason why the parties to an agreement that has been created by the operation of statute should not have a full statement of their current contractual rights and obligations. The landlord should be under an obligation to supply a revised contract to the occupier.

8.73 However, unless the parties agree that their agreement needs to be altered in some fundamental way, it may be assumed that most of the terms which applied during the fixed term period would also apply to the periodic tenancy.

8.74 For this reason, in this context we are not convinced that the full sanctions that attach to the failure of the landlord to provide the initial agreement are appropriate where the periodic tenancy has arisen by operation of law.

8.75 **We provisionally propose that where a periodic tenancy has been created by operation of law, the landlord should be under a duty to provide the occupier with a new version of the contract**.

8.76 **We provisionally propose that if the landlord fails to provide a revised version of the agreement, the occupier shall have the right to require the landlord to provide one**.

8.77 **We provisionally propose that the sanction of the loss of rent to the landlord should not apply until after the occupier has notified the landlord in writing that he or she requires a revised version of the agreement. The sanction would come into effect 14 days from the date of the service of the notice requesting the copy of the agreement on the landlord**.

8.78 **We provisionally propose that the terms of the original fixed term agreement should themselves set out the effect of these proposals**.

SUMMARY

8.79 The type II agreement will primarily be used by private landlords, but will also be available to social landlords in certain circumstances.

8.80 It will be able to be created on both a periodic and fixed term basis.

8.81 The landlord will be entitled to get a mandatory order of possession from the court

[23] See para 6.74 above.

(a) where the landlord has given the occupier two/three months' notice of his intention to seek a possession order. In these cases the accelerated possession procedure is available; and

(b) where the occupier is in two months' rent arrears when the landlord issues a notice of intention to take proceedings and at the date of the hearing.

8.82 The landlord will be entitled to seek a discretionary order of possession

(a) where the occupier has breached the agreement;

(b) where the occupier has driven their spouse or partner from the home by domestic violence; and

(c) where the agreement has been obtained on the basis of false information.

8.83 During a periodic agreement, the landlord will be entitled to seek a discretionary order of possession where there are estate management circumstances; we invite view whether this should be available during any fixed term.

8.84 Terms analogous to break clauses in commercial leases should be available for use in fixed term agreements.

8.85 In the absence of further agreement, on expiry fixed term agreements will become periodic agreements.

PART IX
THE SCOPE OF THE SCHEME

INTRODUCTION

9.1 As we made clear in Part III a principal objective of our project is to develop a scheme of regulation that is considerably simpler than the current law. Much of complexity of the present law arises from the rules about the scope of the schemes currently on the statute book. The Housing Act 1988, the Housing Act 1985 and the Rent Act 1977 detail categories of tenancy that fall within the schemes they create and those that fall outside. Arrangements falling outside the schemes may still come within the scope of the Protection from Eviction Act 1977, unless they are classified as "excluded tenancies and licences". And even these may be subject to indirect regulation resulting from the provisions of the Criminal Law Act 1977.[1]

9.2 If we are to achieve this objective it is important that the scope of the scheme be extended as widely as is practicable and that the number of categories of agreement that fall outside the scheme be reduced. But this will require some significant rethinking of matters found in the current law. These issues are considered in this Part.

9.3 The topics discussed here are

(1) the relationship with other statutory schemes;

(2) whether the lease-licence distinction should be a test for determining the scope of the scheme;

(3) other definitional issues affecting the scope of the scheme;

(4) statutorily excluded categories of agreement; and

(5) Crown tenancies.

9.4 In general we have taken the view that categories of tenancy covered by other statutory schemes should be excluded from our proposals. On this basis we envisage that the following categories of tenancy should remain excluded from our proposed scheme.[2]

(1) Business tenancies.

(2) Licensed premises.

(3) Tenancies of agricultural holdings.

(4) Long leases.

[1] The exclusions and other rules are discussed in Part III, paras 3.18 to 3.37.

[2] Mobile homes are governed by the Mobile Homes Acts 1975 and 1983, and are not considered further.

THE RELATIONSHIP WITH OTHER STATUTORY SCHEMES

Business tenancies

9.5 We anticipate there will be little controversy that our proposals should not attempt to cover business tenancies.[3] There are potential difficulties where premises are subject to mixed residential and business use.

9.6 The evolution of the regulation of agreements with mixed residential and business use is as complex as the evolution of the rest of housing law.[4] Initially business use was irrelevant. The Increase of Rent and Mortgage Interest (Restrictions) Act 1920 s 12(2)(c)(ii) provided.

> the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes.[5]

9.7 Part II of the Landlord and Tenant Act 1954 provides business tenants with some statutory protections. With the decontrol of residential tenancies under the Rent Act 1957, tenancies with joint residential and business use became protected by the 1954 Act. The Rent Act 1965, which restored statutory protection for residential tenants, excluded business tenancies.[6] This exclusion has been maintained through subsequent statutory regimes.

9.8 If the whole of the premises is used for business purposes the Landlord and Tenant Act 1954 Part II clearly applies. Where there is partial business use together with residential use the position is less clear. A series of cases culminating in the joint appeals *Cheryl Investments Ltd v Saldanha* and *Royal Life Saving Society v Page*[7] held that the 1954 Act applies to tenancies with mixed residential and business uses if the degree of business use is significant.

9.9 Two points may be made. First both the statutory framework and the cases are based upon conceptions of business used when the dividing line between home and work was more clearly drawn. It was certainly devised prior to the expansion of working from home deriving from self-employment, consultancy arrangements, portfolio working and internet and e-mail business use. Secondly the cases were argued at a time when the degree of security enjoyed by residential tenants was much greater than business tenants' security.

9.10 Currently a residential tenant seeking some security of tenure who runs a web design company from home may gain greater protection from Part II of the Landlord and Tenant Act 1954 than the Housing Acts, particularly where he or she rents from a private sector landlord. This may suggest that the interface

[3] Defined in the Landlord and Tenant Act 1954. Proposals for the reform of the law of business tenancies, using the procedures created by the Regulatory Reform Act 2002, are currently under consideration.

[4] Cf Michael Haley, "The statutory regulation of business tenancies: private property, public interest and political compromise" [1999] LS 207.

[5] The extent of the protection was made clear in *Vickery v Martin* [1944] KB 679.

[6] Rent Act 1965, s 1(3).

[7] [1978] 1 WLR 1329.

between business and residential use should be revisited. However, we are not aware of significant problems in practice.

9.11 **We provisionally propose that our proposed statutory regime should exclude business tenancies, including those tenancies where there is mixed residential and business use where the business use is significant.**

Licensed premises

9.12 Under the present system, a tenancy is not a secure tenancy if a dwelling house consists of or comprises premises licensed for the sale of intoxicating liquors for consumption on the premises. Nor can such a dwelling house be the subject of an assured tenancy. As a result of the Landlord and Tenant (Licensed Premises) Act 1990 such a tenancy will be a business tenancy within Part II of the Landlord and Tenant Act 1954.

9.13 **We provisionally propose that licensed premises be excluded from our scheme even when such premises include residential premises.**

Agricultural tenancies

9.14 Tenancies of agricultural holdings are covered by the Agricultural Holdings Act 1986 and farm business tenancies by the Agricultural Tenancies Act 1995. The law governing agricultural tenancies is complex and driven by quite different policy considerations from housing law.

9.15 **We provisionally propose that our proposals should not affect property subject to the Agricultural Tenancies Act 1995 or the Agricultural Holdings Act 1986**.

9.16 Nevertheless if an agreement for renting a home includes agricultural or other land which is not subject to the Agricultural Holdings Act 1986, or the Agricultural Tenancies Act 1995, we consider that it should be subject to our proposed statutory scheme. This would change the current law that a tenancy of a dwelling let with agricultural land exceeding two acres is excluded from the assured tenancy scheme.[8] This should be so, regardless of the purpose of the letting.[9]

9.17 **We provisionally propose that agreements for renting homes that include agricultural or other land not subject to the Agricultural Holdings Act 1986 or the Agricultural Tenancies Act 1995 should come within the statutory scheme we propose**.

[8] Housing Act 1988, Sched 1, para 6.

[9] Currently lettings of dwelling-houses which are let together with other land, which is not agricultural land, are included in the ambit of the Housing Act 1988 by virtue of s 2 of the Act. However such lettings are only included if the main purpose of the letting is the provision of a home for the tenant.

Long leases

9.18 Long leases are clearly excluded from the secure tenancy regime.[10] They are indirectly excluded – by the low rent rule[11] – from the assured tenancy regime. We do not consider that long leases should fall within the scope of our proposed statutory scheme. Long leaseholders are akin to owner-occupiers and are subject to a range of other statutory provisions.[12]

9.19 We prefer the straightforward approach of the Housing Act 1985, section 115 which defines a long lease as one "granted for a term certain exceeding 21 years, whether or not it is (or may become) terminable before the end of that term by notice given by the tenant or by re-entry or forfeiture." The definition of a fixed term exceeding 21 years[13] is useful as it conforms to a number of statutory provisions governing long leases. It makes the purpose of the exclusion very clear, and does not require updating in the way that references to rent levels inevitably do.

9.20 **We provisionally propose that leases granted for a term certain exceeding 21 years should be excluded from our proposed statutory scheme**.

SHOULD THE LEASE-LICENCE DISTINCTION BE RETAINED AS A TEST FOR DETERMINING THE SCOPE OF THE SCHEME?

9.21 In Part VI, we provisionally proposed that, subject to the discussion in this Part, our scheme should apply to *all contracts for rent which conferred the right to occupy premises as a home*.[14] This provisional proposal raises a number of issues that fall to be considered in determining the overall scope of our scheme. Here we discuss the question of retaining the lease-licence distinction as a test for determining the scope of the scheme. Other issues, such as the requirement for "rent", and the requirement for the premises to be a person's home, are discussed in the next section.

9.22 The issue considered here is whether the distinction between the lease and the licence should be retained as a test for deciding which agreements should come within the scope of our scheme, and those which should not.

9.23 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

[10] Housing Act 1985, Sched 1, para 1 specifically excludes long tenancies.

[11] Housing Act 1988, Sched 1, para 3. A low rent is one that is less than two-thirds of the rateable value if the tenancy was entered into before April 1 1990, or if entered into after that date at a rent of £1000 or less per annum if the property is in Greater London, or if it is elsewhere £250 or less per annum.

[12] Landlord and Tenant Act 1954, s 2(4); Leasehold Reform Act 1967, s 3(1); Landlord and Tenant Act 1987, s 59 (3); Local Government and Housing Act 1989, Sched 10, para 2(3).

[13] There will be a requirement to register leases of seven years or more once the Land Registration Act 2002 comes fully into effect. We consider it remains appropriate that leases for less than 21 years should continue to come within our statutory scheme so that the rights and obligations of both parties to the agreement are clear.

[14] See para 6.8 above.

interests in land, which are therefore binding on third parties, and those which do not.

Background

9.24 Historically the distinction between a lease and a licence has largely been a matter affecting the private rented sector. Following the model of the Rent Acts, section 1 of the Housing Act 1988 only applies to a "tenancy under which a dwelling-house is *let*…". An early case[15] held that use of the word "let" signified that for the legislation to apply, a valid tenancy had to exist. Where there was a genuine licence, the protective legislation did not bite.

9.25 A series of cases in the 1980s established that the courts should decide that licences, which were in reality tenancies, were shams.[16] A consequence of the case law, however, is that landlords can never be entirely certain – unless a legal challenge is made in court – whether a purported licence will be found to be genuine, or a sham.

9.26 In *Street v Mountford*[17] the House of Lords made it clear that the three hallmarks of a tenancy were (a) exclusive possession, (b) for a term, (c) at a rent. The nature of the agreement was not to be determined by the label the parties give to it but by what the agreement signifies in law. The distinction between exclusive possession and exclusive occupation was that whilst exclusive occupation signified the sole right to use the premises, exclusive possession allowed the tenant to use the premises let to him to the exclusion of all others. As Lord Templeman put it in *Street v Mountford* the tenant can "keep out strangers and keep out the landlord".[18]

9.27 The assured shorthold tenancy substantially changed landlord practice. Since landlords are able to charge market rents, and since tenants have relatively limited security of tenure, this has become the preferred form of letting.[19]

9.28 Section 79(3) of the Housing Act 1985 includes licences within the scope of secure tenancy, whether or not granted for a consideration. However, in *Westminster City Council v Clark*[20] the House of Lords held that a licensee could only qualify as a secure tenant if he or she had been granted exclusive possession of a separate dwelling house. This had the effect of making the lease-licence distinction more significant for the secure tenancy regime than perhaps Parliament had intended.[21]

[15] *Oakley v Wilson* [1927] 2 KB 279.

[16] *Street v Mountford* [1985] AC 809; *AG Securities v Vaughan* [1990] 1 AC 417.

[17] [1985] AC 809.

[18] *Ibid*, at p 816.

[19] Jill Morgan, "The Casualisation of Housing" (1996) 18 JSWFL 445.

[20] [1992] 2 AC 288.

[21] For further discussion of *Westminster City Council v Clarke* see D Cowan, "A Public Dimension to a Private Problem" (1992) Conveyancer 285.

The continuing significance of the lease-licence distinction

9.29 There are certain arrangements, generally regarded as exceptions to *Street v Mountford*,[22] where exclusive occupancy is granted, but which have been construed by the courts as not granting the exclusive possession essential for the creation of a tenancy, thereby ensuring they did not attract statutory protection. One key characteristic of exclusive possession is control of the property that is the subject of the agreement. The exceptions to *Street v Mountford* in essence involve acceptance of the idea that the landlord should retain control over the property despite granting exclusive occupation.

Almshouses

9.30 Rights to occupy almshouses[23] have been construed as providing personal rights to the occupiers rather than property rights. An almsperson occupies an almshouse as a beneficiary of a trust. Accordingly, although an almsperson may make periodic payments for accommodation, he or she is not a tenant and is not entitled to security of tenure under the Housing Act 1988.[24] For the purposes of the Housing Act 1985 (which includes within its ambit licences which grant exclusive possession[25]) there is a specific exclusion of almshouse licences from the secure tenancy regime.[26]

Housing for the elderly

9.31 Another example where the purpose of the accommodation involves a need for the landlord to retain control arises with old people's homes. The landlord must be able to terminate agreements at the point where the landlord can no longer provide the occupier with necessary support. In *Abbeyfield (Harpenden) Society v Woods*[27] the occupier of a room in an old people's home was held to be a licensee. This was explained in *Street v Mountford* by categorising the occupier as a lodger because of the level of personal services provided.

Service occupancies

9.32 Service occupancies can also fall outside of the definition of a lease, even if the normal requirements of rent, term and exclusive possession are met.[28] A person living in tied accommodation will not have a tenancy if it is necessary for him or her to live in the premises in question in order to carry out the employment duties

[22] [1985] AC 809.

[23] An almshouse is a "house provided for the reception or relief of poor persons", per Channel J in *Mary Clark Home Trustees v Anderson* [1904] 2 KB 645 at p 651. See for further information on almshouse charities, John Alder and Christopher Handy, *Housing Associations: The Law of Social Landlords* (3rd ed 1997) at p 78.

[24] *Gray v Taylor* [1998] 1 WLR 1093.

[25] Housing Act 1985, s 79(3).

[26] Schedule1, para. 12.

[27] [1968] 1 WLR 374.

[28] *Street v Mountford* [1985] AC 809 at p 818 per Lord Templeman, "A service occupier is a servant who occupies his mater's premises in order to perform his duties as a servant. In those circumstances the possession and occupation of the servant is treated as the possession and occupation of the master and the relationship of landlord and tenant is not created."

or occupying the premises is a requirement imposed for the better performance of employment duties. Such occupancies are construed as service licences and are therefore excluded from the Housing Act 1988. They are specifically excluded from the secure tenancy regime by paragraph 2 of Schedule 1 to the Housing Act 1985.

9.33 A service licence that is expressly terminable on the cessation of employment comes to an end without any requirement of notice.[29] It was decided in *Norris v Checksfield*[30] that these types of service licence were not periodic licences and therefore were additionally excluded from the notice requirements of the Protection from Eviction Act 1977.[31]

Hostels

9.34 Hostels, in particular where support services are provided, have generally been excluded from statutory regulation on the grounds that accommodation is provided on licence. The existence of rules regulating the occupation of the premises and the managed nature of the provision means that these arrangements have been generally considered to fall outside statutory regulation. However mere provision of hostel type accommodation will not in itself be sufficient to rebut the presumption of a tenancy where the occupier has exclusive occupation.

9.35 In *Bruton v Quadrant Housing Association*[32] the House of Lords reasserted the principles set out in *Street v Mountford*.[33] The landlord, Quadrant Housing Association, provided short-term accommodation for the homeless and others in need of housing. Mr Bruton occupied a flat, part of a block owned by the London Borough of Lambeth and licensed to the housing association. The borough did not have the legal power to grant a lease or other proprietary interest to the housing association.[34] Mr Bruton signed an agreement that explained that the property was being offered on licence. Mr Bruton then sought to enforce the implied repairing obligations contained in section 11 of the Landlord and Tenant Act 1985. The implied terms in the Landlord and Tenant Act 1985 only apply to tenancies.[35] The landlord denied that it had granted a tenancy.

9.36 Their Lordships held that the agreement gave Mr Bruton a right to exclusive possession. The facts that the landlord was performing socially valuable functions, that it had agreed with the council not to grant tenancies and that it had no estate out of which it could grant a tenancy were not sufficient to enable the agreement to be construed as a licence. In particular their Lordships held that it was irrelevant that the landlord did not itself have any legal interest in the land. The

[29] *Ivory v Palmer* [1975] ICR 340.

[30] [1991] 1 WLR 1241.

[31] Section 5(1A) of the Protection from Eviction Act 1977 requires that notice to determine a periodic licence must be in writing and contain the prescribed information, and must be given not less than four weeks before the date on which it is to take effect.

[32] [2000] 1 AC 406.

[33] [1985] AC 809.

[34] Housing Act 1985, s 32.

[35] Landlord and Tenant Act 1985, s 13.

court rejected the housing association's argument that therefore it could not grant Mr Bruton a tenancy. There was no need for the agreement to create a legal estate that would bind third parties. An agreement can create exclusive possession. Therefore a tenancy as between the grantor and the grantee only was possible. What was critical was that the landlord had not retained sufficient control to prevent Mr Bruton having exclusive possession.

Hotels[36]

9.37 The extent of the control which management exercises over the room provided is also used to establish that hotel rooms are provided on licence. If the hotel management reserve the right to move the occupiers from room to room then even though the occupier will in general have exclusive use of the room the occupier will not have exclusive possession. In addition the provision in many hotels of a high level of service involving regular entry to the room prevents agreements from being leases. In *Brillouet v Landless,*[37] for instance, the facilities provided prevented the appellant from demonstrating that he had exclusive possession.

9.38 There is a particular type of occupancy of hotel rooms, which is long term and where a very low level of service is provided. Here it may be difficult to categorise the occupancy as a licence.

Should the lease-licence distinction be used to determine the scope of our proposed scheme?

9.39 We have thought very carefully about whether the lease-licence distinction should retained as a means to determine which agreements should fall within our proposed scheme, and those which should fall outside. Considerable conceptual difficulties are caused by the distinction between exclusive occupation and exclusive possession.[38] It is not readily understandable by the public at large.

9.40 As we have already argued, we regard the contract between the landlord and the occupier as central to the operation of our scheme. We see no reason why any distinction should be drawn between a contract which comprises a lease and a contract which comprises a licence. This distinction is essential where the proprietary consequences of the contract are concerned, and should remain so, but it should not affect the statutory regulation of the contract as between the contracting parties themselves.

[36] In large numbers of cases agreements to occupy hotel rooms will be excluded from our scheme as holiday lets; see para 9.95 below.

[37] (1996) 28 HLR 836.

[38] Professor Mark Pawlowski, "Contractual licences, personal tenancies and tenancies at will" (2001) 5 LTRev p 117 argues (at p 118) that "… there is little to distinguish the licence from a contractual (personal) tenancy, and a contractual licence from a tenancy at will. Most significantly, the hitherto decisive factor of exclusive possession has been eroded significantly in both the *Dutton* and *Bruton* cases. The result is to leave the distinction between leases and licenses even more muddy and to prompt the question whether the time has now come to abandon these fine distinctions in favour of a more rational scheme of occupational rights in leasehold law."

9.41 Arrangements that would currently be regarded as non-contractual licences would fall outside our scheme, because of the lack of a contract, for instance, a permission to occupy granted as an act of friendship.

9.42 **We provisionally propose that the scope of our statutory scheme should be determined independently of the lease-licence distinction**.

Exclusions

9.43 Where there are very strong practical and policy reasons for excluding particular categories of residential occupancy agreement from our proposed scheme, we think that the appropriate way to achieve this is through the use of a statutory list of exclusions. This will make it easier to determine which are inside and which are outside the scheme. It builds on the model provided by the Protection from Eviction Act 1977, which provides protection for all residential occupiers, regardless of their status as tenants or licensees but excludes certain occupiers from protection (such as the tenants of resident landlords) on the basis of statutorily defined circumstances.

Examples

9.44 Examples of situations where people are occupying premises as a place of residence, but which should not fall within the scope of housing legislation, include nursing homes, old people's homes and hospitals, military barracks, and penal institutions. In the past, such arrangements have been excluded either as a result of the lease-licence distinction or as a result of the definition sections of the statutes.

9.45 Of these, penal institutions would be excluded from our proposed statutory scheme because of the requirement for a contract between the parties.

9.46 However contracts will often exist between a resident and the provider of nursing home accommodation, old people's homes and hospitals. It would be inappropriate to include such residential provision within our statutory scheme. The primary purpose of the provision is to provide appropriate care for the resident. The provider has to be responsible for deciding whether the provision is appropriate and whether another type of residential accommodation would provide more appropriately for the needs of the resident. The provider must therefore be free, within the constraints of the contract, to terminate the agreement. Most of these establishments are now covered by the Care Standards Act 2000.

9.47 **We provisionally propose excluding from the ambit of our proposed statutory scheme all residential provision which has to be registered under the Care Standards Act 2000**.

9.48 We also consider for the avoidance of doubt that we should specifically exclude National Health Service hospitals from our proposed statutory scheme.

9.49 **We provisionally propose excluding hospitals defined under the National Health Service Act 1977**.

9.50 We also think that residential accommodation provided in military barracks should not be covered by our proposed statutory scheme.

9.51 **We provisionally propose excluding military barracks from our proposed scheme of statutory regulation**.

Other exclusions?

9.52 It should be stressed that other claims for exclusion from our scheme should be closely scrutinised by the Secretary of State.[39] We seek to prevent the growth of a large body of exceptions, thereby reintroducing the very complexity we are striving to avoid.

9.53 **We provisionally propose that, where there are exceptional reasons for so doing, defined categories of agreement may be excluded from the scheme by the Secretary of State by incorporation in list of exclusions in a statutory instrument**.

Making agreements with those under the age of 18.

9.54 There are many situations where landlords wish to rent to those under the age of 18. Uncertainty is caused by the fact that leases cannot be granted to a person under the age of 18. A minor cannot hold a legal estate in land.[40]

9.55 While minors can enter validly binding contracts, where a rental agreement is under the assured tenancy regime they will have reduced security of tenure because they can only have a contractual licence, not a tenancy (the position is somewhat different in the public sector[41]). There are special rules to protect the position of minors, but they are bound to pay for necessaries[42] supplied under a contract. Landlords find the position confusing and are reluctant to treat minors on the same basis as over 18-year-olds.

9.56 If the distinction between leases and contractual licences is not used to determine the scope of the scheme, this will assist those who wish to rent homes to young people under the age of 18.

9.57 **We provisionally propose that our proposed statutory scheme should explicitly include contracts for renting to those under 18 years of age**.

OTHER DEFINITIONAL ISSUES AFFECTING THE SCOPE OF THE SCHEME

9.58 As noted at the start of the previous section, in Part VI, we provisionally proposed that, subject to the discussion in this Part, our scheme should apply to *all contracts*

[39] Who will be responsible for the statutory list of exclusions.

[40] Law of Property Act 1925, s 1(6).

[41] Housing Act 1985, s 79(3).

[42] The Sale of Goods Act 1979, section 3 provides "(2) Where necessaries are sold and delivered to a minor … he must pay a reasonable price for them. (3)… '[N]ecessaries' means goods suitable to the condition in life of the minor … and to his actual requirements at the time of the sale and delivery." Necessaries are those things without which a person cannot reasonably exist and include food, clothing, lodging, education or training in a trade and essential services. In most circumstances involving the renting of one property by a minor we consider that a contract for renting would be construed as a contract for a necessary.

for rent which conferred the right to occupy premises as a home.[43] Here we consider the extent to which this definition might be simpler than the existing statutory definition sections and thus avoid some of the judicial interpretation these provisions have attracted.[44]

The requirement for "rent"

9.59 Under English law, a contract cannot be a valid contract unless there is "consideration" – most commonly evidenced by a requirement for payment of money, but going wider than that. It might be thought, therefore, that it would not be necessary to provide specifically for a requirement that "rent" should be paid.

9.60 Our objective in requiring that "rent" be an essential feature of our statutory scheme is to ensure that the statutory scheme covers all those arrangements which are commonly accepted as falling within the scope of arrangements for renting housing, and excludes those which do not. The basis of renting agreements is that the right to occupy is purchased not by the payment of a substantial capital sum, as occurs with the purchase of a freehold or leasehold, but where payments are made on a regular basis (weekly, fortnightly, monthly) without a substantial pre-payment of capital.[45]

9.61 The word rent is directly linked, in many people's minds, to the concept of tenancy. If our focus on the contract is agreed, and assuming that the distinction between a lease and a licence will not determine the boundary between agreements within our proposed scheme, and those outside, it should be clear that "rent" should not be linked to the concept of tenancy, but be defined more broadly.[46] We also think that "rent" should include other forms of consideration, such as payments in kind. In short, whether a payment is "rent" should be regarded as a matter of substance, rather than of form. This is why we have put the word in inverted commas.

9.62 **We provisionally propose that our scheme apply to contracts which contain a requirement for the payment of "rent"**.

9.63 **We invite views on whether it is necessary to provide a definition of rent.**

9.64 Under the present law, the concept of rent is used in other ways to determine the scope of the existing statutory regimes.

Low rents

9.65 Once long leaseholds exceeding 21 years are excluded from our scheme,[47] we do not think it is necessary to exclude other agreements at low rents. Once rent is

[43] See para 6.8 above.

[44] We have been assisted in our thinking by the broader approach adopted in many Commonwealth countries: above Part IV.

[45] We exclude the requirement to pay a deposit from this.

[46] The definition of rent in the Housing Benefit (General) Regulations 1987 (as amended) provides an example of this approach.

[47] See para 9.20 above.

payable, then there is an enforceable contract and our statutory scheme should apply.

9.66 **We provisionally propose that there should be no lower limit on the amount of rent payable under the contract for it to be included in our proposed statutory scheme**.

High rents[48]

9.67 The system of statutory regulation that we propose is founded on principles of consumer protection that we think should apply to all residential contracts. It is our view that there is no need to exclude high rent properties from such a system.

9.68 **We provisionally propose that there should be no upper limit on the amount of rent payable under the contract**.

No rents

9.69 Purely gratuitous agreements – acts of friendship – should not fall within the scope of the scheme. But where rent of a non-monetary kind is paid (such as payments in kind), we see no reason why the agreement should not come within the scope of the scheme. Similarly, where there is consideration, but it is not in the nature of rent (such as a capital sum), it would not come within our scheme.

9.70 **We provisionally propose that agreements at no rent would fall outside our proposed scheme**.

The requirement for the premises to be a person's home

9.71 In order to distinguish our scheme from those applying to commercial and agricultural property, we consider it important that our scheme should focus on property to be lived in or intended to be lived in as someone's home.

9.72 The present law uses the term "dwelling". But the House of Lords in *Uratemps Ventures v Collins*[49] recognised the idea of the home as the appropriate focus for housing legislation when they recently considered the meaning of the word. As Lord Irvine LC put it:

> Dwelling is not a term of art, but a familiar word in the English language, which in my judgment in this context connotes a place where one lives, regarding and treating it as home.[50]

9.73 Or as Lord Millett said;

[48] Housing Act 1988, Sched 1, para 2 excludes from the assured tenancy scheme properties where the rent is in excess of £25,000 per annum. The original justification for this exclusion was that the statutory scheme was designed to provide protection for the most vulnerable in the housing market, and that those people who were able to afford to rent high value properties had no need of the protection.

[49] [2001] UKHL 43; [2001] 3 WLR 806.

[50] *Ibid*, at [3]

> The first step is to identify the subject matter of the tenancy agreement. If this is a house or part of a house of which the tenant has exclusive possession with no element of sharing the only question is whether, at the date when the proceedings were brought, it was the tenant's home. If so it was his dwelling.[51]

9.74 **We provisionally propose that the word "home" be used in preference to the word "dwelling"**.

Conferment of a right to occupy

9.75 We think our scheme should embrace all contracts that confer a right to occupy premises as a home. Thus a contract for the renting of a garage would not fall within the scope of our scheme even if the occupier lived in the garage, unless the contract clearly provided that the purpose of the contract was to give the occupier the right to live in the garage as his home.

9.76 We are of the view that this requirement be limited to giving the occupier the right to occupy the premises as a home. There should be no further requirement that the occupier be in physical occupation of the property for the agreement to come within the scope of our proposed statutory scheme.

9.77 Under the current law, both the assured and secure tenancy regimes require the tenant to occupy the dwelling house.[52] Clearly a tenant cannot be expected to be continuously present within the premises. Temporary absence does not mean that the premises have ceased to be occupied. However where there is a lengthy absence, this can lead to the inference that the property is no longer occupied. Then the tenant has to demonstrate that the property remains his residence, that he intends to return[53] and that there is physical evidence of that intention on the property.[54] This causes uncertainty that we regard as unnecessary and undesirable. So long as the occupier continues to abide by his or her contractual obligations, we see no reason why our scheme should not continue to apply.[55]

9.78 **We provisionally recommend that the scheme should cover any agreement that confers a right to occupy premises as a home**.

[51] *Ibid*, at [58].

[52] Housing Act 1985, s 79; Housing Act 1988, s 1. The detailed wording is rather different.

[53] Where there is sub-letting of the premises, then it is going to be very difficult for the tenant to demonstrate the necessary intention: *Ujima Housing Association v Ansah* (1998) 30 HLR 831. Note that in *Waltham Forest Community Based Housing Association v Fanning* [2001] LTR 41 Rougier J pointed out the irreconcilable dicta on the meaning of "occupying as only or principal home" Housing Act 1988, s 1, in the context of sub-letting. In *Crawley BC v Sawyer* (1988) 20 HLR 98 and *Hussey v Camden* LBC (1995) 27 HLR 5, sub-letting of the whole is held to be incompatible with statutory protection. This was not the conclusion in *Ujima v Ansah*.

[54] *Brown v Brash and Ambrose* [1948] 2 KB 247.

[55] We discuss in Part X below the distinct issue of what should happen where the occupier walks away from the home, no longer paying the rent or performing his or her obligations under the contract.

Only or principal home?

9.79 The current law provides that the statutory schemes only apply to the tenant's "only or principal" home. In other words only one letting to a particular individual can be within the statutory scheme. We do not think that this should be part of the statutory definition for the purpose of our scheme. More and more people are having to live in different places, and we see no reason of principle why any agreement should not potentially come within the scheme propose.

9.80 We can understand that a landlord with limited housing resources available for letting may wish not to rent to a person who already has a home. But we think this is better achieved by the landlord putting a term in the contract requiring that the property is the only or principal home of the occupier. If it transpires that this term has been breached that would be a ground for seeking possession.

9.81 It might also be the case that one of the circumstances in which a landlord, who was normally required to create type I agreements, could be permitted to create a type II agreement would be in relation to a person who already has a home to live in. Equally we can envisage circumstances in which a landlord might be willing to enter additional type I agreements with a particular individual, for example in areas of low housing demand; or where a person was having to live in one area while working in another.

9.82 **We provisionally propose that the scheme should not be limited to the occupier's "only or principal" home**.

9.83 We recognise that there are complexities caused where an occupier purports to pass his or her right to occupy onto another. We consider those complexities in our second consultation paper on the succession and transmission of agreement.

Separateness?

9.84 Currently there are statutory requirements that the dwelling must be let as a separate dwelling. The assured tenancy regime provides that where the tenant shares accommodation with someone other than the landlord, as long as there is some part of the accommodation that he or she has exclusive occupation of,[56] the tenant will still be protected under the rather cumbersome route of section 3 of the

[56] See *AG Securities v Vaughan* [1990] 1 AC 417 where the occupiers who shared a flat were found not to be tenants as they did not have exclusive occupation of their bedrooms.

1988 Act.[57] If the tenant is sharing with a sub-tenant then section 4 of the Housing Act 1988 provides protection for the tenant.

9.85 "Separateness" is only relevant in the context of the Housing Act 1988 where the tenant shares with the landlord. The tenant does not have "separate" accommodation if in addition to the accommodation he has exclusive possession of, he shares living accommodation. At this point, cooking facilities become relevant. In *Uratemps Ventures v Collins*[58] Lord Millett said:

> For this purpose a kitchen is a living room, at least if it is possible to occupy it and not merely cook and wash up in it; so that a right to occupy a kitchen (as distinct from a right to make some limited use of its facilities) in common with the landlord will take the tenancy out of the Acts.[59]

9.86 Therefore the word "separate" can take out of protection tenancies which would otherwise be protected. However the resident landlord exclusion[60] provides a more extensive exclusion from statutory regulation.

9.87 "Separateness" is significant for the purposes of the Housing Act 1985 even where there is no resident landlord as there is no provision equivalent to the Housing Act 1988, section 3. Therefore there cannot be a secure tenancy where living accommodation is shared with other tenants. Where a tenant has a bedsitting room with a small bathroom attached as in *Central YMCA Housing Association Ltd v Saunders*[61] but shares kitchen facilities the tenant is excluded from the protection of the secure tenancy regime.

9.88 Currently the definition of secure tenancy also provides the basis for the right to buy. Thus the requirement that the premises occupied by the secure tenant are clearly identifiable is very important. We consider that the right to buy legislation should not distort the scope of security of tenure of type I agreements and would be better provided for within separate legislation.

[57] The Housing Act 1988, s 3(1) provides that

"where a tenant has the exclusive occupation of any accommodation (in this section referred to as "the separate accommodation") and –

(a) the terms as between the tenant and his landlord on which he holds the separate accommodation include the use of other accommodation (in this section referred to as "the shared accommodation") in common with another person or other persons, not being or including the landlord, and

(b) by reason only of the circumstances mentioned in paragraph (a) above, the separate accommodation would not, apart from this section, be a dwelling-house let on an assured tenancy,

the separate accommodation shall be deemed to be a dwelling-house let on an assured tenancy … ."

[58] [2001] UKHL 43; [2001] 3 WLR 806.

[59] *Ibid* at [58].

[60] See paras 9.110 and 9.138 above.

[61] (1991) 23 HLR 212.

9.89 **We provisionally propose that there should be no specific additional requirement that the home be separate from that of others (leaving aside the special case of a resident landlord)**.

Individual?

9.90 We have considered whether the definition of the agreements to be covered by our scheme should specifically refer to an individual, as is the case with the Housing Acts 1985 and 1988. We take the view that the fact that the agreement will confer a right to occupy premises as a home necessarily implies that the agreement must be with an individual, as occupation of premises by companies does not have the quality of occupation "as a home".

9.91 **We provisionally propose that the definition of the agreements covered by our proposed scheme should not include specific reference to occupation by an individual**.

STATUTORILY EXCLUDED CATEGORIES OF AGREEMENT

9.92 The current assured and secure tenancy regimes contain long lists of statutory exclusions.[62] If our objective of simplifying the current law is to be achieved, we are anxious to reduce the number of statutory exclusions from our scheme. One of the reasons for placing some categories of tenancy outside the current regimes is a recognition that the landlord should be able to regain possession quickly. Thus the proposals for the reform and simplification of this area of law are to a degree dependent upon whether the six months' moratorium on the ability of a landlord to obtain a possession order from the court is or is not a feature of type II agreements.[63]

9.93 Our discussion of these exclusions is structured as follows. First we discuss those exclusions which we consider can be modernised and simplified regardless of whether there is a six months' moratorium. Secondly, we consider the remaining exclusions and present two options: the first based on there being a moratorium, the second assuming that there is not.

Exclusions not affected by the six months' moratorium

Holiday lets

9.94 The current situation is that holiday lets are excluded from both the Housing Act 1988, Schedule 1, paragraph 9 and from the Protection from Eviction Act 1977 by section 3A(7)(a). Although there was some evidence of holiday lets being used as a device to evade the Rent Acts, we are not currently aware that this creates any significant problem in practice. There is a very strong argument for retaining their exclusion to facilitate this type of commercial activity.

9.95 **We propose that holiday lets should be excluded both from our proposed statutory scheme and from the Protection from Eviction Act 1977**.

[62] These are summarised in paras 3.18 to 3.37 above.

[63] See para 8.27 above.

Trespassers

9.96 Agreements made with those who enter property as trespassers are currently excluded from the Protection from Eviction Act 1977[64] and the Housing Act 1985.[65] The lease-licence distinction operates to exclude such occupancies from the Housing Act 1988. There are sound social policy reasons for such exclusions.

9.97 **We provisionally propose that agreements granted as a temporary expedient to a person who entered the premises as a trespasser should be excluded both from our proposed statutory scheme and from the Protection from Eviction Act 1977**.

Almshouses

9.98 We noted above[66] that the residents of almshouses – who traditionally have been granted licences rather than tenancies – are specifically excluded from the Housing Act 1985, and are indirectly excluded from the Housing Act 1988 by the lease-licence distinction. They are not however excluded from the Protection from Eviction Act 1977. Thus an almshouse management would have to obtain a court order to lawfully regain possession of accommodation which the licensee is unwilling to leave.

9.99 In view of our proposals relating to the type II agreement, we are not convinced that there remain sound policy arguments for the continued exclusion of the residents of almshouses from statutory regulation.

9.100 **We provisionally propose that the residents of almshouses should not be excluded from our proposed statutory scheme**.

Hostels

9.101 We also noted above[67] that hostels are excluded from the assured and secure tenancy regimes. The Protection from Eviction Act 1977 excludes public sector hostels provided on a dormitory basis with the provision of board or the facilities for the preparation of food,[68] but includes other hostel arrangements.

9.102 We consider that it is essential that the system of statutory regulation we propose should facilitate the provision of supported accommodation for all kinds of short-term social project, for example to help the homeless or the drug addicted move from a life on the streets to more a conventionally based living environment. Although for convenience we use the expression "hostel", the intention would be to exclude all forms of modern supported accommodation, including, for instances, foyers.

[64] Protection from Eviction Act 1977, s 3A(6).

[65] Housing Act 1985, s 79(4).

[66] See para 9.30 above.

[67] See para 9.34 to 9.36 above.

[68] Protection from Eviction Act 1977, s 3A(8).

9.103 **We provisionally propose that all projects providing an appropriate level of supported accommodation to vulnerable groups should be excluded our scheme and from the Protection from Eviction Act 1977**.

9.104 **We further provisionally propose that the definition of "hostel" in the Protection from Eviction Act 1977 should be modernised to reflect the current practice of providing supported provision with an increasing use of self-contained accommodation**.

9.105 It would be advantageous to have a definitive list of such projects, to avoid the status of a project depending on litigation. One way of achieving this would be for the legislation to authorise the Secretary of State to maintain a list of projects which satisfy the criteria, which would be definitive of the status of the project for all purposes. A decision of the Secretary of State in relation to the list would be subject to judicial review, so a project refused listing, for instance, could subject the Secretary of State's decision to judicial scrutiny.

9.106 **We invite views on whether the Secretary of State should have the power to maintain a list of projects which he or she considered met the criteria. The inclusion of a project on the list would be definitive of the status of the project as excluded as supported accommodation**.

9.107 Providers of supported housing projects should be encouraged to provide their clients with a written agreement setting out their rights and responsibilities and the limited security similar to the agreements to be used in the scheme we propose. But this should be a management decision, not regulated by statute.

Introductory tenancies

9.108 These are discussed in the context of our proposals for a general probationary agreement.[69]

Other exclusions: (1) assuming the six months' moratorium is retained

Properties with a resident landlord

9.109 If the six months' moratorium is retained, we do not consider that we are able to propose any change to the current exclusion from statutory regulation of tenants of resident landlords. Resident landlords provide a valuable source of accommodation. We think it right that landlords who share access and stairways with occupiers should have a simple method of termination during the initial six months' of the agreement.

9.110 **If there is a moratorium, we provisionally propose that occupiers of resident landlords be excluded from our proposed scheme**.

9.111 We consider that the current exclusion from the Protection from Eviction Act of those tenants who share living accommodation with their landlord should also remain as it is.

[69] See paras 11.16 to 11.39 above.

9.112 **If there is a moratorium, we provisionally propose that the current exclusion of occupiers who share accommodation with resident landlords from the Protection from Eviction Act 1977 should be maintained**.

Fully mutual housing associations (housing co-operatives)

9.113 The requirement of mutuality means that we do not consider that we can propose a requirement upon the co-operative that it lets without access to a simple method of termination during the initial six months of the agreement.

9.114 **If there is a moratorium, we would provisionally propose that those to whom a right of occupation has been granted by a fully mutual housing association should be excluded from our proposed scheme**.

9.115 The tenants of fully mutual housing associations should continue to be included within the provisions of the Protection from Eviction Act 1977.

Lettings to students

9.116 We consider that the balance of interest between university landlords and their students would be destabilised if there were no simple method of terminating agreements of student accommodation during the initial six months. Similar considerations apply to agreements for students provided by local authorities.

9.117 **If there is a moratorium, we provisionally propose that agreements by educational institutions to students should be excluded from the scope of our statutory scheme**.

9.118 There is, currently, uncertainty whether the provisions of the Protection for Eviction Act 1977 apply to students. In *Mohammed v Manek*,[70] the Court of Appeal held that the use of hotel rooms to accommodate homeless persons on a temporary basis was excluded from the Protection from Eviction Act 1977 since the premises were not occupied as a dwelling. Students are also accommodated on a temporary basis. Thus it could also be argued that lettings to students also fall outside the Protection from Eviction Act 1977. However it is difficult to see how this interpretation of dwelling is reconcilable with that of the House of Lords in *Uratemps Ventures v Collins.*[71]

9.119 **For the avoidance of doubt we provisionally propose that students who rent from educational institutions or local authorities should be included within the provisions of the Protection from Eviction Act 1977**.

Accommodation for homeless persons

9.120 The management of temporary accommodation of homeless persons to whom local housing authorities owe duties under Part VII of the Housing Act 1996 means that landlords will require a simple method of termination during the first six months of the agreement.

[70] (1995) 27 HLR 439.

[71] [2001]UKHL 43; [2001] 3 WLR 806. See the earlier discussion at para 9.72 and 9.73.

9.121 **If there is a moratorium, we provisionally propose that accommodation provided on a temporary basis for homeless persons be excluded from the scope of our proposed scheme, but continue to be protected by the Protection from Eviction Act 1977**.

The temporary purpose of the agreement

9.122 Certain lettings are excluded from the secure tenancy regime within the Housing Act 1985 because of the temporary nature of the provision made. These include

(1) land acquired for development,

(2) temporary accommodation for employment seekers,

(3) short-term arrangements, whereby temporary accommodation is leased to a local authority by a private landlord, and

(4) temporary accommodation during works for non-secure tenants.[72]

These arrangements are not excluded from the Protection from Eviction Act 1977.

9.123 The temporary nature of the provision means that social landlords will require a simple method of termination during the first six months of the agreement.

9.124 **If there is a moratorium, we provisionally propose that the agreements for the temporary purposes currently excluded from the secure tenancy regime should be excluded from the scope of our proposed scheme but should be included within the Protection from Eviction Act 1977**.

Asylum seekers

9.125 Accommodation for asylum seekers provided under Part VI of the Immigration and Asylum Act 1999 is excluded from security of tenure by paragraph 12A of Schedule 1 to the Housing Act 1988 and paragraph 4A of Schedule 1 to the Housing Act 1985. Such accommodation is also excluded from the Protection from Eviction Act 1977.[73] The management of accommodation of asylum seekers means that landlords will require a simple method of termination during the first six months of the agreement.

9.126 **If there is a moratorium, we provisionally propose that accommodation provided for asylum seekers should fall outside our proposed statutory scheme**.

9.127 Policy in relation to asylum seekers is controversial, and not central to the concerns of this project. We do wonder, however, whether asylum seekers should be entitled to procedural protections contained in the Protection from Eviction Act 1977.

[72] Housing Act 1985 Sched 1 paras 3, 5 to 7.

[73] See s 3A(7A).

9.128 **We invite views on whether asylum seekers should no longer be excluded from the Protection from Eviction Act 1977**.

Service occupancies

9.129 Serious constraints would be placed on the landlord of a service occupier who required the employee to occupy the premises for the better performance of his or her duties, if he or she was not able to use the notice-only basis for the termination of the agreement until the initial six months of the agreement had passed.

9.130 **If there is a moratorium, we provisionally propose that service occupiers who are required to occupy the premises for the better performance of their duties be excluded from the scope of our proposed scheme**.

9.131 We do consider however that service occupiers might be entitled to the procedural protections in the Protection for Eviction Act 1977.

9.132 **We provisionally propose that all service occupancies should be protected by the Protection from Eviction Act 1977**.

Other exclusions: (2) assuming the six months' moratorium is removed

Properties with a resident landlord[74]

9.133 We consider that in principle it remains necessary to exclude the occupiers of resident landlords from our proposed scheme. The exclusion should, however, be limited to those resident landlords who occupy the property as their only or principal home. The families of resident landlords should also be included on the same basis.

9.134 Whilst the exclusion provides an important safeguard for the resident landlord and an encouragement to let rooms it is not appropriate to extend it to situations where the landlord has somewhere else to live during the statutory notice period that attaches to the notice-only ground for possession.

9.135 The scope of the current exclusion is complicated as a result of the Protection from Eviction Act 1977. Only occupancies where the resident landlord actually shares accommodation[75] with the tenant are excluded from the requirements of the Protection from Eviction Act.

9.136 We consider the removal of the six months' moratorium on obtaining an order for possession would provide the opportunity to simplify the law. We think that so long as the resident landlord who does *not* share living accommodation (including facilities such as bathrooms and kitchens) with the tenant is able to commence

[74] As Scarman LJ put it in *Bardrick v Haycock, Vernon and Robinson* (1976) 2 HLR 118 "… the mischief at which the section was aimed was the mischief of that sort of social embarrassment arising out of close proximity – close proximity which the landlord had accepted in the belief that he could bring it to an end at any time allowed by the contract of tenancy."

[75] Accommodation is defined in Protection from Eviction Act 1977, s 3A(5) to exdude an area used for storage or a staircase, passage, corridor or other means of access.

proceedings from the beginning of the agreement we consider that he or she has adequate protection.

9.137 It is only those landlords who are actually sharing accommodation with occupiers who need the very speedy end to the relationship which exclusion both from our scheme and from the Protection from Eviction Act 1977 provides.

9.138 **If there is no moratorium, we provisionally propose that an agreement should be excluded from our scheme and from the Protection from Eviction Act 1977 where the landlord shares accommodation[76] with the occupier and occupies the property as his only or principal home; or a member of the landlord's family shares accommodation with the occupier and occupies the premises as his only or principal home**.

9.139 **If there is no moratorium, we further provisionally propose that all other agreements made by resident landlords should fall within the scope of our proposed scheme (as type II agreements)**.

Fully mutual housing associations (housing co-operatives)[77]

9.140 The argument for excluding the tenants of fully mutual housing associations from regulation arises from the mutuality of the provision and the dependence on personal co-operation between the members of the co-operative for the effective functioning of the organisation. We consider that if the notice-only basis for possession proceedings were available from the commencement of the agreement, the current exclusion from statutory regulation is no longer necessary.

9.141 **If there is no moratorium, we provisionally propose that the occupiers of fully mutual housing associations (housing co-operatives) should no longer be excluded from statutory regulation**.

Lettings to students

9.142 Lettings by educational institutions[78] and local authorities to students who are pursuing, or intending to pursue a course of study have long been excluded from statutory regulation. The purpose of the exclusion is to ensure that accommodation specifically provided by educational institutions remains available for the use of successive generations of students.

9.143 Currently the security status of such lettings to students is at best unclear. We accept that these landlords need to act promptly against recalcitrant students. Our proposals on anti social behaviour may be relevant here.[79] More generally universities and local authorities should be able to ensure through the terms of the

[76] As defined in the Protection from Eviction Act 1977: see note 74 above.

[77] For further information on fully mutual housing associations see John Alder and Christopher Handy, *Housing Associations: The Law of Social Landlords* (3rd ed 1997) pp 55 to 58.

[78] The landlords who are excluded are listed in the Assured and Protected Tenancies (Lettings to Students) Regulations 1998 (SI 1998 No 1967 as amended).

[79] See below Part XIII.

contract that they keep appropriate control over their student occupiers. This could include not only provisions about behaviour and the treatment of property, but also provisions that the right to occupy was suspended during vacation periods.

9.144 Breach of the contract would entitle the landlord to seek possession, In addition the availability of the notice only ground for termination of possession without the six months' moratorium would further protect the landlord's position.

9.145 **If there is no moratorium, we provisionally propose that lettings by educational institutions or by local authorities to students should come within scope of the type II agreement**.

9.146 Lettings of student accommodation to others during vacation periods would fall outside the scheme as they would normally be holiday lets.

9.147 Use of facilities for conferences would fall outside the scheme as this would not be use "as a home".

Accommodation for homeless persons

9.148 Under certain circumstances local housing authorities have a statutory obligation to provide temporary accommodation for homeless persons under Part VII of the Housing Act 1996.[80] This accommodation may either be provided from their own stock or by registered social landlords or from the private sector.

9.149 Where temporary housing is provided, it is generally not excluded from the Protection from Eviction Act 1977.[81] Therefore landlords currently have to give occupiers four weeks' notice to quit and seek a court order in order to evict.

9.150 We believe that the simplicity and certainty of eviction that our proposed type II agreement provides will be advantageous to landlords. The availability of the notice-only basis for termination from the commencement of the agreement will be a useful tool for landlords.

9.151 **If there is no moratorium, we provisionally propose that accommodation provided on a temporary basis for those to whom duties are owed under Part VII of the Housing Act 1996 should be provided on the basis of a type II agreement**.

The temporary purpose of the agreement

9.152 Certain lettings are currently excluded from the secure tenancy regime within the Housing Act 1985 because of the temporary nature of the provision made.[82] These arrangements are not excluded from the Protection from Eviction Act 1977.[83]

[80] The temporary housing duties under the Housing Act 1996 are the duties pending inquiries under s 188, duties to the intentionally homeless under s 190, duties pursuant to a local connection referral under s 200 or discharge of the full duty to accommodate those who are homeless, eligible, in priority need, and not intentionally homeless under s 206.

[81] However see the discussion of *Mohammed v Manek* (1995) 27 HLR 439 above at para 9.118.

9.153 Our view is that these particular short-term arrangements should be exceptions to the requirement that social landlords let on type I agreements. There seems to be no justification for excluding them from the limited security of the type II lettings when the notice-only basis for termination is available from the commencement of the tenancy.

9.154 **If there is no moratorium, we provisionally propose that lettings for the for the temporary purposes currently excluded from the secure tenancy regime should be made as type II agreements**.

Asylum seekers

9.155 Clearly there may be a need to manage the accommodation of asylum seekers, in the same way that other accommodation provided on a short-term, temporary basis is managed.

9.156 We consider that the availability of the notice only basis for the termination of possession from the commencement of the tenancy will enable the landlord to do this. But we accept that provision of accommodation to asylum seekers may raise policy questions that go beyond the scope of this project.

9.157 **If there is no moratorium, we invite views on whether accommodation provided for asylum seekers should be on the basis of type II agreements**.

Service occupancies

9.158 Where employees have the right to challenge a dismissal as unfair, then it would also seem appropriate that there should be some notice requirement for the termination of the associated accommodation rights. Even where an employee is summarily dismissed for gross misconduct, he or she will still be able to appeal and therefore the employer cannot expect instant access to the service accommodation.

9.159 Where employees have no right to challenge a dismissal on the basis that it was unfair, they can still challenge their dismissal on the basis of discrimination legislation or using trade union protection.

9.160 We consider that if the notice-only basis for seeking an order for possession is available without the six months' moratorium on obtaining the order this gives employers sufficient control of their accommodation. In addition the terms of the housing agreement could provide that any breach of the employment contract would be a breach of the housing agreement. In any event, proper recruitment of replacement staff always takes some time. Therefore we consider that on balance service employees should benefit from type II agreements.

9.161 **If there is no moratorium, we provisionally propose that service occupancies should come within the scope of our scheme as type II agreements**.

[82] See para 3.26 above.

[83] See para 3.30 above.

Summary

9.162 We can summarise our proposals for excluding agreements from the scheme as follows.

(1) Irrespective of a decision on the six months' moratorium, the following would be excluded

(a) holiday lets,

(b) temporary agreements with trespassers, and

(c) supported housing provision in "hostels".

(2) Additionally, if there *is* a six months moratorium, the following would have to be excluded

(a) all agreements by resident landlords,

(b) agreements by housing co-operatives,

(c) lettings to students by universities and local authorities,

(d) temporary accommodation for the homeless,

(e) other lettings for defined temporary purposes,

(f) accommodation for asylum seekers, and

(g) service occupancies.

(3) Alternatively, if there is *no* six months' moratorium, only the following would be excluded

(a) agreements where the occupier shares accommodation with a resident landlord or a member of the family and the accommodation is the only or principal home of the resident landlord or a member of the family, and

(b) possibly accommodation provided for asylum seekers.

9.163 It can be seen that the removal of the six months' moratorium provides considerably greater scope for the simplification and clarification of the current complex statutory provisions. This therefore provides a very important argument in favour of their being no six months' moratorium on the granting of a possession order in the type II agreement. We regard the decision between the two sets of exclusions as a consequence of the primary choice, whether or not there should be a moratorium at all in the type II agreement. We ask consultees to take account of this factor when coming to a view on the question posed at paragraph 8.27 above.

CROWN TENANCIES

9.164 One group of tenancies, Crown tenancies, (including tenancies of Government departments,[84] but not including tenancies under the management of the Crown Estate Commissioners which were brought into statutory regulation as a result of the Rent Act 1980) are currently excluded from statutory regulation.

9.165 We understand that the letting and estate management practices of the landlords that fall within this class are in practice analogous to the statutory scheme of protection. Nonetheless we think that, given the need to modernise the law, it is hard to justify the continued exclusion of this class of tenancies.

9.166 **We provisionally propose that Crown tenancies should no longer be excluded from statutory regulation**.

[84] Housing Act 1988, Sched 1, para 11. The National Health Service and Community Care Act 1990, Sched 8, para 19 excludes protection for certain tenants whose landlord is either the Secretary of State or an NHS trust.

PART X
TERMINATING AGREEMENTS

INTRODUCTION

10.1 In Part VI we set out our proposals for the core concept of the housing agreement. Parts VII and VIII set out our proposals for the type I and type II agreements and the circumstances in which the landlord is entitled to bring proceedings for possession. In Part IX we set out our proposals on the scope of the scheme.

10.2 Here we discuss

(1) due process – the notice requirements;

(2) termination by occupiers; and

(3) abandonment.

DUE PROCESS – THE NOTICE REQUIREMENTS

10.3 The need for due process arises where the landlord seeks to terminate the agreement.[1] It has long been accepted that, where an occupier has not voluntarily left[2] a dwelling, re-possession by the landlord is such an important matter – not only for the occupier but also for members of the occupier's family – that an opportunity should be provided, prior to eviction, for a court to determine whether possession sought by the landlord should be ordered. Further, the court should not act without the occupier being given notice of the landlord's intention to seek possession.[3] Obtaining a court order also gives the landlord access to court bailiffs in carrying out any eviction, which provides a desirable safeguard against the risks inherent in physical evictions by landlords in person.

10.4 Much of the focus of the recent civil justice reforms has been to ensure that parties settle their disputes without going to court.[4] In the case of possession proceedings the court cannot be relegated to the forum of last resort.

10.5 This does not mean that all possession proceedings need necessarily be the same. There is already acknowledgement that the type of process should vary depending upon the basis on which possession is sought. Thus where the landlord is seeking possession on grounds currently categorised as discretionary, there should be an opportunity for a full hearing before the court. With assured shorthold tenancies

[1] See the discussion of due process as a key principle in paras 1.25 to 1.31 above.

[2] There is no need for a court order where the occupier leaves voluntarily nor where the occupier has abandoned it; see paras 10.49 to 10.69 below.

[3] The same considerations apply in the field of mortgage arrears, though there is no clear statutory authority for making lenders use court proceedings to repossess. However, in practice, lenders almost inevitably want the authority of a court order and accept the need for due process.

[4] See paras 6.176 to 6.185 above.

possession on the notice-only basis can be obtained without a hearing. We stress that the minimum requirement is for a court order, not necessarily for a hearing.

10.6 We suggest in Part VIII above that an equivalent of the accelerated procedure should be retained for notice-only repossessions in type II agreements. We also suggest in Part XIII below that in certain cases of anti social behaviour there should only be a hearing on the merits after an eviction. Nevertheless, even in these cases, we retain the requirement that there should be a court order before the actual eviction.

10.7 **We provisionally propose that a landlord should be required to obtain a court order for possession against any occupier covered by our proposed scheme.**

Why have statutory requirements for notice?

10.8 When repossession of domestic rented housing is contemplated, two key matters need addressing. First is the need for clarity. There must be a clear warning that the home may be lost (together with an idea of what, if anything, can be done to lift the threat). Second, occupiers – taken as a whole – are less likely to take up their rights to challenge evictions than might be expected. One key reason is their lack of knowledge of their rights.[5] There therefore needs to be a clear statement to the occupier that they may be able to challenge the possession proceedings and that they should seek advice quickly.[6] The requirement for a notice enables this prior warning to be given to the occupier in a clear and effective way.

10.9 Some might argue that this would be best provided for by a protocol requiring this information to be provided, with adjournments at the landlord's expense for the occupier to seek advice if the information has not been given. This would have the advantage for the landlord that it would not operate as a defence to the proceedings. However, many landlords come to court unrepresented. They may be unaware of any protocol. It would be hard to incorporate a protocol into the contract. Notice requirements are, in our view, clearer. The court already has power in many cases to dispense with the notice if it is just and equitable to do so.[7] This allows some discretion to mitigate the effects of what is otherwise a complete defence to proceedings.

10.10 **We provisionally propose that landlords should be required to issue a notice warning occupiers of their intention to bring possession proceedings and that this should be a compulsory term in the contract.**

[5] Our proposals for a written contract in plain English may help put that right, at least in part, but the contract may have been entered into a long time before and the details may be forgotten by the time possession proceedings are started against the occupier.

[6] However, see paras 10.38 10.48 below, as to whether notice on the notice-only basis should contain this prescribed information, given that the current notice to assured shorthold tenants under the Housing Act 1988, s 21 does not.

[7] See Housing Act 1985, s 83(1)(b) and Housing Act 1988, s 8(1)(b). There is no equivalent in the Rent Act 1977, the assured shorthold tenancy notice in the Housing Act 1988, s 21 or the introductory tenancy notice in the Housing Act 1996, s 128.

10.11 **We provisionally propose that failure to serve the notice should constitute a defence to possession proceedings. However, there should be power for the courts to ignore non-compliance with the notice requirements where that would be just and equitable.**

Lengths of notice periods

10.12 The lengths of the period of notice need to be different to reflect differences in the circumstances in which the notices are used. In particular we think it will be necessary to have faster procedures where possession is sought on the basis of a breach of the agreement[8] or the social policy grounds than where it is sought on estate management grounds.[9] Faster procedures still will be needed for possession cases brought on the basis of anti social behaviour.[10] The length of notice in the notice-only procedure in type II agreements is another factor to consider.[11]

10.13 The most urgent situation arises where the occupier or those associated with an occupier are engaged in anti social behaviour. Here we think that the serving of the notice and the commencement of proceedings should be able to be simultaneous.

10.14 **We provisionally propose that a landlord's notice of intention to take proceedings on the basis of anti social behaviour should be able to be effective immediately.**

10.15 In relation to other circumstances involving breach of the agreement by the occupier, two options suggest themselves. We could adopt the current assured tenancy rule and propose a two week notice period; or we could adopt the secure tenancy rule and propose a four week period.

10.16 **We invite views as to whether the notice period where the landlord intends to seek possession on the ground that the occupier has broken the agreement should be two weeks or four weeks.**

10.17 In relation to any of the other circumstances in which a landlord may seek an order for possession, save the notice-only basis for seeking possession available for the type II agreement, there again appears to be a choice available. We could adopt the assured tenancy model that the period be two months, or the secure tenancy model that the period be four weeks.

10.18 **We invite views on whether the period of notice in circumstances other than breach of the agreement by the tenant or the notice-only basis for possession for type II agreements should be four weeks or two months.**

[8] Two weeks under Housing Act 1988, s 8(4B).

[9] Two months under Housing Act 1988, s 8(4A).

[10] The Housing Act 1996 amended both secure and assured regimes to allow immediate notice: Housing Act 1985, s 83(3) and Housing Act 1988, s 8 (4). However, for no apparent reason there is a discrepancy in that the Housing Act 1985 adds a requirement, not present in the Housing Act 1988, that the date sought for possession cannot be earlier than four weeks from the notice.

[11] See paras 8.36 to 8.38 above.

10.19 The question of the period of notice where the landlord of a type II agreement seeks possession on the notice-only basis is raised in Part VIII.[12]

10.20 The periods suggested here are all based on the assumption that the landlord will not be able to start proceedings until after the date stated in the notice. Below,[13] we raise for consideration whether the date stated in the notice should be the date on which the landlord hopes to obtain an order for possession. If that proposal were to be found attractive, the periods suggested above would need to be increased. We would equally welcome the views of consultees as to what those increased periods should be.

Replacing common law rules

10.21 A current source of confusion is that some statutory notice provisions apply instead of the common law rules, while others adopt modified versions of the common law rules.[14] In line with our aim of modernisation and clarity, we believe that notice periods should be defined in the provisions of the legislation that we are proposing. The rules would be incorporated into the compulsory terms of the contract. Those terms can be drafted so as to impose greater certainty than is currently provided by the common law rules.

10.22 The only circumstances where the common law rules would continue to apply would be in relation to the limited number of agreements relating to residential premises which fall wholly outside the statutory framework we now propose (they would also continue to apply to notices served by occupiers[15]).

10.23 While the minimum periods of notice should be set down in the compulsory terms in Part B of the agreement, we see no reason why the parties should not be able to negotiate longer periods if they so wish. Thus the compulsory terms could be enhanced by a more generous terms in Part C of the agreement. However they should not be drafted by reference to common law rules on periods of notice, nor to notices provided under section 5 of the Protection from Eviction Act 1977.

10.24 **We provisionally propose that the periods of notice be defined by statute, and the effect of these rules be incorporated in Part B of the agreement, subject to enhancements in Part C.**

10.25 **We further provisionally propose that notices should be able to begin and end on any day, and not be required to end on the last day of a period of a agreement**. This will replace the common law rule which currently leads to obscure cautious drafting such as "… on the 15th December or the next day following on which a period of this agreement shall end" which is hard for the occupier to comprehend.

[12] See paras 8.36 to 8.38.

[13] At paras 10.31 to 10. 37.

[14] Eg it is confusing that Housing Act 1988, s 5(1) provides that landlords' notices to quit "shall be of no effect", but s 8(4A)(b) says the period of statutory notices in certain circumstances should be the same as that of the notice to quit.

[15] See paras 10.49 to 10.55.

Service of notices

10.26 **We provisionally propose that notices should be able to be served on the occupier at the property rented as the address for service given in Part A of the contract**.

Making landlords' notices more transparent

Time limits on issuing proceedings after notice

10.27 We think that any landlord notice should relate to a genuine wish on the part of the landlord to end the agreement. We are attracted by the "use it or lose it" model found in the Housing Acts 1985 and 1988, whereby any notice becomes ineffective if proceedings are not issued within one year.[16] We do not, however, see the need for such a long period. It would seem more sensible to insist on a shorter period, say three months.

10.28 Three months seems to be plenty of time to make a decision to start proceedings. We do not want to cause unnecessary delay and paperwork by landlords having to reissue notices if ongoing negotiations (or improvements in behaviour) break down just after the notice expires. But we think there should be some pressure to come to a decision after a certain time.

10.29 **We provisionally propose that a limit should be put on the length of time a landlord can allow to elapse after the date given in the notice before issuing proceedings, and suggest that the period should be three months.**

10.30 **We provisionally propose that a landlord's notice should include the date on which the notice becomes ineffective.**

The date stated in the notice

10.31 Currently most notices are required to state the earliest date on which proceedings for possession may be started. Nevertheless, both a notice to quit and a notice of intention to seek possession of an assured shorthold tenancy appear on their face to require possession on the date stated in the notice. In practice many occupiers do not understand the difference between a date for issuing proceedings and a date for a hearing or a court order or a bailiff appointment.

10.32 We raise for consideration whether it would be more transparent if the notice stated the earliest date on which the landlord could ask for a possession order to be effective. Directly referring to a specific date on which an order for possession might be made should help occupiers, as eviction is the easiest concept to grasp in the procedure. Were this to be adopted, the time limits for notices suggested above would need to be adjusted upwards to account for the extra time involved in taking proceedings.

10.33 If there was support for this idea, we would envisage that despite having been given notice, occupiers would still need to be warned of the impending issue of

[16] Cf Housing Act 1985, s 83(3)(b) and s 83(4)(b) and Housing Act 1988, s 8(3)(c).

proceedings – as required by the Civil Procedure Rules.[17] The landlord would follow the normal Woolf principles in not issuing proceedings without a pre-action warning letter and without checking whether proceedings would in fact be necessary. The flexibility of the Civil Procedure Rules means that it is possible to issue proceedings with no or minimal warning in urgent cases.

10.34 One model for this approach is found in section 83(3)(a)(ii) of the Housing Act 1985.[18] It provides that proceedings may be commenced immediately, on the same day as the issue of the notice. But the provision still requires that the possession order cannot be granted before a specified date. If this model was applied more broadly, the various notice periods we suggested above would need adjustment and would apply to the proposed possession date.

10.35 One problem with this approach is that the date for possession will depend on when the particular court can list the case, so the earliest date for possession may turn out to be a notional one. On the other hand, rule 55.5(3)(b) of the Civil Procedure Rules calls for the standard period between issue and hearing in most possession cases to be no more than eight weeks. Thus the scope for uncertainty is much reduced.

10.36 Against this it can be argued that people are familiar with the current system. The occupier needs to know the date when proceedings might be started, so he or she can take steps to remedy any problem or establish a defence or find another home, before proceedings are issued. Further, as the date of issue of proceedings is in the direct control of the landlord, the date given in the notice is more likely to turn out to be the actual date of issue (although the landlord does not have to issue straight away).

10.37 **We invite views on whether the date to be given in landlords' notices should be the date before which proceedings cannot be started – as is currently the more common case; or the date before which a possession order cannot take effect.**

Formalities

10.38 We want notices to make a number of key points

(1) warning the occupier of possible loss of their home;

(2) indicating the reasons – if any – why possession is being sought;

(3) encouraging them to seek advice on whether they have any legal rights to stay;

[17] CPR Pt 1, r 1, together with CPR Practice Direction – Protocols, para 4, imposes the obligation not to issue proceedings without appropriate warning. The obligation is backed up by a range of sanctions, including costs orders and case management powers. Cf also the LCD, Consultation Paper on the General Pre-Action Protocol (October 2001).

[18] Oddly not reproduced in the Housing Act 1988.

(4) advising the occupier to avoid unnecessary court proceedings (and possible costs penalties) by letting the landlord know of his or her response to the notice as soon as possible; and

(5) stressing the value of attendance at court should a hearing take place.

10.39 The detail of these provisions would be set out in the statutory instrument prescribing the terms of the agreement.

10.40 These requirements would replace the present situation where in some cases the contents of notices are very fully laid down,[19] and in others there are only minimal requirements.[20]

10.41 Our proposals on written contracts should mean occupiers already have the key information set out there. There could also be a requirement that a copy of the written agreement should be enclosed with the notice.[21]

10.42 We recognise that a difficulty with prescribing forms is that landlords commonly fail to use the correct one, or manage to get them wrong. This can render subsequent proceedings invalid. To meet this difficulty, we envisage that the model agreement would incorporate a form of notice, which could form a tear-off sheet at the back of the agreement.

10.43 The agreement could also allow for notice to be given in any equivalent form, with the court having a discretion to accept any alternative. Currently any failure to include the required information can be used as a complete defence to proceedings. The defect can only be cured by restarting the process. An alternative approach might be that where there was failure to use the correct form, or to complete it correctly, this could be the basis for allowing the occupier an adjournment of any proceedings (perhaps for four weeks to allow time to get advice and file any defence), possibly with costs against the landlord.

10.44 **We provisionally propose that notices should contain prescribed information, in plain English, and that the details should be contained in a term in the agreement. A sample notice should appear in a Schedule to the model agreement.**

10.45 **We invite views whether a copy of the original agreement should be attached to any landlord's notice.**

10.46 **We invite views as to the contents of notices relating to both type I and type II agreements and whether a single form of notice for both agreement types can be developed.**[22]

[19] See the Secure Tenancies (Notices) Regulations 1987, SI 1987 No 755, made under the Housing Act 1985, s 83, and the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997, SI 1997 No 194, made under the Housing Act 1988, s 8.

[20] Cf Housing Act 1988, s 21.

[21] Alternatively it could be enclosed with a pre-action warning or claim letter – cf para10.33 above. At any rate it should be attached to the particulars of claim, given that the landlord will be suing on a written agreement – cf CPR Practice Direction 16, para 7.3(1).

10.47 **We provisionally propose that any failure to comply with notice requirements should not form a defence to proceedings, so that the whole process has to be started again, but rather could become the basis for an adjournment and/or costs application as appropriate.**

10.48 We see no reason why notices arising from a break clause in a fixed term agreement should be different in nature from their equivalents for use in periodic agreements.

TERMINATION BY THE OCCUPIER

Occupier's notice to quit

10.49 Although they may not always realise it, tenants are subject to the same rules relating to notices to quit a periodic agreement as landlords who fall outside the statutory scheme. Such notices must be in writing and the period of notice must be at least 28 days.[23] There appears to be no reason to change these basic requirements. The principle would need to be expanded to apply to contractual licensees.

10.50 We do, however, consider that the requirements on occupiers would be clearer if the rules about their ability to issue a notice to quit were contained in the terms of the agreement.

10.51 **We provisionally propose that the length of notice to be given by a occupier should continue to be four weeks and that the default terms should contain a provision relating to the occupier's notice to quit.**

10.52 One issue relating to notices to quit is notices issued by one of two or more joint occupiers.[24] We are not dealing which this topic here because it is more appropriate for our later consultation paper on succession and transmission of agreements.

Exercise of break clause by the occupier

10.53 Where a occupier exercises a break clause in a fixed term agreement, we suggest that he or she should be required to give the landlord the same notice as would have been given to terminate a periodic agreement. The default terms should make it clear that the notice exercising an occupier's break clause in a fixed term is essentially the same as the notice an occupier issues to end a periodic agreement.

[22] One consequence of our proposals would be that the confusion currently caused by the slight but important differences, for which we see no need, between a notice served under section 21(1) of the Housing Act 1988, during an assured shorthold tenancy fixed term, and one served under section 21(4), relating to a statutory or contractual periodic agreement, could be abolished.

[23] Protection from Eviction Act 1977, s 5.

[24] *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 AC 478; *Hounslow London Borough Council v Pilling* [1993] 1 WLR 1242; *Harrow LBC v Johnstone* [1997] 1 WLR 459; *Notting Hill Housing Trust v Brackley* [2001] EWCA Civ 601, [2001] All ER (D) 164 (Apr). Cf also Andrew Arden, "From Greenwich to Harrow: A Trip Down Memory Lane" [2002] JHL 8.

10.54 Thus, both should have the same requirements for writing, minimum notice, a definite date for leaving and so on. The break clause notice would also make it clear that it is bringing the fixed term to an end early. Both should have the same effect, namely that if the occupier does not leave on the due date the agreement will continue in force, but the occupier will be liable to the landlord in damages for any losses suffered by the landlord.

10.55 **We provisionally propose that the length of notice to be given by an occupier to exercise a break clause should be four weeks and that the default terms should contain a provision relating to the occupier's notice.**

Consequences of occupier's failure to leave

10.56 In addition, both fixed term and periodic agreements should operate in the same way where the occupier does not leave after giving the notice or exercising the break clause. In a type II agreement, the failure to leave should entitle the landlord to take notice-only accelerated possession proceedings within the same period as if the landlord had given the notice. In a type I agreement it should entitle the landlord to issue a notice threatening proceedings for breach of the agreement (assuming that the agreement requires the occupier to leave after giving notice).

10.57 **We further provisionally propose that in the case of both a occupier's notice to quit and a occupier's notice to exercise a break clause, the landlord should have the right to take proceedings against the occupier if he or she has not left the premises by the date stated in the notice. Pending the final departure of the occupier, the agreement should be deemed to continue, subject to the occupier's liability in damages for any losses suffered by the landlord.**

Occupier's response to a repudiatory breach

10.58 A separate issue is whether the occupier should be told in the agreement of their right to leave without notice in acceptance of a repudiatory breach by the landlord and whether the contract should provide a form of immediate notice for the occupier to signal their acceptance.[25]

10.59 This is a complex issue which may arise when the occupier feels the consequences of the landlord's behaviour make conditions intolerable, enters another agreement and leaves without giving enough notice (or before the end of a fixed term).

10.60 Commonly the landlord retains the deposit and any rent paid in advance against the rent for the notice that should have been given. In those circumstances, the occupier should be able to see from the written agreement that he or she may be entitled to defend any claim for unpaid rent, or sue for return of any money retained by the landlord.

10.61 **We provisionally propose that the compulsory terms of the contract should refer to the occupier's right to treat the agreement as terminated**

[25] Cf *Hussein v Mehlman* [1992] 2 EGLR 87.

immediately if the landlord has committed a repudiatory breach of contract.

Express surrender

10.62 Under landlord and tenant law, express surrender occurs when the landlord and tenant agree that the tenancy should end immediately without any need for notice. We believe that it should continue to be possible, as it is in other consumer contracts, for landlords to agree to release occupiers from their obligations early without the occupier giving any (or full) notice.

10.63 Currently express surrender can only validly be carried out by a deed. This is a formality which does not seem wholly appropriate in the context of housing agreements. We accept that surrender ought to be in writing to avoid uncertainty.

10.64 **We provisionally propose that, in relation to the termination of fixed term agreements covered by our regime, the requirement for a deed for express surrender should be replaced by a requirement for writing.**

ABANDONMENT

10.65 A more difficult problem arises where the occupier does not give the landlord any notice of intention to bring the agreement to an end. In such cases, although the law may provide that the occupier remains liable under the terms of the agreement, the reality in many residential lettings is that it is not worth the landlord's time and effort to bring proceedings against the delinquent occupier.

10.66 Yet the landlord may be left in the awkward situation of not knowing whether the agreement is still in existence or not. One of the problems is that the law on the abandonment is hedged around with complexity.

10.67 It has been suggested to us that a possible basis for seeking an order for possession, which might be available to the landlord, is to take proceedings for possession where it appears that the occupier has permanently left the premises. We are not convinced that this would be the best solution to this difficulty. It would only be available where the occupier had actually broken a term in the agreement.

10.68 Rather, we think that there needs to be available a summary procedure to deal clearly with abandonment. Such a procedure is now available in sections 17 to19 of the Housing (Scotland) Act 2001.[26] When the property appears abandoned, the landlord can first secure it and then regard the agreement as terminated on receiving no response to prescribed notices served on the property. The landlord can regain possession without threat of proceedings for unlawful eviction and harassment. Importantly it provides a mechanism for the occupier to apply to court to put right any mistakes.

10.69 **We provisionally propose that a procedure modelled on sections 17 to 19 Housing (Scotland) Act 2001 should be created, allowing a clear simple procedure for repossession in abandonment cases with a procedure for the occupier to apply to court to put right any mistakes**.

[26] See paras 4.14 to 4.18.

PART XI
USING THE NEW AGREEMENTS

INTRODUCTION

11.1 In Parts VII and VIII, we set out our proposals for the two agreement types. In this part we consider whether there is a need to impose requirements relating to their use.

11.2 The basis of our approach to status is landlord neutrality, so that the definition of a particular agreement type is not determined by the identity – private, public or social – of the landlord. This approach offers the greatest flexibility to landlords to provide housing for rent.

11.3 Nevertheless, social landlords are performing a public duty when they provide housing. We accept that there will be circumstances where it is appropriate for social landlords to let accommodation with only minimal security of tenure. But the reality is that it is this sector which – in the main – provides accommodation on a long-term rental basis. We envisage it may be necessary to impose some limitations on the freedom of choice of social landlords.

SOCIAL LANDLORDS

11.4 The options are as follows.

(1) To impose no statutory requirement to use any particular agreement type. This would allow all social housing landlords complete freedom to choose which agreement type to grant to their occupiers. While as a matter of practice, we would anticipate that the emphasis would remain on long-term provision with security of tenure, this would not be a legal requirement.

(2) To impose a statutory requirement on local authorities only to use type I agreements. This would be subject to defined exceptions, when they would be permitted to use type II agreements. The statutory requirement would be limited to local authorities. Housing associations and other providers of social housing would have freedom to choose which agreement type to grant to their occupiers, as in option (1) above.

(3) To impose a statutory requirement on all local authorities and other social landlords[1] to use type I agreements, subject to the same exceptions as indicated in option (2) above.

(4) To impose a statutory requirement on all providers of "not for profit" housing to use type I agreements. This would cover a wider range of social housing landlords than option (3). They would be subject to the same exceptions as outlined in option (2) above.

[1] Defined in a limited way to cover only those social landlords in receipt of financial support for the provision of housing from the State.

11.5 Option (1) provides the greatest flexibility to social landlords. They would be free to choose the appropriate agreement type for the particular occupier, locality and property. However, it would mark a radical change in the housing powers of social landlords, who have been restricted in responding to housing need in the past by the limits imposed by the secure and assured tenancy regimes.

11.6 We would expect that, despite the statutory freedom, social landlords would choose to let on type I agreements for the vast majority of social occupiers for two reasons. First, social landlords are in general committed to the long-term security of tenure provided by the secure and assured tenancy schemes. Second, it is highly probable that other funding and policy requirements would impose effective constraints upon the landlord's choice of agreement type.

11.7 Option (2) springs from the current statutory position. It reflects the public status of local authorities. It places registered social landlords and other providers of social housing in the same position as private landlords. Thus both private landlords and non-local authority social landlords would have freedom of choice of tenure types.

11.8 However, the current position, based on a distinction between local housing authorities and housing associations, is increasingly irrelevant in practice. Registered social landlords are in receipt of large volumes of state funding, their role and aspirations are similar to those of local authorities and their status within public law is becomingly increasingly aligned.[2] We do not think that a distinction between local authorities and other social landlords is defensible in a modernised system of housing law.

11.9 Option (3) is based upon recognising the fact that financial support from the state should do more than merely influence the nature of social housing provision. A consequence of the provision of state funding is that social landlords' freedom of choice of tenure type should be specifically limited by statute. We set out in Part I the principle that social housing should attract a high degree of security of tenure. This is consistent with current policy concerns for social housing to provide for stable and diverse communities. This option, particularly if our proposals relating to probationary agreements are accepted,[3] would provide sufficient flexibility for social landlords to respond appropriately to local conditions, while remaining consistent with the broad approach.

11.10 In referring this project to us, the Department for Transport, Local Government and the Regions made it clear that this reference was the means by which the Government were taking forward their intention to look further at the possibility of a "single form of tenure for the social housing sector".[4] Our provisional proposals in this paper clearly go well beyond that. But it is reasonable to observe that it is only this option for the use of the agreements in the social sector that really

[2] *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595; [2002] QB 48.

[3] See paras 11.16 to 11.39 below.

[4] *Hansard* (HC) 26 March 2001, col 430W.

establishes what could be said to be a single legal status for the mainstream majority of what are now tenants of social landlords.

11.11 Option (4) is more prescriptive still. We consider that there is no justification for imposing requirements over and above those demanded by the standard type II agreement on charitable or other landlords who wish to provide housing on a not-for-profit basis but without recourse to state funding. This does of course mean that such landlords will be excluded from the summary eviction procedures that are available to social landlords who let on type II agreements for cases of anti social behaviour.[5]

11.12 This analysis leads us to the conclusion that the only realistic options are either option (1) – free choice – or option (3) – a requirement on both local authorities and registered social landlords (as recipients of state development funding) to use the type I agreement, subject to a range of exceptions.

11.13 Accordingly, **we provisionally reject two of the four options available, option 2, to require local authorities generally to use the type I agreement, subject to specified exceptions, but to give other social landlords a free choice between using type I or type II agreements; and option 4, to require all social landlords, including purely private charities, generally to use type I agreements, subject to the specified exceptions.**

11.14 **We invite views as to which of the following two options would be preferred**:

(1) allowing all social landlords, including local authorities, free choice between using the type I or the type II agreement (option (1)); or

(2) imposing a statutory requirement on all local authorities and registered social landlords to use type I agreements, subject to a range of exceptions (option (3)).

11.15 If option (3) if favoured, then it is necessary to identify the exceptions to the statutory requirement.

EXCEPTIONS

Probationary agreements

11.16 We consider first the desirability of a general probationary agreement which could be used as a precursor to a type I agreement, replacing the introductory tenancy.

Introductory tenancies

11.17 The introductory tenancy regime provides local authorities – but not registered social landlords – with a means of imposing a low-security probationary period on tenants, before they are promoted to secure tenancies. But they operate inflexibly. First, once local authorities and housing action trusts have elected to operate

[5] See para 13.55 below.

introductory tenancies, every periodic tenancy entered into or adopted by the authority or trust must be an introductory tenancy.[6] Second, the introductory tenancy must last for one year after which it must become a secure tenancy.

11.18 During the period of the introductory tenancy, the landlord can seek a possession order from the county court subject to certain procedural requirements but without proving grounds. The procedural requirements[7] are different from the notice requirements for the termination of a secure tenancy[8] or one covered by the Protection from Eviction Act 1977, save that the notice must be served at least four weeks before it is intended to take effect. It must set out the landlord's reasons for applying for the order, inform the tenant of the right to request a review of the landlord's decision to seek an order for possession and of the time within which such a request must be made.[9] The tenant has 14 days from the service of the notice to request a review of the landlord's decision.[10] Tenants have the right to attend the hearing and a right to be represented. The tenant may call witnesses and cross-examine the landlord's witnesses. However the regulations do not give the tenant the right to know who may have complained about the anti social behaviour, or to force witnesses to attend, thus reducing potential witness intimidation. A housing officer, who may rely on hearsay evidence without having to identify the complainants, may present the landlord's case.

11.19 Provided the landlord has served a notice in accordance with section 128 of the Housing Act 1996 and conducted a review, if requested, the court must make an order for possession.[11]

11.20 Although the introductory tenancy regime has been limited to local authority landlords and housing action trusts, registered social landlords have used assured shorthold tenancies as probationary tenancies in a similar way.

11.21 The interface between the introductory tenancy regime, the public law obligations of local authority landlords and the courts has been examined in a number of cases, as we discussed in Part V above. We consider that the result is a regime that is very much less effective than Parliament originally intended. The result of recent case law is that a decision by a local authority to terminate an introductory tenancy will only be lawful if it was a proportionate response to the actions of the tenant, and it will always be open to tenants to test proportionality in the Administrative Court. Procedurally, that requires the county court to adjourn the case to allow for

6 Housing Act 1996, s 124.

7 *Ibid*, s 128.

8 *Ibid*, s 83.

9 *Ibid*, s 128.

10 The procedural requirements for the review are set out in the Introductory Tenants (Review) Regulations, SI 1997 No 72.

11 Housing Act 1996, s 127(2).

an application for judicial review rather than order immediate possession, as originally intended by Parliament.[12]

A general probationary agreement

11.22 We are of the view that a more flexible general probationary agreement should be available. We see no reason why it should not apply equally to all social landlords, other than those not-for-profit organisations not in receipt of public funds. Use of the general probationary agreement would be available to landlords wishing to test the capacity of occupiers to comply with the full range of occupiers' responsibilities, not just those in relation to anti social behaviour.

11.23 There are two principal ingredients to our proposed probationary period. The first is to ensure that social landlords have available a low-security agreement to deal with general probationary matters. The second is a summary possession procedure to remove seriously anti social tenants.

11.24 We consider that the type II agreement, as outlined in Part VIII above, would provide an appropriate vehicle for use as a probationary agreement, but only if there were no six months' moratorium.[13] The point of a probationary agreement is that the agreement will come to an early end if the occupier fails to live up to required standards or fails to respond to other social service intervention designed to improve their behaviour. A provision which blocked the termination of the agreement for six months would not meet that requirement.[14]

11.25 If the six months' moratorium is retained, then we would propose an adaptation of the type II agreement specifically for this probationary purpose, so that there was no moratorium.

11.26 **We provisionally propose that a general probationary agreement be available to local authorities and registered social landlords**.

11.27 If local authorities and registered social landlords are given freedom to choose when to use type I or type II agreement, *and* the six months' moratorium is removed, there is no need to make additional provisional proposals in respect of a general probationary period. Landlords will have the freedom to act that they require.

11.28 **If local authorities and registered social landlords are required to use type I agreements, subject to specific exceptions allowing them to use type II agreements (option (3)), *or* if there is general freedom of choice (option 1), but the six months' moratorium is retained, we provisionally propose that**

[12] See paras 5.60 to 5.65 above: *R (on the application of McLellan) v Bracknell Forest BC* [2001] EWCA Civ 1510; [2002] 1 All ER 899 and *Manchester City Council v Joseph Cochrane* [1998] EWCA Civ 1967; [1999] 1 WLR 809.

[13] See para 8.27 above.

[14] We note that some registered social landlords have argued for an extension of the current introductory tenancy regime to them, despite the availability of assured shorthold tenancies as an alternative.

(1) **local authorities and registered social landlords should be able to let to a new occupier on a probationary agreement for *up to* 12 months (in the first instance); and**

(2) **if there is no six months' moratorium, the type II agreement would be suitable as the general probationary agreement, but that if there is a moratorium, local authorities and registered landlords should be able to use a variant of the type II agreement that did *not* include the moratorium, for the purpose of creating a probationary agreement.**

11.29 In what follows, we refer to a "probationary agreement" to mean any of the types so proposed.

Use of the probationary agreement

11.30 The current requirement that all new tenancies must come within the introductory tenancy scheme is unnecessarily inflexible. Social landlords should have greater discretion to use probationary agreements as local conditions require. A landlord could adopt a general policy of always using them, or of using them for only certain categories of occupier or even of making a decision on a case by case basis.

11.31 Normal administrative law remedies would be available to prevent capricious, unfair or discriminatory decision making where the landlord was a local authority or – depending on the decision of the court in a particular case – a registered social landlord.

11.32 The current introductory tenancy regime makes provision for a single period of 12 months. We propose using the same time limit as a standard from which divergences may be made in appropriate circumstances. In the first place, it should always be possible to promote an occupier to a type I agreement earlier than 12 months after the start of the probationary period. Again, the objective is flexibility.

11.33 Authorities may wish to have a standard of only six months' probation for all occupiers or for certain categories of occupiers, where others are required to undergo a 12 month period. We can imagine that some authorities might wish to put all occupiers on the 12 months probationary period, but have a scheme allowing promotion at six months for exemplary occupiers.

11.34 At the other end of the probationary period, we consider that there should be some scope for extending the period for occupiers whose behaviour has caused concern, but whom the landlord does not think it necessary or desirable to evict. Such a provision would give landlords a third choice at the end of the probationary period, so that they were not required to either evict or promote. It should therefore result in fewer unnecessary evictions, and fewer inappropriate promotions.

11.35 **We provisionally propose that, after 12 months on a probationary type II agreement, a landlord could extend the probationary period for a further 6 months, but only if it is of the opinion that the behaviour of the tenant was such as to warrant such an extension**. This limit on the discretion of the landlord is important. It would mean that 18 month probationary agreements could not feature in a general probation policy adopted by the local authority,

since it would have to be decided on a case by case basis, and public law remedies would be available to prevent the misuse of the power.

11.36 **We invite views on the periods suggested here. Would an 18 month period for the initial probationary agreement be more appropriate, with a six month extended period?** On one view it would promote further flexibility. On the other hand, it may be objected that, particularly if there is serious anti social behaviour, then the landlord should address it swiftly and a two year period undermines that objective.

General probationary agreements and registered social landlords

11.37 While administrative law remedies are available to enforce the fair application of probationary agreement policies by local authorities, the position in relation to registered social landlords is less certain.[15] If a registered landlord is found not to be a public body, in relation to a particular occupier, then these remedies would not be available.

11.38 An alternative would be to give the Housing Corporation the power to approve and regulate schemes for use of probationary agreements. Housing Corporation approval of probationary agreement schemes would partly compensate for the lack of administrative law remedies in respect of non-public body registered social landlords. A further advantage would be that it could be used to allow registered social landlords a greater degree of flexibility in developing new approaches to the probationary use of agreements. Such licensed innovation could then feed back into the mainstream procedure. On the other hand, such an approach would go against our preference for equal treatment of local authorities and registered social landlords.

11.39 **We invite views on whether the Housing Corporation should be given powers to approve probationary agreement schemes for use by registered social landlords**.

Judicial review

11.40 As we have seen in Part V, decisions by "public authorities" to terminate a probationary agreement could be subject to challenge, on the basis of proportionality, by way of judicial review.[16] We consider that it would be more appropriate to locate such a challenge in the county court rather than the Administrative Court. The county court is closer and more accessible to both parties and their lawyers, and it has regular experience in housing cases. It would also be cheaper for the jurisdiction to lie with the county court. Such an approach would be similar to that recently adopted in respect of homelessness determinations.[17]

[15] See paras 5.42 to 5.53 above.

[16] See paras 5.60 to 5.65 above.

[17] Housing Act 1996, s 202 and s 204.

11.41 This jurisdiction has attracted the attention of the Court of Appeal in two recent cases. In one, the Court considered, *obiter*, that the terms of the reviewing power – on a point of law – were insufficiently wide to render the required internal review procedure compliant with Article 6, where the determination required the finding of primary facts. In the second, the Court found that the procedure was compliant. A judicial-review type process was adequate because the subject matter of the scheme as a whole did not "generally or systematically" require primary fact finding.[18] The Court considered that the county court was able to subject the decision arrived at in the internal review to "a close and rigorous analysis". It may well be that the case law in this area will continue to develop.

11.42 It would seem prudent to ensure that the provision creating the jurisdiction is sufficiently wide to allow the county court to develop whatever level of intensity of review is necessary to satisfy the requirements of the Human Rights Act 1998.

11.43 **We provisionally propose that challenges to a landlord's decisions under a probationary agreement scheme should be to the county court, not the Administrative Court**.

11.44 **We further recommend that the powers of the county court should be framed sufficiently flexibly to allow it to develop whatever level of intensity of review by the landlord is required under human rights law**.

Agreements falling outside the scope of the type I agreement.

11.45 The second group of exceptions derives from our provisional proposals that the type II agreement should be used for a range of letting arrangements that are currently excluded from the secure tenancy regime and which would not be appropriate as type I agreements. Part IX provides a full discussion of these exclusions.

11.46 The number of exclusions that can be brought into our scheme as type II agreements depends on whether or not there is to be a six months' moratorium. Accordingly, in some cases, what follows should be read as applying only if the relevant category is in the system at all, which in turn depends on whether or not the moratorium is to be a feature of type II agreements.

11.47 In summary **if there is no six months' moratorium, we provisionally proposed that social landlords should be permitted to let on type II agreements:**

(1) **to service occupiers,**

(2) **to asylum seekers,**

(3) **to homeless persons to whom the local authority owes duties under Part VII to the Housing Act 1996, and**

[18] *Adan v Newham LBC* [2001] EWCA Civ 1916; [2002] 1 All ER 931 and *London Borough of Tower Hamlets v Begum* [2002] EWCA Civ 239; [2002] All ER (D) 55 (Mar). See the discussion at paras 5.67 to 5.69 above.

(4) **in circumstances where the social landlord is letting on a temporary basis as currently set out in paragraphs 3 and 5 to 7 of Schedule 1 of the Housing Act 1985.**

11.48 In Part IX we also provisionally proposed that certain letting arrangements should be wholly excluded from statutory protection. These arrangements are similar to the current exclusions from the Protection from Eviction Act 1977.

11.49 We have provisionally proposed a modernised version of the hostel exception which would be available for all "not for profit" landlords who wish to provide supported housing for vulnerable people, which should fall within the type II agreement.[19]

11.50 Further, we raise the question whether asylum seekers currently excluded from the Protection from Eviction Act should be included within our scheme for type II agreements.[20]

Other cases

11.51 There may be other circumstances when local authorities and registered social landlords require additional flexibility. For example, when letting to key public sector workers in health and education or other groups who have a particular localised need for accommodation, social landlords should arguably be able to decide whether to let on type II or type I agreements dependent on local circumstances.

11.52 It may also be advantageous for social landlords to be able to let a proportion of their properties on a commercial type II agreement basis in order to provide housing for young employed people, to promote more diverse communities and to provide an income stream for maintenance or development purposes.

11.53 **We invite views on the other circumstances in which social landlords should be entitled to use type II agreements.**

Default position

11.54 If a social landlord fails to provide a written agreement[21] or the written agreement provided does not make it clear which agreement type is being granted, then we consider that the agreement should be by default a type I agreement. Our presumption of type I agreements rests upon the critical role of social landlords in the provision of long term rented housing and continues the long tradition in housing law of favouring the occupier when the landlord has failed to produce the correct paperwork.

11.55 The default position should apply regardless of the response to our proposals on the limitations on the use of agreement types, set out in paragraphs 11.13 and

[19] See paras 9.103, 9.104 and 9.106.

[20] See para 9.157 above.

[21] Our proposals setting out the requirement for a written agreement are set out in paras 6.60 to 6.88 above.

11.14 above, and whether or not the occupier falls within an exception to our proposals for the scope of the type I agreement regime.

11.56 **We provisionally propose that in the absence of a clear written agreement specifying the agreement type social landlords will be presumed to let on type I agreements**.

PRIVATE LANDLORDS

11.57 As has been explained already, one of the objectives of these proposals is to create a scheme in which different types of landlord can use different types of agreement. Any constraints on use should, where possible, not be part of the definition of the agreement type, but be contained in separate provisions. These might be in separate legislative provisions, in a statutory instrument or in a regulator's requirements.

11.58 The private rented sector does not have a direct regulator in the sense that the local authority sector has the Department for Transport, Local Government and the Regions (and the Housing Inspectorate and the Local Government Ombudsman) or the registered social landlord sector has the Housing Corporation (and the Independent Housing Ombudsman[22]). It may therefore currently be more realistic for any constraints on private landlords to be contained in the Act or a statutory instrument, rather than in a regulator's requirements. This might change if the role of the Housing Corporation were to develop into a more broadly based housing regulator, setting industry standards across the board.

11.59 At present, private landlords are subject to some regulatory activity, mostly from local authorities. In particular, local authorities are responsible for taking action following allegations of illegal eviction and harassment; they deal with environmental health issues, which may include aspects of private occupier nuisance, noise and the like; they administer housing benefit, a key issue for many private landlords; trading standards authorities are responsible for taking action for alleged breaches of unfair contract terms regulations.

11.60 In addition, housing authorities are directly responsible where there are licensing requirements. These are currently limited to houses in multiple occupation but may be extended to other private landlords in areas of low demand. Many local authorities are also involved in voluntary accreditation and deposit schemes.

11.61 **We provisionally propose that any restrictions on which types of agreement can be used by private landlords should, at least for the time being, be contained in statutory provisions.**

Type I agreements

11.62 Having adopted the principle of landlord neutrality, our starting point is to assume all types of agreement should in principle be available to private landlords to use.

[22] We recognise that private landlords may agree that they come within the jurisdiction of the Independent Housing Ombudsman; however we understand that rather few private sector landlords have, so far, taken advantage of this facility.

Given that the law should allow markets to develop, we believe private landlords should be able to grant type I agreements if they choose to do so.

11.63 We appreciate that the current state of the housing market means that hardly any private landlords choose to offer fully assured tenancies instead of assured shortholds. But we see no reason to enshrine current practice in law. We believe the way should be left open in case a differently structured rented housing market should develop.

11.64 **We provisionally propose that private landlords should able to grant type I agreements if they choose, but should not be required to do so**.

Type II agreements

11.65 We anticipate that type II agreements will most commonly be used in the private rented sector. The type II agreement, as explained above, bears a close resemblance to the current assured shorthold tenancy. Both the previous Conservative and the present Labour Government have believed this should be available as the default agreement for private landlords. There are differences between type II agreements and assured shorthold tenancies, particularly if there were no six months' moratorium in the former. Nevertheless we believe that they are sufficiently similar to justify similar treatment on the issue of whether they should be regarded as the default agreement for the private sector.

11.66 While we are putting emphasis on landlords putting agreements into writing, we anticipate from past experience that, even if our new scheme is successful, there will still be some private landlords, at least initially, who will fail to make a clear choice of type of agreement. We think there still needs to be a default position.

11.67 **We provisionally propose that agreements granted by private landlords should be type II unless the landlord states that it is to be type I.**

11.68 We deal with anti social behaviour later in this paper in Part XIII. We suggest there a summary procedure in type II agreements for dealing with anti social behaviour. We also explain there the reasons for our view that this summary procedure should not be available to private landlords.[23]

Scope for operation of the market

11.69 The type II agreement would be the basis of regulating the private sector. The default terms and the Unfair Terms in Consumer Contracts Regulations 1999 would provide minimum rights and a system of fairness and transparency. We hope that use of the model agreements would become general because of their widespread availability and their deemed fairness. We hope that the increase in clarity will increase confidence and encourage more people to enter the rented sector as landlords, as well as making it more attractive for occupiers.

11.70 Our new legal framework may not, on its own, lead to a major increase in the size of the private rented sector. It should provide the foundation for any revival. Our

[23] See paras 13.20 to 13.22 below.

proposals maintain the freedom of landlords to enhance by contract the levels of protection afforded by the type II agreement, if they so choose. They will be able to grant contractual fixed terms of up to 21 years in type II agreements, or type I agreements if they wish to provide for an even greater degree of security of tenure.

11.71 They will be able to make flexible use of these options. For instance, if they wish to have a probationary period (whether probationary in terms of assessing the occupier or assessing the market or both) they could start with a periodic type II before moving to a fixed term for the same occupier, and then giving longer fixed terms as their confidence and commitment to the sector or the occupier increased.

Incentives for use of fixed terms

11.72 Six month fixed terms appear still to be being used by many landlords, either out of habit or ignorance of the changes effected by the Housing Act 1996. We believe that the ready availability of our model agreements should help to encourage private landlords (and their agents) to abandon out-moded habits, and their clarity should help to cure any ignorance.

11.73 Some landlords, particularly those letting to students or those where there is a shortage of demand, already feel an incentive to give fixed terms so that they can be more confident of guaranteeing their income and avoiding the costs of finding new occupiers.

11.74 There remains a problem of the effect of the relationship between the Unfair Terms Regulations and section 15 of the Housing Act 1988.[24] We will return to this issue in our later consultation paper on succession and transmission of agreements.

[24] Housing Act 1988, s15 allows the landlord who does not take a premium to withhold consent to assignments, without being challenged as to reasonableness.

PART XII
THE POWERS OF THE COURTS

INTRODUCTION

12.1 This project is principally concerned with substantive housing law But we cannot wholly ignore the procedural implications of our proposals. This Part considers how the powers of the court might be amended in the light of our proposals. The court's powers in relation to anti social behaviour cases are given separate treatment in Part XIII below. Detailed changes to rules of procedure will be made by the Rules Committee in the normal way.

12.2 This part considers

(1) the current approach to housing cases in the Civil Procedure Rules;

(2) issues relating to the exercise of the court's discretion and suggestions for structuring it;

(3) the particular problem of cases dealing with rent arrears and the making of suspended possession orders; and

(4) issues relating to the enforcement of orders.

THE CIVIL PROCEDURE RULES: RECENT REFORMS

12.3 The principles which underpinned Lord Woolf's reforms of the civil justice system are reflected in new rules relating to possession proceedings, introduced into the Civil Procedure Rules in October 2001.[1]

12.4 The principle of proportionality is reflected in the rules which provide that, unless there are very exceptional circumstances,[2] all possession proceedings should be brought in the county court. Further, while no proceedings should be allocated to the small claims track unless all parties agree,[3] the court may direct that a case be allocated to the fast track even though the value of the property is in excess of £15,000.[4] All disputed cases, save the most complex, should be dealt with in the fast track.

12.5 The principle of reducing delay is reflected in the new rule that the standard period between the issue of the claim form and the date fixed for the hearing must be no more than 8 weeks.[5]

[1] CPR Pt 55.

[2] The value of the premises is not an exceptional circumstance; CPR Practice Direction 55.3, para 1.1 and paras 1.3-1.4.

[3] CPR Pt 55, r 9(2).

[4] CPR Practice Direction 55.9, para 6.1.

[5] CPR Pt 55, r 5(3)(b).

12.6 These principles do not conflict with our proposals; indeed we support them.

THE EXERCISE OF DISCRETION

12.7 Under the current law, the court has a considerable discretion as to whether or not to make any order for possession, where the application is based on the discretionary grounds. The judge must make an overall assessment as to whether it is reasonable to make the order sought by the claimant.

12.8 In addition, under each of the three current regimes, the court is given a wide range of powers as to how it should dispose of possession cases based on these grounds.[6] These powers allow courts to adjourn proceedings; or to stay, suspend or postpone orders on appropriate conditions; and to discharge possession orders when conditions are complied with. These powers are commonly used to adjourn cases before trial, to make suspended possession orders on conditions that occupiers make good their breaches of the agreement, and to grant suspensions of warrants.

12.9 We think it important that judges retain the flexibility to determine the outcomes of possession applications.

12.10 **We provisionally propose that the court should have an extended discretion, when dealing with applications for possession orders on a discretionary basis. This discretion would allow the court to adjourn proceedings, to stay, suspend or postpone orders on appropriate conditions, and to discharge possession orders when conditions are complied with**.

Structuring discretion

12.11 There is a clear attraction to a broad discretion. The court can shape its decision to the circumstances of the case. The disadvantage is that the outcome of individual cases, particularly from the claimant's perspective, may appear inconsistent, even arbitrary.

12.12 We are quite clear that, if they have discretionary powers, courts should exercise them. Indeed it has long been the law that merely "rubber stamping" a consent order drafted by the parties is not a proper discharge of the judicial functions in this context.[7]

12.13 We have thought about the criticism that the outcomes of court process are insufficiently certain. We have no compelling empirical evidence that this is in fact the case. There is only limited case law on "reasonableness", other than in the context of anti social behaviour[8]. The usual position is that "reasonableness" is

[6] Rent Act 1977, s 100; Housing Act 1985, s 85 and Housing Act 1988, s 9.

[7] The reason for this is that, as the court "shall not make an order" unless certain issues are proved, a consent order – where the issues are not proved to the court – is not appropriate; cf *R v Bloomsbury and Marylebone County Court, ex p Blackburne* (1985) 14 HLR 56; [1985] 2 EGLR 157(CA).

[8] See 13.72 below.

regarded as a matter for the trial judge and, in the context of secure tenancies, reasonable means having regard to both the interest of the parties and to the interest of the public.[9] The Judicial Studies Board offers both induction and continuation training in housing law which seeks to encourage some uniformity of approach.

12.14 The problem would not be solved even if it were only one of perception.

(1) Private landlords may be discouraged from using fixed terms in type II agreements, and from offering type I agreements where they might otherwise be interested in doing so, if they have no faith in the judges reaching what they (the landlords) would regard as sensible outcomes in proceedings brought on the discretionary grounds.

(2) Social landlords would normally be using type I agreements, so they will be forced to engage with the discretionary grounds. But they too may be reluctant to take proceedings, where they could do so, if they feel the outcomes may not be predictable. Equally under our proposals, social landlords will be able to offer type II agreements in defined circumstances. They may be overly keen to use this route if they perceive problems with obtaining possession on the discretionary grounds available for type I agreements.

(3) Lenders may be put off funding housing projects in both public and private sectors if they have worries about damage to their interests caused by perceived inconsistencies in the use of discretion.

12.15 To the extent that it is a problem, we think that it may in part be resolved by proper litigation practice before the court. Our sense is that well-prepared cases tend to turn out more predictably than poorly-prepared cases. In this context we note that the Department for Transport, Local Government and the Regions and others have recently issued guidance aimed at helping social landlords with the procedures.[10]

12.16 Nevertheless we think there is an argument that the discretionary powers of the court – currently very open-ended – should be more structured. In Part XIII below we suggest that, in anti social behaviour cases, this structuring should take the form of requiring a possession order to be made unless a defined exception applies. We feel that that approach is only suitable in the particular context of anti social behaviour. On other issues, we prefer to see discretion structured by means of a list of factors the court should take into account. In the cases referred to in Part XIII, the Court of Appeal has given guidance on the factors which must be taken into account – in particular, consideration of the interests of landlords and the impact on other occupiers if an order is *not* made – which could be relevant in cases other than anti social behaviour.

[9] *Battlespring Ltd v Gates* (1984) 11 HLR 6; [1983] EGLR 103.

[10] Department for Transport, Local Government and the Regions, Getting the Best Out of the Court System – Claims for Possession (October 2001) available at: http://www.housing.dtlr.gov.uk/local/ court/.

Human rights

12.17 Apart from the anti social behaviour cases referred to above, the other major recent influence on thinking about discretion in reasonableness cases is the Human Rights Act 1998. As was explained in Part V above, the Court of Appeal currently considers that any eviction procedure engages Article 8(1) of the European Convention on Human Rights.[11] The question then becomes whether such a procedure can be justified under Article 8(2).

12.18 The discretionary grounds are most relevant to type I agreements. They will mostly be granted by social landlords, but can be used by private landlords if they choose. They are also available in type II agreements, and will be particularly relevant during the currency of fixed terms.

12.19 In relation to the issue of reasonableness, the Court of Appeal has made a statement of support of the doctrine of "horizontal" applicability[12] of human rights to cases involving private landlords, on the basis that section 3 of the Human Rights Act 1998 requires the word "reasonable" in housing legislation to be construed in a Convention-compliant way "whoever the lessor may be".[13]

12.20 We consider that the circumstances in which we propose it should be possible to seek an order for possession subject to the discretion of the court[14] are all compliant with Article 8(2) of the Convention at the general level. We regard the provisions for eviction in these circumstances to be "in accordance with the law, for a legitimate aim, and necessary in a democratic society in the interests of… the prevention of disorder or crime… the protection of health … or for the protection of the rights and freedoms of others".

12.21 We think this is so, even in relation to the suggested estate management grounds for seeking an order for possession, which requires the availability of suitable alternative accommodation. This would be particularly so if use of this ground for seeking possession was triggered not simply by the availability of suitable alternative accommodation but by more precisely defined circumstances equivalent to those found in the Housing Act 1985.[15] Even if the estate management ground based simply on suitable alternative accommodation, it might still be justified by its objective of enabling social landlords to manage their property more efficiently in the public interest and of allowing respect for the rights of private landlords to use their property in an economically efficient way.

12.22 The discretionary element in these grounds allows the court to undertake an analysis in the individual case, to determine whether there is a pressing social need for the eviction and whether eviction of this particular household is proportionate to the legitimate aim to be achieved.

[11] See paras 5.54 and 5.55.

[12] The principle that rules applying to public bodies should also apply to private bodies who in effect are performing public functions.

[13] Cf *London Borough of Lambeth v Howard* [2001] EWCA Civ 468 at [31]; [2001] All ER (D) 59 (Mar) *per* Sedley LJ.

[14] See Part VII and Part VIII generally.

[15] See paras 7.77 to 7.83 above.

12.23 The Court of Appeal has recently confirmed a line of cases holding that, so long as the court exercises its discretion in a proper manner, this will satisfy the requirements of Article 8(2). Particular emphasis was given to the idea that the exercise of considering reasonableness should be treated as the application of proportionality to the particular case.[16] This case and *Poplar*[17] confirm the approach taken in the anti social behaviour cases mentioned above, namely that the court should take into account *all* factors affecting not only the occupier but also the landlord, the landlord's interests, the landlord's other occupiers and the general public.

12.24 A more structured approach to the exercise of discretion, contained in the legislation, will not prevent human rights issues being taken into account wherever relevant. Indeed it will provide a framework to assist in this. The way in which the structured discretion is constructed should seek to ensure that the same objective standards are imposed on both categories of landlord. In practice, that would mean that it would be necessary to read across requirements generated in respect of public authority social landlords to private landlords. This does not mean, of course, that the court would not be able to take account of the human rights of the private landlord – unlike a public authority which does not have human rights – or that the balancing act would not be affected by the nature of the landlord, but they should be factors to be taken into account when the judge performs the balancing act.

Housing (Scotland) Act 2001

12.25 There is a model from Scotland, in section 16(3) of the Housing (Scotland) Act 2001, for how to approach structuring the equivalent discretion in that Act. Under this provision, in deciding whether it would be reasonable to grant an order for possession on one of the occupier-default discretionary grounds, a Scottish court must have regard the following matters.

(1) The nature, frequency and duration of the conduct giving rise to the ground.

(2) The extent to which the conduct and the consequences thereof were caused by a person other than the occupier.

(3) The effect the conduct has had, is having and is likely to have on any person other than the occupier.

(4) Any action taken by the landlord with a view to securing the cessation of the conduct, before applying to the court.

[16] *London Borough of Lambeth v Howard* [2001] EWCA Civ 468; [2001] All ER (D) 59 (Mar).

[17] Cf *Poplar Housing and Regeneration Community Association v Donoghue* [2001] EWCA Civ 595; [2002] QB 48.

12.26 The Scottish Act applies only to social landlords. Our proposals are designed to cover private landlords as well. The approach in the Scottish Act will therefore have to be developed to take this factor into account.

Our proposals

12.27 **We provisionally propose that our new regime should include a framework to structure the exercise of discretion in cases based on reasonableness grounds. It should explicitly require the court to consider whether the eviction of the household concerned is proportional to the benefit to be obtained by not doing so. It should explicitly refer to the effects of granting or not granting an order, not only on the occupier and the occupier's household but also on the landlord, the landlord's interests, the landlord's other occupiers, and the general public. Where possession of a fixed term tenancy is for decision, the length of the term remaining should also be considered.**

12.28 **We invite views on other factors that might be included in the structured discretion.**

Application of the structured discretion approach to the court's extended discretion: enforcement proceedings

12.29 The Lord Chancellor's Department is currently reviewing enforcement procedures. In this context, the idea has been raised of having a practice direction on the treatment of applications from occupiers to suspend possession warrants. We do not wish to intervene in this review. Nonetheless, it seems that the introduction of a structured discretion would be helpful in obtaining consistency across the range of the extended discretion given by the housing legislation in reasonableness cases.

12.30 The Court of Appeal has given some guidance on applications for the suspension of warrants, in particular holding that courts can consider at that point issues which were not raised by the landlord at the possession order stage.[18] The Court has however held that section 85 of the Housing Act 1985 only contemplates "summary hearings" at the enforcement stage.

12.31 This raises the issue of whether our new scheme ought to adapt that section, so that hearings which make decisions to order evictions are not summary. We deal below with problems related to suspended possession orders and the apparent illogicality of imposing onerous requirements on hearings which only produce a suspended order, while allowing a summary procedure for the actual eviction.

12.32 **We invite views on whether the new structured discretion should apply to the full range of the court's extended discretion on suspension, adjournment and postponement of both orders and warrants or whether**

[18] *Sheffield City Council v Lisa Hopkins* [2001] EWCA Civ 1023; [2001] All ER (D) 196 (Jun) – the landlord only raised the issue of anti social behaviour at the warrant suspension application, when the suspended possession order had been based on rent arrears.

enforcement issues should be left to the Lord Chancellor's Department enforcement review process and the developing case-law.

RENT ARREARS AND SUSPENDED POSSESSION ORDERS

12.33 Suspended possession orders are most common in rent arrears and anti social behaviour cases. Anti social behaviour is dealt with in Part XIII. The use of possession proceedings to deal solely with recovering rent arrears has been recognised as a problem for many years. Various attempts have been made to tackle it. In particular there are concerns that applications for possession are made, particularly by social landlords, when in fact what is really wanted is payment of the debt. The Rent Action was meant as an alternative to possession proceedings, but was finally abolished in 1993 because of under use.[19]

12.34 In his Final Report on Access to Justice[20] Lord Woolf said "It is generally agreed that the present procedure for possession of tenanted property on grounds of arrears is unsatisfactory." There have been concerns that suspended possession orders for rent have been too readily given out, made in hearings listed in bulk for only a matter of minutes each, with very low attendance rates and poor participation by occupiers. It also appears illogical to focus the statutory regulation on a hearing which produces only a suspended order, with very little statutory regulation of the process for dealing with the breach of the order which then leads to the actual eviction. Furthermore, the legal consequence of a breach of the order is that the agreement will terminate immediately,[21] converting the occupier to a "tolerated trespasser".[22] This takes place wherever there is any breach of the order, no matter how trivial.[23]

12.35 The Woolf Report recommended a two-stage procedure.[24] If adopted, this would effectively replace the suspended possession order with an order to pay the rent. Instead of terminating the agreement as now, breach of the order would lead to a hearing, if the landlord wanted an outright possession order. This would replace the current procedure involving the issue of a warrant followed by an application by the occupier to suspend the warrant.

[19] The County Court (Amendment No 3) Rules, SI 1993 No 2175.

[20] LCD, Lord Woolf's Final Report on Access to Justice (July 1996) ch 16, para 20 available at: http://www.lcd.gov.uk/civil/finalfr.htm.

[21] *Thompson v Elmbridge Borough Council* [1987] 1 WLR 1425; (1987) 19 HLR 526, which cites the Housing Act 1985, s 82(2) on this point.

[22] This is the concept devised by the judges to deal with a practical problem but which is not legally logical – by definition a trespasser is doing something not tolerated. See para 12.44 below.

[23] Indeed it may occur without any default on the part of the occupier where arrears are ordered to be paid off weekly, but the cash to achieve this is provided – through housing benefit – only quarterly; cf *Thompson v Elmbridge Borough Council* [1987] 1 WLR 1425; (1987) 19 HLR 526.

[24] Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (1996), ch 16, paras 20 to 29 available at: http://www.lcd.gov.uk/civil/finalfr.htm.

12.36 It will be argued that many occupiers with rent arrears only take their problem seriously if any action on the debt is accompanied by a threat of eviction. Arguably this lack of linkage was the reason why the former Rent Action was not used. Our proposals clearly retain the linkage. They are not intended to make it more difficult to obtain possession for rent arrears. Instead they commend themselves to us by saving the decision to order possession for the point where the landlord is actually seeking possession.

12.37 Indeed, the first stage could be altered to provide for a simple administrative procedure under which the occupier is warned by the court that failure to pay the rent – and take steps to pay off the arrears – will be likely to lead to further proceedings. The substantive hearing will then take place only when the landlord really wants an outright possession order. This would operate to reverse the current position, where there is a full hearing of the matter at the stage when the landlord has no real intention of evicting the occupier but there is no hearing when the occupier's home is genuinely at risk.

12.38 More radically still, the court could at that point be barred from making suspended possession orders, effectively limiting it to choosing between dismissing the application, granting an outright possession order or issuing a renewed warning (with or without a money judgement).

12.39 It is important to stress that such a procedure would only apply to rent arrears applications made on a discretionary basis. It would not apply to any mandatory proceedings based on the equivalent of ground 8 of the Housing Act 1988.[25] Nor would it apply to the notice-only basis for seeking possession that we have proposed should apply to type II agreements, which does not require proof of any ground for possession.

12.40 Currently the Civil Procedure Rules only require the landlord's particulars of claim to detail what attempts, including court proceedings, have been made to recover the arrears in any other ways and what the landlord has found out about the occupier's welfare benefits.[26]

12.41 **We invite consultees to comment on the following options and any practical problems they might cause**.

(1) **Should new housing legislation make the attempt, along the lines suggested by the Woolf Report, to limit the use of suspended possession orders in rent arrears cases?**

(2) **Should the first stage be limited to a court issuing a warning to the occupier instead of making a final judgement on the arrears owed, with liability for the arrears being left to be determined to the stage where the landlord wants an absolute possession order?**

[25] As provisionally proposed in para 8.41 above.

[26] CPR Practice Direction 55.4, para 2.3(4)-(5).

(3) Should suspended possession orders for rent arrears be abolished, forcing parties and the court to focus on eviction?

ENFORCEMENT

12.42 As noted above, we are aware of the Lord Chancellor's Department's review of civil courts enforcement procedures which includes housing. It is not within the scope of this paper to make provisional proposals on the workings of the bailiff system, but there are some relevant substantive legal issues in enforcement that we need to consider.

The point at which the agreement ends under a possession order

12.43 We have suggested, in Part X above[27] that the landlord's notice of intention to seek an order for possession might refer to the earliest date on which the landlord would ask for a possession order to take effect. If adopted, this would change the current requirement that the notice give the earliest date on which proceedings would be commenced. Focusing attention on when the occupier will have to leave could help to focus the minds of both parties on what it is the landlord wants and when. We have also suggested various ways of reducing the uncertainty that can arise where large categories of agreement fall outside the statutory regulatory scheme.[28]

12.44 One of the most troublesome issues in this context is the status of the so-called "tolerated trespasser".[29] Once a suspended possession order is breached, even though the landlord may not realise the breach has occurred, the present law provides that the former tenant is no longer a tenant[30] and loses the rights of a tenant, including for example the rights to have repairs done.

12.45 This situation can also arise where an absolute possession order, having been obtained from the court, is not actually enforced for some while after the given date (or if it is obtained even though the landlord intends not to enforce it on that date).

12.46 Sometimes the landlord may wish to ignore the breach. Indeed the landlord may not be interested in obtaining a warrant against a tenant who has paid only very slightly less than was due in a particular week, even though any such shortfall technically terminates the agreement from that point.

12.47 Subsequently the tenant may seek to suspend any warrant and can apply to discharge or rescind the possession order on compliance with the terms of the

[27] See para 10.37 above.

[28] These include fewer exclusions (paras 9.94 to 9.166 above), and introducing a procedure for eviction of occupiers who do not leave after giving notice to quit (10.57 above).

[29] *Burrows v Brent London Borough Council* [1996] 1 WLR 1448; [1996] 4 All ER 577.

[30] *Thompson v Elmbridge Borough Council* [1987] 1 WLR 1425; (1987) 19 HLR 526, for the position on breach of a suspended possession order. For equivalent problems in absolute possession orders on mandatory grounds, cf *Stirling v Leadenhall Residential 2 Ltd* [2001] EWCA Civ 1011; [2001] 3 All ER 645.

suspension.[31] Until this happens, the legal position of the former occupier is very unclear. This situation can continue for a considerable time.

12.48 It can become even more unclear when trying to establish the point at which a lenient response from a landlord becomes better explained as amounting to the grant of a new agreement, given the emphasis in each of the cases on the point that each case turns on its fact.[32] This will be particularly so when landlords agree not to enforce if the occupier accepts new conditions not contained in the original suspension.

12.49 It might be preferable, indeed, to require the landlord to execute the warrant within a defined period of time on the "use it or lose it" basis, which we considered in relation to the validity of notices of intention to seek an order for possession.[33]

12.50 We want to avoid the position where occupiers, who might appear to be covered by our proposals, in fact slip in and out of them in such a confusing way.

12.51 One solution, which appears straightforward, is to change the rule on when an agreement ends so that it only ends when the eviction is executed.

(1) This would tie in with our proposal that agreements should continue, even after an occupier's notice to quit, until the occupier actually leaves the premises.[34]

(2) Arguably, there might be problems if landlords were to be required to carry out obligations, for example relating to repairs, on behalf of someone who should really have left the premises. However, if the occupier is still there because of the landlord's delay in enforcing the order, then the landlord cannot really complain. If it is the result of delays in the court then it seems wrong to build assumptions of bad practice by courts into the substantive law. It could be the result of the occupier making repeated baseless applications to suspend warrants. But the Lord Chancellor's Department's enforcement review is looking at tackling problems such as this in any event.

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

(1) **Does the current position, that agreements terminate on breach of a suspended possession order, lead to significant problems in practice? Should the present position be replicated in reform of the law? Our provisional view is that it should not.**

[31] Cf Housing Act 1988, s 9(4).

[32] Cf *Stirling v Leadenhall Residential 2 Ltd* [2001] EWCA Civ 1011; [2001] 3 All ER 645.

[33] See 10.27 to 10.30 above. Were such an idea to be taken forward, it would have further consequences – not considered here – on the need for such deemed grants of tenancy to be evidenced by a written agreement.

[34] But the landlord would be able to take type II accelerated possession proceedings – para 10.57 above.

(2) **Would there be more benefit than harm in a rule that an agreement is ended not by the coming into force of the possession order but by its execution?**

(3) W**ould it instead be preferable to tackle any problems by reducing reliance on suspended possession orders in arrears cases as recommended in the Woolf Report?**

Obtaining warrants for possession without a hearing

12.53 Bailiff[35] warrants to enforce possession orders can currently be obtained without any notification to the occupier, by means of a court administrative procedure without a hearing. This is logical enough in the enforcement of absolute possession orders where the occupier knows what is going to happen and should leave.

12.54 It is more of a problem in suspended possession orders, particularly for those in rent arrears, where the entitlement to issue a warrant is based on a breach of the terms of the suspension. The landlord does not have to prove the breach or react to the breach within any time-scale. It is the occupier who has to apply for a hearing to set aside the warrant, which must usually be done before it is executed.[36] The occupier can also apply to suspend the warrant, admitting the breach but arguing that enforcement would not be reasonable. However there is currently no statutory requirement for the occupier to be informed of these rights.[37] The landlord is currently under no obligation to tell the occupier that a warrant is being applied for, or that it has been granted, or that a date for its execution has been set.

12.55 This minimalist approach to a hearing, which actually decides whether someone is evicted, is hard to reconcile with the detailed statutory provisions relating to notice of intention to take proceedings and the detailed consideration of grounds at a full hearing, when that hearing usually only produces a suspended order.

12.56 It has been held by the Court of Appeal that the current law on summary warrant hearings is compliant with the Human Rights Act 1998.[38] However, this only means that it is compliant, not that it is necessarily a desirable feature of the present law worth replicating in a new regime. As explained above, we would like to see suspended possession orders reduced or replaced in rent arrears cases. But if they are to remain in rent or other cases, we would argue that the system for dealing with breaches of such orders needs to be improved.

[35] These points are based on the assumption that the county court is the appropriate venue for housing cases, including their enforcement.

[36] *Leicester CC v Aldwinckle* (1991) 24 HLR 40. It may be possible for the warrant to be set aside after execution if there is evidence of abuse of process or oppression. There has been a number of recent cases on the meaning of oppression in this context: *Barking and Dagenham v Saint* (1999) 31 HLR 620; *Southwark LBC v Sarfo* (2000) 32 HLR 602; *Hammersmith and Fulham LBC v Lemeh* (2001) 33 HLR 231 and *Lambeth LBC v Hughes* (2001) 33 HLR 350.

[37] There is now a standard court form N54 giving information for the tenant.

[38] *St Brice v London Borough of Southwark* [2001] EWCA Civ 1138; [2001] All ER (D) 209 (Jul).

12.57 **We invite views as to the practicality of requiring a hearing before the issue of a possession warrant after a suspended possession order has been made on rent or other discretionary ground cases**.

12.58 **Alternatively we invite views whether any related problems would be best tackled by rules on court forms and/or by adopting the Woolf Report recommendations on rent arrears cases**.

PART XIII
ANTI SOCIAL BEHAVIOUR

INTRODUCTION

13.1 A small number of occupiers, or members of their households, behave in an anti social way towards their neighbours. Although the numbers involved are small, the effect they have on the lives of those around them can be disproportionate. At its worst it can make life for the victims intolerable. In addition to the direct effect on other occupiers, anti social behaviour is socially corrosive. It can lead to a cycle of deterioration in the social and then physical condition of estates, particularly in areas of low housing demand, as occupiers vote with their feet and leave areas blighted by the anti social behaviour of the few.

13.2 In this Part we discuss

(1) the need to combat anti social behaviour;

(2) the current law;

(3) the categories of landlord and their responsibilities in relation to anti social behaviour;

(4) a general duty to deal with anti social behaviour; and

(5) dealing with serious anti social behaviour, looking at

(a) the concept,

(b) type II (probationary) agreements, and

(c) type I agreements.

THE NEED TO COMBAT ANTI SOCIAL BEHAVIOUR

13.3 It is, perhaps, only comparatively recently that the housing world has woken up to the extent and seriousness of anti social behaviour by occupiers. The last few years have seen the gradual emergence of a consensus on the prevalence, seriousness and cost of anti social behaviour, articulated by, amongst others, the Social Landlords Crime and Nuisance Group,[1] the Cabinet Office Social Exclusion Unit[2] and the Labour Party.[3] We have already learned that it is a matter of the gravest concern to tenants' groups.

[1] A lobbying group set up following a major local authority conference on anti social behaviour in 1995.

[2] Cabinet Office Social Exclusion Unit, National Strategy for Neighbourhood Renewal – Report of the Policy Action Team 8: Anti social behaviour (March 2000) and National Strategy for Neighbourhood Renewal – Report of the Policy Action Team 7: Unpopular Housing (October 1999).

[3] Labour Party, A Quiet Life: Tough Action on Criminal Neighbours (June 1995).

13.4 We regard the issue as one of great importance, particularly for the management of social housing, which therefore justifies separate consideration within this consultation paper. It builds on the fundamental principle that occupiers – particularly of social landlords – who show they accept their responsibilities as occupiers acquire rights to security, whereas those who do not lose their rights to security.

13.5 The term "anti social behaviour" covers a disparate and broad range of behaviour ranging from the relatively mild, though annoying, tensions that can arise between neighbours to serious, violent and intimidatory behaviour, which makes the lives of those affected a complete misery.[4] Some forms of anti social behaviour, for instance noise nuisance, are closely associated with the occupation of the home. Other types of behaviour cause people to feel particularly stressed and insecure within their home, for example racist behaviour.

13.6 The legal framework is only a part, albeit an important part, of any strategy for dealing with anti social behaviour. It is also important that social landlords use the whole range of powers available to them to tackle anti social behaviour, and that effective schemes are developed for the rehabilitation of anti social occupiers. We are not the right body to seek to improve good practice, nor can we develop rehabilitative schemes. These are for Government and the wider housing world. The importance the Government attaches to both enforcement and rehabilitation is evidenced in the recent joint Department for Transport, Local Government and the Regions and Home Office consultation paper on anti social behaviour.[5]

13.7 However, any effective strategy needs the right legal basis. The proposals that follow have been informed by our understanding of some of the requirements for effective action to stop anti social behaviour. That understanding comes, in part, from the policy documents footnoted in this Part, but also from what we have learned from representatives of landlords and tenants in the course of the preparation of this paper. Their desired outcome is not to remove the anti social occupier, but to change behaviour. In this connection, we are impressed with the success claimed by Manchester City Council for the use of injunctions in changing behaviour.[6] Eviction is, in some senses, an admission of failure.

13.8 If eviction is necessary, then there are three reasons why, as far as possible, it should be swift and certain. First, once it has become clear that the occupier's behaviour will not change, it is obviously desirable to stop it as soon as possible. Secondly, effective action generally relies on victimised occupiers having the courage to stand up to the perpetrators, including in court as witnesses. If the process itself is both quick and certain then the opportunity for intimidation of witnesses is minimised. Thirdly, effective action against anti social behaviour

[4] There is a variety of definitions provided in statute and policy documents. Eg the Crime and Disorder Act 1998, s 1(1)(a) defines acting in an anti social manner as acting in "a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself".

[5] For which see para13.15 below.

[6] Neighbourhood Nuisance Strategy Group figures for 2001, provided by Manchester City Council, indicate that of the 378 injunctions obtained only 21 resulted in committal to prison.

depends in part on securing the trust and support of the community. It is only if the landlord is trusted to take complaints seriously and prosecute them effectively that occupiers will turn to the landlord, rather than just move or retreat into private misery.

13.9 This Part considers what powers should exist to enable social landlords to deal with those types of anti social behaviour which impact upon the occupation of residential premises or the locality of the premises or the management of that premises. In many instances the criminal law provides a solution. However housing law must supplement the criminal law because of the different procedures and purposes of criminal regulation. In particular, requirements of the criminal burden of proof and the need for witnesses, whilst necessary for civil liberty purposes, can in practice limit an authority's ability to intervene. Further, criminal sanctions are designed to punish the perpetrator and are not necessarily orientated towards either the protection of the victim[7] or the landlord's property.

THE CURRENT LAW

13.10 When the secure tenancy regime was devised in the Housing Act 1980 it provided a comprehensive system of security of tenure for local authority tenants, with no mandatory grounds for possession. At the time anti social behaviour was perceived as an individual problem which could be appropriately dealt with by means of the nuisance ground for possession, modelled on the discretionary ground available to private landlords. In the intervening period, the inadequacy of this mechanism has been revealed.

13.11 Part V of the Housing Act 1996 introduced a raft of measures including

(1) a power for local authority landlords to let on introductory tenancies,[8]

(2) the extension of the discretionary ground for possession available to landlords on the basis of nuisance or annoyance to neighbours,[9]

(3) expedited notice for possession proceedings based upon those grounds,[10]

(4) a new power of arrest for certain injunctions against breaches of a nuisance clause in an occupier's agreement,[11] and

[7] Eg a victim may be best served by the removal of the perpetrator from the locality – something only provided for by imprisonment and then only on a temporary basis.

[8] Housing Act 1996, s 124.

[9] Housing Act 1985, Sched 2, ground 2, as amended by Housing Act 1996, s 144; and Housing Act 1988, Sched 2, ground 14, as amended by Housing Act 1996, s 148. This applies to private landlords as well as social landlords.

[10] Also available to private landlords as well as social landlords: Housing Act 1985, s 83(3), as amended by Housing Act 1996, s 147(1); and Housing Act 1988, s 8(4), as amended by Housing Act 1996, s 151.

[11] Housing Act 1996, s 153, available to councils and other social landlords. Private landlords continue to be able to take injunctions against breaches of their tenancy agreements, but cannot obtain a power of arrest to enforce them.

(5) a new injunction and power of arrest for local authorities to restrain people other than their occupiers from anti social behaviour in the locality of local authority housing.[12]

Also relevant is the power available to a local authority under section 222 of the Local Government Act 1972, to take part in court proceedings – whether suing, prosecuting or defending – when it considers it expedient to do so for the promotion or protection of the interests of the inhabitants of its area.[13]

13.12 These provisions have been supplemented by other legislation,[14] including the Noise Act 1996, the Protection from Harassment Act 1997 and, most particularly, the anti social behaviour orders set out in section 1 of the Crime and Disorder Act 1998. Anti social behaviour orders can be obtained from the magistrates' court by the police or the local authority[15] against a person aged ten years or over who has been behaving in an anti social manner and the order is necessary to protect others from further anti social behaviour. Breaches of the order are punished as criminal offences.

13.13 The strategic role of local authorities has been strengthened by section 6 of the Crime and Disorder Act 1998 which imposes a duty on local authorities – in partnership with the police, probation, health authorities and others – to produce and implement a local strategy for the reduction of crime and disorder.[16]

13.14 Further statutory innovations are contained in the Homelessness Act 2002, which requires local authorities to consider the impact of violence on an applicant for accommodation under the homelessness legislation, extending a similar provision which previously applied only to domestic violence. Thus a local authority will be potentially liable to house a person forced to leave a home because of anti social behaviour by others. In relation to the allocation of social housing, another section allows a local authority to decide that an applicant is *ineligible* on the basis of his or

[12] *Ibid*, s 152, not available to other social landlords nor to private landlords.

[13] It is important to note that s 222 does not create a new cause of action or offence. The use of this power was recently considered by the Court of Appeal in the context of anti social behaviour in *Nottingham City Council v Z* [2001] EWCA Civ 1248; (2002) 1 WLR 607. Nottingham City Council was seeking an injunction based on the tort of public nuisance to restrain a drug dealer from entering a housing estate; it is not stated in the report but this was presumably not a council estate or Housing Act 1996, s 152 would have been available with a power of arrest. The Court of Appeal – overturning the district judge's striking out of the application – held that the authority was entitled to use the protection of the interests of local inhabitants under s 222 to justify instituting civil proceedings for public nuisance, even where the nuisance also constituted a criminal offence.

[14] For a useful analysis cf the article by Caroline Hunter, "Anti social behaviour – can law be the answer?" in Dave Cowan and Alex Marsh (eds), *Two Steps Forward: Housing policy into the new millennium* (2001) at p 221.

[15] Note the amendments to the Police Reform Bill – note 21 below.

[16] The significance of the strategies produced by local Crime and Disorder Reduction Partnerships in reducing anti social behaviour is made explicit by the Cabinet Office Social Exclusion Unit, A New Commitment to Neighbourhood Renewal: National Strategy Action Plan (January 2001) at para 4.31.

her unacceptable behaviour. The Act[17] amends Part VI and Part VII of the Housing Act 1996, which regulate the allocation of local authority housing and local authorities duties to the homeless. Local authorities are given the power to design their allocation schemes in such a way as to reduce the priority given to applicants who behave in an anti social manner. Finally, local authorities are not required to give any priority at all to applicants if they or members of their household are guilty of unacceptable behaviour, if, at the time the case is considered, they do not deserve to be treated as a member of a group of people who are to be given preference.

13.15 Even more recently, the Department for Transport, Local Government and the Regions and the Home Office have published a consultation paper outlining further suggested legislative changes to combat anti social behaviour.[18] The proposals in that paper, of course, would change the current law, rather than being applicable to our proposed new legislative scheme. We have, however, shared the ideas discussed in this Part with the Department, who have adapted some of them to the current law. As such, they feature in the joint consultation paper along with other ideas.

WHICH LANDLORDS?

13.16 Currently, legislation gives local authorities more powers to deal with anti social behaviour than it gives to other social landlords. Most of these powers belong to them as local authorities rather than as landlords.[19] However, local authorities also have powers as landlords to use introductory tenancy schemes, which are not available to other social landlords.[20]

Social landlords

13.17 We do not think that in this context the distinction between local authority landlord and other registered social landlords is generally justified, in so far as we are considering combating *housing-related* anti social behaviour. Both are social landlords, in the sense that they are providers of housing for a social rather than a commercial purpose, and as such have a general obligation to the community in which their housing is located. This is perhaps particularly so now, at a time when the registered social landlord sector is growing enormously as a result of large scale transfers of local authority stock. We note that the Government are moving in a similar direction in that, at the time of writing, amendments are being made to the

[17] For a summary of the Bill, as originally published, cf Caroline Hunter, "'The Good, the Bad and the…': Reasonable Preference, Exclusion and Choice in Housing Allocation" [2001] JHL 77.

[18] Department for Transport, Local Government and the Regions, Tackling Anti Social Tenants (2 April 2002). The consultation period closes on 12 July 2002.

[19] Eg anti social behaviour orders under the Crime and Disorder Act 1998, s 1 and injunctions under the Housing Act 1996, s 152. However, note the amendments to the Police Reform Bill – cf note 21 below.

[20] Under Housing Act 1996, ss 124 to143 (see paras 11.17 to 11.21 above). Registered social landlords have been using assured shorthold tenancies as an alternative.

Police Reform Bill to allow registered social landlords to apply for anti social behaviour orders.[21]

13.18 **We provisionally propose that, so far as possible, local authorities and registered social landlords should have the same powers and duties, as landlords, in respect of anti social behaviour.**

13.19 **We invite views on whether unregistered housing associations should have similar powers and duties.**

Private landlords

13.20 We do not consider that private sector landlords letting on type II agreements should have the same range of powers and duties. They will be able to evict the occupier on the mandatory notice-only basis as well as the discretionary basis for breach of the agreement, and can obtain injunctions, albeit without powers of arrest.

13.21 The Government does have concerns about the prevalence of anti social behaviour in the private rented sector in some areas of low housing demand and has recently completed a consultation exercise on proposals to license landlords in these areas.[22] Additionally the government has discussed withholding housing benefit from both occupiers and landlords who engage in or condone anti social behaviour.[23] These concerns however fall outside of the remit of our project.

13.22 Where private sector landlords choose to let on type I agreements, we again do not think they should have powers and responsibilities to respond to anti social behaviour over and above the power to evict or seek injunctions for breach of the term of the agreement relating to anti social behaviour.

[21] Cf *Hansard (HC)* 12 March 2002, cols 722-730 for the amendments made. Other amendments made at the same time introduce an interim anti social behaviour order and extend the geographical area over which an anti social behaviour order can extend. Anti social behaviour orders are also made available to the county court, where there are existing proceedings against the alleged perpetrator, and become a sentencing option in the criminal courts following conviction for any offence. The amendments insert new sections into the Crime and Disorder Act 1998.

[22] Department for Transport, Local Government and the Regions, Selective Licensing of Private Landlords – A Consultation Paper (November 2001) available at: http:// www.housing.dtlr.gov.uk/information/consult/licensing/index.htm.

[23] Cf Department of the Environment, Transport and the Regions, Quality and Choice: A Decent Home for All, The Housing Green Paper (April 2000) at para 5.46: "There are also situations where the claimant is not so much the victim of the bad landlord as his accomplice, and where his own anti social behaviour is an important part of the problem. Here too it has been suggested that the benefit rules could be adapted to encourage both occupiers and landlords to behave responsibly. Housing Benefit could be reduced for unruly occupiers, whilst the method of direct payment could be denied for landlords who failed to do what they could to control the behaviour of their occupiers. Objective tests would need to be devised of the behaviour to be required of tenants and landlords for this purpose." Available at: http://www.housing.dtlr.gov.uk/information/consult/homes/green/index.htm

A GENERAL DUTY TO DEAL WITH ANTI SOCIAL BEHAVIOUR

13.23 Currently the law does not impose a duty on landlords to combat anti social behaviour.[24] Occupiers who are the victims of anti social behaviour have attempted to utilise the law of nuisance to impose liability on the landowner of the perpetrator occupiers, but to limited effect. As Susan Bright points out "[t]he parameters of nuisance law are unclear, and malleable."[25] Occupiers, in particular, receive extremely limited protection against the actions of other occupiers from the law of nuisance. Essentially, a landlord will be only be liable if he or she has expressly or implicitly licensed the behaviour about which complaint is made.[26] In *Hussain v Lancaster City Council*[27] the Hussains, who ran a small shop on a local authority estate, were not able to persuade the council to take action to evict the perpetrators of appalling racial harassment. This was despite the fact that the perpetrators were council tenants or family members of council tenants, and therefore the council had sufficient powers. The Court of Appeal struck out the Hussains' claim against the council.

13.24 The same result was reached in *Mowan v London Borough of Wandsworth*.[28] The Court of Appeal held that Article 8 of the European Convention on Human Rights did not require the law to be changed. Sir Christopher Staughton did, however, remark that this was "a deplorable result".

A general duty

13.25 We consider that local authorities should be subject to a generally worded public law duty to combat anti social behaviour. As a *general* duty it should not found a cause of action for breach of statutory tort. That would make it individually actionable by the aggrieved occupier. (If that was the desired effect, we would use the proposal for a contractual duty outlined below in paragraphs 13.33 and 13.34). Although – in the current state of administrative law[29] – it would not in practice allow an individual occupier who claimed to be a victim of anti social behaviour to take legal action against a particular decision of the local authority, such a general duty would nevertheless have several advantages.

13.26 First, it would be a declaration of the importance Government attaches to combating anti social behaviour. Secondly, it would promote the importance of such action within the local authorities' own decision making priorities. Finally, it would provide a focus for those, such as occupiers, seeking to hold local authorities democratically to account for their action (or inaction) in dealing with anti social occupiers.

13.27 We have already said that we consider that it is desirable to give local authorities and social landlords the same powers and duties in relation to anti social

[24] *Hussain v Lancaster City Council* [1998] EWCA Civ 834; [2000] QB 1.

[25] Susan Bright, "Liability for the Bad Behaviour of Others" (2001) 21 OJLS 311 at 312.

[26] *Lippiatt v South Gloucestershire County Council* [1999] EWCA Civ 1151; [2000] QB 51.

[27] [1998] EWCA Civ 834; [2000] QB 1.

[28] [2000] EWCA Civ 357; [2000] All ER (D) 2411.

[29] Cf Wade and Forsyth, *Administrative Law* (8th ed 2000) pp 580 to 581.

behaviour. However, whether housing associations (which constitute the great bulk of registered social landlords) are public bodies who can be made liable to such a general public law duty is currently very unclear.[30] Thus, we cannot simply address a generally worded duty to registered social landlords, as well as local authorities, and expect it to apply in a public law context. We are, however, anxious to maintain the principle of equality between local authorities and registered social landlords in respect of duties relating to anti social behaviour.

13.28 We consider that broadly the same effect could be achieved if legislation specified that registered social landlords were covered by a duty in the same terms as that imposed on local authorities (which would be expressed as not to take effect as a statutory tort). The legislation would then also impose a requirement on the Housing Corporation to have regard to the duty in performing its regulatory functions.[31] The result would be that the duty would become effective through the regulatory structure, rather than as a matter of public law. Other agencies involved with housing associations would also take the existence of the general duty into account, for instance, the Independent Housing Ombudsman.[32]

13.29 Alternatively if, as the case law develops, it appears that registered social landlords come to be generally regarded as public bodies, then it might be appropriate to give the Secretary of State a power to impose the duty on them, similar to the "general statutory duty" to promote race relations contained in section 71(1) of the Race Relations Act 1976 – as amended by section 2 of the Race Relations (Amendment) Act 2000. This may be extended to other bodies by order, provided that "the Secretary of State considers that the extension relates to a person who exercises functions of a public nature".[33]

13.30 **We provisionally propose that a general duty should be imposed on local authorities to take action against anti social behaviour.**

13.31 **We further provisionally propose that a similarly worded duty be placed on registered social landlords, expressed as not to take effect in tort, which the Housing Corporation would be obliged to take into account in the performance of its regulatory functions.**

13.32 **We invite views on whether, as an alternative to the proposal in the preceding paragraph, the Secretary of State should be empowered to**

[30] *Peabody Housing Association v Greene* (1978) 38 P & CR 644; *R v Servite Houses, ex p Goldsmith* [2000] EWHC Admin 338; [2001] LGR 55 (QBD). See further the discussion in paras 5.42 to 5.53 above about the status of housing associations.

[31] The Housing Corporation has extensive powers over registered social landlords. Of particular relevance in this context, it has the power to set performance standards under Housing Act 1996, s 34 and to publish housing management guidance under Housing Act 1996, s 36. The Corporation already provides regulatory guidance, information and advice to registered social landlords on anti social behaviour – cf documents at: http://www.housingcorplibrary.org.uk.

[32] Cf Housing Act 1996, Sched 2, para 2; information on the Independent Housing Ombudsman is available at: http://www.ihos.org.uk.

[33] Race Relations Act 1976, s 71(5). The power has been used to extend the duty to the Tate Gallery, the Britain-Russia Centre and the Wine Standards Board.

extend the duty on local authorities to registered social landlords, if he considers that they have come to be recognised as exercising functions of a public nature.

A contractual duty

13.33 It is, however, possible to go further by imposing a requirement that social landlords[34] include, in their agreements, a term specifying that the landlord should take all reasonable steps to ensure that the occupier should be able to occupy the home unaffected by anti social behaviour by other occupants of other premises owned by the landlord. Breach of such a term would provide the occupier with specific and individual remedies, including a right to damages in the event of breach. An advantage of this approach would be that, because it arose out of the agreement, it could be equally imposed on both local authorities and registered social landlords. Such a requirement would further reinforce the principle that both landlords and occupiers have rights and responsibilities arising from the community nature of the provision. The duty would be drafted so as not to interfere with local authorities' right to allocate according to its allocation scheme. Any decision not to re-house someone for previous anti social behaviour should be taken in the context of proper decision making on homelessness, not as a result of pressure arising from the duty. We acknowledge that such a term would place a burden on landlords and might have significant resource implications.

13.34 **We invite views as to whether there should be a requirement on social landlords to include in their agreements a term specifying that the landlord should take all reasonable steps to ensure that the occupier is able to occupy the home free of anti social behaviour by the occupants of other premises owned by the landlord.**

13.35 If there were such a term, clearly it would be for the benefit not only of the occupier but also members of his or her family or household. It would be possible to expressly make provision for the members of the occupier's household to enforce it, as well as the occupier, by using the Contracts (Rights of Third Parties) Act 1999.[35] This option would be helpful if for some reason the occupier him or herself was unwilling or unable to enforce the term, but another member of the household could and would. If this option were adopted, however, there would have to be an express term to the effect that the agreement could be rescinded or varied without the consent of the third party, to ensure that members of the occupier's family did not a veto over those matters.[36]

13.36 **If consultees support the inclusion of a specific term in the agreement, we invite views on whether or not it should be expressed to be for the benefit of other members of the occupier's household for the purposes of the Contracts (Rights of Third Parties) Act 1999 (subject to a further term not requiring their consent to any agreed rescission or variation).**

[34] We do not envisage this requirement being imposed on private landlords.

[35] Contracts (Rights of Third Parties) Act 1999, s 1.

[36] Contracts (Rights of Third Parties) Act 1999, s 2(1) would have this effect, if such a provision was not made under s 2(3)(a).

DEALING WITH SERIOUS ANTI SOCIAL BEHAVIOUR

13.37 We now turn to the issue of whether additional procedures should be available to social landlords to deal with serious anti social behaviour which was specifically related to the occupation of housing. This would be used as the basis on which the new remedies we propose in relation to type II and type I agreement should be available.

The concept of serious housing related anti social behaviour

13.38 Our starting point is to think that it would help if there were a single, coherent concept of what amounts to serious housing related anti social behaviour. Such a definition must be drafted so as to cover the real problems experienced in housing management. We are not wedded to any particular form of words in advance of consultation. We offer below, however, a form of words to assist consultees. We start with the core notion of the conduct constituting anti social behaviour from the definition used in section 1 of the Crime and Disorder Act 1998: "acting in a manner that caused or was likely to cause harassment, alarm or distress". This is the operative definition for the imposition of anti social behaviour orders, breach of which is a criminal offence. To this we add two further elements. First, we limit it to cases where the effects of the conduct are "serious". Secondly, we are concerned with *housing-related* anti social behaviour – not anti social behaviour at large – and so attempt to introduce this link by specifying that it must be "either linked to the occupation of a home or occurs in the locality of a home".

13.39 **We provisionally propose that it would be advantageous if there were a single concept of housing-related anti social behaviour which would apply to new procedures for dealing with the matter.**

13.40 **We provisionally propose that serious housing-related anti social behaviour should be defined as "behaviour where the occupier or a person residing in or visiting the home has acted in a manner that caused or was likely to cause serious harm, harassment, alarm or distress to others where the behaviour is either linked to the occupation of the home and/or occurs in the locality of the home."**

Type II (probationary) agreements

13.41 Here we consider a proposal for a new procedure for the summary eviction of occupiers with type II (probationary) agreements.[37] The introductory tenancy regime, as originally intended by Parliament, was designed to give local authority landlords sufficient speed and certainty to deal with serious anti social behaviour. As a result of decisions by the courts, we have concluded that the introductory tenancy regime is not as speedy and certain as Parliament thought. In addition, the introductory tenancy regime was never available to social landlords.

13.42 The challenge in designing a new procedure is to find a way to accommodate the social landlords' requirements with human rights principles

[37] By a type II (probationary) agreement, we mean a type II agreement without the six months' moratorium. See the discussion in paras 11.22 to 11.29.

13.43 One approach would be to use existing procedures to afford the occupier a bare minimum level of Article 6 rights. The Court of Appeal in *McLellan v Bracknell Forest BC*[38] found that a combination of an internal review process before an application to the court for a possession order with judicial review while proceedings in the county court were adjourned, was compliant with Article 6. The problem with such a procedure is that it does not achieve the swift and certain removal of the alleged perpetrator of the anti social behaviour. At the same time, it can be seen as cutting the alleged perpetrator's Article 6 rights to the minimum, providing an unsatisfactory, even if compliant, mechanism for judicial fact finding.

13.44 Our alternative is to propose that the perpetrator should be entitled to a judicial hearing, but until *after* his or her removal. This would ensure that the process, taken as a whole, was compliant with Article 6. The natural consequence of that is that an occupier who is subsequently found not to have been responsible for anti social behaviour must have appropriate remedies available.

13.45 We have considered two options.

13.46 The features of Option A would be as follows.

(1) The landlord would apply to the county court for a formal order for possession, on the ground that the occupier had breached the term of the agreement prohibiting anti social behaviour. The procedure for obtaining the order would be a paper only one, the court being required only to satisfy itself that any relevant notices had been complied with. There would be no procedure for adjournment.

(2) After eviction, the occupier would be entitled to apply to the court to consider the eviction. The court would determine whether the occupier had indeed breached the term prohibiting anti social behaviour, and, if he or she had, would go on to consider whether it was reasonable in all the circumstances to have evicted the occupier (using the structured discretion we propose below[39]).

(3) If the court found that the occupier had not breached the term, or that he or she had done so but that nevertheless the eviction was unreasonable, then the occupier would be entitled to

(a) be re-housed by the landlord in similar accommodation in the same general area, and /or

(b) compensatory damages.

13.47 The features of Option B would as follows.

(1) There would be a statutory internal review procedure, similar to that for introductory tenancies, requiring notice to be given to the occupier of the decision, with reasons, followed by, at the request of the occupier, a

[38] [2001] EWCA Civ 1510; [2002] 1 All ER 899.

[39] See 13.71 below.

further review by a senior officer which included a right to an oral hearing, representation and examination of witnesses.

(2) On completion of the review process, and on the assumption that the occupier had failed to reverse the landlord's decision, the landlord would obtain a summary possession order from the court.

(3) The occupier would be entitled after eviction to apply to the county court to judicially review the decision to evict, the degree of judicial review being such as was necessary to make the procedure as a whole complaint with Article 6.

(4) The reviewing county court would have the power to quash the order, substitute another order and/or make a declaration in relation to the case, and, at its discretion, order re-housing and/or damages as in option A.

13.48 Both procedures would lead to swift eviction, with the right to a judicial consideration of the process after the event.

An effective remedy?

13.49 We have considered whether this process, taken as a whole, would amount to an effective remedy, as required by Article 13.[40] Article 13 is an auxiliary provision, dependent on an arguable claim that another Convention right has been breached, but it should also be seen as a long stop in that it imposes only minimal procedural safeguards. Where another Article in the Convention imposes a higher standard, then generally Article 13 has no application. In particular, Article 13 generally has no application where Article 6(1) is in play.[41]

13.50 The point could be made that the requirement for an effective remedy requires a domestic procedure "to deal with the substance of the relevant Convention complaint and to *grant appropriate relief*".[42] One might think, therefore, that even if a court procedure was fully Article 6 compliant, it might not be an effective remedy if the court did not have power to grant appropriate relief.

13.51 However, the way in which the European Court on Human Rights has dealt with this is influenced by its approach to the relationship between Article 13 and the substantive Convention rights. The requirements of the Article are to be read in the light of the Convention as a whole, with the result that the remedy need only be as effective as is possible in the circumstances. If it were otherwise, then a finding that Article 8, for instance, had not been breached by German legislation

[40] Article 13 is not one of the Convention rights to which the Human Rights Act 1998 applies, but we would not provisionally propose a procedure that we did not consider compatible.

[41] Keir Starmer, *European Human Rights Law* (1999) p 143; Lester and Pannick, *Human Rights Law and Practice* (1999) p 217; Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd ed 1998) p 700 to 702. It is perhaps worth noting that the authors of the last work (one of whom was for a considerable period a respected judge of the Court) are critical of the Court's development of Article 13, concluding that "the meaning of Article 13 is virtually nullified": *ibid* at p 710.

[42] *Aksoy v Turkey* Reports of Judgments and Decisions vol 1996 part VI p 2260; 23 EHRR 553, para 95 (emphasis added).

regulating the interception of communications could be collaterally attacked using Article 13.[43]

13.52 The result has been that in practice, the argument has resolved itself into one about whether or not judicial review is (in the circumstances) adequate. Thus, although judicial review was adequate in *Vilvarajah and Others*[44] and *Soering*,[45] it was not in *Chahal v UK*[46] where the risk of treatment breaching Article 3 on the deportation of a Sikh activist to India required "independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3". Judicial review in a "national security" case could not, under the rules then obtaining, satisfy that requirement. The court had already found a breach of Article 5(4), which is similar, for these purposes, to a breach of Article 6.

13.53 We accept that there remains a theoretical possibility that the Court might find that there was a procedure which was Article 6 compliant, but not adequate for Article 13 purposes, on the basis of inadequate relief. If it did, *Chahal* gives an indication of what the test of harm in such a case would be. It would be harm that breached Article 3, the prohibition on torture and degrading treatment, not merely Article 8 – or Article 10, in other cases discussed in *Chahal* – and within the Article 3 spectrum it would seem to be at the higher end, in that the Court refers to the "irreversible nature of the harm that might occur".

13.54 This, we consider, is a very long way away from our procedure. It is fully Article 6 compliant and we cannot conceive that the relief, of re-housing and damages could possibly be inadequate to address the breach of Article 8 constituted by the eviction.

13.55 Accordingly, **we provisionally propose that a new summary eviction procedure be created. It would be available to a local authority or registered social landlord believes that an occupier under a type II (probationary) agreement has been responsible for serious housing-related anti social behaviour. The occupier could subsequently challenge the reasonableness of the decision (option A) or the lawfulness of the decision (option B).**

13.56 **We invite views on whether option A or option B is to be preferred.**

Ensuring the procedure is only used as a last resort

13.57 The summary accelerated possession procedure is, and is meant to be, a very powerful weapon in the armoury of social landlords to combat anti social behaviour. The procedure should only be used as a last resort, or in cases of extreme gravity.

[43] *Klass and Others v Germany* Series A (Judgments and Decisions) vol 145 (1978); 2 EHRR 214.

[44] Series A (Judgments and Decisions) vol 215 (1991); 14 EHRR 248.

[45] Series A (Judgments and Decisions) vol 161 (1989); 11 EHRR 439.

[46] Reports of Judgments and Decisions Vol 1996 part V p 1831; 23 EHRR 413.

13.58 One way of encouraging use only in such circumstances would be to require landlords to demonstrate that they have taken appropriate alternative steps. Landlords could be required to produce an account of what other steps had been taken to deal with the anti social behaviour as part of the court process. Failure to do so, or to do so adequately, might, in some cases, affect the decision of the court whether or not to order the eviction. If the court found the steps taken were inadequate, but still considered the eviction justified then the landlord could be penalised in costs.

13.59 **We invite views on whether local authorities and registered social landlords should be required to produce to the court a document setting out either what alternative steps have been taken to deal with the anti social behaviour, or, if none has been, why it was appropriate in the particular case to proceed without taking such steps.**

13.60 **We also invite views as to whether failure by a landlord to provide the document or failure to do so adequately should be a matter that the court is entitled to take into account in coming to its decision, and could in addition be penalised in costs.**

Type I agreements

13.61 We do not consider that the summary eviction procedure with a post eviction hearing is compatible with the long term security that the type I agreement is designed to provide. But it is essential that there be a legal apparatus to control anti social behaviour by type I occupiers, or members of their household or their visitors.

13.62 Currently secure and assured tenants can be evicted for anti social behaviour where the court decides that it is reasonable to do so.[47] There is clearly a concern that it takes too long to get an order for possession and that the judicial outcome is too uncertain. We propose a number of innovations designed to enable the landlord to respond more effectively to anti social behaviour.

Powers of arrest on injunctions

13.63 Currently section 153 of the Housing Act 1996 creates a power of arrest which can be attached to a social landlord's injunction for breach of the agreement term on nuisance in certain circumstances including the use or threat of violence and a significant risk of harm.

13.64 We proposed above that there should be a single definition of serious housing related anti social behaviour.[48] If that proposal is adopted, the power of arrest could be made available for injunctions by social landlords to restrain breaches of their nuisance term, where the breach amounted to serious housing related anti social behaviour according to that definition. This would effectively replace the cumbersome requirements of section 153. We consider that a power of arrest is a valuable tool both in restraining anti social behaviour and providing protection for

[47] Housing Act 1985, Sched 2, ground 2 and Housing Act 1988, Sched 2, ground 14.

[48] See paras 13.39 and 13.40 above.

its victims. This is particularly so where violence or threats of violence are involved.

13.65 **We provisionally propose that the existing power of arrest in Housing Act 1996, section 153 should be replaced with a power for the court to add a power of arrest to any injunction for a social landlord to prevent a breach of a nuisance term which amounted to serious housing related anti social behaviour.**

13.66 A power of arrest as part of a civil law sanction has potential for abuse, and therefore there are, we recognise, strong arguments for limiting its use to cases of actual or threatened violence, as at present. However we also recognise that serious and persistent non-violent harassment can still cause significant harm to the victim. Of particular concern is the harm caused by racially motivated property damage and verbal abuse, which would appear to us to be serious enough to ordinarily justify a power of arrest.

13.67 **We invite views on whether the power of arrest should be available in respect of**

(1) **only behaviour involving violence or the threat of violence;**

(2) **behaviour involving violence or the threat of violence, *or* which would result in serious harm to another; or**

(3) **all breaches amounting to serious housing related anti social behaviour.**

13.68 It is perhaps worth noting that, although we have discussed powers of arrest in the context of type I agreement, they should also be available in respect of type II agreements.

Possession proceedings and the court's discretion

13.69 The current secure tenancy regime contains a discretionary ground of possession for anti social behaviour. We propose maintaining the power of landlords to seek an order for possession for anti social behaviour where it is reasonable to do so. The procedure would involve issuing proceedings on the basis of breach of the agreement and the term pleaded would be the nuisance term. We also propose maintaining the current system of accelerated notice in possession applications on breach of the term in the agreement relating to anti social behaviour.

13.70 We have been concerned about suggestions of a lack of consistency in judicial decision making on the question of the reasonableness of granting a possession. We have proposed above[49] that there should be a statutory structuring of the discretion. In the context of appropriate remedies for anti social behaviour by occupiers we consider that further constraints on judicial discretion would be justified.

[49] See paras 12.27 and 12.28 above.

13.71 **We provisionally propose that where there is a breach of the compulsory anti social behaviour term the judge would be required to exercise his or her discretion to order possession unless certain circumstances obtain. Those circumstances would be very limited, for instance that the breach was trivial or that circumstances had changed such that it was highly unlikely that the behaviour would be repeated (for instance where the person who was responsible for it had left the household).**

13.72 This would be broadly in line with the current case law. In *Woking BC v Bistram*[50] the Court of Appeal explained that, in exercising their discretion in granting possession for anti social behaviour, judges must give proper weight to the local council's obligations to other occupiers on the estate. Further, in *City of Bristol v Mousah,*[51] the Court of Appeal held that where there are serious breaches of the terms of a tenancy, it is only in exceptional cases that it is not reasonable to make an order for possession.

13.73 As was seen in paragraph 10.14 above, we are also provisionally proposing that the notice period required for possession proceedings based on the term prohibiting anti social behaviour should be shorter than in other cases.

New remedies

13.74 In addition, we consider that there are other remedies which would assist in dealing with serious anti social behaviour. If, in other (non-possession) proceedings, an appropriate court has found that the occupier is in breach of the anti social behaviour term in the agreement, then certain *housing* remedies should also be available. The proceedings we have in mind are those relating to breach of an injunction restraining breach of the nuisance term, and breach of a relevant anti social behaviour order. We consider each in turn.

NEW REMEDIES FOR BREACH OF AN INJUNCTION

13.75 If the county court finds that an occupier has breached the terms of an injunction restraining him or her from breaching the term of the agreement prohibiting anti social behaviour, then the factual basis for terminating the agreement exists. That the facts have been proved in injunction proceedings rather than in possession proceedings should not prevent the court from ordering eviction (subject to reasonableness). However, it may be that, even though the landlord might be entitled (subject to reasonableness) to have the occupier evicted in such circumstances, other options would still be useful. The first objective when dealing with anti social occupiers is to change their behaviour so that they cease to be a nuisance to their neighbours, and injunctions appear to be effective in changing behaviour. This could be taken a stage further, and remedies short of eviction

[50] (1993) 27 HLR 1.

[51] [1997] EWCA Civ 1081; (1998) 30 HLR 32. Other cases make the same point, cf: *Darlington BC v Sterling* [1996] EWCA Civ 808, (1997) 29 HLR 309; *Kensington and Chelsea RLBC v Simmonds* (1997) 29 HLR 507; *Northampton BC v Lovatt* [1997] EWCA Civ 821, (1998) 30 HLR 875; *Camden LBC v Gilsennan* (1999) 31 H L R 81; *West Kent Housing Association v Davies* [1999] EWCA Civ 1087, (1999) 31 HLR 415; *Newcastle CC v Morrison* (2000) 32 HLR 891; *Watford BC v Simpson* (2000) 32 HLR 901; *Canterbury CC v Lowe* (2001) 33 HLR 583.

provided as an alternative even where, on a breach of an injunction, the facts of breach are proved.

13.76 **We provisionally propose that where the county court finds that an occupier has breached an injunction restraining breach of the term of the agreement prohibiting anti social behaviour, the court should have the power, on the application of the local authority or registered social landlord, to order that the occupier be**

(1) **demoted to a type II (probationary) agreement, to which the summary eviction procedure could then apply;**

(2) **relocated elsewhere; and either demoted as in (1) above or offered supported housing; or**

(3) **immediately evicted, if it is reasonable to do so.**

Demotion

13.77 Demotion to a type II (probationary) agreement should not be allowed to continue indefinitely. If the anti social behaviour continues, the landlord will use the summary eviction procedure. If the behaviour improved, the landlord could promote the occupier at any time (thus providing an incentive for good behaviour that could be integrated into a more general approach to the occupier and his or her problems).

13.78 After a certain period, the occupier should have the right to apply to the court to be promoted back to a type I agreement. If the landlord took no action at all, then there should, after an appropriate period, be an automatic promotion back to a type I, but that should be subject to a further application by the local authority to extend the type II probationary period, to deal with the situation where the behaviour has abated, but then deteriorated again towards the end of the period.

13.79 **We provisionally propose that, where an occupier is demoted under one of the orders referred to in paragraph 13.76(1) or (2) above, the occupier would be promoted back to a type I agreement if:**

(1) **the landlord chooses to do so;**

(2) **the court so orders, on the application of the occupier after a certain time has elapsed; or**

(3) **a certain period of time elapses.**

13.80 **We invite views on the appropriate periods in paragraphs (2) and (3) above, but provisionally suggest six months for the former and two years for the latter.**

Relocation

13.81 The relocation order we propose would be appropriate where the physical removal of the occupier (and/or his or her household) from the immediate locality was expected by the landlord to stop the anti social behaviour. The order would

operate in a similar way to a mandatory ground to evict where alternative accommodation is available.

13.82 The social landlord would not be restricted to letting within the local area, but the social landlord must continue to be the occupier's landlord (so if, for instance, the occupier is accommodated in the private sector, the social landlord would rent the premises from the private landlord, and then sub-let them to the occupier).

13.83 **We provisionally propose that, where an occupier is relocated under the order referred to in paragraph 13.76(2), the alternative accommodation should be suitable as defined in sections 206 and 210 of the Housing Act 1996, that is the landlord must have regard to the law governing unfitness, overcrowding and houses in multiple occupation, and the accommodation should also be affordable by the occupier and not put the occupier at risk of physical violence or racial harassment. The landlord should not be restricted as to its location**.

ANTI SOCIAL BEHAVIOUR ORDERS

13.84 Local authorities have the power to obtain anti social behaviour orders against a wide range of people for a wide range of behaviour, and the power is now being extended to registered social landlords.[52] Originally, anti social behaviour orders could only be obtained from the magistrates' court, and breach proceedings similarly were confined to that court. With the amendments currently being made in the Police Reform Bill, county courts will be able to make orders, but only where the person against whom the order is made is a party to proceedings before it. Only local authorities, registered social landlords and the police can seek the order, but if they are not already a party to the proceedings before the court, they can be joined for the purpose of applying for the order. Breaches are still to be enforced in the criminal courts.

13.85 We do not consider that it is appropriate that breaches of all anti social behaviour orders should impact upon the security of tenure of social occupiers subject to the order. However, where the anti social behaviour order is related to the occupation of housing let on a type I agreement, then we consider that breach of the order should trigger the remedies outlined in paragraph 13.76. A problem with this is that it is not appropriate for magistrates to make the housing decisions required by our remedies. In particular, we make provision for consideration of the reasonableness of eviction, a matter which should not in our view be decided by magistrates.

13.86 The answer to this difficulty lies in allowing breach proceedings to be taken in the county court, where the order is housing-related, and the local authority or registered social landlord seeks to use the new remedies. Criminal sanctions arising from breach of the anti social behaviour order would continue to be available only from the magistrates' court.

13.87 This would require that the court making the order in the first place, whether the magistrates' court or the county court under the new amendments, certified that

[52] See note 21 above.

the behaviour warranting the making of the order is, or includes, behaviour that would constitute serious housing-related anti social behaviour. Once an anti social behaviour order had been identified as a "housing" order in this way, we propose that a local authority or registered social landlord should have the choice between the magistrates' court and the county court for taking proceedings for breach of the order.

13.88 **We provisionally propose that where the anti social behaviour orders can be certified as including a finding that the conduct of the occupier included behaviour within our concept of serious housing-related anti social behaviour[53] then a local authority or registered social landlord would be able to choose to take breach proceedings in the county court, which would be able make an order to transfer, demote or (subject to reasonableness) evict the occupier, once breach is established. The court would then be empowered to commit the occupier to the magistrates' court or the Crown Court for sentence for breach of the order.**

13.89 An alternative approach would be to allow county courts to make anti social behaviour orders generally, rather than merely in the context of other proceedings. Anti social behaviour orders are a mixture of civil and criminal proceedings. The fact that they were available from and enforced in the magistrates' court emphasises the importance of the criminal element in their make-up. The balance between criminal and civil elements, however, would be changed by our proposed new remedies, which are civil in nature. The Government has made it clear that there is already some role for county courts, by extending the jurisdiction to grant orders to them where there are other proceedings. It would, therefore, we consider, be desirable and appropriate to extend the jurisdiction to make the orders generally to county courts. One further advantage of this would that any potential problems with the certification process in the magistrates' court would be removed.

13.90 **As an alternative to the provisional proposal above, we provisionally propose that the county court should be given jurisdiction to make housing related anti social behaviour orders.**

[53] See paras 13.39 and 13.40 above.

PART XIV
MAPPING EXISTING AGREEMENTS ONTO THE NEW SCHEME

14.1 In Part III above, we indicated that it was our intention, so far as possible, to devise proposals that would enable the existing statutory tenure schemes to be incorporated within our new scheme, rather than simply create another layer of complexity. In this Part, we outline how we see the old schemes mapping onto the new. For the secure, assured and assured shorthold schemes, this process is relatively straightforward, and largely implicit in how we have developed our scheme. Rent Act protected tenancies, however, present a greater problem. Our approach in this part is to consider what adaptations or additions would be necessary to our scheme to accommodate these tenancies, and then ask whether the advantages of incorporating Rent Act protected tenancies outweigh the disadvantages of making special provision for them.

14.2 Our primary concern in this Part is with which new agreements should the old tenancies be converted into, not with the true transitional questions of how the conversion will be brought about, although we do make observations on the latter.

SECURE TENANCIES AND FULLY ASSURED TENANCIES LET BY REGISTERED SOCIAL LANDLORDS

14.3 The way in which existing secure tenancies and fully assured tenancies let by registered social landlords should be dealt with is effected by the approach to be taken to new lettings by local authorities or registered social landlords. In Part XI above, we provisionally proposed two alternatives and asked for views on which was to be preferred.

Compulsory general use of type I agreements

14.4 One option was to require all local authorities and registered social landlords to let type I agreements, subject to a list of statutory exceptions. If that alternative is adopted, then the logical approach to existing tenancies in this category is to simply convert them into type I agreements. In terms of the level of security enjoyed by occupiers, this would make little or no difference to secure tenants. As for fully assured tenants, if we are right to identify the mandatory ground for rent arrears (ground 8) as the key difference between secure tenancies and fully assured tenancies, then there would again be no very significant change in the level of security for fully assured tenants where

(1) the tenancy is subject to an agreement that the landlord will not use ground 8, usually as a result of a large scale voluntary transfer of housing stock from a local authority to a registered social landlord; or

(2) the landlord, voluntarily but as a matter of general policy, does not use ground 8.

14.5 **We would be grateful for information particularly from registered social landlords about the proportion of fully assured tenancies to which ground 8 *in reality* applies, because its use is not pre-empted by either an agreement or a policy not to use it.**

14.6 There would, on the other hand, be an increase in the level of security involved for other occupiers who hold fully assured tenancies. However, ex hypothesi, all *new* occupiers in this category would (subject to the exceptions) be given a type I agreement. The justification for this would, presumably, similarly apply to the conversion of existing tenancies.

14.7 In addition, adoption of this option would most completely satisfy the demand for "a single social tenancy".[1] It would abolish the perceived unfairness felt by many tenants, where tenants of local authorities and tenants of housing associations, often in the same street or estate, have different tenancies with different levels of security.

14.8 On the other hand, we recognise that it may be argued in some circumstances (although not generally large scale voluntary transfers) that private lenders have built the use of ground 8 into their assumptions in lending capital to housing associations. If that were the case, then there would be a degree of unfairness to the lenders to set off against the perceived unfairness to occupiers. For this argument to be powerful, however, it would have to be shown, in relation to the properties in question, first that the income flow from rents as opposed to the asset value of the pledged assets was of real significance to the lender, and secondly, that ground 8 really did make a significant difference to the income flow.

14.9 **We provisionally propose that, if the option to require local authorities and registered social landlords generally to use type I agreements is adopted, then existing local authority secure tenancies and registered social landlord fully assured tenancies should be converted into type I agreements.**

Freedom to choose type I or type II agreements

14.10 A second option in relation to use by local authorities and registered social landlords was that they should be free to use either type I or type II agreements at will. If this alternative is preferred, then we think that a similar choice, but protecting the existing level of occupiers' rights, should be accommodated in the transfer to the new system.

14.11 The obvious comparator for local authority secure tenants would remain the type I agreement. It is only by converting existing secure tenancies into type I agreements that the rights of existing tenants could be retained.

14.12 On the other hand, it would be possible to protect the rights of registered social landlord assured tenants with an enhanced version of a type II agreement. If the notice-only basis for repossession were contractually removed from the type II agreement, it would be similar in the level of security afforded to tenants in the current fully assured tenancy. Registered social landlords could then choose whether or not to grant further rights to their existing, as well as their future, occupiers, by granting an enhanced type II agreement or a type I agreement.

[1] See paras 1.2 and 11.10 above.

14.13 This option has the disadvantage that it does not address the perceived unfairness of similar occupiers of similar, publicly-funded properties enjoying different levels of security, but that is inherent in the free-choice alternative.

14.14 **We provisionally propose that, if the option to allow local authorities and registered social landlords a free choice between type I and type II agreements is adopted,**

(1) **existing local authority tenancies should become type I agreements; and**

(2) **registered social landlords should be required to choose whether to give their occupiers, as a minimum, an enhanced type II agreement which does not contain provision for the landlord to gain possession on a notice-only basis, or a type I agreement.**

OTHER LOCAL AUTHORITY AND REGISTERED SOCIAL LANDLORD TENANTS

14.15 Some tenants (and licensees) of local authorities and registered social landlords are not at present governed by any of the schemes. According to our proposals in Part IX, some would become type II agreements and others would remain outside any statutory scheme.

14.16 **We provisionally propose that tenancies and licences granted by local authorities and registered social landlords which are not presently covered by one of the statutory schemes (excluding the Protection from Eviction Act 1977) should be converted into type II tenancies, or remain outside the scheme, according to their treatment in Part IX above.**

PRIVATE FULLY ASSURED TENANCIES

14.17 There are a number of private fully assured tenancies. Many were created by accident between 1989 and 1997, when this was the "default" private tenancy, as a result of failed attempts to create assured shorthold tenancies, although we would assume that the bulk of these have now come to an end. Within this category we would also place private charitable or other non-registered social landlords, retaining the distinction we have used elsewhere. The enhanced type II agreement discussed above in paragraph 14.12 would preserve the balance of rights between landlord and tenant.

14.18 **We provisionally propose that fully assured tenancies, other than those granted by registered social landlords, should convert into enhanced type II agreements, which do not contain provision for the landlord to gain possession on the notice-only ground.**

ASSURED SHORTHOLD TENANCIES

14.19 As a general rule, clearly current assured shorthold tenancies can readily convert into type II agreements. We suspect that most assured shortholds confer the minimum possible rights on tenants, and so can easily be replaced by the basic type II agreement. The possible abolition of the six months' moratorium would not of itself seem a sufficient reason not to convert existing assured shorthold tenancies into type II agreements.

14.20 However, there will also clearly be cases in which the terms go beyond the statutory minimum, for example because they are for a fixed term of 12 months. We see no reason why, in each individual case, the same contractual enhancements could not be replicated in the replacement type II agreement. We expect that the large majority of divergences from the minimum would be fixed term tenancies. These can readily be converted into type II agreements of a similar term.[2]

14.21 **We provisionally propose that assured shorthold tenancies should convert into type II agreements, the specific terms of the old tenancy becoming terms of the new agreement.**

SAFEGUARDING THE TERMS OF THE OLD TENANCY

14.22 There must be some concern that the conversion of old tenancies into new ones might be improperly used by landlords (the party responsible for the written agreement) to take away rights granted in the old tenancy or impose new obligations on tenants. In large part, the steps that would need to be taken to avoid this relate to both the legal and the non-legal aspects of the transition to the new schemes, rather than the mapping exercise under consideration here. However, it might contribute to clarity in the conversion process if the terms of the old tenancy could, where possible, be seen next to the new.

14.23 **We ask for views on whether there should be an addition to the general requirement for writing in relation to converted tenancies, such that the written agreement should have appended to it the written agreement constituting the old tenancy, if there was one.**

14.24 **In the alternative, we ask for view on whether the obligation should be for the landlord to provide the core and compulsory terms under the new scheme, together with a copy of the old agreement, with a statutory provision that the terms of the old agreement should apply to all matters not covered by the core and compulsory terms.**

14.25 **In either case, should the sanctions for failure by the landlord to provide a copy to the tenant apply in relation to the old agreement?**

RENT ACT PROTECTED TENANCIES

14.26 The principal element relating to Rent Act protected status is the fair rents system. This would have to be retained, relating only to those tenants who were in this category, as part of a separate legislative structure (in the same way as we propose, for instance, in the case of the right to buy). Consideration of succession rights will be found in our subsequent consultation paper on succession and transmission of agreements.

[2] The effect would be, not that a wholly new period starts to run, but that the end date of the new type II agreement would be the same as it would have been had the full term of the assured shorthold tenancy has been allowed to run.

14.27 The questions that then arise are whether the "cases" for possession in the Rent Act 1977 are sufficiently close to the circumstances allowing for possession we are proposing for the type I agreement. There are two questions.

(1) Would any cases available in Rent Act 1977 be unavailable in our new regime?

(2) Would any of the circumstances permitting possession available in our new regime represent a significant weakening of the rights of Rent Act 1977 tenants because they were not present as cases in that Act?

We consider these questions in turn.

Do the circumstances permitting possession under the type I agreement cover all the Rent Act cases?[3]

14.28 Cases 1, 3 and 4 appear to present no problems as they are practically identical to the grounds being absorbed into our breach of agreement ground.

14.29 Case 2 provides a narrowly defined anti social behaviour ground (it was not modified by the Housing Act 1996 when changes were made to the anti social grounds found in the Housing Acts 1985 and 1988). It is likely to be narrower than a default nuisance term. This would not be a problem where the regulated tenancy included an express term on anti social behaviour, as it would be covered by our term relating to breach of agreement which would be the basis for seeking possession. There might, at least in theory, be a problem where the regulated tenancy did not include an express anti social behaviour term. It appears to us unlikely that a tenant who has not been evicted for anti social behaviour since 1989 (the point from which new tenancies were assured instead of regulated) is going to start being a problem now. If this were to happen it would to some extent be the problem of the landlord who had failed to include such a term in the agreement (although we acknowledge the possibility that such an omission might have been deliberate, in that the landlord was relying on the availability of Case 2 to cater for the absence of such a term. We again think this is more theoretical than likely.) In the circumstances, it seems reasonable to conclude that case 2 can be accommodated as a breach of the compulsory term in a type I agreement prohibiting anti social behaviour.

14.30 Case 5, for tenant's notice to quit, would be covered by our proposals on occupiers' notices in Part X. Depending on consultees responses on those points, this might mean landlords might lose out on their ability to repossess in these circumstances. We would not see this as a real problem. Indeed, since the passing of the Housing Act 1988 the concern has been to protect regulated tenants from being edged out to be replaced by new tenants under market rents. If a landlord wanted to be sure that a tenant would leave, he or she could accept a surrender of the lease instead of a occupier's notice to quit.

[3] The cases are listed in para 3.46 above.

14.31 Case 6 is about unauthorised assignment and sub-letting. Consideration of this specific issue will be found in our subsequent consultation paper on succession and transmission of agreements.

14.32 Case 7 has been repealed.[4]

14.33 Case 10 is about tenants over-charging sub-tenants. We are working on the basis that the fair rent system will be reproduced in separate legislation. However, we are not convinced that this ground will need to be reproduced as such in our new scheme. If there is an express prohibition on over-charging in the agreement or in any permission to sub-let, then the problem can be dealt with as a breach of agreement. If not then we are not sure that the problem is such that it requires any special treatment. The effect of sub-letting is something we will return to in our later consultation paper on succession and transmission of agreements.

14.34 Cases 8, 9, 11 to 18 and 20 are all examples of the type of ground we feel should normally be replaced by expecting a landlord to grant a type II agreement instead of a type I agreement. This is obviously a problem in this transitional situation where the landlord already has a regulated tenant. However, cases 13 and 14 are effectively now redundant as they refer to fixed terms of 8 and 12 months (or less) respectively, and so cannot have survived since 1989. It seems similarly increasingly unreasonable to allow possession on the other cases given at least thirteen years must have already elapsed since any notice was given under cases 11 to 18 and 20, and given that even in cases 8 and 9 there is a strong argument that the ground for possession (only ever a discretionary ground) is now very stale.

14.35 Finally case 19 is the protected shorthold tenancy ground. We are inclined to assume that this cannot be worth special provision as we cannot imagine that any have survived since 1989, given they only have equivalent security to an assured shorthold tenancy. If there is evidence that there are any left, then it would make sense to leave consideration of them until detailed transitional provisions are worked out. However, it would seem logical that they should be converted to type II agreements instead of type I agreement. In any event, it does not seem at this stage as if it would be appropriate to try to reproduce case 19 in the type I agreement.

14.36 **We ask for information as to the continued existence of protected shorthold tenancies.**

14.37 Accordingly, we consider that in effect all of the cases in the Rent Act are covered by the circumstances allowing for re-possession in a type I agreement.

Would the circumstances permitting possession under the type I agreement represent a weakening of the rights of Rent Act protected tenants?

14.38 In two respects, the grounds for possession under the type I agreement might be said to go beyond cases available to landlords under the Rent Act. First, the domestic violence ground was never introduced into the Rent Act 1977 when it

[4] Housing Act 1980, s 152 and Sched 26.

was created by the Housing Act 1996. The reason for this was that it only applied to registered social landlords. Second, the ground on giving false statements to obtain a tenancy was never part of the Rent Act scheme. However we suggest that this appears somewhat stale in relation to surviving regulated tenants.

14.39 If Rent Act protected tenants were to become type I occupiers, it could be argued that the bases for repossession involving domestic violence or false statements to obtain the tenancy should be disapplied in relation to them. But we think that these grounds are of such marginal significance that in reality tenants would suffer no practical disadvantage even if such special provision were not made.

Conclusion

14.40 The result of the discussion above would seem to be as follows. It is possible to convert Rent Act protected tenancies into type I agreements, so long as the fair rent regime is preserved in a separate legislative structure, applying only to former Rent Act protected tenants. Specific provision that they could not be evicted on the basis that they had been responsible for domestic violence or that they had made a false statement to obtain the tenancy would not seem to be required.

14.41 It could be argued that making any special provision suggests that we are not really converting the tenancies at all, merely clothing Rent Act tenancies in the linguistic cloak of type I agreements. It could also be suggested that many of those whose residential status is still defined by the Rent Acts are reaching a stage in their lives where they may be worried by or resistant to change.

14.42 On the other hand, we do think that our proposed scheme will bring considerable advantage to both occupiers and landlords, by making the terms on which they occupy their dwellings clear. Converting the Rent Act protected tenancies into type I agreements under the new scheme will allow tenants to obtain all the benefits of the scheme.

14.43 **We provisionally propose that, subject to the preservation of the fair rent system, it would be desirable to convert Rent Act protected tenancies into type I agreements.**

THE TRANSITION TO THE NEW SCHEME

14.44 We do not consider it appropriate at this point to try to set out a detailed scheme of transitional arrangements for the introduction of our new system and the conversion of old tenancies to new agreements. However, we offer the following observations, to indicate the underlying approach that we suggest should be taken to the process.

14.45 First, we suggest that, even though it will be a difficult and to a degree an expensive task, it would be better if the new system were to be introduced as a "big bang" single event or process, rather than implementation taking a considerable period. The sooner that the simplicity and logic of the new system starts to pay dividends to landlords, occupiers and the courts, the better.

14.46 Secondly, the conversion of all or most existing tenancies to new agreements will be an enormous undertaking, requiring individual action by all of those concerned with renting, from large social landlords to small private landlords to occupiers of all descriptions. We doubt whether it can successfully be accomplished without the

commitment of significant effort and resources to a public information and advice campaign.

14.47 Finally, it will be important to make the process of conversion as automatic and as transparent as possible. Many landlords will no doubt wish to use the conversion process as an opportunity to revisit the terms on which they let. That may be a perfectly reasonable response, but we consider that the process of conversion should be kept as neutral as possible, and not become enmeshed in a separate process of variation. Depending on the terms of the agreement, it will of course be possible for landlords to seek occupiers' agreement to variations in any event. If they do so in order to adopt our model agreement or the default terms for part C of their agreements, that would be a desirable development. But it must be done in such a way that occupiers are clear where they have the right not to agree the variation, and are appropriately advised. In part, we would expect to see this as an element of the information and advice campaign mentioned above. But it would also suggest that a variation at the same time as conversion should carry statutory information and warnings for occupiers.

14.48 **We provisionally propose that the scheme be introduced as a single exercise, rather than through a staged programme of change.**

PART XV
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 1.98)

PART V: THE IMPACT OF HUMAN RIGHTS LAW

Human rights and housing law: some conclusions

2. We invite views on whether it should be made clear by statute that registered social landlords should be deemed to be public authorities for the purposes of the Human Rights Act 1998, in relation to their not-for-profit housing activities. (Paragraph 5.77)

PART VI: THE CONSUMER APPROACH: FOCUSSING ON THE AGREEMENT

The need for a contract

3. We provisionally propose that the agreement between the landlord and the occupier should be the place where their respective rights and obligations are definitively set out. (Paragraph 6.6)

4. We provisionally propose that our scheme should, subject to the discussion in Part IX, apply to any contract for rent which confers a right to occupy premises as a home. (Paragraph 6.8)

The application of the law on unfair contract terms to housing agreements

5. We provisionally propose that all those who enter into contractual agreements within the scope of our proposed scheme should be deemed to be suppliers and consumers within the scope of the Regulations, and thus the requirements of fairness and transparency should apply to all agreements covered by our new scheme. (Paragraph 6.45)

6. We provisionally propose that, in relation to agreements covered by our scheme, the requirements of fairness and transparency should not be limited to non-negotiated terms, and should cover negotiated terms as well. (Paragraph 6.50)

7. We provisionally propose that the definition of core terms should be left to consumer legislation rather than being included in a Housing Act. (Paragraph 6.53)

8. We invite views on whether a special jurisdiction should be created, for example in the rent assessment committee, or the county court, to amend written agreements that do not accurately reflect previous oral agreements. (Paragraph 6.55)

The need for a written agreement

9. We provisionally propose that a housing agreement which is made orally or which otherwise fails to comply with statutory requirements as to formality or registration of leases shall nevertheless be treated as a valid agreement between the landlord and the occupier and shall be subject to the regulation of our new scheme. (Paragraph 6.66)

10. We invite views on whether an oral agreement should become effective as soon as the oral agreement was made; or only after there has been written acknowledgement of the agreement in a letter; or by completion of the written agreement prior to the occupier going into occupation; or, assuming that a written agreement has not been provided, only after the occupier has entered into possession. (Paragraph 6.70)

11. We provisionally propose that all agreements covered by our new scheme should be put into a written form. (Paragraph 6.74)

12. We further provisionally propose that the duty to put the agreement into writing should fall on the landlord; that the landlord should be required to provide a copy for the occupier; and that in any court proceedings that might arise under the agreement, the landlord should be required to produce a copy of the written agreement. (Paragraph 6.75)

13. We provisionally propose that the rules relating to the core terms in Part A of the agreement should include specific requirements for providing occupiers with information about the landlord's identity (and those of any agents) and a place of business as an address for service. (Paragraph 6.82)

14. We provisionally propose there should be a new evidential rule, to be used in any claims for arrears, that – in the absence of a system for recording rent payments – there will be a statutory presumption that the rent has been paid. The presumption would be rebuttable. (Paragraph 6.85)

15. We provisionally propose that the current rules on rent books should be replaced by a compulsory term in the agreement that, in the absence of the occupier having a record of payments made, the landlord should provide a system of payment which is documented, whether in a paper rent book or computer equivalent, and in such a way that the occupier can verify entries. (Paragraph 6.88)

The terms of the agreement

16. We provisionally propose that the structure of the contract should be prescribed by Act of Parliament. The details of the contents of each part of the contract should be set out in delegated legislation. (Paragraph 6.90)

17. We provisionally propose that the statutory instrument setting out the terms would also set the requirements as to the format and presentation of the written agreements. (Paragraph 6.94)

18. We also provisionally propose that the regulations are drafted in such a way that the terms of the agreement set out in the regulations can be translated, verbatim, into the model agreement. (Paragraph 6.95)

19. We provisionally propose that the Secretary of State should be obliged to consult relevant interests in the housing industry to ensure that the model agreement terms are fair and clear and that, so far as possible and practicable, terms should be drafted in plain English. (Paragraph 6.97)

20. We invite consultees' views on whether it would be appropriate to require landlords to provide occupiers with summaries of their agreements. (Paragraph 6.100)

21. We provisionally propose that the core terms should be included in the written agreement. (Paragraph 6.102)

22. We invite views on whether other terms, for example the amount of any deposit, should be included as a core term. (Paragraph 6.103)

23. We provisionally propose that terms relating to security and other legally implied terms should be compulsory terms, which will need to be included in the agreement as fully written out terms, and not be subject to amendment. (Paragraph 6.110)

24. We provisionally propose that

    (1) the regulations should prescribe a list of items relating to the parties' rights and obligations under the agreement which must be covered by a term in the agreement and which will be set out in Part C of the agreement;

    (2) that in relation to each item there will be a default term which takes effect in default of an express term but can be overridden by an express term;

    (3) that the agreement should set out the terms in full, not just by reference to the regulations; and

    (4) that the default terms will be applied either where the landlord has failed to provide a written agreement, or where the agreement fails to address all the prescribed matters. (Paragraph 6.117)

25. We invite views on the issues which should properly be prescribed in Part C of the agreement. (Paragraph 6.118)

26. We provisionally propose that legislation should make clear that the appropriate default term will apply where an express written term has been ruled unfair under the Unfair Terms in Consumer Contracts Regulations 1999. (Paragraph 6.121)

Sanctions

27. We provisionally propose that where a landlord fails to provide a written agreement within (say) the first two weeks of the occupier taking possession, the landlord

should be deemed to owe the occupier an amount equivalent to one day's rent for each day's delay, starting with the date of entry into possession. There would be specific provision for the occupier to be able to withhold rent as one way of recovering this amount. The amount due would be calculated by the number of days starting on the date on which the occupier entered into possession of the dwelling under the terms of the agreement (not from two weeks later) and ending on the date the written agreement was provided, subject to an upper limit of the equivalent of (say)two months' (or such other period as may be agreed) rent. (Paragraph 6.126)

28. We seek consultees' views as to whether an ongoing sanction is required for cases where landlords still fail to provide a written agreement, 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 a written agreement by the end of the first two months of the agreement? (Paragraph 6.128)

29. We provisionally propose that the rent sanction should also apply wherever a written agreement is provided but which omits any of the issues prescribed in Part B and Part C of the agreement, but that this should not apply where all such terms are included in a written agreement but one or more term is found to be invalid. (Paragraph 6.133)

30. We also provisionally propose that the written agreement should set out all the terms in full. A mere reference to the statutory provisions containing the relevant terms would not be enough to meet the writing requirement. (Paragraph 6.134)

31. If there is to be a criminal sanction, we invite consultees' views as to whether it should be limited to cases of complete failure to provide a written agreement, rather than including cases where an agreement is provided but is incomplete. (Paragraph 6.135)

32. We provisionally propose that provision of information about the landlord should be treated as one of the matters on which written information must be provided, so any failure will attract the rent sanction we provisionally propose. (Paragraph 6.137)

33. We invite views as to whether the threat of potential criminal proceedings in such circumstances might constitute a useful spur to compliance. (Paragraph 6.139)

Variation of agreements

34. We provisionally propose that the list of matters prescribed for the default terms in Part C of the agreement should make provision for a clause allowing rent to be reviewable and revisable on an annual basis. (Paragraph 6.148)

35. We invite views as to a whether non-rent variation clause should be included in the list of items prescribed for the default terms in Part C of the agreement or left wholly to negotiation between the parties. (Paragraph 6.155)

36. We provisionally propose that, to be enforceable, any variation to the agreement must be notified in writing by the landlord to the occupier. (Paragraph 6.157)

37. We further provisionally propose that, following notification of a variation, the occupier should be entitled to require the landlord to supply a revised copy of the agreement. (Paragraph 6.158)

Ensuring respect for the contract

38. We seek the view of consultees on the following questions:

    (1) Should the landlord's desire to evict an occupier who has sought to assert his contractual or statutory rights be the basis of a defence to possession proceedings, as is common in the Commonwealth and the USA?

    (2) Should a former occupier be able to use the landlord's "improper motive" as the basis of a claim for damages after the eviction?

    (3) Where the landlord's improper motive could be shown, should the court have power to order reinstatement of the occupier in the premises, notwithstanding the complications that might arise, particularly where premises had been re-let? (Paragraph 6.173)

39. In the alternative, we invite views on whether consultees believe that a better approach would be to rely on promoting good practice. (Paragraph 6.175)

Alternative dispute resolution

40. We invite views on whether encouragement should be given to the appropriate use of alternative dispute resolution in the resolution of disputes about housing matters. (Paragraph 6.184)

41. If the answer is yes, we also invite views on whether alternative dispute resolution processes should be included in the issues to be covered by the default terms and in relation to what types of dispute alternative dispute resolution might be particularly relevant. (Paragraph 6.185)

PART VII: THE TYPE I AGREEMENT: THE SECURITY REGIME

The type I agreement

42. We provisionally propose that there should be created a type I agreement, providing long-term security of tenure. It should be defined adopting the landlord-neutral approach. (Paragraph 7.10)

43. We invites views on the question whether type I agreements should only be able to be created on a periodic basis. (Paragraph 7.16)

Court orders for possession: discretionary or mandatory?

44. We provisionally propose that, subject to the discussion on serious rent arrears and mortgage default, below, there should be no circumstances in which a court should be mandatorily required to make an order for possession in relation to a type I agreement. (Paragraph 7.26)

45. We provisionally propose that it is not appropriate that the court should be required to order possession without the exercise of its discretion, even where there are serious arrears of rent, where a home is provided on the basis of a type I agreement. (Paragraph 7.44)

46. We invite views as to whether lenders have found themselves able to take eviction proceedings themselves on ground 2. (Paragraph 7.49)

47. We also invite views on whether lenders are in practice insisting on registered social landlords using ground 2, whether any money has been lent on that basis and whether it would cause problems if money was in future not lent to registered social landlords because of abolition of a basis for possession akin to ground 2. (Paragraph 7.50)

48. We provisionally propose that it is not appropriate that the court should be required to order possession without the exercise of its discretion where the landlord has defaulted on a mortgage. (Paragraph 7.52)

49. We further suggest that consideration should be given to a scheme to enable lenders to enforce their security on the insolvency of a registered social landlord. (Paragraph 7.53)

Security of tenure: the terms in the agreement

50. We provisionally propose that breach of the agreement by the occupier should be the first of the circumstances in which the landlord may take possession proceedings. (Paragraph 7.66)

51. We seek information on whether this ground is used in practice, whether it is seen as useful and what drawbacks are associated with it. (Paragraph 7.72)

52. We provisionally propose that there should be a provision in the agreement stating that proceedings may be taken against an occupier whose violence has driven his or her spouse or partner from the home. (Paragraph 7.74)

53. We provisionally propose that the agreement should contain a provision which enables landlords to seek repossession where they can prove that the agreement was obtained on the basis of false information. (Paragraph 7.76)

54. We provisionally propose that the agreement should contain a provision which would enable landlords to seek possession on estate management grounds where this would be reasonable. (Paragraph 7.81)

55. We seek views on whether the provision should be a broadly drafted term, modelled on the suitable alternative accommodation ground; or whether it should be more precisely defined, as in the secure tenancy scheme. (Paragraph 7.82)

56. We provisionally propose that the agreement should contain a statement about the powers of the court and the steps the occupier should take when threatened with possession proceedings. (Paragraph 7.86)

The "ghost" grounds of possession

57. We provisionally propose that Part C of the agreement (the default terms) should contain a term prohibiting overcrowding, breach of which would be a basis for the landlord taking proceedings for possession in the normal way. (Paragraph 7.91)

58. We provisionally propose that enforcement of housing orders and undertakings should be undertaken directly by the authorities that made the orders or accepted the undertakings, not by the landlord. (Paragraph 7.92)

59. If consultees are against this provisional proposal, we ask whether the possibility of action being brought against an occupier in any of these circumstances should be stated in the agreement. (Paragraph 7.93)

60. We invite views as to whether these are of enough significance in practice (particularly to the relevant enforcement agencies) to be worth bringing into the type I agreement scheme, along the lines suggested above. (Paragraph 7.95)

PART VIII: THE II AGREEMENT: THE SECURITY REGIME

The type II agreement

61. We provisionally propose that there should be created a type II agreement, modelled on the existing assured shorthold tenancy, which should be able to be created on both a periodic and fixed term basis. (Paragraph 8.8)

The court's powers to order possession

62. We provisionally propose that, in relation to the type II agreement, there should be circumstances in which the court would be mandatorily required to order possession. (Paragraph 8.12)

63. We provisionally propose that, on the assumption that our recommendation for a notice-only basis for seeking possession is agreed (below paragraph 67), a landlord employing it should be able to use an accelerated procedure, not involving a hearing. (Paragraph 8.14)

64. We invite views on the question: should the six months' moratorium on a court granting a possession order, currently a feature of the assured shorthold tenancy, be a feature of the type II agreement? (Paragraph 8.27)

65. We would particularly welcome evidence about the benefit tenants currently derive from the six months' moratorium in the assured shorthold tenancy. (Paragraph 8.28)

Security of tenure: the terms in the agreement

66. We provisionally propose that the circumstances in which a landlord may seek an order for possession of premises subject to a type II agreement should be set out in the terms of the agreement. (Paragraph 8.31)

67. We provisionally propose that the periodic type II agreement should provide that the landlord may seek an order for possession from the court merely on the basis of having issued an appropriate notice to the occupier. (Paragraph 8.34)

68. If the six months' moratorium on granting possession is not to be a feature of the type II agreement, we provisionally propose that the statutory minimum period of notice required for seeking possession on the notice-only basis should be three months, rather than the two months' notice (generally) required in assured shorthold tenancies. (Paragraph 8.37)

69. We invite views on whether the period should be two or three months, if there is to be a six months' moratorium in the type II agreement. (paragraph 8.38)

70. We provisionally propose that the type II agreement should contain a term which provides that, where the occupier has accrued two months arrears of rent at the date of the notice of intention to seek possession and at the date of the court hearing, the landlord is entitled to seek an order for possession which the court is required to make without the exercise of discretion. (Paragraph 8.41)

71. Subject to later consideration of ground 7, we provisionally propose that there should be no other circumstances set out in the type II agreement which should entitle the landlord to seek a mandatory order for possession. (Paragraph 8.46)

72. We provisionally propose that all the circumstances entitling the landlord to seek a discretionary order for possession, available in the type I agreement, should also be available to landlords in the periodic type II agreement. (Paragraph 8.49)

73. We provisionally propose that the terms of a fixed term type II agreement should provide that, during the contractual period, the landlord is entitled to bring proceedings for possession before the end of the fixed term if the circumstances we have classified as occupier default or social policy arise. Such an order for possession would only be made where the court thought it reasonable in the exercise of its discretion. (Paragraph 8.53)

74. For the avoidance of doubt, we provisionally propose that the procedures for seeking possession in these circumstances should be those provided for within the scheme we propose, and that the law and procedures relating to forfeiture of tenancies should not apply. (Paragraph 8.54)

75. We invite views on whether the landlord under a fixed term type II agreement should be entitled to seek a discretionary order for possession in the circumstances falling within the scope of estate management. (Paragraph 8.59)

Break clauses

76. We provisionally propose that terms analogous to break clauses in fixed term commercial leases should be able to be included in fixed term housing agreements. (Paragraph 8.62)

77. We provisionally propose that while a landlord who seeks to take advantage of a break clause must be required to obtain an order for possession from the court, occupiers should not be required to obtain a court order, so long as they have notified the landlord that they intend to take advantage of the break clause. (Paragraph 8.65)

78. We invite views on whether courts should be required to order possession where the landlord seeks an order on the basis of an unconditional or conditional break clause, or whether any order should only be made following the exercise of discretion by the court. (Paragraph 8.67)

Expiry of fixed term tenancies

79. We provisionally propose that, on the expiry of the period of a fixed term agreement, a periodic agreement should automatically come into being, unless the parties have agreed to enter a further fixed term agreement. (Paragraph 8.71)

80. We provisionally propose that where a periodic tenancy has been created by operation of law, the landlord should be under a duty to provide the occupier with a new version of the contract. (Paragraph 8.75)

81. We provisionally propose that if the landlord fails to provide a revised version of the agreement, the occupier shall have the right to require the landlord to provide one. (Paragraph 8.76)

82. We provisionally propose that the sanction of the loss of rent to the landlord should not apply until after the occupier has notified the landlord in writing that he or she requires a revised version of the agreement. The sanction would come into effect 14 days from the date of the service of the notice requesting the copy of the agreement on the landlord. (Paragraph 8.77)

83. We provisionally propose that the terms of the original fixed term agreement should themselves set out the effect of these proposals. (Paragraph 8.78)

PART IX: THE SCOPE OF THE SCHEME

The relationship with other statutory schemes

84. We provisionally propose that our proposed statutory regime should exclude business tenancies, including those tenancies where there is mixed residential and business use where the business use is significant. (Paragraph 9.11)

85. We provisionally propose that licensed premises be excluded from our scheme even when such premises include residential premises. (Paragraph 9.13)

86. We provisionally propose that our proposals should not affect property subject to the Agricultural Tenancies Act 1995 or the Agricultural Holdings Act 1986. (Paragraph 9.15)

87. We provisionally propose that agreements for renting homes that include agricultural or other land not subject to the Agricultural Holdings Act 1986 or the Agricultural Tenancies Act 1995 should come within the statutory scheme we propose. (Paragraph 9.17)

88. We provisionally propose that leases granted for a term certain exceeding 21 years should be excluded from our proposed statutory scheme. (Paragraph 9.20)

Should the lease-licence distinction be retained as a test for determining the scope of the scheme?

89. We provisionally propose that the scope of our statutory scheme should be determined independently of the lease-licence distinction. (Paragraph 9.42)

90. We provisionally propose excluding from the ambit of our proposed statutory scheme all residential provision which has to be registered under the Care Standards Act 2000. (Paragraph 9.47)

91. We provisionally propose excluding hospitals defined under National Health Service Act 1977. (Paragraph 9.49)

92. We provisionally propose excluding military barracks from our proposed scheme of statutory regulation. (Paragraph 9.51)

93. We provisionally propose that, where there are exceptional reasons for so doing, defined categories of agreement may be excluded from the scheme by the Secretary of State by incorporation in list of exclusions in a statutory instrument. (Paragraph 9.53)

94. We provisionally propose that our proposed statutory scheme should explicitly include contracts for renting to those under 18 years of age. (Paragraph 9.57)

Other definitional issues affecting the scope of the scheme

95. We provisionally propose that our scheme apply to contracts which contain a requirement for the payment of "rent". (Paragraph 9.62)

96. We invite views on whether it is necessary to provide a definition of rent. (Paragraph 9.63)

97. We provisionally propose that there should be no lower limit on the amount of rent payable under the contract for it to be included in our proposed statutory scheme. (Paragraph 9.66)

98. We provisionally propose that there should be no upper limit on the amount of rent payable under the contract. (Paragraph 9.68)

99. We provisionally propose that agreements at no rent would fall outside our proposed scheme. (Paragraph 9.70)

100. We provisionally propose that the word "home" be used in preference to the word "dwelling". (Paragraph 9.74)

101. We provisionally recommend that the scheme should cover any agreement that confers a right to occupy premises as a home. (Paragraph 9.78)

102. We provisionally propose that the scheme should not be limited to the occupier's "only or principal" home. (Paragraph 9.82)

103. We provisionally propose that there should be no specific additional requirement that the home be separate from that of others (leaving aside the special case of a resident landlord). (Paragraph 9.89)

104. We provisionally propose that the definition of the agreements covered by our proposed scheme should not include specific reference to occupation by an individual. (Paragraph 9.91)

Statutorily excluded categories of agreement

105. We propose that holiday lets should be excluded both from our proposed statutory scheme and from the Protection from Eviction Act 1977. (Paragraph 9.95)

106. We provisionally propose that agreements granted as a temporary expedient to a person who entered the premises as a trespasser should be excluded both from our proposed statutory scheme and from the Protection from Eviction Act 1977. (Paragraph 9.97)

107. We provisionally propose that the residents of almshouses should not be excluded from our proposed statutory scheme. (Paragraph 9.100)

108. We provisionally propose that all projects providing an appropriate level of supported accommodation to vulnerable groups should be excluded our scheme and from the Protection from Eviction Act 1977. (Paragraph 9.103)

109. We further provisionally propose that the definition of "hostel" in the Protection from Eviction Act 1977 should be modernised to reflect the current practice of providing supported provision with an increasing use of self contained accommodation. (Paragraph 9.104)

110. We invite views on whether the Secretary of State should have the power to maintain a list of projects which he or she considered met the criteria. The inclusion of a project on the list would be definitive of the status of the project as excluded as supported accommodation. (Paragraph 9.106)

111. If there is a moratorium, we provisionally propose that occupiers of resident landlords be excluded from our proposed scheme. (Paragraph 9.110)

112. If there is a moratorium, we provisionally propose that the current exclusion of occupiers who share accommodation with resident landlords from the Protection from Eviction Act 1977 should be maintained. (Paragraph 9.112)

113. If there is a moratorium, we would provisionally propose that those to whom a right of occupation has been granted by a fully mutual housing association should be excluded from our proposed scheme. (Paragraph 9.114)

114. If there is a moratorium, we provisionally propose that agreements by educational institutions to students should be excluded from the scope of our statutory scheme. (Paragraph 9.117)

115. For the avoidance of doubt we provisionally propose that students who rent from educational institutions or local authorities should be included within the provisions of the Protection from Eviction Act 1977. (Paragraph 9.119)

116. If there is a moratorium, we provisionally propose that accommodation provided on a temporary basis for homeless persons be excluded from the scope of our proposed scheme, but continue to be protected by the Protection from Eviction Act 1977. (Paragraph 9.121)

117. If there is a moratorium, we provisionally propose that the agreements for the temporary purposes currently excluded from the secure tenancy regime should be excluded from the scope of our proposed scheme but should be included within the Protection from Eviction Act 1977. (Paragraph 9.124)

118. If there is a moratorium, we provisionally propose that accommodation provided for asylum seekers should fall outside our proposed statutory scheme. (Paragraph 9.126)

119. We invite views on whether asylum seekers should no longer be excluded from the Protection from Eviction Act 1977. (Paragraph 9.128)

120. If there is a moratorium, we provisionally propose that service occupiers who are required to occupy the premises for the better performance of their duties be excluded from the scope of our proposed scheme. (Paragraph 9.130)

121. We provisionally propose that all service occupancies should be protected by the Protection from Eviction Act 1977. (Paragraph 9.132)

122. If there is no moratorium, we provisionally propose that an agreement should be excluded from our scheme and from the Protection from Eviction Act 1977 where the landlord shares accommodation with the occupier and occupies the property as his only or principal home; or a member of the landlord's family shares accommodation with the occupier and occupies the premises as his only or principal home. (Paragraph 9.138)

123. If there is no moratorium, we further provisionally propose that all other agreements made by resident landlords should fall within the scope of our proposed scheme (as type II agreements). (Paragraph 9.139)

124. If there is no moratorium, we provisionally propose that the occupiers of fully mutual housing associations (housing co-operatives) should no longer be excluded from statutory regulation. (Paragraph 9.141)

125. If there is no moratorium, we provisionally propose that lettings by educational institutions or by local authorities to students should come within scope of the type II agreement. (Paragraph 9.145)

126. If there is no moratorium, we provisionally propose that accommodation provided on a temporary basis for those to whom duties are owed under Part VII of the Housing Act 1996 should be provided on the basis of a type II agreement. (Paragraph 9.151)

127. If there is no moratorium, we provisionally propose that lettings for the for the temporary purposes currently excluded from the secure tenancy regime should be made as type II agreements. (Paragraph 9.154)

128. If there is no moratorium, we invite views on whether accommodation provided for asylum seekers should be on the basis of type II agreements. (Paragraph 9.157)

129. If there is no moratorium, we provisionally propose that service occupancies should come within the scope of our scheme as type II agreements. (Paragraph 9.161)

Crown tenancies

130. We provisionally propose that Crown tenancies should no longer be excluded from statutory regulation. (Paragraph 9.166)

PART X: TERMINATING AGREEMENTS

Due process – the notice requirements

131. We provisionally propose that a landlord should be required to obtain a court order for possession against any occupier covered by our proposed scheme. (Paragraph 10.7)

132. We provisionally propose that landlords should be required to issue a notice warning occupiers of their intention to bring possession proceedings and that this should be a compulsory term in the contract. (Paragraph 10.10)

133. We provisionally propose that failure to serve the notice should constitute a defence to possession proceedings. However, there should be power for the courts to ignore non-compliance with the notice requirements where that would just and equitable. (Paragraph 10.11)

134. We provisionally propose that a landlord's notice of intention to take proceedings on the basis of anti social behaviour should be able to be effective immediately. (Paragraph 10.14)

135. We invite views as to whether the notice period where the landlord intends to seek possession on the ground that the occupier has broken the agreement should be two weeks or four weeks. (Paragraph 10.16)

136. We invite views on whether the period of notice in circumstances other than breach of the agreement by the tenant or the notice-only basis for possession for type II agreements should be four weeks or two months. (Paragraph 10.18)

137. We provisionally propose that the periods of notice be defined by statute, and the effect of these rules be incorporated in Part B of the agreement, subject to enhancements in Part C. (Paragraph 10.24)

138. We further provisionally propose that notices should be able to begin and end on any day, and not be required to end on the last day of a period of a agreement. (Paragraph 10.25)

139. We provisionally propose that notices should be able to be served on the occupier at the property rented as the address for service given in part A of the contract. (Paragraph 10.26)

140. We provisionally propose that a limit should be put on the length of time a landlord can allow to elapse after the date given in the notice before issuing proceedings, and suggest that the period should be three months. (Paragraph 10.29)

141. We provisionally propose that a landlord's notice should include the date on which the notice becomes ineffective. (Paragraph 10.30)

142. We invites views on whether the date to be given in landlords' notices should be the date before which proceedings cannot be started – as is currently the more common case; or the date before which a possession order cannot take effect. (Paragraph 10.37)

143. We provisionally propose that notices should contain prescribed information, in plain English, and that the details should be contained in a term in the agreement. A sample notice should appear in a Schedule to the model agreement. (Paragraph 10.44)

144. We invite views whether a copy of the original agreement should be attached to any landlord's notice. (Paragraph 10.45)

145. We invite views as to the contents of notices relating to both type I and type II agreements and whether a single form of notice for both agreement types can be developed. (Paragraph 10.46)

146. We provisionally propose that any failure to comply with notice requirements should not form a defence to proceedings, so that the whole process has to be started again, but rather could become the basis for an adjournment and/or costs application as appropriate. (Paragraph 10.47)

Termination by the occupier

147. We provisionally propose that the length of notice to be given by a occupier should continue to be four weeks and that the default terms should contain a provision relating to the occupier's notice to quit. (Paragraph 10.51)

148. We provisionally propose that the length of notice to be given by an occupier to exercise a break clause should be four weeks' and that the default terms should contain a provision relating to the occupier's notice. (Paragraph 10.55)

149. We further provisionally propose that in the case of both a occupier's notice to quit and a occupier's notice to exercise a break clause, the landlord should have the right to take proceedings against the occupier if he or she has not left the premises by the date stated in the notice. Pending the final departure of the occupier, the agreement should be deemed to continue, subject to the occupier's liability in damages for any losses suffered by the landlord. (Paragraph 10.57)

150. We provisionally propose that the compulsory terms of the contract should refer to the occupier's right to treat the agreement as terminated immediately if the landlord has committed a repudiatory breach of contract. (Paragraph 10.61)

151. We provisionally propose that, in relation to the termination of fixed term agreements covered by our regime, the requirement for a deed for express surrender should be replaced by a requirement for writing. (Paragraph 10.64)

Abandonment

152. We provisionally propose that a procedure modelled on sections 17-19 Housing (Scotland) Act 2001 should be created, allowing a clear simple procedure for repossession in abandonment cases with a procedure for the occupier to apply to court to put right any mistakes. (Paragraph 10.69)

PART XI: USING THE NEW AGREEMENTS

Social landlords

153. We provisionally reject two of the four options available: option 2, to require local authorities generally to use the type I agreement, subject to specified exceptions, but to give other social landlords a free choice between using type I or type II agreements; and option 4, to require all social landlords, including purely private charities, generally to use type I agreements, subject to the specified exceptions. (Paragraph 11.13)

154. We invite views as to which of the following two options would be preferred:

(1) allowing all social landlords, including local authorities, free choice between using the type I or the type II agreement (option (1)); or

(2) imposing a statutory requirement on all local authorities and registered social landlords to use type I agreements, subject to a range of exceptions (option (3)). (Paragraph 11.14)

Exceptions

155. We provisionally propose that a general probationary agreement be available to local authorities and registered social landlords. (Paragraph 11.26)

156. If local authorities and registered social landlords are required to use type I agreements, subject to specific exceptions allowing them to use type II agreements (option (3)), *or* if there is general freedom of choice (option 1), but the six months' moratorium is retained, we provisionally propose that

(1) local authorities and registered social landlords should be able to let to a new occupier on a probationary agreement for *up to* 12 months (in the first instance); and

(2) if there is no six months' moratorium, the type II agreement would be suitable as the general probationary agreement, but that if there is a moratorium, local authorities and registered landlords should be able to use a variant of the type II agreement that did *not* include the moratorium, for the purpose of creating a probationary agreement**.** (Paragraph 11.28)

157. We provisionally propose that, after 12 months on a probationary type II agreement, a landlord could extend the probationary period for a further 6 months, but only if it is of the opinion that the behaviour of the tenant was such as to warrant such an extension. (Paragraph 11.35)

158. We invite views on the periods suggested here. Would an 18 month period for the initial probationary agreement be more appropriate, with a six month extended period? (Paragraph 11.36)

159. We invite views on whether the Housing Corporation should be given powers to approve probationary agreement schemes for use by registered social landlords. (Paragraph 11.39)

160. We provisionally propose that challenges to a landlord's decisions under a probationary agreement scheme should be to the county court, not the Administrative Court. (Paragraph 11.43)

161. We further recommend that the powers of the county court should be framed sufficiently flexibly to allow it to develop whatever level of intensity of review by the landlord is required under human rights law. (Paragraph 11.44)

162. If there is no six months' moratorium, we provisionally proposed that social landlords should be permitted to let on type II agreements:

(1) to service occupiers,

(2) to asylum seekers,

(3) to homeless persons to whom the local authority owes duties under Part VII to the Housing Act 1996, and

(4) in circumstances where the social landlord is letting on a temporary basis as currently set out in paragraphs 3 and 5 to 7 of Schedule 1 of the Housing Act 1985. (Paragraph 11.47)

163. We invite views on the other circumstances in which social landlords should be entitled to use type II agreements. (Paragraph 11.53)

164. We provisionally propose that in the absence of a clear written agreement specifying the agreement type social landlords will be presumed to let on type I agreements. (Paragraph 11.56)

Private landlords

165. We provisionally propose that any restrictions on which types of agreement can be used by private landlords should, at least for the time being, be contained in statutory provisions. (Paragraph 11.61)

166. We provisionally propose that private landlords should able to grant type I agreements if they choose, but should not be required to do so. (Paragraph 11.64)

167. We provisionally propose that agreements granted by private landlords should be type II unless the landlord states that it is to be type I. (Paragraph 11.67)

PART XII: THE POWERS OF THE COURTS

The exercise of discretion

168. We provisionally propose that the court should have an extended discretion, when dealing with applications for possession orders on a discretionary basis. This discretion would allow the court to adjourn proceedings, to stay, suspend or postpone orders on appropriate conditions, and to discharge possession orders when conditions are complied with. (Paragraph 12.10)

169. We provisionally propose that our new regime should include a framework to structure the exercise of discretion in cases based on reasonableness grounds. It should explicitly require the court to consider whether the eviction of the household concerned is proportional to the benefit to be obtained by not doing so. It should explicitly refer to the effects of granting or not granting an order, not only on the occupier and the occupier's household but also on the landlord, the landlord's interests, the landlord's other occupiers, and the general public. Where possession of a fixed term tenancy is for decision, the length of the term remaining should also be considered. (Paragraph 12.27)

170. We invite views on other factors that might be included in the structured discretion. (Paragraph 12.28)

171. We invite views on whether the new structured discretion should apply to the full range of the court's extended discretion on suspension, adjournment and postponement of both orders and warrants or whether enforcement issues should be left to the Lord Chancellor's Department enforcement review process and the developing case-law. (Paragraph 12.32)

Rent arrears and suspended possession orders

172. We invite consultees to comment on the following options and any practical problems they might cause.

(1) Should new housing legislation make the attempt, along the lines suggested by the Woolf Report, to limit the use of suspended possession orders in rent arrears cases?

(2) Should the first stage be limited to a court issuing a warning to the occupier instead of making a final judgement on the arrears owed, with liability for the arrears being left to be determined to the stage where the landlord wants an absolute possession order?

(3) Should suspended possession orders for rent arrears be abolished, forcing parties and the court to focus on eviction? (paragraph 12.41)

Enforcement

173. We invite views on the following questions:

(1) Does the current position, that agreements terminate on breach of a suspended possession order, lead to significant problems in practice? Should the present position be replicated in reform of the law? Our provisional view is that it should not.

(2) Would there be more benefit than harm in a rule that an agreement is ended not by the coming into force of the possession order but by its execution?

(3) Would it instead be preferable to tackle any problems by reducing reliance on suspended possession orders in arrears cases as recommended in the Woolf Report? (Paragraph 12.52)

174. We invite views as to the practicality of requiring a hearing before the issue of a possession warrant after a suspended possession order has been made on rent or other discretionary ground cases. (Paragraph 12.57)

175. Alternatively we invite views whether any related problems would be best tackled by rules on court forms and/or by adopting the Woolf Report recommendations on rent arrears cases. (Paragraph 12.58)

PART XIII: ANTI SOCIAL BEHAVIOUR

Which landlords?

176. We provisionally propose that, so far as possible, local authorities and registered social landlords should have the same powers and duties, as landlords, in respect of anti social behaviour. (Paragraph 13.18)

177. We invite views on whether unregistered housing associations should have similar powers and duties. (Paragraph 13.19)

A general duty to deal with antisocial behaviour

178. We provisionally propose that a general duty should be imposed on local authorities to take action against anti social behaviour. (Paragraph 13.30)

179. We further provisionally propose that a similarly worded duty be placed on registered social landlords, expressed as not to take effect in tort, which the Housing Corporation would be obliged to take into account in the performance of its regulatory functions. (Paragraph 13.31)

180. We invite views on whether, as an alternative to the proposal in the preceding paragraph, the Secretary of State should be empowered to extend the duty on local authorities to registered social landlords, if he considers that they have come to be recognised as exercising functions of a public nature. (Paragraph 13.32)

181. We invite views as to whether there should be a requirement on social landlords to include in their agreements a term specifying that the landlord should take all reasonable steps to ensure that the occupier is able to occupy the home free of anti social behaviour by the occupants of other premises owned by the landlord. (Paragraph 13.34)

182. If consultees support the inclusion of a specific term in the agreement, we invite views on whether or not it should be expressed to be for the benefit of other members of the occupier's household for the purposes of the Contracts (Rights of Third Parties) Act 1999 (subject to a further term not requiring their consent to any agreed rescission or variation). (Paragraph 13.36)

Dealing with serious anti social behaviour

183. We provisionally propose that it would be advantageous if there were a single concept of housing-related anti social behaviour which would apply to new procedures for dealing with the matter. (Paragraph 13.39)

184. We provisionally propose that serious housing-related anti social behaviour should be defined as "behaviour where the occupier or a person residing in or visiting the home has acted in a manner that caused or was likely to cause serious harm, harassment, alarm or distress to others where the behaviour is either linked to the occupation of the home and/or occurs in the locality of the home." (Paragraph 13.40)

185. We provisionally propose that a new summary eviction procedure be created. It would be available to a local authority or registered social landlord believes that an occupier under a type II (probationary) agreement has been responsible for serious housing-related anti social behaviour. The occupier could subsequently challenge the reasonableness of the decision (option A) or the lawfulness of the decision (option B). (Paragraph 13.55)

186. The features of Option A would be as follows.

(1) The landlord would apply to the county court for a formal order for possession, on the ground that the occupier had breached the term of the agreement prohibiting anti social behaviour. The procedure for obtaining the order would be a paper only one, the court being required only to satisfy itself that any relevant notices had been complied with. There would be no procedure for adjournment.

(2) After eviction, the occupier would be entitled to apply to the court to consider the eviction. The court would determine whether the occupier had indeed breached the term prohibiting anti social behaviour, and, if he or she had, would go on to consider whether it was reasonable in all the circumstances to have evicted the occupier.

(3) If the court found that the occupier had not breached the term, or that he or she had done so but that nevertheless the eviction was unreasonable, then the occupier would be entitled to

(a) be re-housed by the landlord in similar accommodation in the same general area, and /or

(b) compensatory damages.

187. The features of Option B would as follows.

(1) There would be a statutory internal review procedure, similar to that for introductory tenancies, requiring notice to be given to the occupier of the decision, with reasons, followed by, at the request of the occupier, a further review by a senior officer which included a right to an oral hearing, representation and examination of witnesses.

(2) On completion of the review process, and on the assumption that the occupier had failed to reverse the landlord's decision, the landlord would obtain a summary possession order from the court.

(3) The occupier would be entitled after eviction to apply to the county court to judicially review the decision to evict, the degree of judicial review being such as was necessary to make the procedure as a whole complaint with Article 6.

(4) The reviewing county court would have the power to quash the order, substitute another order and/or make a declaration in relation to the case, and, at its discretion, order re-housing and/or damages as in option A.

188. We invite views on whether option A or option B is to be preferred. (Paragraph 13.56)

189. We invite views on whether local authorities and registered social landlords should be required to produce to the court a document setting out either what alternative steps have been taken to deal with the anti social behaviour, or, if none have been, why it was appropriate in the particular case to proceed without taking such steps. (Paragraph 13.59)

190. We also invite views as to whether failure by a landlord to provide the document or failure to do so adequately should be a matter that the court is entitled to take into account in coming to its decision, and could in addition be penalised in costs. (Paragraph 13.60)

191. We provisionally propose that the existing power of arrest in Housing Act 1996, section 153 should be replaced with a power for the court to add a power of arrest to any injunction for a social landlord to prevent a breach of a nuisance term

which amounted to serious housing related anti social behaviour. (Paragraph 13.65)

192. We invite views on whether the power of arrest should be available in respect of

(1) only behaviour involving violence or the threat of violence;

(2) behaviour involving violence or the threat of violence, *or* which would result in serious harm to another; or

(3) all breaches amounting to serious housing related anti social behaviour. (Paragraph 13.67)

193. We provisionally propose that where there is a breach of the compulsory anti social behaviour term the judge would be required to exercise his or her discretion to order possession unless certain circumstances obtain. Those circumstances would be very limited, for instance that the breach was trivial or that circumstances had changed such that it was highly unlikely that the behaviour would be repeated (for instance where the person who was responsible for it had left the household). (Paragraph 13.71)

194. We provisionally propose that where the county court finds that an occupier has breached an injunction restraining breach of the term of the agreement prohibiting anti social behaviour, the court should have the power, on the application of the local authority or registered social landlord, to order that the occupier be

(1) demoted to a type II (probationary) agreement, to which the summary eviction procedure could then apply;

(2) relocated elsewhere; and either demoted as in (1) above or offered supported housing; or

(3) immediately evicted, if it is reasonable to do so. (Paragraph 13.76)

195. We provisionally propose that, where an occupier is demoted under one of the orders referred to in paragraph 194(1) or (2) above, the occupier would be promoted back to a type I agreement if:

(1) the landlord chooses to do so;

(2) the court so orders, on the application of the occupier after a certain time has elapsed; or

(3) a certain period of time elapses. (Paragraph 13.79)

196. We invite views on the appropriate periods in paragraphs (2) and (3) above, but provisionally suggest six months for the former and two years for the latter. (Paragraph 13.80)

197. We provisionally propose that, where an occupier is relocated under the order referred to in paragraph 194 (2), the alternative accommodation should be suitable as defined in sections 206 and 210 of the Housing Act 1996, that is the landlord must have regard to the law governing unfitness, overcrowding and houses in multiple occupation, and the accommodation should also be affordable by the

occupier and not put the occupier at risk of physical violence or racial harassment. The landlord should not be restricted as to its location. (Paragraph 13.83)

198. We provisionally propose that where the anti social behaviour orders can be certified as including a finding that the conduct of the occupier included behaviour within our concept of serious housing-related anti social behaviour (paragraph 183 above) then a local authority or registered social landlord would be able to choose to take breach proceedings in the county court, which would be able make an order to transfer, demote or (subject to reasonableness) evict the occupier, once breach is established. The court would then be empowered to commit the occupier to the magistrates' court or the Crown Court for sentence for breach of the order. (Paragraph 13.88)

199. As an alternative to the provisional proposal above, we provisionally propose that the county court should be given jurisdiction to make housing related anti social behaviour orders. (Paragraph 13.90)

PART XIV: MAPPING EXISTING AGREEMENTS ONTO THE NEW REGIME

Secure tenancies and fully assured tenancies let by registered social landlords

200. We would be grateful for information particularly from registered social landlords about the proportion of fully assured tenancies to which ground 8 *in reality* applies, because its use is not pre-empted by either an agreement or a policy not to use it. (Paragraph 14.5)

201. We provisionally propose that, if the option to require local authorities and registered social landlords generally to use type I agreements is adopted, then existing local authority secure tenancies and registered social landlord fully assured tenancies should be converted into type I agreements. (Paragraph 14.9)

202. We provisionally propose that, if the option to allow local authorities and registered social landlords a free choice between type I and type II agreements is adopted,

(1) existing local authority tenancies should become type I agreements; and

(2) registered social landlords should be required to choose whether to give their occupiers, as a minimum, an enhanced type II agreement which does not contain provision for the landlord to gain possession on a notice-only basis, or a type I agreement. (Paragraph 14.14)

Other local authority and registered social landlord tenants

203. We provisionally propose that tenancies and licences granted by local authorities and registered social landlords which are not presently covered by one of the statutory schemes (excluding the Protection from Eviction Act 1977) should be converted into type II tenancies, or remain outside the scheme, according to their treatment in Part IX above. (Paragraph 14.16)

Private fully assured tenancies

204. We provisionally propose that fully assured tenancies, other than those granted by registered social landlords, should convert into enhanced type II agreements,

which do not contain provision for the landlord to gain possession on the notice-only ground. (Paragraph 14.18)

Assured shorthold tenancies

205. We provisionally propose that assured shorthold tenancies should convert into type II agreements, the specific terms of the old tenancy becoming terms of the new agreement. (Paragraph 14.21)

Safeguarding the terms of the old tenancy

206. We ask for views on whether there should be an addition to the general requirement for writing in relation to converted tenancies, such that the written agreement should have appended to it the written agreement constituting the old tenancy, if there was one. (Paragraph 14.23)

207. In the alternative, we ask for view on whether the obligation should be for the landlord to provide the core and compulsory terms under the new scheme, together with a copy of the old agreement, with a statutory provision that the terms of the old agreement should apply to all matters not covered by the core and compulsory terms. (Paragraph 14.24)

208. In either case, should the sanctions for failure by the landlord to provide a copy to the tenant apply in relation to the old agreement? (Paragraph 14.25)

Rent Act protected tenancies

209. We ask for information as to the continued existence of protected shorthold tenancies. (Paragraph 14.36)

210. We provisionally propose that, subject to the preservation of the fair rent system, it would be desirable to convert Rent Act protected tenancies into type I agreements. (Paragraph 14.43)

The transition to the new scheme

211. We provisionally propose that the scheme be introduced as a single exercise, rather than through a staged programme of change. (Paragraph 14.48)