The Law Commission

(LAW COM No 284)

RENTING HOMES

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

Presented to the Parliament of the United Kingdom by the Lord High Chancellor by Command of Her Majesty
November 2003

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

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THE LAW COMMISSION

RENTING HOMES

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THE LAW COMMISSION

Report on a reference to the Law Commission under section 3(1)(e) of the Law Commissions Act 1965

RENTING HOMES

To the Right Honourable the Lord Falconer of Thoroton, Lord High Chancellor of Great Britain

PART I
INTRODUCTORY MATTERS

THE STATUS OF THIS REPORT

1.1 When this project was formally launched at the end of March 2001, it was planned that a Final Report, together with draft Bill, would be published in the summer of 2003.

1.2 This time scale has proved over optimistic because:

(1) there was a far greater response to the two consultation papers than we had anticipated; thus analysis of the responses took much longer than had been initially envisaged;

(2) the scope of the first stage of the project was considerably broadened by the decision to consider not only questions relating to succession to agreements, but also those relating to joint occupation and the transfer of agreements; this added substantially to the complexity of the issues to be determined;

(3) as a consequence, the process of preparing instructions to Parliamentary Counsel, who draft the Bill, has taken longer than anticipated.

1.3 However, given the importance of the project, and the attention it is now attracting both within Government and more broadly in the housing world, the Law Commission has decided to publish the following narrative report. This should assist those whose task it will be to consider the implementation of the scheme to proceed with their thinking and planning, without waiting for the final outcome of the Bill drafting process.

1.4 In essence, this report sets out the Law Commission's recommendations for the reform of housing law, which we are likely to make in the Final Report and Draft Bill. The following points must be carefully noted.

POINTS TO NOTE

1.5 One of the features of the legislative process, not perhaps obvious to those outside it, is that drafting Bills does not involve a simple transformation of policy decisions into legislative form. Ideas that may seem straightforward to policy-makers may be hard, if not impossible, to translate into legislative form. There is a lengthy process of discussion and refinement of ideas that takes place between policy-maker and draftsman, particularly of points of detail.

1.6 Thus, while this report sets out the principal features of the scheme we recommend to Government, it cannot be stated too emphatically that **the contents of this report still remain subject to final decisions particularly on points of legislative detail.**

1.7 When the draft Bill and Explanatory Notes on the Bill have been completed, they will be published, in the normal way, preceded by the Commission's Final Report.

1.8 Secondly, in taking this project forward, the Law Commission has worked closely with Ministers and officials, especially in the Office of the Deputy Prime Minister (ODPM), without compromising the independence that is essential to the work of the Law Commission. Indeed, publication of this report is designed, at least in part, to assist ODPM with their own procedures for developing legislative proposals. It again cannot be overemphasised that **any decision as to whether or not the Bill the Commission finally produces is introduced into Parliament is wholly a matter for Government**. The publication of this Report of our recommendations should not be taken as any indication of a commitment by Government to enact our proposed scheme.

1.9 Thirdly, and conversely, if in the interval between the publication of this Report and the publication of our Final Report and Draft Bill it emerges that thinking within the ODPM is beginning to run on lines different from those adopted by the Commission, the Law Commission will not be tailoring its recommendations just to accommodate the policy of the ODPM. **The recommendations that will appear in our Final Report and Draft Bill will remain those of the Law Commission**.

NOMENCLATURE

1.10 In this report, we have followed the nomenclature of agreement types and parties used in the two consultation papers.[1] Thus the agreement types are "type I" and "type II" and the parties are "occupiers" and "landlords". With the exception of the last, we accept that these terms are inadequate, and they will be replaced in the Bill. However, the exact terms have not been finalised, and therefore we concluded that the simplest solution was to continue with these terms for the time being. "Occupier", in particular, causes difficulties. Generally, it is used to indicate the party contracting with the landlord. Where it might not be clear whether we are referring to that person or to another person who is physically occupying the premises, but is not a party to the contract, we have specified "contractual occupier" for the former and "non-contractual occupant" for the latter.

1.11 In relation to terms of the agreement, we have slightly amended the expression "compulsory term" to "compulsory-minimum term", to emphasise the point that (for the most part) these terms provide a minimum of occupiers' rights, which can be varied so as to give greater rights. The "core terms" of CP 162 become "key terms" and "default/negotiable terms" become "other terms", made up of default

[1] Renting Homes 1: Status and Security (April 2002) Consultation Paper 162 (henceforth "CP 162"); and Renting Homes 2: Co-occupation, Transfer and Succession (September 2002) Consultation Paper 168 (henceforth "CP 168").

terms, substitute terms for default terms, and additional terms. We have also created a new category of "special terms". The reasons for these changes are explained at the appropriate point in the text.[2]

[2] See Part VIII.

PART II
BACKGROUND TO THE PROJECT

INTRODUCTION

2.1 Rented housing remains a very significant part of the housing market in England and Wales. Almost a third of the population rent their homes. Although this pattern of tenure is very different from the situation 100 years ago, when the vast majority of people lived in rented accommodation, there is no indication that the rental sector will continue to decline. Indeed, there is some evidence that it has started to increase in size. Whether or not this happens, it is essential that there is a comprehensible and practical regulatory framework which both landlords and occupiers of rented housing can use.

2.2 The need for legislative intervention has arisen from the fact that there is an inherent imbalance in the relative bargaining power of landlords and occupiers. While many landlords provide excellent services to their occupiers, some do not. On key issues, such as ensuring that occupiers get value for money and an appropriate level of security of tenure, history suggests that there is always the possibility of exploitation. Legislation seeks to provide a regulatory framework to minimise such exploitation.

2.3 Historically, the way in which this has been achieved has been through the creation of a large number of statutory provisions that need to be read alongside the tenancy agreements that landlords and tenants may have entered into. This legislative strategy makes for an extremely complex body of law, not readily understood by most of those to whom it should apply, or indeed their advisers (if any).

2.4 There has long been criticism of the complexity of the law regulating the relationship between landlords and the occupiers of residential accommodation.[1] A primary objective of this project has been to devise a scheme for the reform of housing law that would address this fundamental problem.

2.5 Our recommendations for the reform of housing law will, if enacted, represent radical legislative change to the regulation of the rented sector of the housing market. The proposed Bill will not only include detailed changes to the existing rules, but also fundamental change to the legislative approach to the regulation of this sector of the housing market. In particular the historic linkage between principles of property law and housing legislation will, so far as is practicable, be abandoned; instead, a new approach based on contract which incorporates consumer law principles of fairness and transparency is proposed.

[1] 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 observed (at p 114): "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."

Terms of reference

2.6 The terms of reference for the project, announced on 26th March 2001, were:

"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 and the Lord Chancellor's Department.[2]"

2.7 It was always envisaged that the project would be undertaken in two phases. The original intention was to deal with item (1) in the first phase, and leave items (2) and (3) to the second. Government authority for work on phase 1 was granted at the outset; authority for phase 2 would be determined subsequently.

2.8 As work on the questions of status and security progressed, however, it became increasingly clear that the matter of succession could not be left to a later stage. It also became clear that other issues about the ways in which people live in their homes, including joint occupation, could not be left to the second phase. In the event phase 1 of the project became considerably more substantial than originally planned.[3]

2.9 At the same time, we have come to the view that in phase 2 there is more to be done than simply review the law and practice of unlawful eviction and harassment. At the end of this Part we set out our ideas on further work that we think needs to be done before the final goal – the creation of a code of housing law – is achieved. These ideas are currently the subject of further discussion with Government. Fortunately, the original terms of reference were drafted with sufficient flexibility to permit these additions to the scope of the project.

[2] Now the Office of the Deputy Prime Minister and the Department of Constitutional Affairs, respectively.

[3] This can be seen from the two consultation papers that arose from phase 1.

DEVELOPING OUR PROPOSALS

Objectives

2.10 In developing our proposals, the Commission has sought to keep a number of fundamental objectives in mind:

(1) the law should be simpler;

(2) the law should be more comprehensible; and

(3) the law should be more flexible.

Principles

2.11 In addition, the project is underpinned by four main principles:[4]

(1) that the regulatory framework must include provisions guaranteeing security of tenure, though not to the same degree for all categories of occupier;

(2) that possession should, in general, not be able to be obtained without the landlord going through due process and establishing a ground for possession before a court;

(3) that a clearer consumer perspective should be brought to housing law, that would emphasise both the rights and the obligations of both landlords and occupiers; and

(4) that there must be compliance with principles of human rights law.

2.12 While these objectives and principles have been broadly welcomed, some will be difficult to achieve. For example, a body of law that is too simple may not adequately reflect the ways in which people actually live their lives and may thus lead to injustice. Our proposals which emphasise the centrality of the occupation agreement may result in its being longer and thus less readily comprehensible than some might hope. We recognise that these aims and objectives may not be wholly consistent, one with another. Nevertheless, we have found them useful tests against which to judge our recommendations for reform.

OUR WORKING METHODS

2.13 Realising the importance of proposals that could affect the lives of nearly a third of the population of England and Wales, and also impact on the economic interests of a wide variety of people and bodies who have invested in the provision of rented housing, we determined from the outset that we should consult as widely as possible with those who would have an interest in these matters.

[4] These are discussed in more detail in CP 162 paras 1.17 – 1.36.

Housing Advisory Group

2.14 We have been considerably assisted by a broadly based housing advisory group with whom, over the life of the project, we have had a number of meetings. The members of the group are set out at Annex A. The members of the group have not been involved in the drafting of this report, and nothing in it should be taken as representing their views, or the views of the organisations they represent.

Supported housing

2.15 In addition, we have benefited greatly from the assistance of an informal group of supported housing providers, who have explained to us the complexity of the arrangements they enter into in providing accommodation for some of the most vulnerable individuals in our community. Members of that group are set out in Annex B.

Public meetings, conferences and seminars

2.16 A large number of bodies and agencies have offered us platforms to introduce our ideas and to encourage debate and discussion on them. The Team has addressed over 70 events, at venues throughout England and Wales. These have ranged from meetings with landlord groups, tenant groups, and specialist advisers to large public meetings and conferences. For the first time, a Law Commissioner engaged in an on-line web-based discussion. A full list of conferences and other events attended is set out in Annex C.

Responses to the Consultation Papers

2.17 The Law Commission received a substantial written response to both CPs. This was perhaps as the result of the importance of the subject, the stimulus of the public meetings, or a combination of factors. Lists of respondents are set out in Annex D.

Media

2.18 There have been a small number of pieces in the broadsheet newspapers. The specialist press, both housing and legal, has covered the project in some considerable detail and have also taken pieces written by members of the Law Commission team. We are extremely grateful for the coverage we have received.

2.19 Nonetheless, at a recent housing conference organised by the Chartered Institute of Housing (June 2003), it was striking that around half of an audience of experienced housing managers, who might be expected to be aware of it, on a show of hands indicated that they had no knowledge of the Law Commission project. This reinforces the need for a very full publicity campaign to explain the new scheme, should the Government decide to implement it.

REGULATORY IMPACT

2.20 Before any Bill is presented to Parliament, it is subjected to a Regulatory Impact Assessment (RIA). The task of carrying these out is primarily one for the relevant sponsoring Department, in this case the ODPM. While the Law Commission does not have the expertise and resources to carry out a full RIA, we have been trying to identify, as part of the consultation process, what some of the costs and benefits of our proposals might be. Our respondents have drawn attention to a number of

issues that will need to be addressed in any more sophisticated cost-benefit analysis of our proposals.

2.21 These included the following points.

(1) Local authorities and housing associations were concerned about the initial costs of preparing the new occupation agreements which our recommendations would require.

(2) Similarly, private landlords' groups thought that the costs of implementation would be considerable.

(3) There were those who accepted that the production of model agreements could contribute to a reduction in costs.

(4) Many respondents pointed to the need for a generous budget for publicity and training, prior to the introduction of any new scheme. The importance of not forgetting private landlords and occupiers was stressed.

(5) A number of respondents observed that adequate resources for housing advice and other agencies would be required to enable proper advice to be given, both at the start of the new scheme and on a continuing basis, and both to landlords and occupiers.

2.22 The Commission accepts that there will be a substantial initial cost in moving to the new system. In the longer-term, we think that reductions in costs will be achieved by the following:

(1) the creation of model agreements, which will reduce the need for the individual drafting of agreements;

(2) the standardisation of the law, which should allow advisers to deal with issues more easily;

(3) the added clarity which should allow occupiers and landlords to know their legal position more readily without the necessity to obtain costly advice;

(4) more generally, the commercial opportunities for investment in housing that might follow from the adoption of a more flexible regulatory regime; and

(5) increased used of IT which should enable much of the present cost, for example, of posting documents such as copies of the agreement, to be significantly reduced.

THE RELATIONSHIP OF OUR PROPOSALS TO THE DEVELOPMENT OF HOUSING POLICY

2.23 The focus of the work of the Law Commission is on reform of the law. In this project, we cannot ignore the housing policy context which surrounds our work. In particular, the position of local authorities in the housing market has changed. There is decreased emphasis on the direct provision of housing and an increased strategic role. The flexibility of our proposals should make the interface between local authorities, arms-length management organisations (ALMOs) and other

social landlords – whether registered or unregistered – much more responsive to local housing needs. Housing associations which are increasingly developing mixed portfolios of housing (not only for those in social need, but also other groups such as key workers and those wanting to rent in the market) should also find the flexibility of the proposed scheme helpful. Our scheme should facilitate the development of new partnerships between local authorities and private sector landlords, who should be encouraged to use the new contractual framework to improve standards of housing management. We hope our proposed framework could also encourage a new professionalism amongst private landlords, not only those with large numbers of property for rent, but also for the small "hobby" landlord. And it could be the foundation for new partnerships between tenants and landlords.[5]

2.24 The precise extent to which different parts of the rental sector take advantage of these opportunities is not, of course, a matter for the Law Commission. That is the responsibility of Government and other stakeholders in the housing market. But the scheme should provide a much more flexible framework within which these and other policy initiatives can be taken.

THE SCOPE OF THE PROJECT: EXCLUSIONS

2.25 Notwithstanding the scope of the project, there are a number of important matters relating to housing law and policy that we have not directly addressed. These were set out in CP 162.

Disrepair

2.26 We noted that we were not going to revisit the law on disrepair, not least because the Law Commission had completed a project on this topic in 1996[6] and in relation to which the Office of the Deputy Prime Minister (ODPM) is doing further work. We did not consult on the issue. In the event, we have recommended that the proposals we made in Law Com 238 should become part of the compulsory-minimum terms we recommend should appear in the occupation agreement.[7]

Tenancy deposits

2.27 During the period of our consultation, we were aware that schemes relating to tenancy deposits were being tested and evaluated by ODPM. In 2003, the outcome of this evaluation was produced.[8] It has become clear that policy makers see considerable potential for building contractual obligations relating to the taking

[5] Adoption of many of the ideas floated in The Joseph Rowntree Foundation – Shelter Commission on the Private Rented Sector, Private Renting: A new settlement: A commission on standards and supply (2002) would be greatly facilitated by the introduction of the scheme proposed here.

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

[7] See paras 8.32 – 8.52 below.

[8] See http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/page/odpm_house_601879.hcsp.

and repayment of deposits into the scheme we are proposing, even though we did not consider the issue as part of our project.

Rent control and regulation

2.28 A number of consultees criticised the Commission for not revisiting the law relating to rent control and regulation. This was never envisaged as being part of our remit. The present government had, in effect, accepted that the policy of market rents in the private rented sector was one that was not to be disturbed.

2.29 However, given that landlords are now able to derive market rents from their lettings, it is reasonable to expect landlords to respect their contractual obligations. We recommend we should do further work on the mechanisms needed to ensure that both landlords and occupiers meet their obligations under the terms of the agreement.

Housing benefit

2.30 We made it clear at the outset of the project that we would not be looking at housing benefit, either the rules relating to the scheme or its administration. The policy is currently undergoing major review within the Department of Work and Pensions. A number of our respondents expressed regret about this decision, given the important role it plays in sustaining a large number of landlord-occupier relationships, and that failures in housing benefit administration trigger many possession proceedings.

2.31 We can see ways in which reform of housing benefit could usefully underpin some of the reforms of substantive housing law which we are proposing. For example, if the Department of Work and Pensions required those, renting under type II agreements who were in receipt of housing benefit, to be granted, at least initially, a six month fixed term agreement, rather than a periodic agreement, this would resolve a possible difficulty with our proposal to abolish the existing moratorium on the making of a possession order during the first six months of an assured shorthold.[9]

The right to buy and the right to acquire

2.32 At present there are clear links between the status of tenants of local authorities and housing associations and their rights to buy or acquire the properties in which they live. We have not used this project to revisit the scope of the right to buy or acquire. We regard these as matters of policy for government. We accept that those who currently have the right to buy or acquire should have their rights preserved. We also need to ensure that those who enter occupation agreements after our scheme comes into effect will continue to be able to exercise their rights on an equivalent basis.

The right to manage

2.33 The right to manage currently allows local authority tenants, acting collectively, to set up a management organisation to take over the management of their own

[9] See paras 6.3 – 6.16 below.

properties. In CP 162, we included the right to manage in the list of matters which we thought fell outside the proper scope of the project, by analogy with the right to buy. We were persuaded by our consultations that this was too simple a view. Unlike the right to buy, the right to manage is properly an aspect of the landlord-tenant relationship, albeit, on the tenants' side, a collective one.

2.34 We have considered whether the existing right to manage should be extended to all type I occupiers, including those of RSLs. We do not think we can recommend this. First, we are not in a position adequately to assess the desirability of such an extension. Secondly, we have been told by all sides that a right to manage scheme for RSLs would require significantly different mechanisms from the current local authority system (indeed, there is some dissatisfaction with the existing system in any event).

2.35 We have concluded that we should aim to preserve the existing right to manage, while making incremental increases to its possible coverage in specific situations and providing the Secretary of State with power to make broader changes if he or she considers it appropriate.

2.36 We therefore recommend:

(1) that the existing right to manage be retained for local authority type I occupiers;

(2) that the Secretary of State have power to bring defined housing stock where the landlord is an RSL within the right to manage, as if the landlord were a local authority;

(3) that RSLs could voluntarily opt-into the right to manage; and

(4) that the Secretary of State be given a broad power to amend the existing right to manage scheme to make provision for a single scheme to apply to both local authorities and RSLs, or for there to be distinct but comparable schemes for the two classes of landlord.

RECOMMENDATIONS FOR FUTURE WORK

2.37 In the light of responses to the consultation, we have become aware that there are other issues on which further law reform work would be desirable and which follow closely from this initial project.

Promoting landlord responsibility

2.38 The initial terms of reference envisaged that, after Phase 1, we should go on to look at the specific rules relating to unlawful eviction and harassment. We are now persuaded that, though valuable, this would be too narrow a project. We recommend that more work be undertaken looking at a range of options for regulating landlord behaviour and ensuring that the contractual principles that lie at the heart of our scheme are delivered in practice. We think there should be a wide-ranging review of the incentives that should be created to encourage responsibility, and the sanctions that might be imposed where landlords fall short.

Promoting responsible occupier behaviour

2.39 One of the most controversial aspects of the first stage of our work related to our provisional proposals for dealing with anti social housing behaviour. Our recommendations on this issue – which relate largely to occupiers of accommodation provided by social landlords – are found in Part XV.

2.40 Many consultees complained, rightly, that anti social behaviour was not exclusively an issue for the social rented sector. Private sector tenants, and indeed owner-occupiers, could be just as guilty of anti social behaviour. The strength of feeling on this has led us to recommend that this should be another topic on which we should do further work. We need to explore what the current law is; how it works in practice; whether it could be made to work more effectively; and whether changes to the substantive law are required to address the issue further.

Adjudication

2.41 A third issue on which we did not consult, but on which we invited comments, related to modes of adjudicating housing disputes. In relation to this, we were surprised at both the level of complaint about current procedures and the degree of support for a study of alternatives, including alternative dispute resolution (ADR). We recommend that there should be a further project on the adjudication of housing disputes and how the law and practice in this area might be reformed.

PART III
THE SCHEME IN OUTLINE

3.1 This Part provides an outline of the scheme we recommend. Detailed consideration of the issues is found in the Parts that follow.

THE CONSUMER APPROACH (PART IV)

3.2 At the heart of the proposals we made in CP162 was the proposition that housing law should be shaped by a "consumer approach". There was very broad, if not universal, support for this. The proposition that both landlords and occupiers should be able to find an accurate statement of their legal rights and obligations in the occupation agreement was welcomed.

3.3 In developing these ideas, we built on the fact that the Unfair Terms in Consumer Contract Regulations 1999[1] ("UTCCR") were already in force and applied to tenancy agreements. The Office of Fair Trading, who are responsible for enforcement of the UTCCR, were strongly in favour of our approach.

Implications of this approach

3.4 This approach has a number of practical implications:

(1) the regulatory framework governing the relationship between landlord and occupier will apply wherever there is a contractual agreement (other than an excepted agreement) for the occupation of a dwelling as a home;

(2) the principles underlying the UTCCR will extend to all landlords and occupiers; and all terms save key terms that are also core terms[2] will be subject to the UTCCR principles of fairness and transparency;

(3) the language of occupation agreements should be as comprehensible as possible; and the structure of agreements should be as clear and user-friendly as possible.

Fairness

3.5 We recommend that the detailed content of occupation agreements be prescribed by regulation. The regulations will contain schedules setting out different model agreements. These will, by definition, be "fair" for the purposes of the UTCCR. (Terms that are varied and other negotiated terms may be open to challenge as unfair.)

Language and layout

3.6 We recommend that occupation agreements should use language that is as easy to comprehend as is practicable. Further, the layout of the agreement should be

[1] SI 1999 No 2083, based on Council Directive 93/13/EEC.

[2] See para 4.19 below.

considered carefully in order to assist the understanding of those who will use the documents.

AGREEMENT TYPES AND THEIR USE (PART V)

3.7 We recommend that there should be two basic agreement types.

(1) Type I agreements with a high degree of security of tenure protected by the Act; these will be periodic agreements only.

(2) Type II agreements with a low degree of security of tenure provided by statute. Landlords will be able to enter either fixed-term or periodic agreements. (Fixed-term agreements may offer a much greater degree of security to occupiers.)

Landlord-neutrality and the definition of agreement types

3.8 A key feature of the proposed scheme is that the identity of the landlord should not be part of the *definition* of the agreement types. The "landlord condition" for a secure tenancy under the Housing Act 1985 should not be replicated in the new scheme. To do otherwise would prevent the creation of a single social tenancy, which is one of the Government's objectives. It would also seriously restrict the flexibility of the scheme, which is one of our key objectives.

Use of the agreement types

3.9 Nevertheless, we recommend that there should be regulation of the *use* to which the two agreement types can be put. In particular, social landlords will be required to use type I agreements unless the conditions set out in a defined list of exceptions are met.

3.10 In default, agreements entered into by social landlords will be type I agreements; those entered into by private landlords will be type II agreements.

"Writing up" agreements

3.11 The extent to which landlords provide their occupiers by contract with more advantageous terms than those required by the legislation will be a matter of negotiation and landlord policy. In order to encourage this, we recommend that the majority of terms in agreements can be varied in favour of the occupier.

SCOPE OF THE SCHEME (PART VI)

3.12 Our broad objective is that, unless there are compelling reasons for excluding them, all occupation agreements should come within the scope of the scheme we propose. For this purpose the historic distinction between the lease and the licence will no longer be of importance.

3.13 We recommend abolition of the "six-month moratorium"[3], which we do not believe to be an effective measure of tenant protection. Abolition is essential if the simplification of the scheme we seek is to be achieved.

Inclusions within the scheme

3.14 We recommend that a number of types of agreement currently outside the principal statutory schemes should be brought within the proposed scheme. These will include, for example, service occupancies and student accommodation provided by universities and local authorities.[4]

Exclusions from the scheme

3.15 Although we are anxious to reduce the number of special cases falling outside the scheme – a particular cause of current complexity – we acknowledge that there have to be exceptions. We recommend that there should be two classes of exception from the scheme.

(1) Agreements covered by other statutory schemes. These include business tenancies, agricultural holdings, and mobile homes.

(2) Certain types of agreement excluded on social policy grounds. These include holiday lets; agreements granted as a temporary expedient to persons who entered the premises as trespassers; agreements where the occupier is sharing accommodation with the landlord; agreements relating to certain categories of sheltered accommodation; and agreements relating to accommodation provided on a temporary basis to meet duties to house the homeless under Part VII of the Housing Act 1996.

3.16 While this may seem like a long list of exceptions, the actual number of agreements affected by them will be very modest compared with the total number of occupation agreements that will come within the scope of our proposed scheme.

Removal of statutory tests

3.17 Because of the "inclusive" approach that we contemplate, many of the tests currently used to define the scope of statutory protection will be removed. For example, requirements that the rent should be under a defined rent limit or that occupation must be related to the "only or principal home" will not be retained.

Contracts with minors

3.18 In accordance with this inclusive approach, we recommend that there should be special provision to facilitate the ability of landlords to enter agreements with 16 and 17 year-olds. This can be a problem under the present law, particularly for social landlords wanting to provide secure accommodation for persons in this age group.

[3] See paras 6.3 – 6.16 below.

[4] Though excluded from the current principal schemes, these were still covered by the terms of the Protection from Eviction Act 1977 and were thus not wholly outside statutory regulation.

Application of the new scheme

3.19 Obviously, these recommendations will apply to all new agreements entered into after the coming into force of the legislation. But we also recommend that existing agreements should, as far as possible, be brought within the scope of the new scheme. This will greatly simplify the state of the law.

3.20 There will be two exceptions. The first is tenancies still covered by the Rent Act 1977. The consultation revealed widespread anxiety among this group of tenants about the prospect of their incorporation into the new scheme. Though they would be fully protected in law, they were not convinced that in practice landlords might not seek to take advantage of them. The second is agreements still covered by the Rent (Agriculture) Act 1976.

THE WRITTEN AGREEMENT (PART VII)

The need for an agreement

3.21 For the scheme we propose to work, it is essential that there should be a contractual agreement between the landlord and the occupier.

Making the contract

3.22 Writing will not be a crucial element in the creation of the contractual relationship. In other words, it will be possible for a landlord and occupier to reach a binding occupation agreement orally.

Evidencing the contract

3.23 However, once made, it will be essential that a written statement of the agreement is provided by the landlord to the occupier. There are two reasons for this.

(1) It will provide evidence of the existence of the relationship; this will be essential in cases where the relationship breaks down and court proceedings of some kind are in contemplation.

(2) The whole point of the consumer approach is to ensure that both parties should have a document setting out their respective rights and obligations.

3.24 Where the landlord is happy to adopt the relevant model agreement (see below, paragraph 4.12), it will not be essential for the landlord to provide his/her own personalised version of the whole agreement. Evidence of the agreement will then comprise a front page, which sets out the key terms, states that the agreement is subject to the relevant model agreement, and sets out any additional terms or variations to terms that may be agreed by the parties, to which a copy of the relevant model agreement is appended.

Sanctions

3.25 As the provision of a written statement of the agreement is essential, there must be sanctions against landlords who fail to comply with this requirement. There was broad support from consultees for this approach. We do not recommend criminal

penalties. We do not think that they are appropriate in this context. Current criminal sanctions have not worked well. Indeed, we recommend that the existing law on rent books[5] should be repealed.

Rent sanction

3.26 We recommend that landlords who fail to provide a written copy of the agreement are liable to a civil penalty related to the rent payable. We think that this will provide a proportionate and appropriate incentive to landlords to comply with the requirement to provide a written copy of the agreement.

Procedural sanction

3.27 Where the landlord under a type II agreement fails to provide a written copy of the agreement, we also recommend that there be a procedural sanction which will prevent the landlord from being able to take immediate advantage of the notice-only ground for possession.

STRUCTURE AND CONTENT OF THE AGREEMENT (PART VIII)

Structure and language of the agreement

3.28 We recommend that the structure of the agreement should be determined by accepted approaches adopted in other types of consumer agreement. The details will be determined in secondary legislation.

Content of the agreement

3.29 We recommend that the agreement should contain four categories of terms:

(1) The first will contain *key* terms, providing information about the parties and setting out the fundamentals of the agreement such as the description/address of the property and the rent payable.

(2) The second will contain *compulsory-minimum* terms. These will (a) prescribe the circumstances in which a landlord may seek possession against an occupier; and (b) set down the duties imposed by law on landlords (such as statutory repairing obligations). It will be possible for parties to agree to amend these terms but only so that they are rendered more favourable to the occupier. Where the term contains a statutorily defined obligation (such as statutory repairing obligations), the term will also be able to be varied if the relevant statutory test is changed. It will not be possible for either party to contract out of these terms.

(3) The third will contain *special* terms, which impose obligations on occupiers for social policy reasons (in particular, those relating to anti-social behaviour).

(4) The fourth will contain *other* terms. This part will include *default* terms, which will deal with a list of issues needed to make the contract work. The

[5] Sections 4 to 7 of the Landlord and Tenant Act 1985.

model agreements will contain default terms covering these matters, though the parties may substitute their own terms for the default terms. Any *substitute* term will have to be fair and transparent. In addition, this part of the agreement will contain *additional* terms dealing with other matters not otherwise considered.

Varying the terms of the agreement

3.30 We accept that in many cases, particularly with type I agreements and some fixed-term type II agreements, the original contract may need to be varied from time to time. Apart from anything else, rent levels will need to be adjusted to match inflation. We therefore recommend that agreements contain terms allowing for variation of the agreement. We also make recommendations about the requirements for landlords to provide written evidence of any variation. Failure to provide written evidence of any variation will also be subject to the sanctions mentioned in paragraphs 3.26 and 3.27.

Issues to be dealt with outside the contract

3.31 Notwithstanding the primary objective of making the contract the source of information about the respective rights and obligations of landlords and occupiers, we have accepted that there are issues which will remain outside the agreement. These include a number of matters relating to tenants of local housing authorities, such as the right to repair and rights relating to consultation and information.

TERMINATION OF AGREEMENTS AND PROCEEDINGS FOR POSSESSION (PART IX)

3.32 This part considers first the processes which landlords must undergo to obtain possession of their premises lawfully; termination by the occupier is discussed more briefly at the end of this part.

Termination by landlords

Due process

3.33 The principle of due process, whereby a landlord may not lawfully recover possession without an order of the court, will be retained in the proposed scheme. Nonetheless, where the notice-only ground for possession is available, we recommend that a possession order should be capable of being obtained by summary procedures, as is currently the case.

3.34 We also recommend that the related principle, that proceedings should not be commenced without the landlord first issuing a notice of his intention to take proceedings, should also be retained. We recommend some rationalisation of the notice periods required. In the case of proceedings for anti-social behaviour, we recommend that court proceedings should be capable of being started at the same time as the notice is issued to the occupier.

3.35 We have taken the view that, once a notice has been issued, the landlord should decide whether or not to start possession proceedings. Thus we recommend that landlords will have a defined period within which to commence proceedings. Failure to do this will result in the notice of intention to take proceedings lapsing and a new one having to be issued.

Grounds for possession

3.36 We recommend that type I agreements will only be capable of being finally brought to an end by the exercise of *discretion* by a court; type II agreements will be able to be ended on *mandatory* as well as discretionary grounds.

3.37 A consequence of this recommendation will be that housing associations, which currently let on assured tenancies and which therefore have a number of mandatory grounds for possession available to them (including the right to obtain possession where two months' arrears of rent have accrued), will lose these mandatory grounds.

3.38 In the process of consultation we learned that many housing associations in fact impose a self-denying ordinance, whereby they undertake with their tenants not to use the mandatory grounds. On the other hand, there were those who argued that it was an important mechanism for tackling problems with rent arrears. In many cases, rent arrears were not the fault of the tenant but a consequence of the poor operation of the housing benefit system.

3.39 We have had to reach a judgement on this question. We cannot achieve the simplification of the present law that we seek if we retain mandatory grounds for possession in the type I agreement. To do so would reduce the status of secure (local authority) tenants to an unacceptable extent. We have concluded that all those occupying under agreements with social landlords should do so on the same terms.

3.40 We accept the argument made by many landlords, whether or not they were able to use the mandatory ground, that they found the courts too inconsistent in their approach to decision taking. We make recommendations for structuring the court's discretion which we hope will tackle the problem of inconsistency.[6]

3.41 We recommend that possession may be sought by the landlord under a type I agreement, on the ground either that the occupier is in breach of the terms of the agreement or that other prescribed circumstances relating to estate management are satisfied. In the latter case, the landlord will have to ensure that suitable alternative accommodation is available. In addition, the landlord under a type II agreement may seek possession on the (mandatory) ground of serious rent arrears, or the notice-only ground.

Procedural requirements

3.42 Currently the procedural steps that landlords must take before they can commence proceedings in court vary, depending on which statutory code is relevant. We recommend changes to the various rules relating to the notices that landlords must give in order to make them more coherent. Failure to issue proceedings following the expiry of the notice period will, after a prescribed period of time, result in its becoming ineffective. Thus before court proceedings can be taken, a further notice will be required.

[6] See paras 9.81 – 9.90 below.

Powers of the court

Discretionary grounds for possession

3.43 The consultation process revealed widespread dissatisfaction with the role of the court in determining possession proceedings. We recommend that the Bill contain provisions to structure the discretion of judges when making these orders. In exercising their discretion, judges will be required to balance the interests of (a) the occupier against whom proceedings are being taken, (b) the landlord (whose cashflow may be disrupted by failures to pay rent) and (c) other occupiers and neighbours (who are often aggrieved when their fellow occupiers do not pay the rent on time or are a nuisance or are in other ways in breach of their agreements).

3.44 The present system provides for a hearing when a possession order is sought to which most occupiers do not turn up – often encouraged by the landlord not to – but does not require a hearing when the question of execution of the warrant for possession is at issue. In CP 162,[7] we considered that this system represented a less than satisfactory use of the court to ensure fairness. We have been persuaded that to adopt the most radical proposal – prohibiting the use of suspended possession orders – would not at this stage be appropriate. We will however be recommending the creation of a power to enable new procedures to be piloted and evaluated on a trial basis, designed to ensure not only that landlords can still effectively collect rent arrears, but also that occupiers threatened with eviction have a realistic opportunity to state their side of the case.

3.45 We also make detailed recommendations about the point at which the occupation agreement should be regarded as terminated, once a suspended possession order has been breached. These are designed to eliminate the problematic concept of the "tolerated trespasser".

Mandatory grounds for possession

3.46 These will only be available in relation to type II agreements. (The discretionary grounds will also be available.) We recommend retention of the accelerated possession procedure currently available to landlords using the notice-only ground for possession.

Challenging decisions by public bodies

3.47 A "public body" in public law terms is subject to judicial review of its administrative decisions, in principle including decisions about taking possession proceedings (such as using a mandatory ground for possession, or using the notice-only procedure). A "public authority" for the purposes of the Human Rights Act 1998 is also subject to challenge on the basis of breach of a right under the European Convention on Human Rights and Fundamental Freedoms, particularly Article 8, which guarantees respect for the home.[8] Until recently, the

[7] See paras 12.33 – 12.41 below.

[8] There is academic debate on whether or not the domestic category of "public body" for judicial review purposes is the same as the "public authority" category under the Human Rights Act 1998: see for instance Dawn Oliver, "The frontiers of the State: public authorities and public functions under the Human Rights Act" [2000] PL 476. The dispute is not relevant to our proposals in this area.

courts had held that any eviction "engaged" article 8(1), the basic guarantee, and so had to be justified under Article 8(2) as proportionate and necessary in a democratic society.[9] The House of Lords, in *Qazi v London Borough of Harrow*,[10] has now put that broad approach into doubt, although without undermining the basic accountability in administrative law of landlords who are public bodies. The courts will doubtless continue to wrestle with these issues for some time to come. However, a significant problem in coping with public law challenges has been that judicial review must be taken in the High Court, whereas possession actions take place in the county court. We therefore recommend that the county court should be given a jurisdiction to review decisions relating to mandatory possession cases, along the lines of those granted to them by section 204A of the Housing Act 1996 (as inserted by the Homelessness Act 2002). In exercising these powers, county courts would apply judicial review principles.

Termination of fixed-term agreements

3.48 Where a fixed-term agreement ends because its time has expired, we recommend that the occupier will automatically become a periodic type II occupier, on as many of the same terms as before as are relevant.[11]

Abandonment

3.49 Where accommodation is abandoned by an occupier, we recommend that the landlord should have available a procedure enabling him to recover possession following service of notice. If the occupier has not actually abandoned the accommodation he or she will be able to challenge the notice in court.

Termination by the occupier

3.50 We recommend that the occupier, under a periodic agreement, should have the right to give a month's notice to terminate the agreement. The agreement will continue until the expiry of the notice period. If the occupier continues to occupy after the period is over, he or she will become a trespasser and the landlord may take steps to evict on that basis. In the case of a type II agreement, the landlord will have the right to treat the occupier's notice as a landlord's notice of intention to seek possession on the notice-only ground; thus the landlord can obtain possession through the accelerated possession procedure. The occupier will be entitled to continue in occupation until the court orders possession and the order is acted upon.

3.51 Where all joint occupiers give notice, this will similarly terminate the agreement.

3.52 Where one or more, but not all, joint occupiers give notice, we recommend that this has the effect of terminating only the interest in the agreement of the person giving the notice; it will not, as is currently the law, have the effect of bringing the whole agreement to an end.

[9] For a discussion of the case law as it was in April 2002, see CP 162 paras 5.70 – 5.77.

[10] [2003] UKHL 43, [2003] 3 WLR 792.

[11] See para 9.79 below.

SPECIFIC ISSUES

3.53 Although anxious to achieve the greatest possible degree of simplification in the scheme we propose, we also have to make sure that the scheme will reflect the ways in which people lead their lives. The fact is that, particularly as a relationship between landlord and occupier can last for some time, arrangements made at the start of an agreement may not always remain appropriate or workable. A person may start occupying premises on his or her own, but subsequently wish to bring another person into the dwelling. A group of occupiers may start off getting on well, but then one may want to leave; and the rest of the group may wish to introduce a new occupier to the dwelling. The possibilities are endless.

3.54 There is a great deal of law which currently exists, but it is piecemeal and incoherent. We seek to bring order to these issues to make the law more workable and – more importantly – to help landlords and occupiers understand better where they stand legally.

(1) Consent (Part X)

3.55 While an occupier may wish to alter the initial agreement, for example by adding a new person to the agreement, the landlord may well not wish to do so. For example, he may be worried about the ability of a new party to look after the premises properly; or, in the case of social landlords, the new occupier may not have that degree of social housing need that would justify the allocation of a scarce publicly-funded resource to them. There will, therefore, be many situations where it is right that the landlord should be able to turn down a proposal that a new person come into the premises.

3.56 Three possibilities can be envisaged.

(1) The landlord has an absolute right to veto a proposal put to him.

(2) The occupier must seek the landlord's consent to do something, but the landlord may only withhold consent on the ground that it is reasonable to do so.

(3) There should be no requirement for consent – the landlord should not be able to prevent the occupier doing what he or she wants.

3.57 In situation (2), where consent is required, the occupier must submit any request in writing; consent would be deemed to have been granted if the landlord failed to respond to a request within two months of the request being made (or within two months of any request for further information being complied with); and, where consent was denied, a short statement of reasons should be given by the landlord to the occupier.

3.58 Any action taken by an occupier in the teeth of a landlord's veto or reasonable refusal of consent would not bind the landlord and would expose the occupier to proceedings for possession for breach of the agreement.

(2) Joint occupation (Part XI)

Joint and several liability

3.59 We recommend that the contractual liabilities of joint occupiers should be joint and several. Thus, if one of a number of joint occupiers defaults on his or her part of the deal, the other occupier(s) will remain fully liable under the agreement, albeit with the right to seek compensation from the defaulter. Joint and several liability is the only practical way to ensure that the proper economic interests of the landlord are protected.

Altering the identity of the occupiers

3.60 We also need to make provision for the common situation where relatively fluid groups of occupiers share a home. We need to provide mechanisms for altering the parties to the agreement. In so doing, we need to balance the rights of the landlord to control the numbers and identity of those living in the home with the rights of the occupier to be able to take in a new occupier.

3.61 Three separate issues will be dealt with:

(1) adding new occupiers to an agreement;

(2) permitting a joint occupier to leave the agreement;

(3) dealing with non-contractual occupants.

ADDING NEW OCCUPIERS TO AN AGREEMENT

3.62 We recommend that this should be possible, subject to the occupier obtaining the consent of the landlord.[12] The legislation will define the extent to which the new occupier will take over the rights and liabilities of the other occupier(s).

PERMITTING A JOINT OCCUPIER TO LEAVE AN AGREEMENT

3.63 We recommend that a joint occupier under both a type I and type II agreement should be able on notice to terminate his interest in the agreement without it bringing the whole agreement to an end.

3.64 Where a joint occupier leaves without properly bringing the agreement to an end, we recommend that the landlord should be able to use the new abandonment procedure to seek a declaration from the court that the former occupier has indeed abandoned the premises.

DEALING WITH NON-CONTRACTUAL OCCUPANTS

3.65 We recommend that, in normal circumstances, the occupation agreement should contain a default term providing that the occupier should control who else occupies the premises on a non-contractual basis. We also recommend that non-contractual occupants should, under the Civil Procedure Rules, be notified of any

[12] The landlord will be able, subject to UTCCR, to determine the number, age and general characteristics of any proposed new joint occupier, subject to the overall law on overcrowding.

possession proceedings being brought in relation to the premises in which they are living.[13]

(3) Lodgers and sub-occupation agreements (Part XII)

3.66 We recommend that:

(1) type I occupiers should have the right to take in a lodger, over which the landlord will have no right of veto;

(2) the default position in respect of type II occupiers will be that they are able to take in a lodger subject to the consent of the landlord; and

(3) lodgers will not be entitled to a written agreement.

3.67 We further recommend that any (head) landlord (that is, a person other than the occupier who enters into the lodging agreement) will not be bound by any lodging agreement.

3.68 We do not think that occupiers, either under a type I or a type II agreement, should have a statutory right to grant a sub-occupation agreement, even with the consent of the landlord. Thus we recommend that there should be a default term that will give the landlord a veto on the granting of any sub-occupation agreement by the occupier.

3.69 Where the head landlord *does* give consent, the sub-occupation will usually be a type II periodic agreement. The head landlord who has given consent will also become the landlord of the sub-occupier should the original occupier subsequently leave the agreement.

(4) Transfer of rights of occupation (Part XIII)

3.70 We recommend, as a general principle, that landlords should have the right to veto any request for the transfer of rights of occupation from one contractual occupier to another not a party to the contract. This will be subject to three specific exceptions.

(Mutual) exchange

3.71 The secure tenants of local authorities are currently able to exchange their tenancies, subject to securing the consent of the landlord.[14] We recommend that this should be incorporated into the new scheme and extended to apply to all type I agreements granted by social landlords. The right will remain exercisable only with the consent of the landlord.

[13] This will be similar to the notification requirements now required in relation to occupiers of premises where possession proceedings are brought arising out of mortgage default: see CPR Rule 55.10.

[14] Housing Act 1985, s 92 and Schedule 3.

Transfer to potential successor

3.72 Secondly, we recommend that occupiers under type I agreements should have the right to transfer their contractual rights of occupation to a potential successor. Again this should be subject to obtaining the consent of the landlord. (Rights of succession are outlined below, paragraph 3.76)

Transfer by order of family courts

3.73 Thirdly, we recommend that section 24 of the Matrimonial Causes Act 1973 and Schedule 1, paragraph 1 (2)(d)–(e) to the Children Act 1989 should be amended to enable the court to make orders in relation to all occupation agreements coming within the proposed new scheme, whether or not they create a property interest.

(5)Effect of death on the occupation agreement (Part XIV)

3.74 We recommend that where there are joint occupiers, the normal position should be that the surviving joint occupier(s) will take over the agreement. However, there should be some flexibility in the case of fixed term type II agreements.

3.75 We want to address the uncertainty that arises when an occupier dies leaving no joint occupier or other successor. We recommend that periodic agreements should be deemed by law to end on a defined date after the death of the occupier (or the last of joint occupiers).

3.76 Building on existing provision, we also recommend that there should be a statutory scheme of succession available to spouses (broadly defined), other members of the family and carers. Any person in these last two groups must have lived in the home for a defined period before the death of the occupier before the right arises. Where more than one person is potentially entitled, joint succession will be possible. The Bill will provide a framework for the resolution of disputes arising from the statutory succession scheme, with the details set out in regulations.

ANTI-SOCIAL BEHAVIOUR (PART XV)

3.77 We recognise that landlords have a role in the control of anti-social behaviour. Our scheme is designed to provide them with the necessary legal tools. We have recognised concerns with our provisional proposals expressed in responses to CP 162 and have decided not to proceed with those relating to summary eviction and the further structuring of discretion.

A general target duty on social landlords

3.78 We consider that the prime purpose of extending the powers of social landlords to respond to anti-social behaviour is the protection of their occupiers.

3.79 We recommend that a general “target” duty is imposed upon local authority landlords to take into account in the management of their rented property the need to deal with anti-social behaviour on behalf of their occupiers. We also recommend that a similarly-worded duty be placed on registered social landlords, which the Housing Corporation would be obliged to take into account in the performance of its regulatory functions.

Special anti-social behaviour term

3.80 We recommend that both the type I and the type II agreement should contain a special term which prohibits anti-social behaviour by the occupiers of the property or by visitors. The term will also prohibit use of the property for criminal purposes.

3.81 This term may be enforced by possession proceedings or by injunction. Where an injunction is breached, the landlord will be able to seek a possession order as part of the proceedings for breach without having to issue separate possession proceedings. Possession may only be ordered by the court where it is reasonable to do so.

Additional powers for social landlords

3.82 For the purposes of powers to deal with anti-social behaviour, we recommend that "social landlord" be defined more broadly than elsewhere in our Bill to include non-registered housing associations and charitable housing trusts.

3.83 We recommend that social landlords, as thus defined, should be able to obtain a free-standing injunction against anti-social behaviour. Where the anti-social conduct consists of or includes the use or threatened use of violence, or where there is a risk of significant harm to a person in the locality of the property, the social landlord will be able to obtain an order excluding an occupier from the property. A power of arrest may also be attached to the order.

Exceptional use of type II agreements

3.84 Social landlords will be able to let on a type II basis where the letting is for an initial probationary period. The probationary period will normally last twelve months, but the period may be extended to eighteen months where the behaviour of the occupier warrants such an extension.

3.85 In addition, use of type II agreements will be available when in the course of possession proceedings for breach of the anti-social behaviour term the social landlord requests, as an alternative to eviction, that a type I agreement is demoted to a type II. Demotion will only be ordered where the social landlord produces a plan of support to the court. Demotion will last for a maximum period of one year. After this, the occupier will either be promoted back to a type I agreement, or other arrangements will be made.

Domestic violence

3.86 Domestic violence will constitute breach of the anti-social behaviour term. Landlords will be able to take possession proceedings against the perpetrator. Where the perpetrator is a joint occupier, the proceedings will operate to terminate the occupation of the innocent party. However, the court will be able to consider the re-housing arrangements of the innocent party as part of its deliberations on reasonableness. This should provide the innocent joint occupier with sufficient protection.

3.87 Social landlords will additionally be able to apply for orders to restrain anti-social behaviour. Where there is violence, the threat of violence or risk of significant harm to another occupier of the property, they should be able to obtain orders which

exclude a perpetrator. A power of arrest may be attached to such order for use in the event of breach.

SUPPORTED HOUSING (PART XVI)

3.88 The provision of supported housing raises complex issues as to how it should fit into our proposed scheme. Our original proposal was to exclude supported housing from our statutory scheme.

3.89 Many respondents pointed out that this was not appropriate. We had failed to appreciate the extent to which providers were committed to enhancing the rights of occupiers. We have benefited greatly from extensive discussions with the key stakeholders in this area and we are grateful to them for their time and expertise.

Status

3.90 We recommend that different types of supported housing attract different levels of security.

3.91 Direct access accommodation, that is accommodation provided for immediate occupation, will be excluded from our scheme.

3.92 Temporary supported accommodation such as short stay or respite accommodation will also be excluded. However, once the provision of temporary accommodation exceeds four months it will be brought within our statutory scheme.

3.93 Temporary accommodation provided for the purpose of assessment will also be excluded from our statutory scheme for a period of four months. Again, once the accommodation provided is for a period of longer than four months it will come within our scheme.

3.94 All other supported housing will be treated consistently with our statutory scheme. Social landlords will be required to provide accommodation on a type I basis unless the provision falls within an exception to the statutory requirement.

3.95 We recommend a limited exception to the requirement to provide type I agreements where the landlord is providing supported housing. The exception will last for the first two years of provision. After that time we consider that most occupiers will have acquired the necessary skills to justify the provision of permanent accommodation on a type I basis. Social landlords will have powers available to them to respond to anti-social behaviour by occupiers with type I agreements.

3.96 For some residents the responsibilities and autonomy implied by the type I agreement will not be appropriate and their landlords will consider that those residents require greater control. In those circumstances social landlords will be able to continue to use the type II agreement following an assessment of the support needs of the resident and in particular a statement justifying the continued availability of the police exclusion order, a new power which we detail below (paragraph 3.99).

Supported housing agreements

3.97 Managing a supported housing project imposes particular responsibilities upon a landlord. It must ensure appropriate use of scarce accommodation, it must be able to respond to the particular needs of residents and it must be able to act swiftly to protect the safety of residents and workers where necessary.

3.98 We recommend that a specific model agreement is drafted by the Secretary of State, assisted by representatives of both providers and residents of supported housing, in order that the needs of this type of provision are fully recognised.

3.99 We recommend that where supported housing is provided on a type II basis managers should be able to ask the police to exclude an occupier for a period of 48 hours without the necessity of going to court. The police exclusion order will only be available to the police following a request by a designated manager when he or she believes that a serious act of violence has occurred, that the safety of someone on the premises is in danger from a resident or a visitor, or that the ability of a resident to benefit directly from the support provided by the project has been seriously impeded by the behaviour of a resident or a visitor.

3.100 Police exclusion orders may be followed by an injunction to exclude the occupier from the project if the management of the project decide that this is advisable. The application for the injunction may be issued contemporaneously with possession proceedings and the injunction in such circumstances will last until effective eviction.

3.101 The modified type II agreement and the police exclusion order will only be available to relevant landlords. Relevant landlords will be defined more broadly than our normal definition of social landlords since it will include charitable housing trusts and housing charities. We do not consider that the broader powers should be available to private landlords who have no public accountability.

THE RELATIONSHIP BETWEEN THE PROPOSED SCHEME AND PRINCIPLES OF LAND LAW

3.102 Our scheme is designed to render the distinction between the lease and the licence irrelevant for the determination of the rights and obligations of landlords and occupiers. We anticipate that there will still be a number of related situations where rights will need determination, not by our proposed scheme, but by the application of principles of land law. One important example will be where a landlord transfers his rights in the land to a third party. These consequential issues are not discussed in this report; they will be considered further in the Final Report.

APPLICATION TO WALES

3.103 The basic position under the devolution settlement is that, in Wales, the National Assembly for Wales exercises powers that in England are exercised by the Secretary of State. The National Assembly has responsibility for housing policy. We have considered whether different provision for Wales would be appropriate. On one important issue – the rule that social landlords should generally be required to use the type I agreement – we have concluded that the National Assembly should have greater powers than the Secretary of State in England. In other areas, however, we have not considered it appropriate to recommend that the National Assembly have greater or different powers from those of the Secretary of State in England.

PART IV
THE CONSUMER APPROACH

INTRODUCTION

4.1 As noted in Part III,[1] a central feature of the provisional proposals made in this project was that reform of housing law should be shaped by what we described as the "consumer approach".

4.2 In the past, housing legislation attempted to protect tenants against the weakness of their bargaining position under unregulated principles of land law and contract by overlaying separate statutory rules on top of the tenancy agreement. Our proposed scheme seeks to create the appropriate levels of protection directly through the terms of the agreement, by subjecting the terms themselves to statutory regulation.

4.3 Two essential principles underpin this approach:

(1) agreements between landlords and occupiers should be more *transparent*; so far as possible the rights and obligations of both parties to the agreement should be set out there, and should not have to be discovered by reference to supplementary rules in Acts of Parliament, law reports or legal textbooks;

(2) agreements should be *fair*; there should be a fair balance of rights and obligations on both sides of the agreement, for both landlords and occupiers.

4.4 For some, this will be seen as representing a radical new approach to housing law. In our view, it builds on developments that have already occurred. In particular, the application of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR)[2] to rental agreements is now an established part of housing law. The Office of Fair Trading have recently issued guidance on the fairness, or otherwise, of terms in rental agreements.[3] As might be anticipated, the OFT supported this approach. But there was also broad, if not unanimous, support from a wide range of consultees.

4.5 At the same time, anxieties were expressed about the implications of this approach. Some were concerned about the amount of detail that might need to go into the occupation agreement. It was suggested that not many occupiers would in practice read their agreements from cover to cover. This is a concern we share, and which we suspect cannot be wholly eliminated. Nonetheless, the object of ensuring that parties could potentially understand their relationship from a single document was welcomed. It was also noted that the prospective use of the "model agreements" we propose would increase the similarity between occupation agreements. This

[1] Para 3.2.

[2] SI 1999 No 2083.

[3] Office of Fair Trading 381 (March 2003).

would make it much easier for housing advisers – whether for landlords or occupiers – to give advice about the parties' rights and obligations.

4.6 One or two respondents wondered whether the analogy between occupation agreements and other forms of consumer contract was as close as we had suggested. They observed that, unlike the position with other consumer contracts, the residential occupier could not easily go to another supplier to purchase housing goods or services, particularly in areas of the country where there remained significantly high demand for housing and shortage of supply. Our response is that one of the justifications for regulatory intervention to protect the consumer arises where suppliers of services are able to use their market power to impose possibly unfair terms on consumers. Our project seeks to create a fair balance of rights and obligations.

4.7 Some noted that, of itself, a consumer approach would not necessarily result in any realignment of the power imbalance that exists in the landlord-occupier relationship.[4] While this may be true, we think that we need to create an appropriate legal framework for the residential-rental relationship. We can then consider the appropriate mechanisms for encouraging good practice and discouraging inappropriate behaviour (on the part of occupiers as well as landlords), which can be built on this foundation.[5]

IMPLICATIONS OF THE CONSUMER APPROACH

4.8 The adoption of the consumer approach has a number of important implications, which need to be spelled out clearly at the outset.

The focus on the contractual agreement

4.9 First, in making our proposals for the reform of housing law, we want to move away from the approach adopted hitherto that the right of an occupier to occupy a home should depend on the grant of an estate in land (a leasehold interest) however notional.

4.10 In the past, much protective legislation in the housing context has only been triggered where there was a tenancy, not where there was a licence. This generated much litigation, particularly as the successful creation of a licence would take the agreement outside the scope of the statutory schemes.

4.11 For the purpose of the new scheme, we seek to ensure that this historic distinction between a lease and a licence will no longer be of any importance.[6] We think that it

[4] For a critique of this approach, see Susan Bright, "A Consumer Perspective in Housing Law: Rhetoric or Reality?" unpublished paper presented at the Socio-legal Studies Association Conference, Nottingham 2003. Her complaint, in essence, is that we have not taken the implications of this approach further; in part at least some of her criticisms may be addressed in phase 2 of the project, assuming that it gets the go-ahead.

[5] We anticipate that this will be a key part of Phase 2 of the project.

[6] This aspect of the practical significance of the distinction fell away with the introduction, by the Housing Act 1988, of the assured shorthold tenancy, with market rents and limited security of tenure. The distinction will remain of significance in relation to the acquisition of the landlord's interest by third parties even under our scheme: see para 3.103 above.

was not easy for people – either landlords or occupiers – to understand. Linking rights to occupy to contractual agreements will be more comprehensible. We received considerable support for this from consultees.

Model agreements

4.12 Secondly, the UTCCR currently provide that terms prescribed by statute are outside the scope of the UTCCR.[7] They are, by definition, "fair" within the meaning of the regulations. We recommend that the Secretary of State should have power to prescribe model agreements, which will be found in secondary legislation. We expect that the Secretary of State will ensure that, both as regards the drafting and as regards the layout, these model agreements will conform to the principles of fairness and transparency.

4.13 The question of whether or not occupation agreements are UTCCR compliant is currently a matter of considerable confusion and uncertainty for landlords. One of the great advantages of our proposed scheme will be that those who use one of the model agreements can be certain that all the terms in the model agreements will be UTCCR compliant.[8]

Adapting the principles of the UTCCR

4.14 Thirdly, there are important respects in which, to be effective as regards their application to occupation agreements, it will be necessary to adapt the principles of the UTCCR so that they are effective in the context of occupation agreements.

Negotiated terms

4.15 One of the current features of the UTCCR is that the principles of fairness and transparency in the regulations extend only to those terms in the contract that have not been negotiated between the parties. We recommend that these principles should cover individually negotiated terms in occupation agreements as well.[9] We do not think that this represents a major shift in the policy of housing law, which has always been to try to ensure that there is fairness in the legal rights and obligations of the parties; we merely seek to achieve this objective by a different legislative route.

4.16 Naturally, the degree to which a term was freely negotiated will be a factor in the assessment of the fairness and transparency of the particular term. We anticipate that individually negotiated terms will more readily pass the requirement of good faith. It will be easier to show that any imbalance they create is not adverse to the occupier.

[7] UTCCR Reg 4(2)(a).

[8] Any amendments made by the parties, or other additional negotiated terms must, on normal principles, be fair and transparent.

[9] The Law Commission has provisionally proposed a similar change in the context of its major review of UCTA and the UTCCR. See Unfair Terms in Contracts: A Joint Consultation Paper (2002) Consultation Paper No.166; Scottish Law Commission Consultation Paper No119, paras 4.42 – 4.54.

4.17 These changes will require a degree of public education when the new scheme is introduced, not only for landlords and tenants, but also for those bodies involved in enforcement of consumer law. They may also involve extra enforcement work for those bodies.[10] But we do not regard these problems as insuperable.

4.18 The categories of term we anticipate being included in occupation agreements are discussed in Part VIII.

Key terms and core issues

4.19 One feature of the UTCCR is that certain terms relating to what are usually referred to as "core" issues, are exempt from the fairness requirements of the UTCCR, so long as they are transparent. We wish to limit this exemption in relation to housing agreements. We shall therefore recommend that one of the components of our occupation agreement will be "key" terms. The exemption from fairness permitted by the UTCCR will apply only to key terms that are also core issues. Other terms which might be regarded as relating to a core issue will not be exempt from the UTCCR, unless they are included within the statutory model agreements. This will enhance for landlords the attractiveness of using the model agreements, the terms of which will be UTCCR compliant. We discuss this further below in Part VIII.

The status of the contracting parties

4.20 At present, the UTCCR apply to "sellers or suppliers" and "consumers".[11] In relation to agreements covered by our new scheme, we recommend that the UTCCR should be modified to make it clear that this applies to all landlords and occupiers. This will mean that all occupation agreements are covered, irrespective of the "supplier" or "consumer" status of the landlord or occupier.

4.21 As is well known, most private landlords rent only a very small number of properties. We received representations that they should not be brought into our proposed scheme. It was argued that some might innocently or accidentally find themselves subject to agreements covered by our new scheme. We had some objections from small landlords both to this proposal and to the proposal to impose sanctions for failure to provide a written agreement even where the occupier has not asked for one.

4.22 However, many other respondents argued that one of the challenges of the new regulatory framework was to ensure that small landlords better understood the obligations and rights they were taking on when they entered occupation agreements. We had representations from organised groups of professional landlords complaining about unfair competition and bad publicity generated by amateur landlords who do not do the job properly. Equally, it has been put to us

[10] It might be that after implementation it became clear that enforcement of the regulations in respect of housing agreements would be more efficient if local housing authority staff were able to take on this work in conjunction with their regulatory work on stock other than their own. The OFT could recommend adding local housing authorities to the list of "qualifying bodies'" in Schedule 1 of the Regulations.

[11] UTCCR Reg 4(1). "Seller or supplier" is defined as "any natural or legal person who…is acting for purposes relating to his trade, business or profession…": *ibid*, Reg 3(1).

that “hobby” landlords frequently merely need help in understanding how they should perform their role, and we believe that our model agreements will provide them with assistance here.

4.23 We have no wish to penalise unnecessarily those who make innocent mistakes. But we do believe that anyone renting out property as someone else’s home should take the matter seriously enough to ensure that they are acting properly. In any event, the UTCCR do not impose criminal sanctions. They merely require landlords to use fair and transparent terms. This does not seem a disproportionate burden to impose on someone who has contracted to provide a home for another.

4.24 Any potential prejudice to the innocent non-professional or accidental landlord, which we think is small, is outweighed by the advantages of a general scheme which is landlord-neutral, and where agreements are subject to the fairness and transparency of the UTCCR. In any event, the ready availability of statutory model agreements will make life very much easier, particularly for the “hobby” landlord. They have nothing to fear from our proposals.

Structure and language of occupation agreements

4.25 A very important consequence of the “consumer approach” is that careful attention must be given to both the structure of occupation agreements and the language used in them. We recommend that the Secretary of State is given power to make regulations on both of these matters.

PART V
THE AGREEMENT TYPES: THEIR DEFINITION AND USE

INTRODUCTION

5.1 We recommend that our scheme should apply to all occupation agreements, save those that we recommend should fall outside the scope of the scheme.[1]

5.2 The definition of the two agreement types we propose will be on a "landlord-neutral" basis. The reason for this is that this is one of the ways in which simplification of housing law can be promoted. Our scheme should be broad and inclusive, embracing the vast majority of occupation agreements. We shall nevertheless recommend that there should be landlord-specific rules relating to how each of the tenancy types may be *used*. In particular, social landlords will be required to use the type I agreement unless defined conditions are satisfied. The consultation process revealed strong support for this approach.

AGREEMENT TYPES

5.3 We recommend that there should be two basic forms of occupation agreement. For the purpose of this report we refer to them as the type I agreement and the type II agreement.[2]

5.4 The type I agreement will provide extensive security of tenure. It is largely modelled on the current secure tenancy regime. Type I agreements can only be created on a periodic basis. Given our proposals on how the type I agreement must be used, around 90% of occupiers will occupy under type I agreements.

5.5 The type II agreement will provide a very limited minimum level of security. It is modelled on the current assured shorthold tenancy. It can be created on both a periodic and a fixed-term basis.

5.6 Key features will be common to both types of agreement: for example, the need for a written agreement with fair terms and the need for due process in proceedings for possession.

5.7 In other respects, the rights and obligations arising under the two types will differ. For this reason we must ensure that the line between the two is clear and does not lead to unnecessary litigation. We wish to avoid the boundary disputes between inclusion and exclusion from protection that have bedevilled housing law in the past.

5.8 We also want to ensure that those landlords who so desire can enhance or "write up" the contractual terms of the type II agreement to the benefit of their occupiers.

[1] The scope of the scheme is discussed in Part VI.

[2] See paras 1.10 – 1.11 for an explanation of our approach to nomenclature in this report.

For example, this could involve agreeing not to use all the available grounds for seeking possession, or granting rights to occupy for a longer fixed period of time.

Default positions

5.9 In most cases, the agreement type will be clear from the face of the document, certainly if the model agreements are used. But this will not always occur. For example:

(1) the document may not state what the agreement type is; or

(2) a particular agreement type may have been used which, it is now argued, was not what was intended.

5.10 We have decided to recommend default rules to determine the type of the agreement. Thus:

(1) the default for a social landlord is the type I agreement; and

(2) the default for any other landlord is the type II agreement.

5.11 If a landlord wishes to issue an agreement which is not the default agreement for that description of landlord, the landlord must give express notice to that effect. This will be achieved, either by a preamble to the agreement, or by a separate notice to the occupier. In the absence of such notice, the agreement will be the relevant default agreement.

Common features

5.12 The common features of the two types of agreement will be as follows:

(1) both are contractual agreements for the right to occupy premises as a home;

(2) they will be stated in writing;

(3) they will contain a range of key, compulsory-minimum, special and default terms;

(4) those terms (other than key terms) will either be deemed to be fair (by being contained in a model agreement) or will be subject to regulation as to fairness and transparency;

(5) agreements will not be capable of being lawfully determined by the landlord save by due process in the courts.

Particular features

Type I agreements

5.13 Type I agreements will have particular features:

(1) their duration will be indefinite;

(2) they will have only discretionary grounds for possession;

(3) they will contain a broader range of compulsory-minimum terms.

Their underlying feature is security for the occupier.

Type II agreement

5.14 Type II agreements provide a more flexible form of rental agreement.

(1) They will be able to be either fixed-term or of indefinite duration.

(2) They will be subject to mandatory grounds for possession, including the notice-only ground, as well as the discretionary grounds.

(3) They will contain a narrower range of compulsory-minimum terms.

(4) The power to the vary terms of the agreement will be less restricted than that available to the landlord of a type I agreement.

USE OF THE AGREEMENT TYPES

The social rented sector

5.15 As we set out in CP 162, the basis of our approach to agreement types is landlord neutrality. By this we meant that the definition of a particular agreement type is not to be determined by the identity – private, public or social – of the landlord. However this principle of landlord neutrality is limited to the question of definition; it does not answer questions about the use of the two agreement types.

5.16 Certain classes of landlord either have responsibilities and functions imposed upon them by statute or have particular concerns and constraints deriving from their nature, such as charitable status. Local authorities are public authorities for the purposes of the Human Rights Act 1998. Local authority landlords and registered social landlords receive public subsidies. Local authorities have responsibilities towards housing the homeless, even though these are often delegated to registered social landlords.

5.17 In the consultation, some social landlords argued that they should have complete freedom to choose which type of agreement they used. The overwhelming response, however, was that it was essential to limit the freedom of social landlords to choose which agreement type they might use. We accept these arguments. We recommend that there should be constraints on local authority landlords and registered social landlords regarding their use of type I and type II agreements.

5.18 Nevertheless, our recommendations create the opportunity for bringing much greater coherence into the legal treatment of the occupiers of social housing. This was a matter of significance to the Department for the Environment, Transport and the Regions[3] at the time of the Law Commission reference. Nick Raynsford MP, then Minister for Housing and Planning, stated, "We also intend to look to the review as the sensible vehicle within which to take forward our intention, announced in the Housing Policy Statement ("Quality and choice: a decent home

[3] Now Office of the Deputy Prime Minister.

for all – the way forward for housing") to look at a single form of tenure for the social housing sector and other tenure flexibilities."[4]

5.19 Currently, the two major providers of social housing, local authorities and registered social landlords, operate under different legislative structures. This is despite the fact that their client groups are very similar and that as a result of large scale voluntary transfer of social housing, registered social landlords now own former council estates. (Indeed, the powers and responsibilities of local authority landlords and registered social landlords are moving increasingly close. For instance, the Police Reform Act 2002 extended the availability of anti-social behaviour orders to registered social landlords.)

5.20 Our recommendations will not eliminate all differences between the occupiers of local authority landlords and those of registered social landlords. There will still be significant differences in their respective rights to buy.[5] And registered social landlords will not, simply as a result of being registered social landlords, automatically be deemed to be public authorities for the purposes of the Human Rights Act.[6]

5.21 Whilst we recommend restrictions on the use of agreement types, we want to enable social landlords to respond appropriately to housing market and housing management requirements. We think there are two ways to encourage this.

5.22 The first is to allow for enhancement of the terms of agreements. At present the content of the tenancy is prescribed in great detail by the relevant statutes. We seek to provide landlords with flexibility for them to enhance the terms on which they offer accommodation to occupiers, for example where they provide additional services, or where they seek to attract business in areas where there is low demand for housing. We also consider that our recommendations will be able to encourage new forms of partnership agreements, for example between local authorities and private landlords, or where other social landlords want to provide more complex mixes of social and market housing.

5.23 Secondly, we want to provide greater flexibility for social landlords in relation to their use of tenancy types. The need for flexibility was recognised in our terms of reference. Announcing them, Nick Raynsford MP said that the Law Commission's work would "enable social landlords to make better use of their stock" and "facilitate greater choice and diversity in the housing sector".

5.24 Thus we recognise there will be circumstances in which use of the type II agreement by social landlords will be appropriate. A list of these is set out at paragraphs 5.30 to 5.50 below.

[4] *Hansard* (HC) 26 March 2001, vol 365, col 433W.

[5] The rights to buy and to acquire are not affected by our scheme.

[6] We did raise, as a consultation issue, (see CP 162 paras 5.45 – 5.53) whether we should recommend that all RSLs should be deemed to be public authorities for the purposes of the Human Rights Act 1998. There was a good deal of support for this idea; but there was also very considerable hostility to the suggestion, particularly from registered social landlords and Government respondents. In the light of this, and our conclusion that it was not a *necessary* step for the purposes of our scheme, we have not pursued the idea.

5.25 We are also anxious that our scheme for occupation agreements should be able to respond to new social imperatives relating to the provision of rented housing. Our proposals for the use of agreements should not, therefore, be regarded as fixed for all time. Rather they should be seen as providing policy makers with flexible tools to achieve their policy objectives. (For instance, current concern about the housing of key workers in areas of high housing demand may at some time require a policy response which would include allowing social landlords to use type II agreements for schemes for key workers.)

5.26 The achievement of these objectives requires two things:

(1) defining the social rented sector; and

(2) defining the circumstances in which that sector may grant type II agreements.

Defining the social rented sector

5.27 We recommend that the definition of social landlords should embrace local authority landlords, and all registered social landlords other than fully mutual housing associations.[7]

Defining the circumstances in which that sector may grant type II agreements

5.28 Under the present law, certain categories of housing provision made in particular by local authorities fall outside the scope of statutory protection altogether. These exceptions to the current secure tenancy regime constitute one of the sources of complexity in the current law. The reason why these categories of letting are not secure tenancies is because there are special factors which justify their exclusion. In general terms, they do not represent those classes of tenancy which would justify full secure status.

5.29 In seeking to devise a more coherent legal framework, we are anxious that the number of agreements that fall totally outside our scheme should be limited. At the same time, we accept that it would not be right to require social landlords only to grant type I agreements. The type II agreement provides a means of giving social landlords considerable flexibility in those cases where full security is not justified.

5.30 We recommend that social landlords should be able to grant type II agreements in the following classes of case:

(1) probationary agreements;

[7] Local authorities, in response to Government policy, are increasingly using Arms Length Management Organisations (ALMOs). ALMOs are companies limited by guarantee and not profit making, which are legally independent from the local authority. They provide housing services to tenants and leaseholders under a management agreement with the local authority. They are not, however, legally the occupier's landlord, and accordingly we do not think their use would undermine or side-step the obligation of a local authority, as landlord, to use type I agreements.

(2) demotion;

(3) service occupancies;

(4) students;

(5) homeless persons following a decision that full housing duties are owed to the applicant;

(6) provision of accommodation on a temporary basis;

(7) other cases:

(a) development of co-operative housing;

(b) supported housing;

(c) commercial "market" provision.

5.31 There will of course be no compulsion to grant type II agreements in any of these contexts; social landlords will always be able to enter type I agreements. However, in the light of representations made to us during the consultation, we agree that these are the special cases in which social landlords should have the flexibility to grant type II agreements.

5.32 Where the social landlord decides to grant a type II agreement, we recommend that it should be required to notify the holder or potential holder of the occupation agreement that an exception to the normal statutory requirement applies.

PROBATIONARY AGREEMENTS

5.33 We recommend that social landlords should be able to use the type II agreement during a probationary period. This will be available

(1) where the occupier was not immediately prior to the grant of the agreement a type I occupier with any social landlord; or

(2) where the occupier or a member of his or her family has been subject to proceedings for and found to have engaged in anti-social behaviour.

This will replace the current "introductory tenancy".[8] The key distinction between our recommendation and the introductory tenancy is that probationary use of type II agreements will be able to be granted on an individual basis. Landlords will not have to adopt the "all or nothing" approach of the current law.

5.34 The probationary period would initially be for a maximum of 12 months, although in line with our objective of greater flexibility, landlords would not be obliged to make them last for the whole of that period. Thereafter, the landlord would have power to extend the probationary period for a further six months, where the behaviour of the occupier warrants such an extension. Prior periods as a type II

[8] Housing Act 1996, Part V, Ch 1.

occupier with another social landlord should count towards the probationary period in certain circumstances.[9]

5.35 At the end of the probationary period the occupation agreement will automatically become a type I agreement. Conceptually, probationary occupiers are type I occupiers on probation. The end of the probation period will signal the end of the availability of the notice-only and the other mandatory grounds for possession and the start of full security of tenure. At this stage the occupier will have the right to request a written statement of the (revised) agreement.

DEMOTION

5.36 A second situation in which social landlords will be able to use type II agreements will be when they have asked a court for an order to this effect in proceedings for anti-social behaviour.[10] If the court decides to make such an order, it will provide that an occupier, currently under a type I agreement, should have that agreement demoted to a type II agreement.

SERVICE OCCUPIERS

5.37 Social landlords should not be obliged to provide service occupiers (such as school caretakers) with type I agreements (though they will be able to do so if they wish). We recommend that where the occupier is an employee of the social landlord and the contract of employment requires him to occupy the premises for the better performance of his duties, the landlord will be entitled to grant a type II agreement.[11] This exception to the statutory requirement to let on a type I agreement should extend[12] to other categories of public sector employees, for example the police and fire service employees.

STUDENTS

5.38 We recommend that where accommodation is provided by a social landlord to an occupier who is a student and the occupation agreement is granted to enable the student to attend a designated course at an educational establishment, the agreement could be a type II agreement.[13]

[9] This will reproduce the effect of Housing Act 1996, s 125 (3).

[10] Discussed below, para 15.37.

[11] This exception is based upon the current exclusion at Housing Act 1985, Schedule 1, para 2.

[12] As does Housing Act 1985, Schedule 1, para 2.

[13] Housing Act 1985, Schedule 1, para 10(4) provides that "designated course" means a course of any kind designated by regulations made by the Secretary of State for the purposes of this paragraph and "educational establishment" means a university or establishment of further education. These definitions will be retained.

DUTY TO ACCOMMODATE FOLLOWING A DECISION UNDER SECTION 193 OF THE HOUSING ACT 1996

5.39 Most duties to accommodate arising under Part VII of the Housing Act 1996 are temporary and will be wholly excluded from the statutory scheme.[14]

5.40 We think that the duty which arises after a housing authority has decided that it owes an applicant full housing duties should be covered by our scheme. We considered whether, in such cases, social landlords should be under a duty to provide a type I agreement. But we have concluded that, in general, type I agreements should only be granted following an allocation under Part VI of the Housing Act 1996.

5.41 We think it would not be appropriate for social landlords, in fulfilling their housing obligations under the homeless persons legislation, to be obliged to provide accommodation on a type I agreement. In many circumstances this would make their housing management role much more difficult.

PROVISION OF ACCOMMODATION ON A TEMPORARY BASIS

5.42 Under the present law, local authorities have a number of ways in which they can provide housing temporarily without granting a full secure tenancy. We recommend that the provision of such temporary accommodation should continue to be an exception to the general requirement to provide accommodation on a type I basis. Such accommodation will, in future, be provided on the basis of a type II agreement.

Existing temporary housing exceptions

5.43 There are currently four situations to which these recommendations will apply:

(1) where accommodation is provided temporarily on land acquired for subsequent redevelopment;

(2) where temporary accommodation is provided while works on other premises are being undertaken;

(3) where temporary accommodation is provided for persons moving into an area to take up employment there; and

(4) other short-term arrangements.

These exceptions will in effect reproduce the current law.[15]

New temporary housing exceptions

5.44 We also wish to extend the temporary housing exception in two particular circumstances.

[14] See para 6.29.

[15] Housing Act 1985, Schedule 1, Paras 3, 5, 6 and 7.

5.45 First, in CP168 we discussed what should happen when an occupier makes an arrangement with a person to occupy the premises, contrary to the landlord's veto, or without obtaining the requisite consent from the landlord.[16] We wanted to avoid creating a new form of "tolerated trespasser". To deal with this, we recommend that it should be open to the landlord to enter into a temporary agreement with the new (unauthorised) occupier on the basis of a type II agreement.

5.46 Secondly, we recommend that social landlords should have the ability to enter into a temporary agreement with a person who occupies premises after the occupier has died leaving no one with a statutory entitlement to take over the agreement as successor.

OTHER CASES

5.47 Finally, there are three special cases where we think that a social landlord should be permitted to let on a type II basis.

Development of co-operative housing

5.48 While fully mutual housing associations or co-operative housing associations are excluded from the definition of social landlords, circumstances can arise in which a registered social landlord which is not fully mutual develops homes for subsequent transfer to a fully mutual housing association. Any occupation agreement made in these circumstances should be an exception to the requirement to provide type I agreements and our Bill should provide for this.

Supported housing

5.49 The application of the scheme to supported housing is a particularly difficult issue. We discuss this separately in paragraphs Part XVI. There will be circumstances in this context in which social landlords must be able to grant type II agreements.

Commercial (market) provision

5.50 Certain RSLs provide accommodation on a commercial "market" basis. This accommodation has not been funded via public monies and cannot be described as social provision. Where accommodation is being provided on a commercial (non-subsidised) basis, the social landlord should be able to choose whether to let on a type I or a type II basis.

ADDING TO THE LIST OF EXCEPTIONS

5.51 We recommend that the Secretary of State, and the National Assembly for Wales, should have the power to add to the list of exceptions. The provision of housing, particularly in the social sector, is not static – providers continue to innovate, and in some circumstances, we accept that this will require further exceptions to the general rule that social landlords should use type I agreements. A particular current example is the reaction to the crisis in the affordability of housing in London and other areas of housing pressure. Social landlords have developed, or are considering developing, schemes to let on assured shorthold tenancies to particular groups of workers, in particular nurses, teachers and police officers. We

[16] CP 168 paras 2.45 – 2.67.

accept that this is a broad power, and will therefore recommend, in respect of an English order, that it be subject to the highest level of scrutiny by Parliament, namely the affirmative resolution procedure.

Private landlords

5.52 We recommend that all occupation agreements provided by private landlords should be type II agreements unless the landlord has notified the occupier to the contrary. If the private landlord fails to provide a written agreement or the written agreement provided fails to clarify whether it is a type I or a type II agreement, the agreement shall be deemed to be a type II agreement. The exception, whereby the private landlord notifies the occupier that the agreement will be a type I agreement, is similar to the current legal position, when a private landlord positively grants an assured (rather than assured shorthold) tenancy.

FACILITY TO "WRITE UP" THE TERMS OF THE AGREEMENT

5.53 As noted earlier, we are anxious to encourage all landlords, both social and private, to "write up" the terms of their agreements, so that the contract provides more than the statutory minimum requirements. We recommend that the scheme should make it clear that this option is available to all landlords.

THE POSITION IN WALES

5.54 As noted in Part III, we have concluded that the National Assembly for Wales should have the power to vary the rule that, in general, social landlords should be required to use the type I agreement.

PART VI
THE SCOPE OF THE SCHEME

INTRODUCTION

6.1 One of the principal complexities of the present law is the wide variety of types of housing status that occupiers of rented housing may have. While we cannot get rid of all of these, our aim is to produce a statutory scheme of protection that reduces the current number and embraces the vast majority of occupation agreements. This aim was widely welcomed by consultees.

6.2 This Part sets out the classes of agreement that will fall within the scheme and those that will remain outside. It considers the extent to which existing statutory tests under present schemes of protection can be eliminated, thus making the basic definition of the scope of our proposed scheme more straightforward. It indicates the extent to which existing schemes will be mapped on to the scheme we proposed. First, though, we discuss one of the most controversial of our recommendations: the abolition of the six-months' moratorium.

ABOLITION OF THE SIX-MONTHS' MORATORIUM

6.3 This rule, which currently applies to the assured shorthold tenancies favoured by private landlords, prevents a court from making an order for possession on the notice-only ground for possession within the first six months of the start of a tenancy.[1] In CP 162, we asked whether this rule should go. The issue sharply divided consultees.

6.4 Many people coming from the tenant's perspective thought that the rule provided some protection for a tenant, albeit limited, against a cavalier landlord. The problem, however, was that when pressed they were not able to provide empirical evidence of the practical value of this limited protective measure. We heard of no cases where, as a result of the existence of the moratorium, a tenant started proceedings against the landlord, for instance to enforce the statutory repairing covenant. Indeed, Shelter was one of a number of tenants' groups which argued that the period should be extended to 12 months.

6.5 Others coming from the landlord's point of view considered the moratorium to be of little significance in practice. Some argued that the rule did have a negative impact on the flexibility of the housing market to provide very short-term lettings.

6.6 From the perspective of the project, we knew that, were the moratorium to be retained, we would have to provide for a much longer list of exceptions to the scheme.[2] This was because we recognised that there are situations in which it would not be appropriate to expect a landlord to have to wait for the six months' period of delay. At the same time, we did not want our ambition to make

[1] This will not, of course, apply if the agreement is for a fixed term of more than six months. The rule only applies to the first agreement of the same premises with the same tenant. Housing Act 1988 s 21(5).

[2] See discussion in CP 162, paras 8.15 – 8.27, 9.92 – 9.162.

recommendations to simplify the law to undermine important tenants' rights. Simplification of the law and individual social justice do not always lead to the same conclusion.

6.7 At present, the moratorium has little *direct* effect. Private landlords overwhelmingly let on assured shortholds with contractually fixed terms of six months or more.[3] Thus, notwithstanding the moratorium, the agreement itself prevents the landlord from taking possession using the notice-only procedure until at least six months have elapsed.

6.8 The question really, therefore, is whether the moratorium has an *indirect* effect by persuading landlords to use six month fixed terms, rather than periodic tenancies. We do not think that it does. First, landlords tell us that they like to use six month fixed terms because of the contractual stability it brings by "locking in" the tenant to a fixed period.[4] Secondly, if the moratorium was an important factor in landlords' decisions to use fixed term agreements, it is surprising that they continue to use six month (or longer) fixed-term agreements after the initial six month period covered by the moratorium has expired.

6.9 It was put to us that if there were no moratorium, a landlord would then rent on a periodic basis so that if a potential tenant turned up willing to pay a higher rent than that paid by the tenant already in the premises, the landlord could then simply evict the existing (perfectly satisfactory) tenant to put in the one willing to pay the higher rent. But if this consideration really would change landlords' letting behaviour, they would now let on periodic tenancies after the first six months. And they do not.

6.10 There was one argument about the relationship between housing benefit delays and the moratorium that caused us sufficient concern that we commissioned some economic research. The argument was that, should the moratorium be abolished, there may be situations in which it could be in the economic interest of a landlord to seek to obtain possession from an occupier on the notice-only ground during the first six months. This could arise because of the time taken to process a housing benefit application. The research, conducted by Professor Szymanski of Imperial College, London, suggested that this might happen.[5]

6.11 The argument runs as follows. Once a claim for housing benefit is made, each claim takes time to be decided. Straightforward claims that are decided in favour of the claimant will tend to be determined more speedily than complex claims, many of which will be decided against the claimant. The time taken to determine a claim for housing benefit may therefore be taken as an indicator as to how likely it is that the claim will eventually be decided in favour of the claimant. The more time that has elapsed without the claim being decided, the more likely it is that the claim will not be decided in the claimant's favour and the greater the probability that the

[3] Twelve month fixed term tenancies, for instance, are the standard in the student market.

[4] Although it is also true that there is a comparatively high level of ignorance of the law: many landlords apparently still believe that to be an assured shorthold, a tenancy must be (at least) a six-months fixed term, as was the case before the Housing Act 1996 came into force.

[5] Copies of the research are available on request from the Law Commission.

landlord will not receive the anticipated rental income. Landlords who believe this to be true may use the fact that a claim has not been settled by a particular date as a trigger for eviction (as a way of minimising losses from unsettled claims).

6.12 Local authorities differ significantly in the efficiency with which they process claims. Where a local authority is known to be very inefficient, then almost all decisions will take a relatively long time to be made. The landlord in such situations will not be so concerned about delay, at least for the first few months, because all claims – whether ultimately in favour of the claimant or not – take a long time to decide. Perversely, where a local authority is relatively efficient and processes claims rapidly on average, then the fact that an individual claim has not yet been decided even within a fairly short period of time may lead the landlord to conclude that the decision is likely to be adverse to the claimant. Under these circumstances the landlord may decide that it is in his economic interest to start proceedings for possession (whether or not the specific claim would eventually have been decided in favour of the claimant). If landlords acted in this way then some evictions will occur in relation to claims for housing benefit which, had the landlord held fire, would have been successful. On this argument, the abolition of the six months' moratorium could lead to some increase in proceedings for possession in cases where the landlord has let to an occupier, knowing that the occupier will apply for housing benefit to cover the rent, and local authorities are relatively efficient at administering the benefit.

6.13 It should be noted that, in any event, a landlord who is really concerned about whether or not the rent will be paid by a tenant who is in arrears can – under the present law – commence proceedings for possession if there are two months' arrears of rent, both at the date of the start of proceedings and at the date of the hearing. The six months' moratorium does not apply to these cases. In such cases, however, the landlord cannot take advantage of the accelerated possession procedure.

6.14 Our conclusions are that:

(1) the six months' moratorium does not apply to assured tenants who are currently in the social rented sector and who will in future become occupiers with type I agreements with full security of tenure;

(2) it does not offer private sector tenants who might wish to assert their rights against their landlord any significant effective statutory protection;[6]

(3) the majority of private sector tenants get as good, if not better, contractual protection through the terms of their agreements, and we see no reason why this should change;

(4) the rule prevents the private rental sector from being as flexible as it could be; and

[6] We hope to consider, in phase 2 of this project, ways in which landlords who are unwilling to fulfil their contractual obligations under occupation agreements may be persuaded to do so.

(5) were it to be retained, it would add significantly to the complexity of our scheme.

6.15 Therefore we recommend that the moratorium should not be a part of the scheme we propose.

6.16 We remain concerned about the potential problem identified by Professor Szymanski. At root, the problem he identified is one of the administration of housing benefit. We think it should be addressed within the housing benefit scheme, rather than by distorting housing law. Accordingly, if our recommendations generally are accepted by Government, including abolition of the moratorium, we suggest that the Department of Work and Pensions might consider whether a housing benefit application in respect of a *new*[7] letting should be required to be on an initial six months' fixed term type II agreement.

CONTRACTS GRANTING THE RIGHT TO OCCUPY AS A HOME

6.17 We recommend that, unless there are compelling social policy grounds for excluding them or they are covered by another statutory code, all contractual agreements granting the right to occupy premises as a home[8], whenever created and regardless of the identity of the landlord, should be included within our scheme.

6.18 It will govern letting agreements provided by private landlords, local authorities, housing associations and charities, and regardless of whether they are, in land law, leases or licences.

The lease-licence distinction

6.19 One of the complexities of the present law is that the Housing Act 1988 (as did the Rent Act 1977 before it) applies only to arrangements that, in law, are leases (tenancies),[9] not licences. This is the result of the statutory formulation which only applies where a dwelling has been "let".[10] (The Housing Act 1985 appeared to extend the scope of that Act to licences, but even this has not been without its

[7] The problem identified by Professor Szymanski would not apply where a person became eligible for housing benefit after the initial six months of a periodic letting, in that such a person would be no *more* vulnerable if the moratorium were to be abolished than they are now. While it is conceivable that it would apply if the occupier became eligible shortly after the start of a periodic agreement, the effect is likely to be marginal, in that it is very unlikely that this possibility alone would dissuade landlords from their current practise of generally letting on six months fixed terms.

[8] This phrase may cause problems in a small number of cases where a person lives, on a long-term basis, in an hotel. We have not sought to try to define periods of residence in hotels that are clearly excluded (eg as holiday lets, or because they are so short-term that they could not possibly be regarded as a giving the right to occupy *as a home*) from those where it could be argued that the nature of the occupation was *as a home*. We think that in such rare cases, the matter would be a matter of fact, to be determined if necessary by a court.

[9] Lord Templeman in *Street v Mountford* [1985] AC 809, 816 provided the following definition of a tenancy, "My lords, there is no doubt that the traditional distinction between a tenancy and a licence of land lay in the grant of land for a term at a rent with exclusive possession."

[10] See the early, formative case of *Oakley v Wilson* [1927] 2 KB 279.

complications.[11]) While the practical importance of the distinction has receded in recent years,[12] it nonetheless retains its potential for complexity. We think this distinction is out of place in a modern system of housing law. We recommend that our scheme should apply to all contractual occupation agreements, not just those classifiable as tenancies.

6.20 While we seek to render the lease-licence distinction irrelevant so far as the question of which arrangements fall within our proposed scheme are concerned, it will remain of significance in the determination of certain third-party rights, where it will still be important to rely on established principles of property law.

INCLUSIONS WITHIN THE SCHEME

6.21 A consequence of the adoption of this broad approach, taken together with our recommendations on the "six months' moratorium" (see above paragraphs 6.3 – 6.16), is that we recommend that a number of arrangements currently excluded from schemes of protection should be brought within the scope of the scheme we propose. This will make a significant contribution to the simplification of the law.

6.22 Most of the classes of letting currently outside statutory protection will be incorporated in our scheme as type II agreements. Where these are currently provided by social landlords, specific statutory provision will ensure that these types of agreement will not be type I agreements, but type II agreements.[13]

6.23 The types of agreement we recommend should be brought within the scope of our new scheme are:

(1) service occupancies;

(2) crown tenancies;

(3) student accommodation provided by universities and local authorities;

(4) agreements made by fully mutual housing associations (co-operatives);[14]

[11] Housing Act 1985, s 79(3) states: "The provisions of this Part apply in relation to a licence to occupy a dwelling-house (whether or not granted for a consideration) as they apply in relation to a tenancy". However, in *Westminster City Council v Clark* [1992] 2 AC 288, 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. In that particular case Mr Clarke had signed a "licence" agreement containing a statement that he did not have exclusive possession of the self contained bedsitting room he was renting in a rehabilitation hostel owned by the plaintiffs. The agreement also contained a mobility clause entitling the plaintiffs to move Mr Clarke to another room without notice. The House of Lords found that the plaintiffs had retained possession of all the rooms of the hostel in order to supervise and control the activities of the occupiers.

[12] This is the result of the creation of the concept of the assured shorthold tenancy by the Housing Act 1988; as this reduced the level of regulation on private landlords, so the incentive on them to seek to avoid the provisions of the legislation by the purported use of licences has also sharply reduced.

[13] These are the classes of agreement discussed in paras 5.28 – 5.51 above.

[14] The principal issue raised by respondents representing co-operatives was that those provided with accommodation by a housing co-operative should not remain entitled to that

(5) temporary housing provided by social landlords;

(6) agricultural occupancies under the Housing Act 1988 (although with important changes to preserve existing substantive rights – see paragraphs 6.55 to 6.60 below); and

(7) tenancies arising under Part 1 of the Landlord and Tenant Act 1954 at the end of long leases.

6.24 Introductory tenancies, created under the Housing Act 1996, should be dealt with by transitional provisions.

6.25 Residents in almshouses are currently excluded from the Housing Act 1985 by special provision to that effect. There is, however, doubt as to whether this exclusion is necessary following the decision in *Gray v Taylor*.[15] In that case, the almshouse landlord successfully argued that residents in an almshouse were excluded from statutory protection because the residents were not regarded as tenants, but as beneficiaries under a trust, and the payments they made for this privilege were not rent. On this analysis, residents in almshouse are not in a contractual relationship with the trustees of the almshouse. In view of the requirement that our scheme should apply only to contractual agreements, residents in almshouses will be exempt on that basis.

EXCLUSIONS FROM THE SCHEME

6.26 As noted above, there will be two classes of exclusion from the scheme.

Agreements coming within other schemes

6.27 First, we have concluded that there should be specifically excluded from our proposed scheme those classes of agreement that fall within other statutory regimes.

(1) *Long leases*. We take the view that leases for substantial periods are more akin to owner-occupation than to rental agreements. Usually they are acquired only by the payment of a substantial premium. Leases for a term certain of 21 years or more are currently excluded from the definition of secure tenancy[16] and are indirectly placed outside the scope of assured tenancies as the result of the current rules on the exclusion from that scheme of leases at low or no rent.[17] We recommend that all leases for 21 years or more should fall outside our scheme. The exclusion will also extend to agreements for the sale of residual periods of a long lease, even though they may now have less than 21 years to run. The provisions of Part 1 of the Landlord and Tenant Act 1954, which provide for what

accommodation if they were themselves no longer members of the co-operative. We conclude that this outcome is reasonable and can be achieved by appropriate use of type II agreements.

[15] [1998] 1 WLR 1093.

[16] Housing Act 1985, s 115 and Schedule 1, para 1.

[17] Housing Act 1988, Schedule 1, para 3.

happens when a long lease comes to an end, will be adapted to fit our proposed scheme.

(2) *Business premises and agricultural holdings/businesses.* While we do not consider that our Bill should be limited to agreements relating to premises designed, modified or equipped for residential purposes, it is important that the agreement confers the right to occupy premises as a home. If the premises in question are not premises designed, modified or equipped for residential purposes but rather are business premises, the question of whether our statutory scheme applies will depend upon the contract and not upon the premises. Rental agreements of business premises for the purposes of carrying out a business will continue to be covered by Part II of the Landlord and Tenant Act 1954. The business exclusion will also embrace the exclusion of licensed premises. On a similar basis our scheme will continue to exclude "agricultural holdings" covered by the Agricultural Holdings Act 1986, and "farm business tenancies" covered by the Agricultural Tenancies Act 1995.

(3) *Mobile homes.* These are protected by their own statutory scheme – the Mobile Homes Act 1983.

(4) *Rent Act tenancies.* For practical reasons, we have concluded that tenancies still protected by the Rent Act 1977 should remain within the Rent Act scheme and, at least for the present, not be brought into the scheme recommended here.[18]

(5) *Rent (Agriculture) Act tenancies.* For similar reasons, we also recommend that tenancies protected by the Rent (Agriculture) Act 1976 should remain within that scheme, rather than being brought into the newly proposed scheme. The current position is of long standing and the numbers of people affected are small, and reducing.

6.28 The consultation revealed broad support for these exclusions.

Other categories of exclusion on social policy grounds

6.29 There is a number of other categories of agreement that we have concluded should also be excluded from our proposed scheme. These may be broadly described as "social policy" exclusions.

(1) *Holiday lettings.* These have long been excluded from statutory regulatory schemes. We think this exclusion should be continued.

(2) *Resident landlords.* We think agreements with a resident landlord should continue to be excluded from the scheme. We have however come to the view that the current exclusion of the tenants of resident landlords from the Housing Act 1988 is too broad and should not be replicated in our scheme. We prefer the definition of resident landlord used for the purpose of the exclusion of tenancies and licences from the Protection from

[18] See para 6.62 below.

Eviction Act 1977. That definition depends upon the landlord actually sharing living accommodation[19] with the tenant. This exclusion would be lost if the resident landlord did not continue to reside in the premises as his only or principal home (and could not be revived even if the landlord returned to live in the premises). The exclusion would not apply where the occupier resides, not with the landlord, but a member of the landlord's family. In such a case, a type II agreement would be created, unless the member of the family in question became the landlord of the occupier by entering into a direct contractual relationship with the occupier. Then the normal exclusion would apply.

(3) *Accommodation provided as a temporary expedient to a trespasser.* This is currently excluded from protection and we think it should remain excluded.

(4) *Housing for the homeless.* At present, all accommodation allocated by a housing authority to an applicant who is owed duties under the provisions of Part VII of the Housing Act 1996 is excluded from statutory protection. We think this position should be retained, except that housing provided under the full housing duty should be included (as a type II agreement).

(5) *Other special categories of accommodation.* There is a range of types of accommodation which could be argued to be homes but which we think is of a sufficiently distinct character to fall outside the scheme. These include: residential provision registered under the Care Standards Act 2000; hospitals defined by the National Health Service Act 1977; and military barracks. We recommend that the Secretary of State should have an exceptional power to add to this list, by order, to meet particular situations, analogous to those identified above.

(6) *Supported housing.* In CP 162, we suggested that all supported housing schemes should be excluded from our proposed scheme. We have now modified this position in the light of strong representations from those providing sheltered housing. They stressed that a blanket exclusion would not be appropriate given the enormous variety of schemes in existence. For example, while some schemes offer very short-term emergency accommodation to those coming direct from the street, others are more long-term, often part of a care strategy to assist the person to a position where he or she could take full responsibility for meeting their own housing needs. In the light of these representations, we now recommend that while some supported housing schemes should indeed be excluded from our scheme, others should come within it. We deal with these issues more fully in Part XVI below.

[19] Under the Protection from Eviction Act 1977, accommodation means any accommodation other than storage, a staircase, passage, corridor or other means of access. See s 3A (4) & (5).

ABOLITION OR AMENDMENT OF EXISTING STATUTORY TESTS

6.30 A consequence of this approach is that other tests which, historically, were inserted in legislation in order to define the scope of that legislation will, in the scheme we recommend, no longer be required. These include the following.

Rent

6.31 Our primary requirement is that there should be a contractual agreement. Under normal principles of the law of contract, for there to be a contract, there must be "consideration". Some forms of consideration may not appear to be like "rent" as usually conceived. However, we think that provided that there is consideration in the common law sense, then the agreement should fall within the scheme.

Agreements for high or low rent

6.32 A related feature of earlier schemes was that they should not apply either where no or only a low rent was paid, or where a high rent was paid.

6.33 The primary purpose of the low or no rent exception was to exclude from earlier schemes leasehold agreements where only a small ground rent was paid, in addition to the premium paid to acquire the leasehold interest. We have accepted that leaseholds should continue to fall outside the scope of our scheme, but think that a more sensible way to achieve that exclusion is by placing grants of terms of 21 years or more outside the scheme.

6.34 In relation to the exclusion of high rents, this can be explained historically on the basis that earlier types of regulatory legislation were, at least initially, intended to apply only to those in poorer and cheaper housing. It was assumed that those who could afford to pay higher rents would have greater bargaining power and would therefore be in less need of legislative protection.

6.35 We are not aware of any empirical work that has attempted to assess this assumption. But in any event we have come to the conclusion that to try to distinguish between those who should come within a scheme of regulation and those who should not, simply on the basis of the rent they can pay, is no longer desirable.

6.36 Furthermore, the nature of the protections available under the scheme we propose are very different from those envisaged when the first protective legislation was introduced. To retain a rent-threshold test would be to retain one element of complication and inflexibility, which we are striving to remove. We have therefore come to the conclusion that all occupation agreements should come within the scheme, irrespective of the rent payable.

The identity of the landlord

6.37 Another key feature of the present law is that one scheme applies to lettings by one category of landlords,[20] another to lettings created by other landlords. We have

[20] Secure tenancies under the Housing Act 1985 can only be created by landlords who satisfy the "landlord condition": Housing Act 1985, s 80 (1).

concluded that, while there may well be a strong case[21] for requiring defined categories of landlord to use type I rather than type II agreements, we have not been convinced that the identity of the landlord should be a key aspect of the definition of the agreement type.

6.38 We therefore recommend that the identity of the landlord should no longer be a part of the definition of the agreement types that fall within the scope of the new scheme. Removal of this requirement will facilitate greater flexibility in rental housing provision, as the scope of the housing activities of local authorities, other social landlords and private landlords become increasingly complex and inter-dependent.

Occupation as only or principal home

6.39 The current regulatory schemes attach only to a tenant's occupation of premises as his or her "only or principal" home. We accept that social landlords, in particular, will want to ensure that persons in housing need do not have agreements relating to more than one property. This, however, can be controlled by making it a condition in the agreement.[22] Thus a person occupying more than one home will be in breach of the agreement, and liable to proceedings for possession being taken against them. In addition, we recommend that it should still be possible for the landlord to seek possession against a person who has provided false information when applying for accommodation. There is no reason why an agreement relating to a property that is not a person's only or principal home, but nevertheless is (one of) their homes should fall outside the statutory framework and be regulated only by the common law. In addition, this approach avoids the need for complex case law on what constitutes "occupation" for these purposes. There are cases where the present law makes it extremely difficult for a landlord to know whether or not a tenant is still in occupation of the premises.[23]

6.40 There may, indeed, be cases where even a social landlord would be willing, exceptionally, to allow an occupier to continue to rent a home which was not their only or principal home. Examples are where the occupier works in one place, but his or her family lives in another, or where the contractual occupier is in long term hospital care, or in prison. If a landlord is willing to allow such an arrangement, it could be accommodated by way of variation of the term which would otherwise require use of the home as the only or principal home of the contractual occupier. It would be impossible to sanction such an arrangement at the moment without the occupier losing the statutory security attaching to his or her tenancy.

[21] Discussed in paras 5.15 – 5.51 above.

[22] We accept that one use to which the current "only or principal home" formula is put is to limit the rights of secure tenants to buy their property. By recommending that our scheme should apply to all agreements granting a right to occupy, we are not proposing any change to the law on the extent of the right to buy. This will remain limited to the person's "only or principal" home. This will be dealt with in particular provisions relating to the right to buy.

[23] See eg *Brown v Brash* [1948] 2 KB 247; *Crawley B C v Sawyer* (1987) 20 HLR 98; *Ujima Housing Association v Ansah* (1997) 30 HLR 831; *Hammersmith and Fulham LBC v Clarke* (2001) 33 HLR 77.

Discontinuous occupation

6.41 There are situations where a landlord may want to grant a right to occupy, but also provide that for defined periods the occupier should be required to vacate the premises. Universities wanting to have student residential accommodation available for vacation-time conferences is an obvious example.[24] We consider that it should be possible to make such arrangements in type II agreements, but not the high security type I agreements. We therefore recommend that there should be a compulsory-minimum term that the right to occupy is continuous from the point at which it first arises until the termination of the agreement, but that in type II agreements, this term would be subject to the proviso that it did not apply if there were clearly defined periods during which the right to occupy would be suspended.

Separateness and sharing

6.42 We recommend that scheme should extend to any premises and any part of any premises. It is our intention that existing complexities about separateness and sharing are avoided. Thus occupation agreements will be included whether or not there is sharing of accommodation or indeed where there is no separate accommodation. The sole test will be whether the agreement confers the right to occupy premises *as a home*.[25]

6.43 As already noted above, there will be a specific exception where accommodation is actually shared with the landlord.[26]

OPTING IN AND AGREEMENTS WITH COMPANIES AS "OCCUPIERS"

6.44 Although agreements in the excluded categories outlined above will not be *required* to be type I or type II agreements, the parties may nonetheless wish them to be so. We think that this should be possible in some cases. Some "exclusions" are so fundamental to the scheme that we do not think it would be appropriate to allow opting in. Thus, an arrangement where no legally binding contract exists should not be able to opt in; nor should a contract to rent a garage (as a garage). Additionally, there would be a danger of our scheme being used to circumvent other regulatory regimes if premises subject to one of the other statutory scheme – for example, business tenancies, or agricultural holdings – could opt in. On the other hand, we think a resident landlord providing accommodation to lodgers, for instance, should be able to opt in, if he or she so chose.

6.45 Our recommendation is therefore that an arrangement which is exempt from the requirement to use a type I or type II agreement can nevertheless be brought within the scope of such an agreement, if the parties agree, and

(1) there is a contract,

[24] It would be possible for student lettings to be provided on a termly or semester basis, rather than a full academic year basis; but we are not attracted by this idea as it would add a very considerable administrative burden which we regard as unjustifiable.

[25] This builds on the approach of the House of Lords in *Uratemp Ventures v Collins* [2001] UKHL 43, [2002] 1 AC 301.

[26] See para 6.29(2) above.

(2) for a home,

(3) which is not covered by another statutory scheme.

Agreements where the company is the "occupier"

6.46 Under the current law, agreements where the tenant is a company do not qualify for the statutory regimes because they are not agreements "with an individual". On balance, we think this approach is right, even where there is a contract for a home. However, we think that the parties to a contract for a home with a company as the "occupier" should be able to opt into our scheme. We therefore recommend that an agreement between a landlord and a company to provide a home for a natural person may be brought within the scheme, provided that the agreement is sufficiently compatible with the scheme for occupation agreements.

CONTRACTS WITH MINORS

6.47 Both land law principles – which prevent a person under 18 from holding an estate in land, including a tenancy – and contract law put obstacles in the way of landlords renting homes to 16 and 17 year olds. This can present difficulties for social landlords seeking to house, particularly, vulnerable young people.

6.48 We want to make it clear that 16 and 17 year olds are able to enter occupation agreements and that, where necessary, landlords will be able to sue for breach of contractual obligations. We are seeking to remove unnecessary legal barriers to the creation of occupation agreements with 16 and 17 year olds. We recommend that 16 and 17 year olds should be treated as adults for all purposes relating to occupation agreements. (This will also have significance in terms of the availability of injunctions to restrain anti-social behaviour.)[27] The Bill will make clear that those under 16 years of age *cannot* hold an occupation agreement.

APPLICATION TO EXISTING AGREEMENTS

6.49 Our new scheme will apply to all agreements within its scope entered into after the coming into effect of the new Act. But promoting simplification of the law, which is a key objective of the project, will not be achieved unless as much as possible of existing housing legislation can also be repealed.[28] This will reverse historic approaches, whereby – in general – new regulatory law was added on to earlier legislative provisions. This accumulation of legislative provision has been in large part responsible for the complexity of the current law. Consultees were in broad agreement with this approach.

6.50 We shall, therefore, recommend repeal of most of the earlier legislation that dealt with the legal status of tenants of residential occupation. These will include:

(1) Part I of the Housing Act 1988 (assured and assured shorthold tenancies)

(2) Part IV of the Housing Act 1985 (secure tenancies)

[27] See paras 15.23 – 15.33 below.

[28] See CP 162 paras 3.4 – 3.73.

(3) Chapter 1 of Part V of the Housing Act 1996 (introductory tenancies).

Converting existing agreements

6.51 A consequence of this recommendation is that existing agreements will be converted into one of the two types of agreement under the scheme. We anticipate that there will be a reasonably long period before the key parts of the new Act come into force. During that time there should be an education campaign to prepare landlords, tenants and others for the conversion. The conversion should then all take place at once rather than being staggered. This was strongly urged by consultees.

The Rent Act 1977

6.52 Logically, Parts I and VII of the Rent Act 1977, which deal with the definition of tenants protected by the Rent Acts and their security of tenure, should also be repealed and tenancies still protected by it should be brought into our new scheme. With rare exceptions, no new Rent Act protected tenancy has been able to be created since 15th January 1989 (the date on which the Housing Act 1988 came into force). The population of tenants with Rent Act protection is ageing and declining in numbers.

6.53 This very fact resulted in strong representations being made to us during the consultation, that there would be considerable political danger to making this an integral part of the new scheme. Even if all rights of Rent Act protected tenants were to be fully preserved in the new legislation, including rights to fair rents, there was considerable worry that they could become confused about their rights and that landlords might take advantage of that confusion. We will therefore recommend that a power for the Secretary of State to repeal relevant parts of the Rent Act 1977 should be included in the Bill, but that the question of repeal of the Rent Act 1977 should be taken no further at this stage.

6.54 The Rent (Agriculture) Act 1976 provides for agricultural labourers equivalent protection to that in the Rent Act 1977. Our general reasoning on Rent Act 1977 tenancies therefore applies equally to the 1976 Act.

Agricultural occupancies

6.55 Just as the Rent (Agriculture) Act 1976 is equivalent to the Rent Act 1977, so chapter 3 of Part I of the Housing Act 1988 is the agricultural equivalent of the general assured regime in the Housing Act 1988. However, the way in which the assured tenancy regime was applied in the agricultural context was significantly different from the general regime. Agricultural occupancies are a specialised and particularly complex area of housing law, with a unique political history. To understand the practical implications of this, we engaged in discussions with the National Farmers' Union, the Country Landowners' Association, the agricultural division of the Transport and General Workers Union and Shelter. We now appreciate that a particular feature of the system is the inter-relationship between the functions of the Agricultural Wages Board and the current low rent threshold for assured shorthold tenancies, which does not apply to assured agricultural occupancies. Thus, the tenure position of agricultural labourers is intimately inter-woven with the system designed to determine wage levels. The result is that any attempt to change significantly the substantive rights of occupiers under the tenure regime would have an impact on labour relations within farming. In the light of

this, we have concluded that it would be inappropriate for us, as a law reform body, simply to apply our standard system to agricultural occupiers.

6.56 We therefore recommend that the current legal settlement in this area should be reviewed by the Government, so that the proper *policy* considerations can be considered, with a view to simplifying the law on agricultural occupancies in such a way as to fit them more straightforwardly within our new scheme. In the meantime, we make the following recommendations to ensure that agricultural occupation agreements are brought into the scheme in such a way as to preserve as far as possible the features of the current assured agricultural occupancy.

6.57 We recommend continuing to use the definitions of property in "qualifying ownership" occupied by a "qualifying worker", which set the scope of which agreements are covered by special provisions on agriculture. The new scheme should deem such arrangements to be contracts even where they are not, in order to reflect the breadth of the current position.

6.58 At present such an agreement qualifying as agricultural will produce an assured agricultural occupancy, unless the landlord can and does choose to use an assured shorthold tenancy instead, and unless it is excluded altogether by the special provisions on sharing. Use of an assured shorthold is only possible where there is a tenancy. Many such arrangements will be service occupancies which constitute licences despite giving exclusive possession. It is also only possible where other requirements for ordinary assured status are met, in particular where the rent is above the low rent threshold, which will normally involve the Agricultural Wages Board protecting the wages to be paid.

6.59 We recommend that agricultural occupancies in future should be under type II agreements. The type II agreement should be in a modified and written up form to reflect the assured agricultural occupancy. It should not allow inclusion of the notice-only ground for possession or of a term enabling the landlord to repossess merely because of termination of the employment. It should include an estate management ground based on the landlord's current ability to apply to a housing authority to rehouse the tenant "in the interests of efficient agriculture" under section 27 of the Rent (Agriculture) Act 1976, as also applied to assured agricultural occupancies.

6.60 The exception, where a normal type II agreement can be used to reflect the current assured shorthold tenancy, should be where the landlord notifies the occupier that he has chosen not to use the modified agreement in two sets of circumstances. Those are where:

(1) the agreement constitutes a tenancy rather than a licence, so that service occupancies can still benefit from the modified type II agreement; and

(2) rent is payable which is above the current low rent thresholds in paragraph 3A of Schedule 1 to the Housing Act 1988, so that the Agricultural Wages Board will be engaged in the same circumstances as at present.

Mapping the current status of existing agreements on to the new types

6.61 The main principles which we recommend for converting existing agreements to the new scheme are as follows.

(1) In general, existing tenancies and licences should convert to the type of agreement which they would have been if the new Act had already been in force when the tenancy or licence was originally granted.

(2) Despite an element of retrospectivity, the compulsory-minimum terms and the fairness and transparency principles of the UTCCR should be applied to existing agreements on conversion.

(3) Following conversion the occupier should be able to require the landlord to provide the existing occupier with a fresh written statement of the agreement which complies with the new Act, and face the normal sanctions for failure to do so.

(4) If a landlord seeks to vary the agreement, beyond the changes necessitated by the conversion process, any such variation shall only be made in accordance with the terms on variation included in the occupation agreement.

(5) Notices issued and proceedings for possession started before conversion should be able to be continued after conversion, except where they are incompatible with the new scheme.

6.62 Subject to detailed exceptions in marginal cases, we make the following recommendations.

(1) Regulated tenancies under the Rent Act 1977 should not convert, and should remain governed by that Act.

(2) Any remaining protected shortholds and restricted contracts under that Act should convert to type II agreements on appropriate terms.

(3) Rent (Agriculture) Act 1976 occupancies should not convert.

(4) Assured agricultural occupancies should convert to modified type II agreements of the kind described above.

(5) Introductory tenancies or licences should remain as such. They should be promoted into type I agreements in the circumstances where they would currently become secure. This should mean they will all cease to exist within a year of the new scheme coming into force, except those still subject to ongoing court proceedings. The relevant parts of the Housing Act 1996 should be repealed in due course.

(6) Secure tenancies or licences should convert to type I agreements, with their right to buy and right to manage preserved.

(7) Fully assured tenancies should convert to type I agreements where the landlord falls within the definition of social landlord under our rules on the use of the types of agreement. Any right to acquire and similar rights should be preserved.

(8) Fully assured tenancies with other landlords should convert to “written up” type II agreements. These are on similar terms to type I agreements. The main difference from type I is that they also include the type II

mandatory repossession for substantial rent arrears. The notice-only ground for possession would not be available.

(9) Assured shorthold tenancies should convert to type II agreements, subject to the following rule on social landlords. Any fixed term will be taken over into the converted agreement.[29] The abolition of the six months' moratorium would affect periodic shortholds, or those with fixed terms for less than six months, if they had been granted less than six months before the conversion. In these cases transitional provisions should preserve the effect of the moratorium.

(10) Assured shorthold tenancies with social landlords (as defined under the rules relating to the use of agreement types) should convert to type I, unless they fall within the list of exceptions permitting use of type II by social landlords. We recommend that Housing Corporation guidance should regulate attempts by registered social landlords to evict under section 21 of the Housing Act 1988 to avoid existing shorthold tenants acquiring type I status.

(11) Those tenancies and licences which currently fail to meet the requirements for secure or assured status,[30] but which fall within the scope of either or both of sections 3 and 5 of the Protection from Eviction Act 1977 (not being excluded by section 3A), should convert to type II agreements. For agreements with a social landlord, this will create an additional transitional class of allowable exceptional uses of type II, but this will only last until those original agreements end. In some cases, particularly fully mutual housing co-operatives, the conversion will be to a form of "written up" type II agreement.

(12) Those tenancies and licences which are currently not secure or assured and not covered by sections 3 or 5 of the Protection from Eviction Act 1977 (mainly because of being excluded by section 3A) should remain outside the scope of housing legislation.[31] They will be subject only to general leasehold law, if they are leases, or any applicable law for licences, to the Unfair Terms in Consumer Contracts Regulations 1999 where applicable, and to the restrictions on entry in sections 6 and 7 of the Criminal Law Act 1977.

(13) Our scheme does not generally apply to trespassers. However, on conversion there are two groups which will change from being counted as

[29] The effect would not be that a wholly new term starts to run. Rather, 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 been allowed to run.

[30] Other than because they are covered by other statutory regimes, such as those for long leases, business tenancies, agricultural holdings and so on. So this will cover those excluded by Schedule 1 to the Housing Act 1985 or Schedule 1 to the Housing Act 1988, and those who do not meet the current requirements, not reproduced in the new scheme, that the property is let as a separate dwelling and occupied as the only or principal home.

[31] These include: holiday lettings, lettings by resident landlords, accommodation provided as a temporary expedient to a trespasser, and hostel accommodation.

trespassers to being occupiers under the new Act. So-called "tolerated trespassers"[32] should convert to type I occupiers, but still subject to the suspended possession order.[33] Under the new scheme the agreement, and its statutory status, do not terminate until the possession order is enforced. Given the time before the Act can come fully into force, landlords will in appropriate cases be able to evict any such tolerated trespassers before they gain the rights, such as rights on repairs, that are associated with type I status. The other special case is when someone let in by the tenant or licensee remains in occupation after the termination of the tenancy or licence (either by death of the occupier without a successor, or in some other way not involving a possession order), and the landlord does not evict but takes "mesne profits" without creating a fresh tenancy or licence. Our scheme makes special rules for imposing a type II agreement in some cases where this will happen in future.[34] We recommend a similar approach to convert arrangements to type II agreements where a tenancy or licence terminated in those circumstances before commencement of the new Act.

[32] *Burrows v Brent London Borough Council* [1996] 1 WLR 1448.

[33] In theory, it would be possible for a private landlord, who is not a social landlord, to have a former assured tenant as a tolerated trespasser; in this case, the tolerated trespasser would become a "written up" type II occupier.

[34] Paras 10.9 – 10.10 below.

PART VII
THE WRITTEN AGREEMENT

INTRODUCTION

7.1 We have already discussed the implications of our adoption of a "consumer approach" to this project.[1] We consider that this approach requires that:

(1) there must be an agreement between the landlord and the occupier;

(2) the new Act should ensure that the agreement is as transparent as possible; it should both say what it means and mean what it says; and

(3) the landlord and occupier should be able to understand their respective rights and obligations from the agreement.

Principles for occupation agreements

7.2 To implement the consumer approach:

(1) landlords should be required to put agreements into writing;

(2) this requirement should be backed up by appropriate sanctions;

(3) the written agreement should contain a full and clear statement of the landlord's and the occupier's contractual rights and obligations to each other;

(4) the written agreement should also contain other information which, as a matter of public policy, it is desirable for landlords and occupiers to have (for example, the requirement on the landlord to provide an address in this country);

(5) agreements should be in plain language and clearly laid out;

(6) the Secretary of State should be required to provide, by statutory instrument, model agreements which will assist those drafting written agreements and will operate as a default where a landlord fails to meet the requirements to put an agreement into writing;[2]

(7) statutory regulation of the landlord-occupier relationship should as far as possible be achieved by the incorporation of appropriate terms in the written agreement; as little as possible should be in separate statutory provisions which take effect independently of the contract;

[1] See above Part IV.

[2] Although the compulsory and default terms set out in statutory instruments will be exempt from challenge under the UTCCR (see UTCCR Reg 4(2)(a)), they should be drafted to be fair and transparent in the first place.

(8) the written agreement should contain basic explanations of the effect of any essential but non-contractual statutory provisions, or reference to the provisions and the nature of their subject matter;

(9) the law governing the agreement should as far as possible be found in the new Act, supplemented by consumer legislation and the common law of contract;

(10) as far as possible the occupier's statutory status[3] should be linked to the occupation agreement; it should not be possible to terminate one without terminating the other;

(11) nor, as far as possible, should the occupier's statutory status be able to be altered without a variation of the agreement; and

(12) as far as possible all the terms of an agreement should be "fair" and "transparent" in accordance with the principles the UTCCR;[4] and these principles should be applied to occupation agreements entered into before, as well as since, 1995.

FORMATION OF THE CONTRACT

7.3 As already stated, the primary objective of this project is to create a scheme which can easily be used by ordinary people. In deciding whether or not an occupation agreement has been made, we are anxious to avoid the imposition of formal procedural steps that must be completed. While these may be appropriate in some circumstances, for example when buying or selling a house, we do not think they are needed for what are often fairly informal arrangements. We therefore think that the formation of the agreement should be determined by application of the normal principles of contract law. For there to be a contract, there must be an offer to enter the contract; the offer must have been accepted; and there must be some consideration.

7.4 Formation of the occupation agreement should not be related to land law rules on formalities for the creation of leases. The agreement should not be rendered invalid for lack of writing.[5]

THE REQUIREMENT FOR A WRITTEN AGREEMENT

7.5 Notwithstanding our approach to the question of how an agreement is made, it is fundamental to the scheme that the landlord should be required to provide the occupier with a written statement of the agreement. There was some opposition to this idea, particularly from small landlords.[6] But most respondents accepted that

[3] The status of being a type I agreement occupier, a type II agreement occupier or an excluded occupier.

[4] See also the Office of Fair Trading, *Guidance on Unfair Terms in Tenancy Agreements* (November 2001).

[5] Although we propose that, before a written agreement is provided by the landlord, the agreement would not be binding on the occupier: see para 7.21 below.

[6] The ready availability of model agreements will make it easy for landlords to participate in the scheme.

this requirement was an essential part of the new scheme. Thus we recommend that the landlord must put the agreement in writing and give a written version to the occupier. The use of electronic,[7] rather than paper, copies should be permitted where the occupier has expressly agreed to this.

7.6 The Act should not require any specific number of copies, or counter-parts, to be produced (save the one to be given to the occupier), nor should it require signatures by either party. While we would expect landlords to obtain a signature for receipt of the written agreement, and to keep a copy of the agreement for themselves,[8] this will not be a statutory requirement. If they do not obtain a receipt and court proceedings ensue, receipt will have to be proved on the normal civil burden of proof.

7.7 The prudent landlord will also ensure that the agreement is signed before the occupier moves in, with the occupier being allowed enough time to understand the agreement before signing it, but again we would not wish the new Act to require this.[9]

7.8 We shall not recommend that the landlord should be prohibited from making a charge for providing a written statement of the agreement. We anticipate that, in most cases, landlords will wish to use the model agreements, which will be widely and readily available and will suit most purposes. They will be very cheap to acquire.

7.9 Instead we recommend that agreements should contain a default term providing that the written statement will be provided free of charge to the occupier. Should a landlord wish to make a charge, it would have to be by way of a departure from the default term; this will therefore have to be properly justified if it is to satisfy the fairness requirements of the UTCCR. If the occupier loses the copy initially supplied, the landlord should be able to charge a reasonable fee for issuing a replacement.

7.10 Given the importance to the scheme of the landlord providing the written statement, we recommend that once agreement has been reached, the landlord must provide it, notwithstanding any failure by the occupier to comply with the terms of the agreement.

7.11 The requirement to provide a written statement of the agreement will apply to all agreements entered into on or after the date on which the Act comes into force.

[7] By whatever appropriate means such as by email, by downloading from the World Wide Web or an intranet, or by a disc.

[8] They will need to do so in order to take any court action, for instance.

[9] The giving of time to read the contract will help protect the landlord against challenges under the UTCCR. The preamble to the Directive on which the UTCCR are based states: "Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail". Reg 7(1) requires that "any written term is expressed in plain, intelligible language".

7.12 In the case of agreements already in existence on that date, landlords should have had an adequate lead-in time, and we hope that Government will allocate appropriate resources to ensuring that landlords are aware of and prepared for the introduction of the new scheme. In these circumstances, we think that it is right to expect landlords to provide a written statement of the new form of the agreement, as it has been converted under the scheme.[10]

Practical issues

7.13 The scheme needs to take account of a number of practical matters which may arise in the process of putting an oral occupation agreement into written form.

Putting an agreement into immediate effect.

7.14 Notwithstanding our assumption that in most cases the agreement will be put into writing before the occupier goes into occupation, it should be possible for a landlord and occupier to enter an occupation agreement, for that agreement to be put into writing, and for the occupier to go into occupation, all on the same day, with the agreement being binding on both sides from that day. In this situation, both parties would be fully bound by the lawful terms of the written agreement.

Reaching an agreement for occupation at a future date

AGREEMENTS PUT INTO WRITING

7.15 Frequently, an occupation agreement will be made and put into writing well in advance of the date on which the occupier is due to go into occupation. For example, parties may agree in July that a flat may be occupied as a home starting in September. In accordance with the principles set out above, both parties would be fully bound by the contract.

7.16 The compulsory-minimum terms should make clear which terms come into effect immediately upon the contract being put into written form and those which have effect only when the occupier becomes entitled to go into occupation.

7.17 In this context, we consider that the terms relating to security of tenure (thus requiring the obtaining of a court order for possession) should only come into effect once the occupier becomes entitled to go into occupation of the home. Any termination of the agreement prior to that date will depend upon the contract.

7.18 We do not intend to specify any compulsory-minimum terms, or recommend any default terms to the Secretary of State, to govern the termination of the contract prior to the date on which the occupier is entitled to enter into occupation for the first time.

AGREEMENTS NOT PUT INTO WRITING

7.19 We want to encourage landlords to put the agreement into writing as soon as possible, particularly if they are contracting in advance of a start date. We also

[10] Our recommendations on how existing agreements should be treated under the new scheme are discussed in paras 6.61 – 6.62 above.

want to ensure that, if there is a dispute about the terms, they are clarified before the occupier is due to move in. We accept, however, that this will not always happen.

7.20 In order to provide an incentive to landlords to put the terms of the agreement into writing, we recommend that if there is a delay between the agreement being orally entered into and the start of the occupier's occupation, then the agreement should bind the landlord immediately. However, the intended occupier should not be bound until either a written statement of the agreement is issued or the date for occupation arrives, whichever is the earlier.

7.21 During any period when the agreement is not binding on an intended occupier, he or she should be able to notify the landlord that he or she is treating the contract as cancelled without loss, and have any deposit or advance payments of rent returned to him or her.[11] This will provide an appropriate incentive to the landlord to put the agreement into writing as quickly as possible.

7.22 We do not think landlords should be subject to the full range of sanctions set out below if they fail to issue a written statement of the agreement before the date on which the occupier actually goes into occupation.

Failure to provide a written copy of the agreement after the occupier goes into occupation

7.23 We want landlords to provide occupiers with their written statement of the agreement at least from the start-date of the agreement, that is, the date on which the occupier is entitled to take occupation. Even here, we think that a further period of grace of two weeks should be allowed for the landlord to put the agreement in writing. After the expiry of that period, we recommend that two consequences should follow:

(1) First the statutory default terms in the agreement should be applied in lieu of any terms that may have been orally agreed by the parties. The application of the default terms in this way is designed to provide certainty and act as an incentive to issue written agreements for landlords who seek to use terms which are more favourable to them than the default terms.

(2) Secondly, there should be sanction on the landlord for their failure to provide a copy of the agreement. We discuss the sanctions in paragraphs 7.35 to 7.53 below.

[11] This principle will apply to payments relating to the agreement itself, such as a deposit or an advance payment of rent, rather than those for what the OFT currently calls "pre-tenancy agreements". Those payments, for example a payment to be allowed to hold a place in a queue for consideration for being given an occupation agreement, should be governed by general contract law, the provisions of UTCCR and, where relevant, the Accommodation Agencies Act 1953, rather than by the provisions of the new Act.

Default terms

7.24 In our detailed proposals relating to the content of occupation agreements[12] we recommend that some terms *must* be included in the agreement. We call these "compulsory-minimum terms". In addition, we recommend that there are certain issues which must be dealt with in the agreement, but in relation to which the parties to the agreement may negotiate their own terms. Default terms dealing with these issues will be in the model agreements. We call these "default" terms. Where the parties agree their own terms instead, they will be binding on the parties, provided that they comply with the standards of the UTCCR. We call these "substitute" terms.

7.25 If one of the matters in the "default" category is not actually contained in a particular agreement, we recommend that the relevant default term in the model agreement should operate to fill the gap.[13]

7.26 Similarly, if a term has been negotiated but is found not to comply with the UTCCR, the relevant default term will fill the gap. This same principle will also apply if a term is found, under normal rules of the law of contract, to be void because it is uncertain; or if a term is invalid in some other way, for example because it offends anti-discrimination law.

7.27 These matters will be avoided if the parties decide to use one of the statutorily prescribed model agreements, which – by definition – will address all the issues that the agreement must address, and will be UTCCR compliant.

The powers of the court

7.28 In CP 162, we asked whether, if there was a dispute as to the terms of the agreement, should there be a procedure for amending the agreement. We invited views on whether this should be undertaken by the county court, or by Rent Assessment Committees. Some respondents supported the latter suggestion. The Independent Housing Ombudsman suggested it was a task his service could take on. But the clear general view was that this should be a matter for the court.

7.29 We recommend that the court should have jurisdiction to make a declaration as to the terms of the agreement, and to issue a correct and complete written statement of the agreement or to order the landlord to do so. This should be available where no written agreement has been issued or it has been issued but is incomplete, or where it does not accurately set out the compulsory-minimum terms or reflect the expressly agreed key terms.

Cooling off

7.30 There are now a number of situations where consumer law imposes a cooling off period to allow the consumer time to back out of an agreement. Examples include legislation relating to consumer credit agreements,[14] timeshare agreements,[15] and

[12] Discussed in Part VIII.

[13] If the missing term was expressly orally agreed, it would be open to either party to seek a declaration to have it included in the written terms: see para 7.29 below.

[14] Consumer Credit Act 1974, s 68.

long-term insurance contracts.[16] We have considered whether our requirement for a written agreement could be married with a cooling off period to give occupiers the opportunity to withdraw from an occupation agreement once made. We have concluded that such a step would not work, given the practicalities of the rented housing market.

7.31 In the social rented sector, the legislation and policies relating to allocation act to *limit* the number of times a prospective occupier can refuse to accept an offer of a home. It would be confusing and counter to the realities of social housing also to give occupiers a formal, legal, right to withdraw from an offer they have already (in allocations' terms) accepted. And it would be unnecessary, because the occupier under a type I agreement can terminate it on one months' notice.

7.32 In the private sector, as a general rule most homes are rented on a short term basis, on six month fixed terms or periodic tenancies. This would continue to be so under our scheme. The argument for a cooling off period is clearly less forceful where the occupier is able to withdraw from the agreement within a reasonably short timescale. In any event, we do not consider it practicable, or fair to landlords, to allow an occupier to exercise a right to withdraw during a cooling off period once they have already gone into occupation (even if there was provision for payment of the equivalent of rent for the relevant period). It would, if it were used to any degree by occupiers, seriously disrupt landlords' ability to manage their properties and result in properties remaining un-let for longer.

7.33 If a cooling off period was reserved for agreements made in advance of the occupier going into occupation, it would provide an incentive for landlords to delay concluding an agreement (and thus falling under the obligation to produce a written statement of the agreement) until the occupier went into occupation. This would clearly be undesirable, and would reduce rather than increase the effective rights of occupiers.

7.34 More generally, there is something in the argument that providing homes is not like the provision of other consumer products. Particularly in areas of high demand for housing, unlike consumer goods or services, it will very often be the case that there *is* no real alternative for an occupier, so a right of withdrawal would prove a somewhat illusory safeguard. In this context, the occupier's position is best safeguarded by having a fair agreement that guarantees his or her basic rights. That is what our agreements aim to provide. We have therefore come to the conclusion that a cooling off period is not appropriate.

SANCTIONS

7.35 For these requirements relating to writing to work there will have to be sanctions against landlords who do not provide a written statement of the agreement. We are concerned that sanctions should still be effective even where there is ongoing non-compliance designed to frustrate the purpose of the legislative requirement. At the same time, we are anxious that sanctions should be proportionate, particularly

[15] Timeshare Act 1992, ss 5 and 6.

[16] Insurance Companies (Cancellation No. 2) Regulations 1993, SI 1993 No 1327, reg 70.

against an inexperienced first time small landlord who is not deliberately evading the writing requirements and who, indeed, may be dealing with an occupier who is seeking to exploit the rules.

7.36 We think that use of criminal law sanctions in this context is inappropriate. Under the present law, there are a number of criminal sanctions which can theoretically apply to landlords who fail to provide defined types of information. But we have no evidence that these are significantly used in practice.[17] In any event, we do not think that failure to provide a written statement of an occupation agreement is a matter that warrants criminal liability.

7.37 We recommend that there should be two sanctions (apart from the imposition of default terms):

(1) the rent sanction; and

(2) the civil procedural sanction.

The rent sanction

7.38 Under the present law,[18] rent is not "lawfully due" until certain defined information is available to the tenant. Often this does not, in the end, benefit the tenant since, once the relevant information is provided, the tenant remains liable for the whole amount which then becomes lawfully due. The ignorant or ill-advised tenant may incorrectly assume that they will never have to pay any sum which is said to be not "lawfully due".

7.39 We have decided to develop this basic idea by giving the occupier the equivalent of limited relief from liability for the rent. We recommend that after the expiry of the two weeks' period of grace, the landlord should be deemed to owe the occupier an amount equivalent to one day's rent for each day's delay.

7.40 The period upon which the calculation is made will start with the date of entry into possession (not the end of the period of grace). It will end on the date the written statement of the agreement was actually provided. Thus the minimum amount owed to the occupier will be a sum equivalent to 15 days rent. This will be subject to an upper limit of the equivalent of two months' rent.

7.41 This amount will be owed as a debt, rather than as a refund or suspension of rent.[19] There will be specific provision to enable the occupier to withhold future rent as one way of recovering the amount.

7.42 This sanction in itself will not provide an ongoing sanction against a landlord who still refuses to provide a written statement of the agreement after the first two

[17] We recommend that the law on rent books, Landlord and Tenant Act 1985, ss 4 – 7, which adopts this approach, should be repealed.

[18] Landlord and Tenant Act 1987,ss 47(2) and 48(2).

[19] For those in receipt of housing benefit, it should be expressed to ensure that it is not treated as a reduction in the rent due for the purposes of calculating entitlement to housing benefit under the Housing Benefit (General) Regulations 1987, SI 1987 No 1971.

months of delay. Some pressure will be maintained on the landlord by the fact that, on ordinary principles, he or she will be liable for interest on the rent sanction.[20]

7.43 In addition, we recommend that in the case of on-going delay, the court should have the power, on the occupier's application, to increase the rent-sanction by up to one hundred per cent. This power to double the debt will be available where the court has accepted that the default by the landlord was "wilful".

The procedural sanction

7.44 In relation to type II agreements, where notice-only repossession is available under an accelerated possession procedure, we recommend that there should be a further procedural sanction.

7.45 Where the landlord has been asked[21] to put the agreement in writing, whether by the occupier or someone on their behalf,[22] and has failed to do so within the first two months of the occupier entering into occupation, then the period of notice of intention to take possession proceedings under the notice-only procedure should be extended from its normal minimum of two months to a minimum of six months.

7.46 Furthermore, the period of notice should not be able to expire before six months from the date on which the requirement for writing has finally been fully complied with, unless the court is satisfied it would be just and equitable[23] to shorten this period.

Court's discretion in the case of incompleteness or inaccuracy

7.47 If the landlord has provided a written statement of the agreement, but it is not complete or it is inaccurate, we recommend that the court should have discretion as to whether to impose any or all of the sanctions at the same time as it considers any application to correct it. In minor cases of breach no sanction might be imposed. Conversely, the full range of sanctions could be imposed where the landlord was deliberately attempting to prevent occupiers obtaining a full and proper statement of their rights under the agreement.[24]

7.48 Similarly, the sanctions should be available, but only at the court's discretion, where the agreement is varied, whether by agreement or through a variation

[20] We will rely on the courts' ordinary powers to apply interest, and to do so at the penalty rates available under the Civil Procedure Rules (particularly in cases of Part 36 offers). See CPR Rule 36.22.

[21] Whether in writing or not, but subject to the occupier having the burden of proof as to whether the request was made. The request should not have to make reference to the Act.

[22] Such as their adviser or solicitor, or an enforcement agency such as the local authority tenancy relations officer or the Office of Fair Trading.

[23] "Just and equitable" is the current test for disregarding problems with notices; there will be similar provision for other problems with notices in the Bill.

[24] In consumer law terms this would be equivalent to the criminal sanctions available under the Consumer Transactions (Restrictions on Statements) Order SI 1976 No 1813, for making written statements purporting to limit various statutory rights of consumers.

clause, and the landlord fails either to notify the occupier in writing of the varied term. (The issue of variation of the agreement is discussed further below at paragraphs 8.89 – 8.120.)

Sanctions for positively misleading occupiers

7.49 A possible problem with this approach is that the landlord who ignorantly, rather than maliciously, omits a compulsory-minimum term from the agreement will be subjected to the rent sanction, whereas the landlord who deliberately but maliciously includes a term which purports to give the occupier fewer rights than the compulsory-minimum term will escape it.

7.50 For example, a term providing that only one month's notice has to be given for a notice-only eviction (whereas the legal minimum is two months) will not be valid, but it will be in the landlord's interest to try to use it if most occupiers are unaware of their rights and believe what is in the agreement without challenging it.

7.51 The purpose of the requirement for writing is to ensure all parties are aware of their rights and responsibilities. This will be undermined if there is no disincentive to counter-balance the benefits of deceiving occupiers. We considered whether the sanctions set out above would be appropriate for wilful abuse consisting of attempting to mislead an occupier by the inclusion of a term which was known not to meet the requirements of a compulsory-minimum term. However, we have concluded that this would lead to confusion over when the basic sanction was applicable.

7.52 Instead we have concluded that the UTCCR should be relied on to remove such clauses from agreements. The OFT has power to order landlords to stop using such terms in all current and future agreements, thereby reducing the scope for abuse by landlords.

7.53 We believe the issue of penalties should be dealt with by the law of fraud. The Law Commission has made proposals for the reform of the law on fraud.[25] Under clause 2 of the proposed Fraud Bill, a landlord could be criminally liable if he 'dishonestly makes a false representation', namely as to what the terms of the agreement are, intending "to cause loss to another or to expose another to a risk of loss" where that other person was the occupier. We feel that the issue should properly be addressed by the law on fraud, rather than by specific provision in housing law.

[25] Fraud (2002) Law Com No. 276; Cmnd 5560.

PART VIII
THE STRUCTURE AND CONTENT OF THE AGREEMENT

INTRODUCTION

8.1 Our aim is that the occupation agreement should, as far as possible, provide an accurate statement of the legal relationship between the parties to the agreement, without the need for additional reference to statutory provisions or other sources of law.

8.2 A particular feature of the new scheme is that the grounds on which a landlord may seek possession will operate through the agreement instead of, as currently happens, being a statutory addition to it. This is discussed in detail in Part IX.

8.3 Our proposed Bill will prescribe both the content and form of the written agreement. It will also enable the creation, in delegated legislation, of sets of terms that can be used in default of a written agreement – "the model agreements".

8.4 Most of the required content will take effect as ordinary contractual terms. But some of the content of the agreement will be required for social policy reasons, to provide the occupier and landlord with information about matters that, though not strictly contractual, are nonetheless of crucial practical importance.

8.5 Not all occupiers will read and understand the whole of their agreement; it is likely to be a relatively substantial document. Nevertheless, it will be the reference source from which both landlords and occupiers can find out about their respective rights and duties when questions arise.

8.6 This will be a considerable improvement on the current position where, even if a tenancy agreement sets out the terms accurately and in some detail, neither party can know the full legal basis of their relationship without reference to numerous statutory provisions and other legal sources as well. Furthermore, the harmonisation of agreements implicit in the scheme should make it easier for housing and legal advisers to give advice to both occupiers and landlords.

8.7 One feature of the consumer approach is whether a prospective occupier should be given time to digest the contents of the agreement. We have not recommend that there should be a "cooling off" period as exists in other consumer contract contexts. We anticipate that there will be circumstances in which the parties will, quite properly, want to enter into an agreement speedily.[1]

8.8 The UTCCR provides an incentive for landlords to allow prospective occupiers time to consider the contract. The precise amount of time will need to be appropriate for the length and complexity of the terms in the agreement.[2] One

[1] Discussed at paras 7.30 – 7.34 above.

[2] Recital 20 of the Directive states "contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms…". At para

factor to be taken into account will be the extent to which the contract deviates from the prescribed model agreements – the greater the deviation, the more time should be given.

THE STRUCTURE AND LANGUAGE OF THE AGREEMENT

8.9 As well as specifying the content of the agreement, we recommend that requirements as to the presentation of written agreements should be prescribed. This has been an important feature of existing consumer protection legislation which we want to extend to occupation agreements. This comprises two elements:

(1) the layout of the agreement should, so far as possible, aid comprehension of it; and

(2) the agreement should be drafted in as plain language as possible.

8.10 We recommend that, in drafting the model agreements that will be published in secondary legislation, the Secretary of State should consult widely with the stakeholders in the rented housing sector – both landlords and occupiers.

CONTENT OF THE AGREEMENT

8.11 We recommend that the agreement should be made up of four categories of terms. The first category will be *key* terms; the second, *compulsory-minimum* terms; the third, *special* terms, and, the fourth, *other* terms, made up of *default* terms, or terms *substituted* for them, and any further *additional* terms required by the parties. The primary object of these requirements is that there should be certainty as to the terms of an agreement, even where they have been inadequately dealt with by the parties.

8.12 We have already noted that the Secretary of State will be required to set out the key, compulsory-minimum and default terms in model agreements.[3] If a landlord and occupier merely agree a weekly rent for a property and the latter moves in with no further agreement or planning, they will be subject to the appropriate model agreement. The landlord will still be obliged to provide a written statement of the agreement. He can do this simply by issuing a front page, setting out the key terms and any variations of or additions to the compulsory-minimum or other terms, to which the relevant model agreement is then attached.

KEY TERMS

8.13 This category relates to the key terms on those subjects which are essential to the agreement, either because there can be no agreement without them or because they need to be covered in practice, but the contents of which cannot be prescribed in advance.

8.14 The key terms will be:

19.2 of their Guidance, the OFT regard the requirement of transparency in reg 7 of the UTCCR as coloured by Recital 20.

[3] See para 8.10, above.

(1) the name of the landlord and the occupier;[4]

(2) an adequate description to identify the property subject to the agreement;[5]

(3) the date on which the occupier can enter into possession;

(4) whether the contract is for an indefinite length of time or is to end on a set date, and if so what that date is; and

(5) the nature, amounts and due dates of the consideration.[6]

8.15 This basic information is known only to the parties. Thus the legislation can only set down the topics to be covered in the key terms section of the agreement. The model agreement will provide suitable wording, but with gaps to be completed by the parties. If the gaps are not completed, then we recommend that the sanctions for failure to provide a complete written agreement should be applied.

8.16 Any subsequent variation of these key terms should be subject to the terms relating to variation of the agreement.[7]

8.17 Details of an address for service, a contact address and any agent's details will be dealt with in the compulsory-minimum terms, rather than key terms.

Relationship of key terms with the UTCCR core terms

8.18 Under the provisions of the UTCCR, certain contractual terms, defined in Article 6(2)[8] of the regulations, are exempt from the requirement that they be fair, provided that they are expressed in plain and intelligible terms. Although the regulations do not actually use the phrase, these terms are generally referred to as "core terms". We had originally thought that what we describe as key terms should

[4] It is important that the occupier's name must be provided. In sole agreements, without any non-contractual occupants, there will not be a problem. But in joint agreements, or where certain people are to occupy the premises but not be parties to the contract, it will be essential that the landlord sets out clearly which people are entering the agreement. The most common problems are with couples or in student shared houses where a variety of arrangements can be made.

[5] We have considered whether we should recommend that the Secretary of State include in the secondary legislation a default term about whether fixtures and chattels are included in the agreement and whether an inventory must be provided. This issue ties in closely with work ODPM are doing on the regulation of deposits (as disputes are often about the existence or state of items which could have been listed in an inventory to avoid disputes). We do not wish to prejudge that work by proposing that there should be a compulsory-minimum term on this issue in the Act.

[6] The consideration will normally be rent, but need not be in all cases. The consideration could be purely in the form of a premium or could be payment in kind – most commonly found in relation to "tied" accommodation where the consideration is the entering into, or work done under, an employment contract – or any combination of these. It may thus include arrangements which under the current law of landlord and tenant could not be "rent".

[7] See paras 8.89 – 8.120, below.

[8] "In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate (a) to the definition of the main subject matter of the contract; or (b) to the adequacy of the price or remuneration, as against the goods or services supplied…"

also be called core terms, thus indicating that they should fall within the scope of Article 6(2). We have however come to the conclusion, not least in the light of representations made to us by the OFT, that this could lead to confusion. We have therefore decided to describe these terms as key terms.

8.19 All the key terms we prescribe, which are also core terms as defined by Article 6(2), will be exempt from the requirement that they be fair. Any other term, which is not a key term, which might otherwise be regarded as being a core term within the scope of Article 6(2), should be deemed not do so. Thus, any such term would remain subject to the UTCCR principles both of transparency and of fairness.

8.20 For example, a term relating to payment of a deposit, which will not be a key term, will be subject to UTCCR standards, even if, in other contractual contexts such a term might be regarded as a core term. Article 8 of the Directive creating the UTCCR provides that "Member States may adopt or retain the most stringent provisions compatible with the Treaty in the area covered by this Directive, to ensure a maximum degree of protection for the consumer". Thus there will be no breach of the Directive in extending the scope of the regulations in this way, as the result is to give consumers greater protection.

COMPULSORY-MINIMUM TERMS

8.21 The second category of terms is made up of those we recommend must be included in the agreement. They will represent a "floor of rights and obligations". In relation to most of these terms, variations will be permitted, though any variation will have to be in favour of the occupier.

8.22 We recommend that agreements should include three broad classes of compulsory-minimum terms:

(1) terms relating to security of tenure and the grounds on which landlords may seek possession against tenants;

(2) terms on matters relating to the operation of the agreement; and

(3) terms on issues currently implied by statute or the common law, for example the landlord's obligation to keep the structure of the building in repair.[9]

8.23 As noted above, the compulsory-minimum terms will be required to set minimum standards of protection for occupiers and fundamental obligations on landlords. However, where appropriate, we also recommend that terms more favourable to the occupier should be able to be agreed instead of the compulsory-minimum terms. These might include, for example, a term that omits a ground for possession by the landlord or expands the landlord's repairing obligations.

8.24 Model terms will be set out in the model agreements; these will automatically be UTCCR compliant. While a term is capable of variation and is varied, the parties

[9] Currently found in the Landlord and Tenant Act 1985, s 11.

will need to ensure that any terms as varied are still compliant with UTCCR principles by being transparent and fair.[10]

Terms relating to security of tenure

8.25 We recommend that the compulsory-minimum terms should deal with the ways in which the landlord may terminate the occupation agreement. We seek to bring as many of the existing statutory grounds for possession as possible under a general ground of possession for breach of the agreement. In addition, we shall provide terms to enable a landlord under a type I agreement to seek an order for possession on "estate management" grounds. We shall also provide terms to enable landlords under type II agreements to seek a mandatory order for possession on the notice-only ground and for serious rent arrears. The details of these terms are discussed below in Part IX.[11]

Terms relating to the operation of the agreement

8.26 We recommend there should be a number of compulsory-minimum terms relating to the regulation of the relationship between the occupier and landlord. Under this head we include terms that deal with matters relating to adding a party to the agreement, the ability to take in a lodger, transferring rights of occupation to another, and succession to rights of occupation. The details are set out below in Parts X to XIV.

Terms relating to issues implied by statute or common law

8.27 Finally, we also have to make provision for those terms currently implied by statute or common law into residential tenancies. The most important of these are the obligations imposed by statute on the landlord relating to keeping the premises in repair;[12] and the common law duty on the landlord to ensure that the occupier has "quiet enjoyment" of the premises. The parties will not be able to contract out of these terms, though it may be possible to vary these terms in favour of the occupier. We discuss these in the following paragraphs.

8.28 Since the focus of this project was primarily on the status and security of residential rental occupiers, we did not consult on the specific details of these terms. Indeed, to have done so would have made an already very substantial project even greater. However, for the scheme to be able to come into effect, we need to make provision for these important terms.

8.29 Our basic approach is to recommend that all those terms and conditions currently implied into tenancy agreements either by statute or by the common law should be adapted for and brought into the new scheme as compulsory-minimum terms. We accept that these terms and conditions may need further revision in the light of experience of the new scheme. We therefore make these recommendations on the

[10] And the UTCCR rules, or any other rules of interpretation or validity, will not be able to lead to a result which is less than the minimum term.

[11] Paras 9.15 – 9.44.

[12] Landlord and Tenant Act 1985, s 11.

basis that this class of compulsory-minimum terms should be regarded as an interim statement, pending any more fundamental revision of them.

(1) Landlord's address for service and agent's details

8.30 Although the identity of the landlord must be one of the key terms, we recommend that there should be a compulsory-minimum term that requires additional information about the landlord and their agent to be provided to the occupier. This will include information about an address in England and Wales at which the occupier may serve notices on the landlord. The term should prescribe that this information should initially appear on the face of the written agreement. Any later changes will be notified in writing to the occupier. If the landlord fails to notify the occupier of such changes, then the occupier will be entitled to rely on the original information, so that service at the original address will be deemed effective.

8.31 The present law prescribes criminal sanctions for failure to provide this information. We do not think that criminal sanctions are either appropriate or effective; we do not recommend that these are brought into the scheme we are proposing. Failure to provide this information, either at the outset of the agreement or after any later variation, will render the landlord liable to the same sanctions that applies to other failures to provide the agreement.[13]

(2) Repairs, fitness and improvements

8.32 In 1995, the Law Commission produced a detailed report, with a draft Bill, entitled "Landlord and Tenant: Responsibility for State and Condition of Property."[14] The recommendations in that report complement the consumer approach we advocate in this report. The degree to which Government will adopt our earlier recommendations is still not settled. Should Government wish to implement them, this will have the inevitable consequence of changing the current law.

REPAIRS

8.33 The most important current provision on repairs is section 11 of the Landlord and Tenant Act 1985. It imposes repairing duties on a landlord by statutorily implying a term into tenancies out of which the parties cannot contract. It is very close to our model of a compulsory-minimum term. It applies to lettings of dwelling-houses, which are premises let wholly or mainly as a private residence, for less than seven years.[15]

8.34 It requires the landlord to keep in repair the structure and exterior of the dwelling-house, and any part of the building in which the landlord has an estate or interest if the tenant's enjoyment of the dwelling-house or any defined common parts is

[13] See paras 7.35 – 7.53, above.

[14] (1996) Law Com No. 238.

[15] The seven years are calculated by ignoring any part of the term before the grant, but including any longer term if it is determinable at the lessor's option before the expiration of seven years from its commencement. A tenant's option for renewal beyond the seven years is ignored.

affected. It also requires the landlord to keep in repair and proper working order the installations in the dwelling-house for supply of water, gas and electricity, and for sanitation and space and water heating.

8.35 The landlord's obligation does not extend to reinstatement after destruction or damage by fire, flood and similar occurrences; matters covered by the tenant's common law duty (or any express covenant) to use the property in a tenant-like manner; or anything which the tenant is entitled to remove from the dwelling-house.

8.36 Although the parties cannot contract out of this term, exclusion of it is possible by county court order. Without such order, the following are void: (a) all exclusions or limitations on the landlord's obligations or the tenant's immunities; (b) any authorisation of forfeiture or the imposition of a penalty, disability or obligation on a tenant who seeks to enforce or rely on those obligations or immunities; and (c) any tenant's repairing obligations covering the same area.[16] We understand that orders seeking exclusion of the term are rarely sought in practice.

8.37 There is a corresponding right for the lessor (or any persons authorised by him in writing) to enter the premises at reasonable times of the day and on giving 24 hours notice in writing to the occupier, in order to view their condition and state of repair.

8.38 The case law has qualified section 11 of the 1985 Act by applying the general limitation on repairing covenants that the landlord is not liable for breach unless and until he has had notice of the disrepair.[17] The landlord must also make good any damage caused by doing the works needed in order to ensure compliance with the covenant.

8.39 Under section 17 of the Landlord and Tenant Act 1985, where a tenant wishes to enforce the repairs duties implied by section 11,

> the court may order specific performance of the covenant whether or not the breach relates to a part of the premises let to the tenant and notwithstanding any equitable rule restricting the scope of the remedy, whether on the basis of a lack of mutuality or otherwise.

This is extremely useful in practice. It ensures that orders for the carrying out of works can be obtained while avoiding the more notorious problems caused by the uneven development of the law on specific performance over the years.

8.40 We recommend that there should be a compulsory-minimum term in the agreement the effect of which is to adapt and apply the provisions of section 11 to all agreements falling within the scope of our scheme.

8.41 The following points should be noted in relation to this recommendation:

[16] Landlord and Tenant Act 1985 ss 11 – 14, as amended by Landlord and Tenant Act 1987, s 60.

[17] See *McGreal v Wake* (1984) 13 HLR 107.

(1) the provision will apply to all occupation agreements falling within the scope of the scheme, including those created by the Crown as landlord of residential accommodation;[18]

(2) the limitation to agreements for less than seven years will be retained;

(3) the power to seek an order from the court to exclude this term will not be reproduced in our scheme;

(4) the restrictions to the scope of the present term to those parts of the property set out in paragraph 8.34 above will be retained;

(5) the (current) tenant's common law duty to use the premises in a tenant-like manner will be adapted to apply to all occupiers;

(6) the current provision[19] that the standard of repair should be judged against the age, character and locality of the premises will be retained;

(7) the current common law requirements that the landlord must have notice of the breach before he or she becomes liable under the term will be incorporated into the compulsory-minimum term; and

(8) the power to order specific performance will be extended to cover all breaches of this compulsory-minimum term.

8.42 There should be a default term which enables the landlord to enter the premises for the purpose of carrying out works required by the terms on fitness and repair.

8.43 Were the Government to decide to go further in terms of implementing our earlier recommendations on responsibility for the state and fitness of property, then these detailed provisions would need to be amended. However, for the purpose of the present project, we limit the scope of our proposals to adapting the present law to occupation agreements under our scheme, subject only to the minor modifications set out above.

FITNESS FOR HUMAN HABITATION

8.44 At present, the general rule in the context of lettings of land is that you take the property as you find it. There is no implied term that premises are fit to live in, even where that is the clear purpose of the letting.[20] This is at odds with our consumer approach; in other contexts, there is a legal presumption that goods supplied are "fit for purpose".

8.45 Section 8 of the Landlord and Tenant Act 1985 implies a term, which the parties cannot contract out of, that certain lettings will be fit for human habitation at the

[18] This will overturn the decision in *Department of Transport v Egoroff* (1986) 18 HLR 326.

[19] Landlord and Tenant Act 1985, s 11(3).

[20] This is subject to an exception in relation to lettings of furnished premises: *Smith v Marrable* (1843) 11 M & W 5; this only applies at the start of the letting and does not import an obligation to keep in repair.

start of the let and will be kept so by the landlord. The history of this provision is explained in *Lee v Leeds City Council*.[21] However, it has become redundant in that it only applies to leases for less than three years where the rent is less than £80 per year in inner London and £52 per year elsewhere. These figures date from when they were typical of working class rented housing, but now would only ever be associated with ground rent on a long lease.

8.46 In our earlier report on responsibility for the state and fitness of property we recommended that this provision should be revived and updated to apply to all leases for less than seven years without any rent limit. We recommended there should be a general obligation to keep premises let fit for human habitation in accordance with the modernised nine point standard.

8.47 We note that a major change in circumstances since LC 238 was published is that the government is now working to a programme of making social landlords achieve a "decency" standard in all social housing stock by 2010.[22] This standard includes meeting the statutory fitness standard, but goes beyond that to include "reasonably modern facilities and services" and "a reasonable degree of thermal comfort". It is therefore likely that, under this programme, social housing would have to be fit within five years of our proposed scheme coming into operation.

8.48 We accept that if our recommendation was introduced with immediate effect for all occupation agreements, both new and pre-existing, this could have serious cost implications. Nevertheless, we think that our new scheme should include a compulsory-minimum term on fitness which adapts the principles set out there.

8.49 We recommend that, exceptionally, this term should not have immediate effect, but that the Secretary of State should have power to decide when it should be introduced. It could be introduced at different times for different types of agreement, and for new agreements and those in existence at the date our proposed Housing Act becomes operative.

8.50 When fully operational, the term should apply to all occupation agreements under our scheme, though the term should apply only to agreements for a term of less than seven years. The landlord should not be liable for matters which arise from the occupiers' fault, or their failure to look after the premises in a "tenant-like" way. Nor should the landlord be liable where the "unfitness is incapable of being remedied by the [lessor] at reasonable expense".

8.51 For the time being, the standard of fitness should be based on the provisions of section 604 of the Housing Act 1985, which provides:

> "(1) Subject to subsection (2) below, a dwelling-house is fit for human habitation for the purposes of this Act unless, in the opinion of the local housing authority, it fails to meet one or more of the requirements in paragraphs (a) to (i) below and, by reason of that failure, is not reasonably suitable for occupation,—

[21] [2002] 1 WLR 1488.

[22] See documents at http://www.odpm.gov.uk/stellent/groups/odpm_control/documents/contentservertemplate/odpm_index.hcst?n=1187&l=3.

(a) it is structurally stable;

(b) it is free from serious disrepair;

(c) it is free from dampness prejudicial to the health of the occupants (if any);

(d) it has adequate provision for lighting, heating and ventilation;

(e) it has an adequate piped supply of wholesome water;

(f) there are satisfactory facilities in the dwelling-house for the preparation and cooking of food, including a sink with a satisfactory supply of hot and cold water;

(g) it has a suitably located water-closet for the exclusive use of the occupants (if any);

(h) it has, for the exclusive use of the occupants (if any), a suitably located fixed bath or shower and wash-hand basin each of which is provided with a satisfactory supply of hot and cold water; and

(i) it has an effective system for the draining of foul, waste and surface water;

and any reference to a dwelling-house being unfit for human habitation shall be construed accordingly.

(2) Whether or not a dwelling-house which is a flat satisfies the requirements in subsection (1), it is unfit for human habitation for the purposes of this Act if, in the opinion of the local housing authority, the building or a part of the building outside the flat fails to meet one or more of the requirements in paragraphs (a) to (e) below and, by reason of that failure, the flat is not reasonably suitable for occupation,—

(a) the building or part is structurally stable;

(b) it is free from serious disrepair;

(c) it is free from dampness;

(d) it has adequate provision for ventilation; and

(e) it has an effective system for the draining of foul, waste and surface water…"

8.52 If the draft Housing Bill, currently the subject of consultation, reaches the statute book in essentially its present form, we recommend that this standard be adapted so as to avoid a "category 1 hazard" as defined in clause 2 (1) of the Bill.

(3) Occupiers' improvements

8.53 There is no general right for tenants or licensees to carry out improvements in the absence of an express term to that effect. Secure tenants do have statutory rights.[23] Assured tenants do not have these statutory rights. However, the Housing Corporation would expect, as part of its regulatory regime, that RSL tenants would be given contractually equivalent rights.

8.54 We recommend that the Bill should provide that type I agreements contain a compulsory-minimum term giving occupiers the right to make improvements subject to the landlord's consent, which may not be unreasonably refused.[24]

8.55 Type II occupiers, whether in the social or private sector, are differently placed. Introductory tenants and licensees do not currently have the right to make improvements. We do not see why it should be guaranteed to other type II occupiers. We will recommend in type II agreements that there should be a default term giving the landlord a veto over proposed improvements by the occupier.

8.56 The rights to compensation, reimbursement, and rent restriction relating to improvements should be preserved. They should operate as statutory provisions outside the agreement, and should apply to type I agreements only.

(4) Quiet enjoyment and non-derogation from grant

8.57 The covenant of quiet enjoyment is a promise that, without special reasons,[25] the landlord should leave the tenant to enjoy occupation of the premises undisturbed. Case law has applied this basic concept to a wide range of factual circumstances, such as obstructing access to the premises, or even failing to keep premises watertight, which a landlord was obliged to repair. Under the present law it is a term that is implied into tenancies; it does not apply as a standard implied term to licences.

8.58 The common law also implies into tenancies a covenant that the landlord will not derogate from the grant of the tenancy. Broadly this prohibits the landlord from doing things that would undermine the purpose of the agreement. In the

[23] Housing Act 1985, s 97 provides that a secure tenant or licensee, but not an introductory tenant or licensee, has the right to make improvements to the premises, provided that they obtain written consent from the landlord. The landlord must not unreasonably withhold consent, but can impose reasonable conditions. It is for the landlord to show that a refusal or a condition is reasonable, and consent will be treated as given if it is withheld unreasonably or if unreasonable conditions are imposed. On reasonableness the court must have regard in particular to whether the improvement would make the dwelling less safe for occupiers, would cause the landlord to incur additional expenditure, or reduce the value of the property on the market or the rent which could be charged. "Improvements" for these purposes covers any alteration or addition to the dwelling, including to the fixtures and fittings, such as a new kitchen, bathroom or toilet, the outside decoration, and the addition of a television aerial or satellite dish.

[24] We discuss the question of consent below, Part X.

[25] For example to gain access to inspect the premises or carry out repairs.

residential letting context, the covenant against derogation from grant effectively covers much the same ground as the covenant for quiet enjoyment.[26]

8.59 We recommend that all agreements should contain a compulsory-minimum term setting out an equivalent of the current covenant of quiet enjoyment. This provision will have two main purposes:

(1) to protect the occupier from harassment by the landlord (or his agents); and

(2) to prohibit unnecessary interference with the occupier's peace and comfort.

8.60 We shall also recommend that the model agreement contains a note explaining these essential features of the meaning of "quiet enjoyment", emphasising that it is not a provision designed to deal with noise.

8.61 We recommend that the issue of the extent to which the landlord has the right to enter the premises should be dealt with in a default term.[27]

(5) Warranties as to title

8.62 Under the current law on leases, the landlord does not have to give any warranty as to title, and unless the contract for granting the lease states otherwise the prospective tenant does not even have the right to call for the landlord's title.[28] This principle has a number of practical consequences. The landlord is under no obligation to the tenant, unless the contract provides otherwise, to have obtained any necessary permissions from any head landlord or mortgagee to enter the tenancy agreement. The same principle applies to the obtaining of any planning permission or permission from insurers.

8.63 Commonly landlords with mortgages let without the permission of the mortgagee. If necessary, the mortgagee can repossess against the tenant as well as the landlord. This can be a considerable problem in practice. A person who thought he or she had a legally valid tenancy finds that, as against the mortgagee, he or she is an unlawful occupier. The landlord will usually be in breach of contract where the tenant is evicted because of action by the mortgagee, but only in rare cases will it be worthwhile suing. This position is in stark contrast to provisions in consumer law under which warranties as to title are impliedly made by both sellers of goods and hirers of goods.[29]

8.64 We considered whether occupation agreements should contain a compulsory-minimum term requiring the landlord to give a warranty of title. However, we have concluded that this would be a step too far and might well have undesirable consequences. Nonetheless, although there are no current provisions on the point,

[26] Peter Sparkes, in *A New Landlord and Tenant* (2001), says at p 310 that it "seems to add little to quiet enjoyment".

[27] See para 8.42, above.

[28] See Law of Property Act 1925, s 44.

[29] See Sale of Goods Act 1979, s 12(1); Supply of Goods and Services Act 1982, s 7(1).

we think that this is one area where – given the consumer approach we have adopted – some innovation is required.

8.65 We shall therefore recommend that occupation agreements should contain a compulsory-minimum term modelled on the implied term contained in section 7(1) of the Supply of Goods and Services Act 1982.[30] The term should require the landlord to have, and maintain for the duration of the agreement, a right to give the occupier the right of occupation under the agreement. Failure to obtain some permission (for example from an insurer) would not constitute breach of the agreement by the landlord, unless it actually led to the termination of the occupier's right to occupy.

8.66 The original landlord would be liable for breach if he transferred his interest to a third party, and failed – as part of that transaction – to ensure that the new landlord agreed to be bound by occupation agreements made by the original landlord.[31]

(6) Consultation and information

8.67 Most current provisions relating to requirements on landlords to provide information to their tenants and to consult with tenants about changes to their agreement should continue to be dealt with outside the contractual agreement.

8.68 There are certain provisions, to which social landlords are subject, relating to requirements to consult their tenants about matters of housing management. In relation to local housing authorities, these are statutory requirements;[32] registered social landlords are required by the Housing Corporation to adopt similar rules.

8.69 We have come to the view that it would be helpful to set these requirements out in a compulsory-minimum term. It would apply to all type I agreements; and also to type II agreements when used by social landlords for probationary purposes.[33]

SPECIAL TERMS

8.70 The third category is special terms. These reflect social policy concerns. As they will reflect matters of social policy determined by Government, they will be capable of variation only by the Secretary of State amending the law.

8.71 There are three issues which, reflecting the current law, we recommend should be dealt with in this category:

(1) anti-social behaviour;[34]

[30] Section 7(1) reads: "In a contract for the hire of goods there is an implied condition on the part of the bailor that in the case of a bailment he has a right to transfer possession of the goods by way of hire for the period of the bailment and in the case of an agreement to bail he will have such a right at the time of the bailment."

[31] This would only apply to occupation agreements that amounted to licenses; agreements that were, in law, tenancies would bind the new landlord in any event.

[32] Housing Act 1985, s 105; and Housing Act 1996, s 137.

[33] This will reflect the fact that introductory tenants are currently entitled to the benefit of these consultation obligations.

(2) domestic violence;[35] and

(3) the consequences of providing false information when applying for an occupation agreement.[36]

8.72 We discuss (1) and (2) in Part XV.

8.73 In relation to (3) we recommend that there should be a special condition in the agreement that the occupier warrants that they have not knowingly or recklessly made false statements, or instigated anyone else to do so, in such a way as to induce the landlord to enter the agreement.[37]

OTHER TERMS

8.74 The last category is the other terms. These will include *default* terms dealing with matters essential to the operation of the agreement; *substitute* terms, where the parties have agreed to replace a default term with one of their own terms; and *additional* terms, which relate to matters particular to the specific contract and in relation to which the parties have agreed a term.

Default and substitute terms

8.75 We recommend that, following consultation with representatives of the various interests in rented housing, the Secretary of State should produce terms on matters not covered by the key or compulsory-minimum terms but which are nonetheless essential for the creation of an operational occupation agreement. These will relate to obvious matters, for example the obligations of the occupier to pay the rent and to look after the property. The model agreements will contain default terms relating to these matters.

8.76 Where the parties agree, they may substitute their own terms for the default terms, here called substitute terms. Any express written substitute term set out in the agreement will override a default term. The default terms will apply where a substitute term has been agreed orally but has not been included in the written agreement, or where a substitute term has been agreed and written into the agreement but which turns out to be unenforceable for failing the fairness and transparency principles of the UTCCR.

8.77 The object of these recommendations is to ensure that, even if the parties do not expressly agree anything more than the key terms, a complete written agreement is still available to the parties. This means that all occupation agreements will have to include terms covering the matters for which there are default terms in the model

[34] Currently dealt with in Housing Act 1985, Schedule 2, ground 2A, and Housing Act 1988, Schedule 2, ground 14.

[35] Currently Housing Act 1985, Schedule 2, ground 2A, and Housing Act 1988, Schedule 2, ground 14A.

[36] Currently Housing Act 1985, Schedule 2, ground 5, and Housing Act 1988, Schedule 2, ground 17.

[37] To reproduce the effect of Housing Act 1985 Schedule 2, ground 5 and Housing Act 1988 Schedule 2, ground 17.

agreement. They can achieve this, either simply by adopting the default terms set out in the model agreements or by substituting others. The terms in the model agreements will, by definition, be UTCCR compliant.

8.78 The matters in relation to which there will be default clauses will include:

(1) terms relating to occupiers' responsibilities, such as occupiers' obligations relating to repairs, to act in a tenant-like manner, to report disrepair, to give the landlord access for repairs, and not to make improvements without consent;

(2) where relevant, a term that the occupier use the property as their only or principal home; and

(3) where relevant, terms proposed as part of the new rules on joint occupation, lodgers, sub-occupation, transfer and succession.[38]

8.79 While each default term should be capable of being imposed on the parties without amendment, some will need to be contingent on some particular feature of the property that would not be found in all cases. For example: "If there is a garden included in the property detailed in the key term, then the occupier will be responsible for maintaining it in the condition it was in at the start of the agreement".

8.80 The parties will be free to depart from the default terms, subject to the UTCCR tests of fairness and transparency. While those compulsory-minimum terms which are variable can only be varied in the occupier's favour, a default term can be varied against the interests of the occupier, provided that it still passes the UTCCR tests.

Additional terms

8.81 However carefully drafted, the model agreement will never capture all the particular requirements needed for all occupation agreements. There will therefore often be a need for additional terms to be agreed by the parties and included in the agreement. Such terms should be written down just like all the others, to produce a complete account of all the terms in the written agreement.

8.82 Where such a term has been agreed orally but is not included in the written agreement, we think that the rent sanction, normally applied for failure to reduce the agreement to writing, should *not* apply.

8.83 This leaves the question of whether such a term should be valid if it is not put into writing. If the term is treated as valid, then this could lead to uncertainty as these terms would then exist outside of the written agreement, and there will be no direct penalty on the landlord for having produced an incomplete written version of the agreement. We therefore recommend that any additional term should not be effective if it is not written down and included in the written statement of the agreement.

[38] These are discussed in Parts XI to XIV.

8.84 Where the landlord takes advantage of the model agreements to set out the bulk of the terms of the agreement, any additional terms would be stated on the front page of the written agreement.[39] Having additional terms does not prevent a landlord from using a model agreement. The landlord could create a written agreement by joining together a statement of the additional terms and a generally available model agreement containing the approved form for the key terms and a set of compulsory-minimum, special and default terms.

8.85 This approach is subject to two caveats.

8.86 First, a landlord might agree orally to a favourable additional term to entice a potential occupier into an agreement. For example: "The occupier shall be entitled to use the garden." The landlord should not be allowed to renege on it by the simple expedient of omitting it from the written agreement. We therefore wish to enable the occupier to apply to court to rectify the written agreement to reflect the actual agreed terms. The court would order any additional term to be added to the agreement.

8.87 Under normal Civil Procedure Rules principles, there would be cost penalties against a landlord who refused to correct a written agreement voluntarily or against an occupier who brought an unwarranted case.

8.88 Secondly, there might be a term which was not express, but which needed to be implied into a particular agreement under the normal contractual principles of using implied terms to ensure the "business efficacy" of the agreement. Our scheme must not remove the court's power to imply terms on the basis of business efficacy outside the areas covered by the compulsory-minimum and default terms. Obviously, the issue will not come up until one or both of the parties notice the lacuna. If they agree what should fill the lacuna, they can agree on an additional term which can be put into writing and added to the agreement. If they do not agree then they will have to make do as best they can. If there is a dispute in court about the matter, then the court will have to be asked to judge what, if any, the contents of any implied term should be, following which the landlord will have to reduce it to writing in the normal way.

VARIATION OF THE TERMS OF OCCUPATION AGREEMENTS

8.89 Occupation agreements may last for a considerable period of time. Thus terms agreed at the commencement of an agreement may cease to be appropriate. If agreements cannot be varied then landlords will wish to terminate them. Our scheme must provide a method of varying terms to provide the flexibility necessary to enable agreements to survive. At the same time we recognise that variations could detrimentally affect occupiers and could be open to abuse by landlords.

8.90 We have already discussed the importance to our scheme of putting the agreement into writing. The requirement of writing must also apply to varied terms. Having said this we want to avoid unnecessary procedural complexity and onerous administrative burdens. The ability to vary the agreement must be related to the importance of the term to be varied.

[39] See para 8.12 above.

Varying terms

8.91 The availability and extent of the power to vary will be different for each of the sets of terms in the agreement.

Key terms

8.92 The key terms of the agreement relate to defining the property subject to the agreement; the parties to the agreement; and the rent. In relation to the variation of these terms we recommend:

(1) There can be no variation of the property which is the subject of the occupation agreement.[40]

(2) The parties to the agreement may be varied by mechanisms relating to joint-occupiers, successors and so on.[41] There should be no variation of the parties to the contract other than by use of these provisions.[42]

(3) The term relating to the rent can be freely varied; the extent to which the rent term can be varied will depend on the type of agreement, as discussed below at paragraph 8.102.

Compulsory-minimum terms

8.93 We have already noted that some of the compulsory-minimum terms, for instance those relating to repairing obligations, which reflect statutory tests, will need to be varied if the legislation underlying those terms is changed. Governments will need the freedom to make changes to these terms from time to time in order to pursue housing policy objectives. To achieve this, we recommend that the Secretary of State should have power to vary such compulsory-minimum terms by statutory instrument. The Secretary of State will have to consider, when varying these compulsory-minimum terms, whether the variation shall apply retrospectively to all agreements or only to ones created after the date of commencement of the statutory instrument. This will be a political decision for the Secretary of State. The system of notifying occupiers of a statutory variation and the sanctions for failing to notify should be consistent with the scheme described below.

8.94 We also recommend that compulsory-minimum terms should be capable of variation by the parties. In such cases, the variation can only be in the occupier's favour.

[40] That is consistent with the current provision in Housing Act 1985, s 102(2), the effect of which should be extended.

[41] Discussed below in Parts XI to XIV.

[42] This is a separate issue from complying with the compulsory-minimum term requiring up to date written information about an address for service for the landlord and the name and address of any agent. Changing that information is not a question of varying the compulsory–minimum term, but there should be special provisions for the rent sanction and other consequences to be applied where there is a change to the information. See paragraphs 7.47 – 7.48.

Special terms

8.95 These will not be variable, save by legislative amendment.

Other terms

8.96 Default terms can be varied if the contract provides a variation clause. The model agreements for type I and periodic type II agreements will include a default term dealing with variation. Such term will be deemed to be fair for UTCCR purposes.

8.97 Where the model terms do not provide a default variation term (as in the case of a type II fixed-term agreement) or the landlord chooses to use a substitute term, any variation clause must conform with the requirements of UTCCR.

8.98 Any term of the contract, once varied, must also comply with the UTCCR .

Rules for the different agreement types

8.99 We recommend that different rules relating to variation should apply to the different agreement types.

Variation of type I agreements

8.100 Type I agreements provide a high level of security for occupiers. This means that landlords have less control over the premises. Such agreements have the potential to last for a very long period during which time the conditions surrounding the agreement may change profoundly. Landlords have to be able to vary both rent and non-rent terms of the type I agreements.

8.101 However, the power to vary must be limited so that the security of the type I agreement is retained and the occupier retains some sense of personal autonomy in the home. We consider that the practical way in which to achieve this is to allow unilateral variation, but within limits. In particular, we recommend that there be mechanisms which support occupiers by requiring landlords to involve them in decision making about varying the terms of the agreement.

VARYING THE RENT

8.102 We recommend that the model agreement for type I include a default term allowing landlords to vary the rent unilaterally. There should also be a compulsory-minimum term within the type I agreement which sets out the procedure for varying the rent. The term should provide that at least one month's notice of any proposed increase in rent should be given. Rent variation should be limited to annual rent increases.[43]

8.103 If landlords using type I agreements wish to limit their right to rent increases then they can do so by varying the compulsory-minimum term in the occupier's favour and providing for no or less frequent rent variation.

[43] In the same way that it is limited within the current assured tenancy regime set out in Housing Act 1988, s 13.

VARYING OTHER TERMS

8.104 We recommend that landlords of type I occupiers should be able to vary other terms of agreements (other than the terms which cannot be varied save by the Secretary of State and the key terms other than rent) either by agreement between the landlord and the occupier or following a prescribed process of consultation with the occupier.

8.105 The provision allowing variation by agreement is desirable as it can avoid the procedural requirements of consultation.

8.106 The consultation requirements will apply to all landlords who rent on a type I basis. The requirements should be part of a compulsory-minimum term which sets out the right of the landlord unilaterally to vary the agreement subject to completion of the consultation process. As the requirement to consult will be a term in the contract, failure to consult will be a breach of contract.

8.107 Failure to consult properly may provide a basis for judicial review and Human Rights actions where the landlord is, respectively, a public body or public authority. The relevant principles are those recently restated by the Court of Appeal in *R v North and East Devon Health Authority, ex parte Coughlan*:

> To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.[44]

The effect of *Coughlan* is that the requirement to consult is necessarily more than a mechanistic one for public bodies.

8.108 In order to provide an equivalent remedy for failure to consult where the landlord is not a public body, we recommend that the term setting out the consultation requirements reproduce the *Coughlan* test as far as possible. Thus to be valid, the consultation process must be procedurally correct.[45] In addition, there must be a "conscientious" evaluation of the results of the consultation. The decision-maker should not simply pay lip-service to the consultation process.

Variation of type II fixed term agreements

8.109 By definition, fixed-term agreements are designed to be fixed. The default position is that there will be no term permitting variation of agreement during the fixed term. This will be appropriate where the fixed-term is designed to be of short duration.

8.110 Where the fixed-term is for a longer period, the existence of a variation clause may be desirable. In such cases, the landlord will be free to insert an additional term in the agreement. Such a term, not being part of the model agreement, will not be

[44] [2001] 1 QB 213, 258.

[45] This can build on provisions currently found in Housing Act 1985, s 103.

automatically deemed fair for UTCCR purposes in the way that other default terms in the model agreement will be.

8.111 Current indications from the OFT guidance on unfair terms in rental agreements would suggest for instance that the OFT are likely to require rent increases during a fixed term rental agreement to be set to some objective framework such as RPI.

Variation in type II periodic agreements

8.112 Although periodic type II agreements have the potential for longevity, the landlord will usually be able to seek possession on the notice-only basis. Thus if variation is not permitted, the landlord may simply terminate the original agreement and re-grant it to the original or another occupier with the terms varied. It seems sensible to include a default term which allows for the variation of the rent and of other terms (not being key terms or special terms which are not variable). The default term should provide that the rent is reviewable and revisable on an annual basis. A landlord will be able to substitute a term to allow for more frequent variation of rent, but if they do so they will be subject to UTCCR principles.

8.113 Certain landlords, for instance social landlords or landlords who are co-operatives, may wish to consult before varying terms within a type II agreement. They will be able to include an additional "consultation-prior-to-variation" term within their agreements. However, we shall not recommend that such a term should be either a compulsory-minimum term or a default term.

PROCEDURE

8.114 The procedure for varying type II periodic agreements should be the same for both rent and other variations. Variation should operate by at least two months' notice of variation which sets out the variation and informs the occupier that the variation will come into effect on the date stated in the notice, which must be at least two months after the date the notice was issued.

8.115 The notice of variation must additionally inform the occupier that it also takes effect as a notice of intention to take possession proceedings. Thus the landlord may commence possession proceedings under the notice-only procedure for eviction on a date following expiry of the two months' notice period, if the occupier does not agree to the variation.[46]

8.116 The reason for conflating the variation and possession procedure in this way is to encourage the private landlord to use it. Otherwise he or she would simply issue notice-only proceedings for possession. This procedure should assist the landlord who wants the occupier to continue in possession but on varied terms.

Notification of variations: provision of a copy in writing

8.117 We recommend that the landlord should not be able to take advantage of the varied term until any period of notice has expired and written notification of the term as varied has been provided to the occupier.

[46] The principle of "use it or lose it" will equally apply in this context. Thus proceedings must be started within four months of the end of the notice period: see para 9.13 below.

8.118 We also recommend that, following notification of any variation, other than a variation of the rent, the occupier should have the right to request a written statement of the agreement complete with the varied term, which must be provided within two weeks of the request.

8.119 In those cases where the landlord has taken advantage of our recommendation that evidence of the written agreement can be provided by attaching the relevant model agreement to the front page, which sets out the key terms together with any variations of or additions to the model agreement,[47] compliance with the request will be satisfied by the landlord simply re-issuing the front page, as further amended by the relevant variation.

8.120 Failure to provide this within two weeks of the date of the request will trigger the same sanctions, as does failure to provide the original agreement.[48]

ISSUES TO BE DEALT WITH OUTSIDE THE CONTRACT

8.121 Notwithstanding our general approach towards ensuring that the occupation agreement is the principal source of information about the landlord-occupier relationship, a number of issues will remain outside the contract.

(1) *The right to buy and the right to acquire*. These rights are in essence statutory schemes which do not directly relate to the landlord-occupier relationship, but where the right derives from the identity of the landlord and the status of the occupier. These provisions will be preserved in appropriately reformulated statutory provisions.

(2) *The right to repair.* This is a complex statutory scheme available to tenants of local authorities setting out procedures for the timely handling of certain small urgent repairs, likely to affect the tenant's health, safety or security. A similar scheme is available to the tenants of registered social landlords. We recommend that this be renamed the "small repairs procedure". It should apply to all type I agreements, and to type II agreements made by social landlords. It should remain as a statutory scheme, outside the contract, though we recommend that there be a compulsory-minimum term in the agreement under which the landlord contracts to follow the requirements of the statutory small repairs procedure, where this is relevant.

(3) *Information about safety regulations.* We think that at some future time it may be possible to incorporate into the agreement requirements relating to the safety of gas and electrical appliances.[49] However, for the time being we recommend that the details of these continue to be set out in their statutory schemes.

[47] See para 8.12, above.

[48] See para 7.35 – 7.53, above.

[49] Gas Appliances (Safety) Regulations 1992, SI 1992 No 711 and Gas Appliances (Safety) Regulations 1995, SI 1995 No 1629; Electrical Equipment (Safety) Regulations 1994, SI 1994 No 3260.

(4) *Financial matters relating to improvements.* The current right to compensation for improvements, the power to reimburse for improvement and the limitation on increases of rent following improvements[50] should be preserved as statutory provisions outside the contract.

(5) *Consultation and information requirements.* There are a variety of provisions relating to the provision of information and consultation which should continue to operate outside the agreement. They apply to social landlords. These provisions include: the right to receive annual reports on housing management performance;[51] tenant participation compacts;[52] publicity for certain allocation schemes;[53] and consultation and balloting requirements where a social landlord intends to dispose of their interest to another landlord.[54] The only consultation requirement to be brought within the occupation agreement is that relating to housing management (see above paragraph 2.36).

8.122 There will be a requirement to provide information about these extra-contractual issues in the occupation agreement.

[50] Housing Act 1985, ss 99A, 99B, 100, 101.

[51] Local Government and Housing Act 1989, s 25.

[52] Local Government Act 1999, Part I.

[53] Housing Act 1985, s 106.

[54] See, for example, Housing Act 1985, s 106A and Schedule 3A, relating to large scale voluntary transfers under Housing Act 1985, s 32.

PART IX
TERMINATION OF AGREEMENTS AND PROCEEDINGS FOR POSSESSION

INTRODUCTION

9.1 In this part, we discuss first our recommendations in relation to the termination of occupation agreements by landlords and requirements relating to taking proceedings for orders for possession. At the end of the Part, we consider termination by occupiers.

9.2 Termination of occupation agreements by landlords is an issue which has become increasingly regulated by statute over the years. While we wish to retain the basic substance of the existing rules, we need to adapt them to the consumer approach we have adopted in this project.

9.3 In particular, because we want the occupation agreement to be the place where a clear statement of the rights and obligations of both landlords and occupiers is set out, we wish to see the grounds for possession set out in the agreement itself. This will replace the present situation where the grounds for possession are prescribed in detail in statutory provisions, which operate outside the agreement. We wish the circumstances in which and the processes by which the agreement may lawfully be brought to an end to be apparent on the face of the written agreement.[1] To achieve this we recommend that statute should provide a framework for the compulsory-minimum and default terms which will be set out in the agreement.

9.4 We will need to preserve in statute the court's powers over the termination of agreements by the landlord. It would be inappropriate to seek to give the court jurisdiction through the contract itself.

TERMINATION BY LANDLORDS

9.5 In this section, we discuss:

(1) due process;

(2) the grounds for possession;

(3) notice requirements; and

(4) abandonment.

[1] This will not be as revolutionary as it might seem. Many years ago the distinguished housing policy expert, the late Professor Nevitt, described the Rent Act as the "poor man's lease" in that it actually set out in statute what would be found in the well-drawn lease available to the better off. Our intention is that all occupation agreements should benefit from the same clarity, but in the agreement itself.

DUE PROCESS

9.6 Where a landlord is seeking possession from an occupier at the end of an agreement, and the occupier refuses to leave the premises voluntarily, it has long been accepted that the landlord should go through "due process" to regain possession. This comprises two elements:

(1) the need for notice; and

(2) the need for a court order.

9.7 Such processes conform to the requirements of Article 6(1) of the European Convention on Human Rights. They also ensure 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). Our recommendations are framed to ensure that the principle of due process remains a key feature of the scheme we are proposing.

9.8 This does not mean that the detail of the existing law should not be changed. For example, we recommend changes to the existing rules relating to notices, in order to make them more coherent and efficient.

Notice of intention to take proceedings

9.9 Even before a landlord can get to court to seek an order for possession, it has become an almost universal requirement that he or she must start the process by issuing a notice to the tenant warning the tenant of his intention of going to court.[2] These have largely replaced the common law rules relating to the need for a notice to quit to determine a periodic tenancy.

9.10 For agreements currently falling outside the principal classes of protection, the requirement for a notice to quit followed by a court order is set out in the Protection from Eviction Act 1977.

9.11 In addition, the new Civil Procedure Rules place great emphasis on the need for parties to litigation to give the other side notice of their intention to bring proceedings. This is part of the policy of the CPR that, wherever possible, proceedings should be settled without the need for a hearing at court.

9.12 Accordingly, we recommend that the notice requirement be retained. We make detailed recommendations about the time periods relating to these notices, designed to make the rules more straightforward.[3]

Use it or lose it

9.13 We also want to strengthen the principle of "use it or lose it". If proceedings are not in fact taken within a prescribed time after the notice period has expired, the

[2] There are some circumstances in which this is not required, for example, where the court can dispose of the notice requirement on the ground that that would be 'just and equitable'.

[3] See paras 9.45 – 9.60 below.

validity of the notice will cease, and a new notice of intention to take proceedings will have to be issued before court proceedings can be started.

Court order

9.14 It has long been a key feature of housing law in England and Wales that a landlord should not be able lawfully to regain possession of property let for residential purposes without first obtaining an order from the court. We recommend that this principle be retained in our new scheme.

GROUNDS FOR POSSESSION

9.15 In line with our objective of ensuring that the occupation agreement sets out, as fully as possible, a statement of the parties' rights and obligations, we recommend that the grounds on which a landlord may seek possession should be set out there.

9.16 We recommend that all occupation agreements should contain, as compulsory-minimum terms, the grounds on which possession proceedings may be brought. Being compulsory-minimum terms, the landlord and occupier may agree to alter the grounds, but any variation will only be in favour of the occupier (for instance a variation to provide that a particular ground would not be used). If so varied, the landlord will not be prevented from agreeing a further variation, so long as the position of the occupier does not fall below the statutorily prescribed compulsory-minimum level.

9.17 As with the present law, there will be two categories of grounds:

(1) discretionary, where possession may be ordered only if a judge thinks that making the possession order is reasonable; and

(2) mandatory, where possession must be ordered once the relevant ground for possession has been proved.

Availability of the grounds

Type I agreements

9.18 Central to the scheme we propose is that, in relation to type I agreements, only the discretionary grounds for possession will be available. As noted above,[4] this proposed change will affect registered social landlords who, under the present law, do have a number of mandatory grounds for possession available to them.

9.19 Although some registered social landlords in their consultation responses argued strongly against this proposed change, others saw the logic in what we were proposing, and accepted that without this change, it would be impossible to create a single agreement type that would apply to all occupiers from social landlords.

[4] See paras 3.37 – 3.38 above.

9.20 We also heard numerous complaints that, when exercising their discretion, judges are too inconsistent in their decisions. We seek to address this issue in our recommendations on structured discretion.[5]

9.21 We accept that there will be some cases where use of an agreement broadly in line with a type I agreement would be appropriate, but where there would still be compelling reasons for including a mandatory basis for seeking possession. We think this may apply where a private landlord created an assured tenancy under the Housing Act 1988, or where a tenancy has been created by a fully mutual housing co-operative. In these situations, the flexibility of our proposed scheme means that, instead of transforming such agreements into type I agreements, they can be converted into type II agreements, on condition that they are "written up". This will mean that any such agreement will contain all of the relevant terms of a type I agreement, but additionally contains the required term providing a mandatory ground for seeking possession, for example, relating to rent arrears.

Type II agreements

9.22 The mandatory grounds will be available for type II agreements.

9.23 The discretionary grounds will also be available, though we anticipate that in many cases they will not be required. They will be of particular value in relation to fixed-term type II agreements.

Definition of the grounds

9.24 The present law sets out the grounds for possession in very great detail. Each of the principal Housing Acts has its own set of grounds, all of which differ from each other. In accordance with our objective of simplification, we recommend a major rationalisation of the grounds for possession.

Discretionary grounds

9.25 We recommend that the discretionary grounds on which a possession order may be sought should fall into two broad classes:

(1) a general ground, for breach of any of the terms or conditions of the agreement; and

(2) circumstances which we have labelled "estate management grounds" where, in addition to establishing that it is reasonable for a court to make the order, the landlord has to show other suitable accommodation will be available to the occupier.

BREACH OF THE AGREEMENT

9.26 We recommend that the agreement contain a compulsory-minimum term providing that a landlord may take proceedings for possession for breach of any of

[5] See paras 9.82 – 9.90 below.

the terms in the agreement by the occupier.[6] It will not be necessary for the occupier still to be in breach at the time of taking proceedings. Thus, for example, a person who persistently pays the rent late will be as much at risk as the person who has not paid at all.

9.27 We intend that this term should replace all the current statutory grounds for possession which are based on fault by the tenant, such as where the tenant has damaged the house or furniture or not paid rent. Even where a landlord has forgotten to include a term prohibiting a particular type of activity,[7] the default terms, prescribed in secondary legislation, will reproduce the effect of the existing grounds.

Overcrowding

9.28 In relation to overcrowding, ground 9 of Schedule 2 to the Housing Act 1985 currently requires suitable alternative accommodation to be provided in all cases where the occupier is found to be in breach of the statutory rules on overcrowding. This might suggest this should become part of the "estate management" basis for seeking possession, set out below. In our view, however, it appears more appropriate also to treat overcrowding as a matter for a default term. The landlord will have the possibility of seeking repossession for breach of the term.

Unreasonable grounds

9.29 We have considered whether our approach might lead landlords to invent unreasonable grounds for possession by writing additional terms into agreements. We do not think this likely. Landlords already have the general ground for possession based on breach of the tenancy agreement.[8] The landlord who seeks to add a term enabling him to evict for, for instance, moving a piece of furniture to the other side of the room from where it was placed by the landlord,[9] will find that such a term must pass the fairness and transparency tests of the UTCCR. Even if it passed them, the court must still think it reasonable to order eviction.

ESTATE MANAGEMENT GROUNDS

9.30 Both the Rent Act 1977 and the Housing Act 1988 provide that a landlord may seek possession on the basis that they provide the current tenant with "suitable alternative accommodation". By contrast, the Housing Act 1985 prescribes a set of particular circumstances in which a landlord may seek possession, for example where a house adapted for use by a disabled person is no longer occupied by a

[6] Each of the current Acts includes a possession ground for breach of the contract: see Rent Act 1977, Schedule 15, case 1; Housing Act 1985, Schedule 2, ground 1, Housing Act 1988, Schedule 2, ground 12.

[7] The main grounds replaced will be Housing Act 1985, Schedule 2, grounds 1, 3 and 4, and Housing Act 1988, Schedule 2, grounds 10-13, and 15.

[8] See Rent Act 1977, Schedule 15, case 1; Housing Act 1985, Schedule 2, ground 1 and Housing Act 1988, Schedule 2, ground 12.

[9] Terms prohibiting movement of furniture have been fairly common in the past in some parts of the furnished private rented sector. The OFT Guidance on Unfair Terms in Tenancy Agreements (November 2001) at para 18.8.5 gives the example of a term prohibiting pets in general, which would, if valid, prohibit even keeping a goldfish.

person with a disability. Again, before this ground can be used, the landlord must ensure that suitable alternative accommodation is provided. In both sets of circumstances, the court must decide that it is reasonable to make an order for possession. The objective of both approaches is to give the landlord some flexibility in the use of their estate, while preventing the tenant from being arbitrarily up-rooted from their home.

9.31 We think that landlords should continue to have the ability to manage their estates in a flexible and efficient way, so long as the interests of occupiers are also fully taken into account.

9.32 In view of the fact that we anticipate that most type I agreements, which provide the highest security of tenure, will be made by social landlords, we have concluded that the approach in the Housing Act 1985 is the more appropriate one for the scheme we now propose. The Housing Act 1985 was meant to give tenants security in their homes. Its approach is to balance the social landlord's need for efficient use of their stock against the need to provide security and respect for home and family life, as well as avoiding disrupting the sustainability of communities by unnecessarily moving those who have created an established community.

9.33 We therefore recommend that there is a compulsory-minimum term in the agreement, to the effect that the landlord may take possession proceedings in a list of circumstances where, without the occupier being in breach of the agreement, it is nonetheless in the broader public interest that the landlord should be able to seek possession.[10] In such cases a court may order possession only if it finds that it is reasonable to do so and that suitable alternative accommodation will be provided for the occupier who is being displaced.[11] We also recommend that there should be a limited right for landlords to seek possession where a joint occupier withdraws from or abandons the agreement.[12]

An additional more general ground?

9.34 The one difficulty with the list approach is that it may fail to cover closely analogous situations in which there is a good case for the landlord having the same flexibility. For the reasons given above, we do not recommend giving landlords a general power to seek possession, simply where they are able to provide suitable alternative accommodation, as is possible under the Rent Act 1977 or the Housing Act 1988. At the same time we think the system needs to be more flexible than is currently provided for in the Housing Act 1985.

[10] This will be based on the list currently found in the Housing Act 1985. The landlord can choose to leave out any items from the list or to impose more stringent requirements (favouring the occupier) in relation to them.

[11] It will not be essential that the alternative accommodation has to be provided by the same landlord. The fact that any alternative letting will be on the same (type I) terms will facilitate this.

[12] See paras 11.33 – 11.34 below.

9.35 While we do not think that there should be a general power to evict simply for under-occupation,[13] nevertheless there should be scope for repossession in other analogous circumstances where particular estate management needs pass a similarly high threshold test. We shall therefore recommend that it should be possible to allow a landlord to seek possession in other similar cases. The provision should make clear that it is only applicable in exceptional circumstances and where there is a particular need of the landlord which justifies eviction. As with the other estate management grounds, it will be subject to the availability of suitable alternative accommodation and to the test of reasonableness. By requiring the landlord to show that exceptional public interest is involved, human rights considerations will be taken fully into account.

Suitability of alternative accommodation

9.36 There are currently two sets of provisions relating to the definition of suitable alternative accommodation.[14] While they seek to achieve similar objectives, they will need to be combined into one. In CP 162 we asked whether these tests might be simplified. We did not receive any suggestions from consultees on simplifying them.

9.37 We recommend that the reformulation should be based on the Housing Act 1985 version, reflecting the general policy that creating a unified social occupation agreement requires movement towards the secure tenancy regime created by the Housing Act 1985.

"GHOST" GROUNDS FOR POSSESSION

9.38 In CP 162 we asked whether the circumstances in which occupiers can lose their statutory security of tenure – for example, because a closing order had been made on the property – should also be dealt with by way of terms in the agreements. (These are sometimes referred to as "ghost" grounds for possession.) We have decided that they should not. Any eviction should be carried out by the relevant enforcement agency using their own statutory powers, rather than through the landlord using powers under the agreement. These powers cannot be realistically be made part of the agreement because they operate outside the agreement.

Mandatory grounds

9.39 We recommend that there should be two mandatory grounds for possession, available for type II agreements only:

(1) the notice-only ground; and

(2) serious rent arrears.

[13] We recommend that, following the death of an occupier, landlords should have a limited right to seek possession of premises that, as a consequence are not being used to their full capacity. See paras 14.9 – 14.10 below. We note that some social landlords do in fact seek to encourage movement of tenants from under-occupied premises by providing cash incentives; these practices would in no way be affected by our proposals.

[14] They are found in Housing Act 1985, Schedule 2, Part IV and Housing Act 1988, Schedule 2, Part III.

NOTICE-ONLY GROUND

9.40 The notice-only ground refers to the ground, currently available in section 21 of the Housing Act 1988, whereby the landlord under an assured shorthold tenancy may seek possession solely on the basis of issuing a notice to the tenant indicating that he will be taking court proceedings to obtain an order for possession. The landlord has the right to do this, irrespective of whether there has been any breach of the agreement or other default on the part of the tenant, and irrespective of whether it is reasonable for the court to make an order.

9.41 We recommend that this ground for possession should be retained in the scheme we propose. There is a widespread perception that the existence of the notice-only ground is a fundamental underpinning of the market approach to private sector renting. It would not be within the scope of a law reform exercise to question the basic approach.[15] It was also pointed out that, in practice, most private landlords grant agreements for at least six or twelve months. Thus the position of the occupier is not wholly insecure. But such security is provided by the terms of the agreement, not statute. We have concluded that this is a feature of the type II agreement which must be retained. Landlords who do not wish to take advantage of this ground can always remove it from their agreements with occupiers.

SERIOUS RENT ARREARS

9.42 Ground 8 of Schedule 2 to the Housing Act 1988 provides that, if a tenant is in two months' arrears of rent, both at the date of the issue of the notice of intention to take proceedings and at the date of the subsequent hearing, the court must order possession, again irrespective of any default on the part of the tenant (for instance where the sole reason for rental default is maladministration of housing benefit). As noted earlier,[16] we do not see any justification for the retention of this ground for possession in relation to type I agreements. But we do see it as essential for type II agreements, particularly if private landlords are to be encouraged to enter longer fixed-term type II agreements.

9.43 We shall therefore recommend that the court have jurisdiction to make a mandatory order in circumstances similar to ground 8. The amount of rent owing should be set at two months, as at the date of the issuing of the notice of intention to take proceedings, and at the date of the court hearing. We shall also recommend that type II agreements should include a term enabling the landlord to seek a possession order from the court on this mandatory basis.

ABOLITION OF OTHER MANDATORY GROUNDS

9.44 No other mandatory grounds will be provided. While, under the current law, there are other mandatory grounds provided for in the legislation,[17] we found no

[15] It is noteworthy that, with very limited exceptions, respondents did not seriously question the continued existence of the notice-only ground.

[16] See paras 3.37 – 3.38 above.

[17] These grounds are: (1) the landlord's own need to occupy the property; (2) repossession by a mortgagee in the event of the landlord defaulting on mortgage payments; (3) eviction from a holiday home following a winter let; (4) eviction from student accommodation following a vacation let; (5) eviction to enable a minister of religion to occupy the property as a residence from which to perform his or her duties; (6) eviction to enable the landlord to

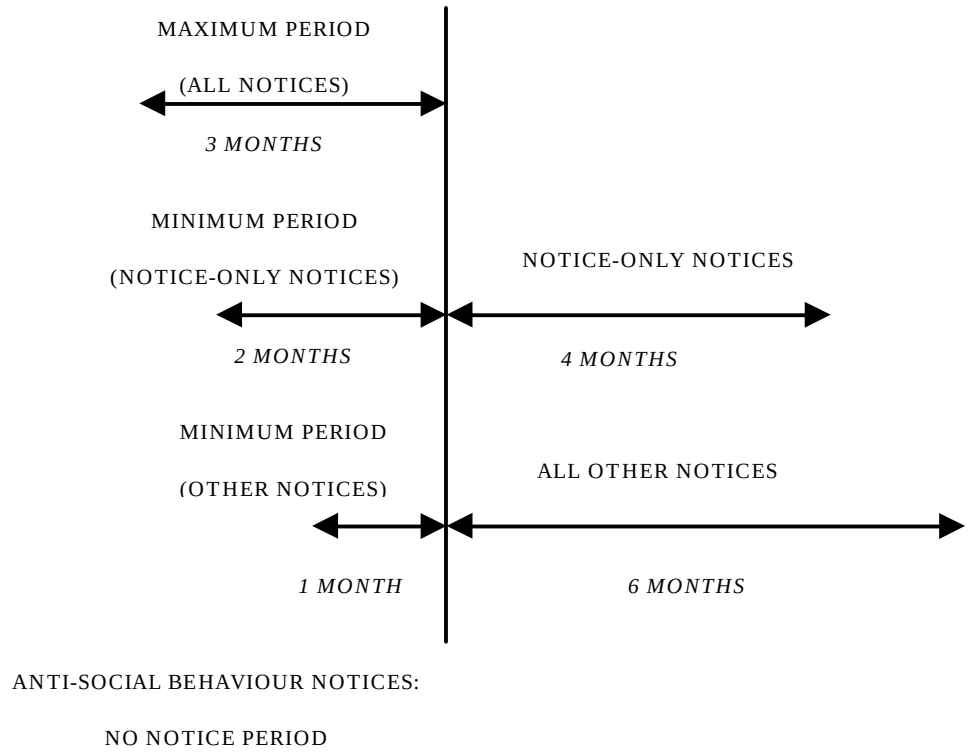
evidence of their significant use in practice. In the interests of simplification, we recommend that they should not be taken into the new scheme.

NOTICE REQUIREMENTS

9.45 In this section we set out our detailed recommendations on matters relating to notices. We recommend that specimen notices should be attached to the model agreements. The effects of the rules we recommend are summarised in Diagram 9.1.

DIAGRAM 9.1

NOTICES OF INTENTION TO TAKE POSSESSION PROCEEDINGS



Discretionary proceedings

Notices to contractual occupiers

9.46 Wherever possession is sought on one of the discretionary grounds, we recommend that a landlord must serve a prescribed notice on the occupier(s) before the court can entertain possession proceedings.[18] The court may lift the

demolish, or carry out work on, the premises; (7) the death of the tenant, where there is no widow or widower or person who lived with the tenant as husband and wife.

[18] These provisions will be similar to those currently found in the Housing Act 1985, ss 83 and 83A and the Housing Act 1988, ss 8 and 8A.

requirement if it considers it just and equitable to do so. Currently this is usually on the basis that the tenant has not suffered any disadvantage as he or she was otherwise aware of what would have been in the notice.

9.47 We recommend that there is a compulsory-minimum term in all occupation agreements stating that the landlord will serve such a notice before taking possession proceedings. The provision should be framed so as not to prejudice the court's ability to waive the notice when that would be just and equitable.

9.48 We recommend that the notice should contain a statement of the factual and legal basis for seeking possession. The landlord will not, as at present, have to write out a statutory ground in full. The notice will simply refer to the term in the agreement under which repossession is sought.[19]

9.49 We recommend that current requirements about the length of the notice that must be given should be simplified. Where possession is sought on a discretionary basis, all notices must give one calendar month between the date of the issue of the notice and the date of issue of proceedings in the court.

9.50 The only exception will continue to be where possession is sought on the basis that the term in the agreement prohibiting anti-social behaviour has been broken. In such cases, notice of the intention to take proceedings will be able to be issued on the same day that proceedings are actually issued.[20]

9.51 The issuing of a notice of intention to take proceedings is likely to cause the occupier some uncertainty, and possibly distress, particularly if he or she is unclear whether the landlord will in fact take proceedings. We therefore think that there should be a default term that the maximum period of notice should be three months. A landlord will be able to vary this term to agree that any notice served by him will be for a longer period; this would have to be fair within UTCCR principles.

9.52 As noted, the minimum period of notice should be one calendar month. We recommend that the notice should be able to start and end on any day. In particular, the notice should not be dependent on any rental "period" of a tenancy, and should not be tied to the day of the week or month on which the rent is due to be paid.

USE IT OR LOSE IT

9.53 We do not think that notices of intention to take proceedings should be left hanging over occupiers, unacted upon. The notice should become ineffective, as now, after a set period.[21] We recommend that this period should be 6 months, rather than the 12 months currently found. Where the landlord fails to issue proceedings within the period of validity of the notice, he or she will not be able to

[19] We had considered making landlords attach a copy of the written agreement when serving a notice, but we were persuaded that that would be unnecessarily cumbersome.

[20] This reflects the current position.

[21] See Housing Act 1985, s 83(3)(b) and (4)(b), and Housing Act 1988, s 8(3)(c).

start proceedings until another notice of intention to take proceedings has been issued.

Notices to non-contracting occupants

9.54 By analogy with the procedural rules relating to mortgage possession proceedings,[22] we recommend that the CPR should provide that notice that proceedings have been issued must also be served on others occupying the premises on a non-contractual basis. This is to ensure that they are put on notice that their occupation is under threat and they may therefore start to make alternative arrangements.

9.55 The CPR should be amended to provide that any person on whom a notice is served under these provisions may at the court's discretion be joined in the possession proceedings where the court has a discretion about granting possession.

Mandatory proceedings

9.56 In the case of notices of intention to take proceedings on the mandatory grounds, it should not be possible for the court to waive the notice requirements.

Notice-only ground for possession

9.57 We recommend that there should be a compulsory-minimum term providing that a landlord who wishes to use the notice-only ground must give at least two months' notice of intention to take proceedings. As with other notices, the effective period of the notice should not be tied to the day on which rent is due.

9.58 We also think that a maximum period of notice should be prescribed, for the same reasons.[23] As with type I agreements, we recommend that the maximum default period should be three months.

9.59 As with notices under discretionary grounds, notice-only notices should become ineffective if not used to start proceedings within a set time. In the case of notice-only notices the time limit for taking proceedings following the expiry of the period of notice should be four months.

Serious rent arrears

9.60 We recommend that the landlord should be able to use the same notice of intention to take proceedings as for a discretionary ground, suitably adapted to meet the requirements of this ground for possession.[24] The period within which proceedings must be taken, following expiry of the period of the notice, should be the same period of six months as applies to other notices (save notice-only notices).

[22] CPR Rule 55.10.

[23] See para 9.51 above.

[24] Set out para 9.48 above.

ABANDONMENT

9.61 As discussed below (paragraphs 9.109 to 9.121), procedures are available for occupiers to give notice to their landlords. Practical experience suggests that in many cases occupiers simply leave the premises without giving their landlords any form of notice that they are leaving. While many may regard this as deplorable, it is a fact of life. One of our objectives in reforming housing law is to ensure that the legislative framework takes into account what is likely to happen in the real world as well as what ought to happen if people followed the rules.

9.62 There is a Scylla and a Charybdis to be avoided here. The recovery of possession must not be made too difficult or time-consuming for a responsible landlord in the case of a genuine abandonment. However, the irresponsible landlord must not be provided with an easy method of obtaining possession, which can be used to circumvent proper procedures when the occupier has not genuinely abandoned the property.

9.63 In the case of a true abandonment, it is not in the interests of either party that the legal position should remain uncertain any longer than necessary. The landlord will be unable to relet the property; if it is left empty, it will be susceptible to vandalism and decay. The occupier will remain liable for the rent (although from a practical point of view the landlord may well be unable to recover it). It does not seem sensible to require the landlord to take possession proceedings in the normal way (in view of the length of time this will take).

9.64 Here we discuss our recommendations where there has been a total abandonment of the premises – that is, where all the occupiers have quit, leaving the premises empty. We discuss what should happen where there has been partial abandonment of the premises, that is, where some occupiers are left in the premises, below.[25]

9.65 Although the law does currently provide some means for resolving the issues contemplated in this context, it is of very uncertain scope. The law on the surrender of a tenancy is particularly difficult. We regard the requirement that express surrender can only be achieved by deed as quite inappropriate in this context.

9.66 For this reason, we proposed in CP 162 that there should be a process available to landlords whereby they could lawfully regain possession of residential premises that had been abandoned, modelled on provisions already available in the Housing (Scotland) Act 2001.[26] This suggestion was widely welcomed by consultees.

9.67 The definition of abandonment should be that:

(1) the occupier is no longer using the property as their home, whether they are required to do so or not; and

(2) there is evidence of the occupier behaving in a way which indicates an intention no longer to be bound by the agreement.

[25] See paras 11.31 – 11.32 below.

[26] Sections 17 – 19; they replaced Housing (Scotland) Act 1987, ss 49 – 51.

9.68 We recommend the creation of a procedure to enable the landlord to regain possession by service of four weeks' notice – the abandonment notice – on the occupier of the landlord's intention to terminate the agreement, where the landlord has reasonable grounds for believing that the house is abandoned. The landlord will then be able lawfully to take possession of the house without any further proceedings. It will only be necessary for the court to become involved if the occupier, aggrieved by this procedure, applies to the court for a remedy within six months of the termination of the notice period.

9.69 The procedure should be available where (whether or not any furniture and other goods are present at the property) the landlord has reasonable grounds for believing that the occupier(s) under the occupation agreement has abandoned the property.

9.70 It may be that non-contractual occupants are still living in the property. If so, this may provide evidence that the occupier has not, in fact, abandoned. But if the test for abandonment is made out, any such occupants would be trespassers, and liable to eviction as such. The procedure would similarly be available where squatters had occupied the property.

9.71 Use of the procedure would be dependent on a reasonable belief on the part of the landlord that the property is no longer occupied by the contractual occupier and that the occupier under the occupation agreement does not intend to occupy it as his or her home.[27]

9.72 The landlord should have an immediate right to enter the premises to secure it and its contents against vandalism. If furniture or other goods are left at the property, the landlord can be left to deal with these (by relocation, storage, return or disposal) in accordance with the ordinary law relating to the disposal of personal property.[28]

9.73 The legislation would need to make it clear that the abandonment notice would be effective to terminate the occupation agreement, regardless of whether it was fixed term or periodic, and regardless of whether it was a type I or a type II agreement.

9.74 Provision will need to be made about the method of service of the notice where the occupier is untraceable. It should be possible in the last resort for the notice to be served by posting it conspicuously at the main access to the property.

9.75 The risk that the occupier may have left the property for some purpose other than abandonment (for example, holiday, relocation of employment, accident or illness) would be taken care of by the occupier's right to apply to the court within six months of the termination of the notice period, for reinstatement of the property if it has been not been relet, or otherwise for the provision of suitable alternative accommodation.

[27] The genuineness of such a belief can sometimes be in issue; see *Tannoch v Glasgow City Council* (2000) 32 HLR 64 decided under the Housing (Scotland) Act 1987, ss 49, 50.

[28] See Torts (Interference with Goods) Act 1977, ss 12, 13, Schedule 1.

9.76 We recommend that the occupier should be able to seek damages where the landlord has failed to comply with the procedure, or did not have reasonable grounds for believing that the essential facts required for the service of an abandonment notice in fact existed.

9.77 We have considered whether the procedure for recovery of possession on abandonment should only apply where the agreement contains a requirement to reside or use the property as the occupier's only or principal home. However, it is perfectly possible for a property to be "abandoned" in the sense we intend even if there is no such requirement.

ENDING OF FIXED-TERM AGREEMENTS

9.78 We recommend that fixed-term type II agreements[29] should not automatically terminate by expiry of the term of the agreement. If either or both parties wish to terminate the agreement at the end of the fixed term they will have to use one of the other methods of termination. Either they should give notice or they should agree to enter a new agreement.

9.79 If the occupier does not leave and the parties have not agreed a new fixed term, we recommend that the agreement will take effect as a periodic type II agreement. The continuation of the agreement will be on the basis that any terms inconsistent with its becoming a periodic agreement are amended. Thus the term which sets the end date for the fixed term, which will be redundant, will be effectively deleted. In addition, the landlord will be entitled to add the term providing for the notice-only ground for possession. The occupier will also be entitled to add the term permitting him or her to terminate the agreement on notice.[30] This will prolong the status quo while the landlord and occupier decide what to do. The effect of these recommendations will be that either party will be able to end the agreement by giving notice without needing reasons.

9.80 The effect of these provisions is to vary the agreement. The occupier should have the right to require the landlord to provide a written statement of the agreement as so varied. Failure to comply would trigger the normal sanctions.

THE POWERS OF THE COURT

Discretionary grounds

9.81 Where possession is sought on a discretionary ground, we recommend that the court must not make an order for possession unless it considers it reasonable to do so.[31]

[29] Type I agreements will be periodic only.

[30] See paras 9.111 – 9.114. The effect will be similar to Housing Act 1988, s 5(2) – (4), but we do not think it necessary to reproduce the elaborate provisions in section 6 of that Act for fixing the terms of a new tenancy.

[31] This will reproduce the effect of Housing Act 1985, s 84(2)(a). The new Act should also reproduce the effect of Housing Act 1985, s 85, and Housing Act 1988, s 9, in giving an "extended discretion" for the court to adjourn cases, and suspend or postpone orders, where discretionary repossession grounds are being used.

Structured discretion

9.82 The long-standing approach to reasonableness was recently restated by Clarke LJ in *Gil v Baygreen Properties Ltd*:[32]

> When considering reasonableness, it is the duty of the judge to take into account all relevant circumstances as they exist at the date of the hearing in a "broad, common-sense way as a man of the world ... giving ... weight as he thinks fit to the various factors in the situation": see *London Borough of Haringey v Stewart & Stewart,*[33] following the statement of Lord Greene MR in *Cumming v Danson*.[34]"

We wish to retain the breadth of this approach.

9.83 We nevertheless wish to tackle perceived problems, widely expressed in responses to CP 162, about the variability of decisions on reasonableness. We have concluded that the general discretion available to judges should be "structured". The structuring should ensure compliance with human rights law, so that the court tests whether the benefits from the legitimate aims to be achieved by eviction are proportionate to the interference with the rights of the occupier and anyone else whose home life will be affected by an order for possession made against them.

9.84 We recommend that the Bill's provisions on reasonableness should require the court to consider all the relevant circumstances, including, but not necessarily limited to, those set out in a statutory list. The court should also consider whether the benefits to be gained by making the proposed order (as opposed to making any lesser order, or no order at all) make it reasonable to make it despite the disbenefits.

9.85 On one side the court should consider, as far as relevant in the individual case, the likely effect of an order on the home, family and private lives of the contractual occupier(s), and then of anyone else known to occupy the property as their home.[35] This includes considering how long it is likely to take each person or group to find another home, and how they will be affected by not having a home. It should specifically include any undertaking to offer a fresh agreement (of the same property or elsewhere) the landlord is prepared to give to any of the occupants, whether singly or jointly.[36] It should also include consideration of whether the

[32] [2002] EWCA Civ 1340, [2002] HLR 12, at paragraph 41.

[33] (1991) 23 HLR 557 *per* Waite J at p 562 and *per* Mustill LJ at p 563.

[34] [1942] 2 All ER 653, 655.

[35] See para 9.54 below for provisions as to notices to non-contractual occupants.

[36] The effect would be to make it possible to take proceedings against two joint contractual occupiers, for a breach of which only one is guilty (though the other is jointly and severally liable), and to obtain possession by undertaking to give a sole agreement for the same property to the innocent occupier. This would be as close as we feel it is right to come to allowing possession proceedings, as opposed to abandonment proceedings, to be taken against only one of several joint occupiers.

occupier would be likely to comply with the terms of suspension of a possession order.[37]

9.86 It should not include consideration of whether the person is likely to be rehoused under the homelessness provisions in Part VII of the Housing Act 1996, as it is undesirable to have the court second-guess a process which should follow the eviction decision rather than being a contributing factor to it.

9.87 On the other side the court should consider, as far as relevant in the individual case, the likely effect of making an order, as against not making the order sought, on the interests of the landlord and a list of others. (This would correspond with the consideration of the legitimate aims being pursued in the interference with human rights under Article 8.) The effect on the landlord should include the effect on the landlord's interests, including their financial interests, but also any interest the landlord may have in being able to meet housing need or fulfil other housing functions.

9.88 The other groups to be considered are, in the order of priority which would normally be followed, whichever are relevant on the facts from:

(1) the landlord's other occupiers;[38]

(2) people on any waiting list for the landlord's properties;[39]

(3) other neighbours who are not renting from the landlord; and

(4) the local community.[40]

9.89 In cases of breach of the agreement this should include consideration of the importance of the term breached to the relevant groups, the seriousness of past and likely future breaches,[41] the degree to which any of the contractual occupiers

[37] This should mean, as ought to happen now, that someone who will remedy the breach without the imposition of any order should have no order made (the proceedings should be adjourned on terms or dismissed). Someone who is likely to comply with, but not without, a suspended possession order, should have one made against them (but subject to the points about warrants and suspended orders below). Someone who is unlikely to comply with a suspended order should have an absolute order made.

[38] These will tend to be most relevant in anti-social behaviour cases, and will act as a counter-balance to the fact that we are not recommending a contractual right to require the landlord to take action against their other occupiers. In cases of rent arrears it may be that the cost of carrying rent arrears has to be shared out among the landlord's other occupiers in increased rents or reduced spending on the properties. In an estate management case the neighbours might for example be affected by whether an estate modernisation scheme can go ahead.

[39] This might be most relevant in the estate management grounds relating to properties no longer occupied by someone with a special need for the features of that property. It could also include whether people would want to take up offers of properties on an estate being terrorised by a particular household.

[40] These last two would most commonly be relevant in cases of anti-social behaviour, but could also be relevant in other cases such as estate management cases where community regeneration is at stake.

[41] As explained above, persistent past breaches should be able to be considered if they provide evidence of likely future breaches, even if the occupier is not in breach at the moment.

or other occupants are responsible for the breach,[42] and any attempts to resolve the situation previously, including by the use of alternative dispute resolution.[43]

9.90 Where the landlord under type I agreements has adopted, and agreed with its occupiers, a code of practice relating to estate management or, having complied with the duty to consult[44] has published a written agreement with its occupiers, the court should be required to take account of these documents in considering the reasonableness of the order being sought. We recommend that there should be a reference to such documents in the structuring list. The Secretary of State should have power to make regulations, which would cover how any agreement should be drawn up.

Suspended possession orders

9.91 In Consultation Paper 162, at paragraphs 12.33 – 12.58, we described a problem that is particularly severe in rent arrears cases, but also applies in other discretionary grounds cases.

9.92 The current law requires a full hearing for a possession order, even though it may be unopposed and landlords are only asking for a suspended order. By contrast the current law does not require any hearing to be held when the issue of a warrant for breach of a suspended possession order is at stake, even though it is the warrant that produces the actual eviction. Indeed, the warrant application is regarded as essentially an administrative procedure based on a simple allegation by the landlord, of which the tenant need have no notice, that the terms of the suspension have been breached. (Although the application for the warrant is without notice, the courts do now, as a matter of practice, use a standard form to notify tenants after it has been issued.) The tenant has to read the note on this form to discover that it is up to him or her to apply to set aside or suspend the warrant.

9.93 There is widespread use of possession actions, not actually because the landlord wants to obtain possession, but as a tool to aid debt collection. Hearings relating to such orders are listed for determination in a matter of a few minutes each. The

[42] This will cover the situations where nobody living at the property is really responsible, the commonest of which is Housing Benefit delays. This should not mean that eviction is impossible in such cases, merely that the landlord has to show that they cannot be expected to tolerate the continuing problems even though the occupier is not to blame. In other common cases, where contractual occupiers find themselves unable to evict or control their adult children or other household members, who are causing anti-social behaviour, the landlord may nevertheless still be entitled to possession as he/she cannot be expected to continue to tolerate the behaviour. In joint agreements, the landlord may wish to try to improve their chances by offering to grant a new agreement for the same property in the sole name of the innocent occupier. This would lessen the impact on the innocent party, while achieving the full effect on the guilty.

[43] This should cover both whether the landlord has reasonably tried other means to resolve the problem and how reasonably the occupier has responded. In particular it should cover the history of a case in court, so that a sixth application for suspension of a warrant is viewed very differently from suspension of the original order.

[44] See para 8.121(5) above.

merits of the majority of warrants are not investigated because they are not challenged. In most cases, the tenant is neither represented nor present in court.[45]

9.94 Consultees were opposed to the additional bureaucracy of always requiring a hearing before the issue of a warrant for breach of a suspended possession order, and we accept that they have a point. This still leaves the original problem of the inappropriate use of possession proceedings for collecting rent arrears. We referred to the solution suggested by Lord Woolf[46] and suggested one of our own.[47] Responses from housing managers were split on the impact such a change would have on the management of arrears. Some saw the attraction of such a system, while others saw suspended possession orders as an important tool in controlling arrears.

9.95 We still consider that the broad objective should be to ensure that proportionate consideration is given to the reasonableness of making an order for possession at appropriate stages before an agreement is terminated on a discretionary basis because of rent arrears. However, the effect of a new system on the ability of landlords to control arrears is clearly of fundamental importance, and it is not a matter on which we can come to a concluded view. We therefore recommend that the new Act gives the Secretary of State a power to use secondary legislation to run pilot schemes to test alternative procedures; and to allow him or her to introduce it nationally if the pilot schemes prove successful.

The problem of the "tolerated trespasser"

9.96 One of the issues we wish to tackle is the inelegant concept of the "tolerated trespasser".[48] Its latest twists are illustrated in *Dunn v Bradford MDC*.[49] In that case, the Court of Appeal overturned a decision that a tenant, whose tenancy had ended on breach of a suspended possession order and who had then left following a period as a tolerated trespasser without the need for a warrant, could not have her tenancy reinstated to the point at which she left so as to allow her to sue for disrepair during that period. The root problem is that a tenancy terminates on the

[45] The responses indicate that practices vary enormously between courts in different areas. In some areas, a high proportion of tenants will attend, whereas in others it is very rare for them to do so. We were told of county courts in which judges routinely signed in chambers dozens of suspended possession orders drawn up by a housing manger.

[46] 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. Lord Woolf recommended a two-stage procedure that would in effect replace the suspended possession order with an order to pay the rent. Instead of terminating the agreement, 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.

[47] We proposed the abolition of suspended possession warrants and their replacement with an administratively issued notice from the court, warning an occupier that proceedings for possession will be commenced if he or she does not rectify arrears. If the occupier continued in arrears, the landlord would apply for an outright possession order.

[48] For detailed criticism of the concept, and support for our approach to its removal, see Susan Bright, "The concept of the tolerated trespasser: an analysis" (2003) 119 LQR 495.

[49] [2002] EWCA Civ 1137, [2003] HLR 15.

breach of a suspended possession order, however minor, rather than at the point at which a tenant is actually evicted.

9.97 We recommend that breach of a suspended possession order should not terminate the agreement. Instead, we recommend that the agreement should continue in existence until the point at which the occupier actually leaves the home, either voluntarily, or having been forcibly evicted under the authority of a warrant for possession. This approach would mean that the rights and obligations under the agreement, including landlords' repairing obligation, would continue. We have little doubt that this will result in a simplification of the law.

9.98 We accept that such a recommendation could potentially place a greater burden on the landlord. However, we believe that these potential difficulties can be resolved if landlords make a positive choice either to evict or not to evict. In the same way that we have recommended that notices of intention to take possession proceedings should have limited validity, so too do we think that landlords who could obtain a warrant for possession should be encouraged to make up their minds. They should not let arrangements drag on indefinitely with the former occupier living in a kind of twilight status. Landlords will therefore limit any potential exposure by completing the process of eviction, triggered by the occupier's breach of the suspended order.

Mandatory grounds

9.99 When dealing with cases on the mandatory grounds, we recommend that the new Act should replace section 89(1) of the Housing Act 1980 with a similar provision requiring possession orders to be made within 14 days, with up to 6 weeks' alleviation in cases of exceptional hardship.

Accelerated possession

9.100 We will also recommend that, in relation to proceedings based on the notice-only ground for possession, the Rules Committee should reproduce the "accelerated possession procedure" which currently applies to proceedings based on section 21 of the Housing Act 1988.[50] It allows the court to make a possession order without a hearing, greatly reducing listing times and expense, if the occupier does not raise a substantive defence in response to the landlord's claim form and the landlord does not oppose any application for extra time before possession by the occupier.

Public law challenges

9.101 Under our proposed scheme, it is clear that the availability of the mandatory notice-only ground for possession will apply not only to private landlords, but also to social landlords, in those contexts where use of type II agreements is permitted.[51]

9.102 Decisions by a landlord that is a "public body" for the purposes of public law are amenable to judicial review. Anything done by a "public authority", a distinct

[50] See CPR Part 55(II).

[51] See paras 5.28 – 5.51 above.

status defined by the Human Rights Act 1998, will be unlawful if it amounts to a breach of a substantive provision of the European Convention on Human Rights, such as Article 8, which guarantees respect for the home. The extent to which "public body" and "public authority" are distinct or co-extensive is a matter of academic debate, and has yet to be definitively determined by the courts. For current purposes, they can, we think, be treated as though they apply to the same classes of landlord.

9.103 Local authorities are clearly both public bodies and public authorities. The position in respect of RSLs is more complicated. The Court of Appeal has held in *Donoghue v Poplar Housing and Regeneration Community Association*[52] that the question of whether an RSL is a public authority[53] or not depends on a close examination of the history and nature of the particular RSL under consideration. Thus, in that case, the role of an RSL was found to be "so closely assimilated" to that of the local authority whose stock it had been created to take over that it was a public authority. The conclusion rested on a number of specific factors (such as the fact that it had local authority nominees on its board, it was subject to local authority guidance and so on). Had one or more of these features not been present the decision might have gone the other way.[54]

9.104 In principle, both judicial review and human rights challenges can be mounted against decisions to take possession actions. This provides occupiers with a potential means to challenge the decision of a public body/authority to use a mandatory ground of possession.

9.105 In a series of cases on the extent to which human rights challenges could be dealt with on the hearing of the *possession* case, the Court of Appeal had held that any eviction "engaged" article 8(1), the basic guarantee, and so had to be justified under Article 8(2) as proportionate and necessary in a democratic society.[55] That in turn led to problems with accommodating such challenges to the supposedly automatic nature (once the primary facts are established) of mandatory grounds, and other similar rules. However, the House of Lords have recently considered broadly the same question in *Qazi v London Borough of Harrow*.[56] The case was not directly concerned with mandatory grounds of possession, but some of the principles may have application to such circumstances (although it is also arguable that some of the five speeches are of wider application than others).

9.106 Mr Qazi's wife had issued a notice to quit their jointly held secure tenancy, thus terminating it. Mr Qazi was refused a new tenancy in his own name, and the local authority landlord took possession proceedings. In the House of Lords, the minority (Lords Bingham and Steyn) agreed with the approach taken by the Court

[52] [2001] EWCA Civ 595, [2002] QB 48.

[53] That is, a "functional" public authority under the Human Rights Act 1998, s 6(3)(b).

[54] For a case in which a charity providing supported housing was found not to be a "public authority", see *R (Heather and Others) v The Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936.

[55] For a discussion of the case law as it was in April 2002, see CP 162 paras 5.1, 5.54 – 5.57, 5.70 – 5.77.

[56] [2003] UKHL 43, [2003] 3 WLR 792.

of Appeal. The majority (Lords Hope, Millett and Scott), however, all concluded that it was not necessary for the county court to consider whether the order sought could be justified under Article 8(2), although on somewhat different bases. However, it was not contested that Mr Qazi could have applied for judicial review of the landlord's decision to seek possession.

9.107 It will no doubt take some time for the implications of *Qazi* to be worked out by the Court of Appeal in various contexts. A great, and unnecessary, complicating factor, however, is that judicial review must be taken in the High Court, whereas possession actions are confined to the county court.[57] In our view, the county court is the better forum for decisions on housing matters, whether grounded in public law principles or in occupation agreements.

9.108 We therefore recommend that, in such cases, an occupier against whom possession proceedings have been brought should be able to ask the county court to review the decision to take possession proceedings on public law grounds. In so doing, the court would apply the principles applied by the High Court on an application for judicial review. A model for such an approach exists in the current law on the determination of homelessness decisions.[58]

TERMINATION BY THE OCCUPIER

9.109 In this section we set out our recommendations about the termination of agreements by the occupier.

Termination by occupier's notice

Periodic agreements

9.110 The present law provides that an occupier under a periodic tenancy can give notice to quit the agreement, which must be for at least four weeks. We wish to retain this possibility. We therefore recommend that there should be a compulsory-minimum term in periodic agreements that the occupier can give written notice to terminate. A specimen form of the notice will appear in the model agreement.[59]

9.111 A default term should provide that the minimum notice the landlord can expect is one calendar month between service of the notice and the date on which the agreement terminates and the occupier leaves. An occupier will be able to contract to give more than the minimum of one month, and may in fact give more even when not contractually obliged to do so.

[57] The litigation, including *Qazi* itself, has tended to focus on the question of whether human rights considerations give a tenant a defence to a possession action, rather than examining the parameters of the tenant's rights in judicial review.

[58] Housing Act 1996, s 204A. It has been held that the predecessor to this provision gave the county court a jurisdiction that was equivalent to judicial review, see *R v Brent LBC ex parte Connor* (1998) 31 HLR 923, 924 *per* Tucker J.

[59] This will be without prejudice to a consumer's rights to terminate a contract under the Consumer Protection (Distance Selling) Regulations 2000, SI 2000 No. 2334.

9.112 The minimum period should be a calendar month, starting on the day the notice is issued.[60] The length of notice should not be dependent on any "period" of a tenancy. Even if the rent is paid in advance quarterly, or once per academic term or over any other longer time-scale, the notice term should simply require one month's notice which need not end on a rent day. The agreement will also need a default term providing that the landlord will refund the appropriate proportion of any pre-paid rent or other charges.

Fixed-term agreements

9.113 In fixed term type II agreements there may be a break clause, allowing one side or both to terminate the agreement before the end of the fixed term. We recommend that occupiers' break clauses in fixed-term agreements should operate as similarly as possible to occupiers' notices in periodic agreements. Thus, it should be possible for an occupier to serve a three months' break clause notice when there are two months of a fixed term still to run. This would take effect to terminate the agreement without further action one month into the subsequent periodic agreement which had arisen by operation of law, in default of further agreement.

9.114 There should be a compulsory-minimum term that the agreement should not terminate until the end of the notice period (unless both parties agree an earlier date), but otherwise should only terminate when the occupier actually gives up possession after serving the notice, even if that is later than the end of the notice.

Joint occupiers

9.115 Where there are joint contractual occupiers, we recommend that there should be a default term in the agreement that will require that the joint occupiers all take part in any action that could otherwise be taken by a sole occupier.

9.116 Where there is provision for notice, one or more joint occupiers should be able to serve it, even were not all join in. The result will be to terminate the agreement in relation to those occupiers who have given notice; it will not have the effect of terminating the whole agreement.

Termination where an occupier does not leave after giving notice

9.117 Currently the Rent Act 1977 has a specific ground, case 5, whereby a landlord may seek an order for possession where the tenant fails to leave having issued a notice to quit to the landlord. This ground only applies where the landlord can show that it is reasonable to evict because they would otherwise be "seriously prejudiced" as they have contracted to sell or let the property or taken other particular steps. In the secure and assured regimes no special provision is made. In these cases, the legal position is that the tenancy will end on the expiry of a tenant's notice to quit, leaving the landlord to repossess against the former tenant who now has the status of trespasser.

[60] The current law relates the dates for such notice to the dates which under the common law or Protection from Eviction Act 1977, s 5, were dates on which a "notice to quit" could be issued. This should not be replicated in the new scheme.

9.118 We have considered whether our new scheme should contain a version of Case 5. We have concluded that this would put an unfair burden on the landlord who has been told that his occupier will leave. It would not be right to require the landlord to make a full case to persuade a court that it be reasonable for it to make an order for possession against the former occupier.

9.119 We want to achieve an outcome that is fair from the landlord's perspective, given that the process has been started by the occupier, rather than the landlord. We have come to the view that in this situation, while the landlord should still be required to obtain an order from the court, this should be on the basis that the former occupier becomes a trespasser, with no residual rights to occupy under the original occupation agreement.

9.120 We do not think that this position should be allowed to remain indefinitely. Thus, on the principle "use it or lose it", there should come a point at which, following the continued failure of the landlord to take possession proceedings against the former occupier, the former occupier's status as trespasser should be regarded as coming to an end, and a new occupation agreement between the landlord and occupier should be deemed to have come into being. The landlord will have two months in which to decide what to do.

9.121 The same principle will apply both to type I and type II agreements, periodic or fixed term. However, in any type II agreement where the landlord is entitled to use a notice-only notice which would have been of the same length as, or shorter than, the occupier's notice, then the landlord should be able to treat the occupier's notice as a landlord's notice-only notice. The practical consequence will be that the landlord will be able to issue the simpler and cheaper accelerated possession proceedings. These will usually be more convenient than bringing proceedings in trespass. The landlord will have to accept the consequence that the agreement will remain effective until the date on which the occupier either leaves the premises or is finally evicted.

PART X
SPECIFIC ISSUES 1: CONSENT REQUIREMENTS

INTRODUCTION

10.1 In the following five Parts of this report, we deal with a number of issues that must be addressed for the scheme we propose to be able to work in practice. These relate to ways in which the relationship between the landlord and the occupier may alter during the life of the agreement. These parts discuss four principal issues:

(1) joint occupation;

(2) lodgers and sub-occupation;

(3) transfer of rights of occupation; and

(4) succession to rights of occupation and the effect of the death of the occupier.

10.2 In this context, there can be a tension between the right of the landlord to control who lives in the premises; and the right of the occupier to use the premises – while in occupation of them – as he or she wishes. One of the policy choices that must be made is the extent to which the landlord should be able to consent, or required to consent, to such events occurring. Our recommendations are based on the current law, but adapted and modified to fit the scheme we now propose.

10.3 As the issue of consent arises in a number of different contexts, discussed in subsequent Parts, we have decided to consider it as a separate issue at the outset to avoid constant repetition.

CONSENT: THE AVAILABLE OPTIONS

10.4 Where an occupier asks the landlord if he or she can do something not directly provided for in the agreement, there are three potential outcomes.

(1) The landlord has the absolute right to say no to the request. If the landlord decides to accede to it, that is a matter for the landlord in the exercise of his or her discretion. In these cases, the occupier cannot force the landlord to agree to what has been proposed.

(2) The landlord needs to give consent, but this can be withheld on the grounds that it is reasonable to do so. This enables the landlord to retain some control over the premises, but requires him to consider any request seriously.

(3) The occupier has an untrammelled right to do what he or she wants, without the need to obtain the consent of the landlord.

10.5 Each of these outcomes is already found in the law. They will continue to be important in the discussion of the specific issues considered in later Parts of this report.

TERMS IN THE AGREEMENT RELATING TO CONSENT

10.6 In accordance with our overall approach, the requirements relating to consent will be set out in the agreement. Where options 1 and 3 are concerned, the issue will be straightforward.

(1) If the landlord has a veto (Option 1), the agreement will make that clear. Indeed, the landlord can simply ignore the request. There will be no circumstances in which the request will be deemed to have been granted.

(2) If the occupier has the untrammelled right to do something (Option 3), it will not even be necessary to make a request.[1] The only circumstance in which we recommend that the occupier have this right is in the compulsory-minimum term giving a type I occupier the right to take in a lodger.[2]

10.7 Option 2 requires the occupier to seek consent, but that consent may not be unreasonably withheld. We recommend that, in such cases, the following apply.

(1) Any request for consent must be made to the landlord in writing. If this is not done, the occupier will have no rights in relation to the landlord's failure or refusal to give consent, his or her reasons for refusing it, or the terms on which it is given.

(2) Failure by the landlord to respond (either by granting or refusing consent or making a reasonable request for further information[3]) to a properly made request for consent within a period of two months should be regarded as an unreasonable refusal of consent, and the requisite consent should therefore be deemed to have been given.[4] The two month period should only begin to run from the date on which all information reasonably required by the landlord to be given has been provided. The landlord should be required to define what information he requires within 14 days of the request for consent being made. If the occupier fails to supply sufficient or adequate information, then any further request for additional information must be made by the landlord within 14 days from the date of the supply of the insufficient or inadequate information. Where there is a dispute as to whether and when all such information has been provided, the county court should have jurisdiction to determine the issue.

(3) Where the landlord refuses a properly made request for consent he or she should, if asked, give reasons for refusal. If the landlord fails to give reasons within two months from the date on which the request was made, he or she shall be deemed to have given consent. Any challenge to the

[1] An additional term may include a stipulation that the occupier should notify the landlord of certain steps, if the parties so agree. Such a term would of course be subject to the UTCCR tests of fairness and transparency.

[2] See Part XII below.

[3] For example, the name and address of any person whom the occupier wants to be joined into the agreement; or any reference relating to that person.

[4] See CP 168, 2.38, 2.15.

adequacy of reasons or whether they are evidence of reasonableness shall be resolved by application to the county court. The reasons shall be deemed adequate and reasonable until a court rules otherwise.

10.8 Any transaction carried out by the occupier, which

(1) is subject to the landlord's veto and to which the landlord has not given consent, or

(2) is subject to the landlord's consent and consent has been reasonably withheld,

is not binding on the landlord. The agreement should note that the making of any unauthorised transaction is itself a breach of the agreement which could result in possession proceedings being taken against the occupier.

The effect on the landlord of an unauthorised occupant entering the premises

10.9 A landlord should not be deemed to have accepted an unauthorised occupant as an authorised occupier at any time before the landlord had actual knowledge that he or she was unauthorised, or ought reasonably to have discovered this. From that moment, the landlord has two months within which he or she may receive payments from the unauthorised occupant without this implicitly creating a binding occupation agreement.

10.10 During this period, the landlord may

(1) take possession proceedings against the unauthorised occupant; or

(2) grant the unauthorised occupant a type II agreement;[5] or

(3) grant the unauthorised occupant a full type I agreement.[6]

10.11 If at the end of this period, the landlord has taken none of these steps, he/she will be deemed to have granted either

(1) a type I agreement in the case of a social landlord; or

(2) a type II agreement in the case of a private landlord.[7]

10.12 Where a social landlord grants a type II agreement it should be treated as a probationary agreement.[8]

[5] This will be one of the circumstances in which a social landlord may grant a type II agreement on a temporary basis.

[6] See CP 168, 2.34 to 2.36

[7] See CP 168, 2.37.

[8] On probationary agreements, see paras 5.33 – 5.35 above.

STRUCTURING DECISIONS RELATING TO THE REASONABLENESS OF WITHHOLDING CONSENT

10.13 At present, the law on what constitutes a reasonable withholding of consent is found in case law that has been developed almost exclusively from cases arising in the commercial lettings market. We recommend that the question of the reasonableness of withholding of consent in the housing context must be seen separately.

10.14 We recommend here that reasonableness should be the subject of a number of structured questions, to guide the parties and the court, particularly in relation to those issues which could result in the landlord losing some control over who lives in the premises. They should also apply to the reasonableness of any conditions imposed on the giving of consent. This will be very important where a condition requiring an occupier to accept that the transaction has used up a succession right is in question.[9] The structuring questions should apply whenever a term in the agreement, whether compulsory-minimum or default, requires consent not to be withheld unreasonably in relation to joint occupation, lodgers or sub-occupation agreements, or transfer.[10]

(1) In deciding whether consent has been withheld unreasonably or offered subject to an unreasonable condition, the court should be required to balance the interests of the current occupier and the proposed new joint occupier, lodger or sub-occupier or transferee against the interests of the landlord and the wider community.

(2) As regards occupiers, the court should be required to consider first the likely effect of the refusal or imposition of a condition on the home, family and private lives of the contractual occupier(s) and the newcomer, and then of anyone else known to occupy the property as their home.

(3) Consideration should also be given to any financial interest of the occupier. This will not normally be relevant for occupiers of social landlords. However, it may be relevant for those with longer fixed term type II agreements from private landlords where either a premium has been charged, or the occupier was expecting to generate an income from lodgers or sub-occupiers, or the occupier is seeking to use a transfer or sub-occupation agreement to ameliorate the effect of being locked in to a fixed term.

(4) In considering the landlord's interests, the fundamental issue should be: to what extent are those interests prejudiced by the granting of the consent, or by not imposing the disputed condition? Where a court is minded to overturn the landlord's refusal or imposition of a condition, it should also

[9] This is discussed at para 11.19 below.

[10] Although in both types I and II the default term will be a landlord's veto, the landlord may choose to use a consent term instead.

take into account the effect on the other groups whose interests would be affected by the court reversing the landlord's decision.[11]

10.15 In the housing context, any adverse assessment of financial risk to the landlord should be adequate in most cases to justify withholding of consent.

10.16 In addition, as social landlords must use their properties to relieve housing need, it will be important to consider the extent to which reversing a decision to refuse consent will result in a loss of their ability to ensure that the property is used by those satisfying their housing needs' criteria. The court should be required to consider any evidence as to how soon, if at all, a person, to whom the occupier wants to extend his/her right of occupation, would have been allocated an equivalent property if he or she had applied for a vacancy through the waiting list. In other words, the priority that would attach to the person the occupier seeks to bring into the agreement should be tested against the priority of others seeking that sort of property, in that area, from that landlord.

[11] Depending on the facts, these would include: people on any waiting list for the landlord's properties, the landlord's other occupiers, other neighbours who are not renting from the landlord, the local community, and the general public.

PART XI
SPECIFIC ISSUES 2: JOINT OCCUPATION

INTRODUCTION

11.1 So far this Report has proceeded on the basis that there is just a single occupier. The reality is that many premises are occupied by more than one person. The scheme we propose must be sufficiently robust and clear to accommodate this fact, and the fluidity with which many people organise their lives.

11.2 This Part deals with a number of specific issues relating to the joint occupation of rented premises. These are:

(1) joint occupation agreements;

(2) adding new parties to the agreement;

(3) joint occupiers leaving the agreement;

(4) an additional ground for possession if a joint occupier withdraws from the agreement or abandons the premises;

(5) the rights of non-contractual occupants in relation to possession proceedings; and

(6) amendments to the Family Law Act 1996.

JOINT OCCUPATION AGREEMENTS

11.3 A distinction must be made at the outset between those joint occupiers who are in occupation because they are parties to an occupation agreement and other joint occupants, who are there on a non-contractual basis. These include: the members of the family of an authorised occupier, guests or some lodgers. We discuss the position of non-contractual occupants below, paragraphs 11.36 – 11.39.

11.4 The current law of landlord and tenant provides that where an estate in land is granted to two or more persons, they (or the first four named, if there are more than four[1]) acquire the legal estate as joint tenants. This means that, on the death of one of them, the survivor(s) take the whole of the estate.

11.5 Joint tenants are jointly and severally liable for all obligations under the tenancy agreement, unless there is any provision to the contrary.[2] Each tenant is therefore liable to the landlord in full, although a joint tenant who has met an obligation in full has a right of recovery from other joint tenants to the extent of his or her share.[3]

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

[2] See C Harpum, *Megarry and Wade, The Law of Real Property* (6th ed 2000) paras 9-002 – 9-008.

[3] *Chalmers, Guthrie and Co v Guthrie* (1923) 156 LTJ 382.

11.6 It will often be in the interests of both landlords and occupiers that occupation agreements are granted to a number of joint occupiers. Landlords have a larger number of people to proceed against should there be breaches of the agreement in respect of the rent or other obligations. Occupiers have others on whom they can rely in respect of these obligations. Additional joint occupiers will also have contractual rights directly against the landlord, and an automatic right to succeed to the occupation agreement.[4] Nothing in our proposed scheme should discourage the creation of joint occupation agreements.

11.7 For the purpose of our scheme, we recommend that where joint occupiers reside in premises under the terms of an occupation agreement, their occupation should be on the basis that their liability is joint and several.[5] Thus breach by one occupier of the terms of the agreement (for instance, to pay rent) means that the full liability of the other party or parties to pay the rent remains unaffected. A joint occupier who has met an obligation in full has the right of recovery for the other joint occupier(s) to the extent of their share.

11.8 If the parties wish to move away from this position and take on unequal liabilities in relation to the premises, they should be able to do so by negotiating individual contracts with the landlord. For example, if two or more surviving joint occupiers wish to re-allocate the way in which they occupy the property, say into two or more flats, they should negotiate with the landlord a termination of the current agreement and a grant of two or more new occupation agreements covering the relevant premises.

11.9 We recommend that:

(1) joint holding of occupation agreements should be possible;

(2) the holders should hold as joint occupiers and therefore be jointly entitled to the benefits of the agreement; and

(3) joint occupiers have joint and several liability.

11.10 Two more specific issues follow from this. They relate to:

(1) numbers of joint occupiers; and

(2) survivorship.

[4] Because of this, it is important that a landlord should not agree to the creation of a joint occupation agreement without being aware of the implications of these principles. Consent to adding a new occupier to the agreement should always be required; this is discussed below at paras 11.16 – 11.24.

[5] We shall leave open the possibility of joint occupiers agreeing between themselves if they wished to do so how their liability for obligations under the agreement is ultimately to be borne as between them (even though one of them may have had to pay the landlord in full).

Numbers of joint occupiers

11.11 Section 34(2) of the Law of Property Act 1925 limits the number of persons who may hold a legal estate in land to four. Any more than that hold an equitable interest only. We regard these principles as irrelevant to housing law.

11.12 We recommend that there should be no limit to the number of persons to whom joint rights of occupation in respect of a home may be given under an occupation agreement, whether initially or by the subsequent addition of a party to the agreement. We also recommend that the landlord should be entitled to set, in the occupation agreement itself, a maximum number of occupiers. This number must, in accordance with normal UTCCR principles, be fair. This is subject to the overriding statutory rules on overcrowding, currently found in Part X of the Housing Act 1985, which must not be broken. (These recommendations are without prejudice to the law relating to the registration of the legal interests of joint tenants, which should not be changed.)

Survivorship

11.13 Under current land law, where a joint tenant dies, the survivor(s) takes over his or her rights under the principle of survivorship. We recommend that this principle be adapted to those with joint occupation agreements.

11.14 Thus we recommend that there should be a compulsory-minimum term in type I and type II periodic occupation agreements that joint occupiers will hold their interests on the basis that if any occupier dies or the interest of that occupier is terminated, the remaining occupier(s) will take over the agreement, and all the rights and obligations going with it.[6]

11.15 In relation to fixed term type II agreements only, it would be a default term. The parties could then agree that on the death of any joint occupier his or her interest in the agreement is to be transferred in accordance with the provisions of his or her will or intestacy (or that any joint occupier shall be able to require that this shall be so by giving notice to this effect to the others) and that this is to take effect for all purposes.

ADDING NEW PARTIES TO THE AGREEMENTS

11.16 In recent years, there has been an increasing tendency, particularly amongst social landlords, to grant joint tenancies to those living together. The focus is particularly on couples who are husband and wife or living together as husband and wife. We seek to take these trends forward and to rationalise current best practice by creating a right which enables the occupier to ask to add another person into the occupation agreement jointly with him or her, without the need for terminating the original agreement and creating a new one. The objective is to ensure as much flexibility as possible.

11.17 We recommend that there should be a compulsory-minimum term in the occupation agreement giving the occupier the right to ask to add a person to the

[6] This is discussed further in paras 14.21 – 14.22 below.

agreement as a new joint occupier.[7] It would be subject to the landlord's consent, which could not be unreasonably withheld.

11.18 We offer, as guidelines, a number of possible instances where a refusal might be reasonable.

(1) Refusal of consent might be justified by considering the implications of the proposed new joint occupier becoming the sole occupier at a later date. For example, consent might reasonably be refused if there were doubts about the ability of the new occupier to shoulder all the obligations under the agreement; if the new occupier had no need for the type of housing involved (for example, housing adapted for the disabled); if the application amounted to an attempt to jump the queue for social housing; or if the original agreement was for a service occupancy to be held in name of the employee alone.

(2) The objects of a charitable registered social landlord should have a major influence on whether it would be reasonable to add a new joint occupier.

(3) Any relevant housing management agreement made by the landlord with representatives of occupiers should be taken into account.

(4) A landlord might reasonably refuse consent where the proposed new occupier was shown to be in rent arrears to any landlord, or he or she or any member of his or her family had been found to have engaged in anti-social behaviour.

(5) The landlord will be entitled to take into account the total number of occupiers who would end up entitled to live in the home. This should not exceed either the statutory overcrowding limit in the Housing Act 1985 Part X, or the number of occupiers set by the landlord in the agreement.

11.19 A landlord might be reluctant to allow a new joint occupier to be brought into the agreement because this could have the effect of anticipating a succession[8], thereby enabling a succession to take place at a later date, which would not otherwise have occurred. For example, grandmother G (the occupier under the agreement), daughter D and granddaughter C all live in the same home. Landlord L assumes that D will succeed on G's death, as a member of G's family, but that the occupation agreement will end on D's death. G asks to bring D in as joint occupier. L is unhappy because D will then automatically succeed by survivorship, as a remaining joint occupier; C would at a later date also have the right to succeed on D's death as a member of D's family. In this situation, instead of the agreement coming to an end on D's death, the agreement would not come to an end until C's death. In the light of this, we think it should be possible for the landlord to give consent to the request to add C to the agreement subject to a condition that this would count as a statutory succession. Assuming that the overall effect of giving

[7] This transaction should be capable of being effected with the same degree of informality as a transfer: see paras 13.26 – 13.32 below.

[8] We discuss the impact of the death of a joint occupier in Part XIV.

permission subject to this condition was reasonable[9], this would have the effect of removing C's right to succeed.

11.20 A landlord might also be reluctant to give consent to adding an occupier to the agreement where he suspected that the original occupier might, after the new occupier has been added, proceed to disappear. In such a case it might be reasonable to make the giving of consent subject to a condition that the original occupier cannot withdraw as a joint occupier for a period of, say, three months. Questions relating to the reasonableness of conditions will, naturally, depend heavily on the particular circumstances of the case.

11.21 Where an occupier is refused permission to add a joint occupier, he or she ought to have the right to apply to the county court for a declaration that the refusal is unreasonable. Such a declaration, if made, should also have the effect of ordering the addition of the proposed new joint occupier into the occupation agreement jointly with the current occupier, as from the date of the order or some other date fixed by the court. Similarly, if the landlord sought to impose an unreasonable condition before granting consent, the occupier should have the ability to ask the court to make an appropriate order. At the same time, the court should have power to amend any other terms of the agreement if it considers it necessary to do so.

11.22 New joint occupiers should not normally become liable for pre-existing liabilities. A default term in the agreement would provide that the new joint occupier would only be liable for future breaches under the agreement (save where liability arises under a continuing breach)[10] and would only be able to take action in respect of future breaches of the agreement by the landlord. However, it should be regarded as reasonable for the landlord to impose a condition, on giving consent for the bringing in of a new joint occupier, that outstanding breaches of the agreement are rectified; and, as potentially reasonable, that the incoming joint occupier is required to accept liability for certain specified outstanding breaches.

11.23 The right to ask to add an occupier should apply to all agreements within the scheme, whether type I or type II. (The impact of the right will be much greater in the former case than in the latter, but this should not prevent an occupier under a type II agreement seeking permission, particularly where the agreement is a longer fixed-term one.)

11.24 There should be a default term in the agreement that any decision as to who the *non*-contractual occupants are should be a matter for the occupier under the agreement.

JOINT OCCUPIERS LEAVING THE AGREEMENT

Notice

11.25 Under the present law, a joint tenancy can only be brought to an end by the complete termination of the agreement. If one of several joint tenants gives notice to quit, it brings the whole tenancy to an end, regardless of the wishes or even

[9] For example because C was in well paid employment and not in need of social housing.

[10] C Harpum, *Megarry and Wade, The Law of Real Property* (6th ed 2000) para 15-039.

knowledge of the other(s).[11] Attempts to limit this rule have been unsuccessful.[12] But it is a rule that can cause considerable injustice.

11.26 Under the Housing (Scotland) Act 2001, section 13, a joint tenant under a Scottish secure tenancy has a right to bring his or her interest in the tenancy (and not the whole joint tenancy) to an end by giving four weeks' notice to the landlord and the other joint tenants.

11.27 We recommend that a joint occupier should be able to terminate his or her interest in a joint agreement by means of a notice, without bringing the whole of the agreement to an end. Provision should be made for the remaining joint occupiers to be warned of what has happened and of its implications for them. The model occupation agreements should provide information about the required content of the notice.

11.28 We recommend that:

(1) the effect of a notice given to the landlord by a joint occupier under an occupation agreement (whether type I or type II) is merely to terminate his or her interest in and rights under the agreement;

(2) the landlord should be required to give a copy of the notice to all the other joint occupiers under the agreement within a month of receipt of the notice, at the same time giving them written warning that they may need to take steps to protect their position in the home; and

(3) it should be a default term of any fixed term type II agreement with a break clause that where only one of two or more joint occupiers operates the break clause, it will only terminate that occupier's interest in and rights under the agreement.

11.29 Once the joint occupier has issued such notice, and after the period of the notice has expired, he or she should acquire no further rights and obligations under the agreement.

11.30 The statutory model agreements should contain a specimen notice which could be used either by a joint or sole occupiers terminating the agreement.

Abandonment

11.31 It may also happen that a joint occupier simply walks away from the agreement, without giving notice to the landlord. In such a case if should be possible for the landlord to use the abandonment procedure[13] to terminate that occupier's interest in the premises.

[11] See *Greenwich London Borough Council v McGrady* (1982) 46 P & CR 223; *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 AC 478.

[12] *Newlon Housing Trust v Alsulaimen* [1999] AC 313.

[13] Set out at paras 9.61 – 9.77 above.

11.32 In this case, as other joint occupiers will remain in the premises, it will not be possible for the landlord automatically to regain possession of them, as we recommend should be able to happen when the premises are completely abandoned. In such circumstances, the additional ground of possession outlined in the following paragraphs would also apply.

ADDITIONAL GROUND FOR POSSESSION IF A JOINT OCCUPIER WITHDRAWS FROM THE AGREEMENT OR ABANDONS THE PREMISES

11.33 We recommend that in type I agreements there should be a compulsory-minimum term providing that where there are joint occupiers (say, A, B and C) then if A gives notice of intention to quit the agreement, or abandons the agreement, the landlord should have a limited right to bring proceedings for possession against B and C. The reason for this recommendation is, for example, because:

(1) the landlord is a social landlord who does not feel that the remaining occupier(s) has/have the requisite degree of housing need;

(2) because the property is too large for the remaining occupier(s); or

(3) because it contains special features (for example, adaptation for a person with disabilities) which are not needed by the remaining occupier(s).

11.34 A landlord should take the following steps.

(1) As where other possession proceedings are contemplated, the landlord should give written notice of intention to take proceedings to the remaining joint occupiers. In accordance with our normal rules, the period of notice will be a minimum of one month and a maximum of three months.[14]

(2) The notice must be issued within six months of the landlord receiving A's notice, or within six months of the effective date of the second notice under the abandonment procedure or the date of the court decision confirming that notice if it is challenged in court proceedings, whichever is the later.[15]

(3) Following expiry of the notice period, actual proceedings against B and C would have to be commenced within six months.

11.35 We recommend that this should be a discretionary ground for possession. In addition a court would only be able to order possession, subject to the provision of suitable alternative accommodation, on the basis that the property in question is no longer appropriate for occupation by the remaining joint occupier(s).

[14] Paras 9.49 and 9.51 above.

[15] Para 9.68 above.

RIGHTS OF NON-CONTRACTUAL OCCUPANTS IN RELATION TO POSSESSION PROCEEDINGS

11.36 In general, the occupier(s) under an occupation agreement should be able to determine who else may be present in the property. It would be open to the landlord to use a substitute term in the agreement on this subject, for example about the numbers of guests permitted to stay in the home. Most non-contractual occupants will be there for short periods of time. Some will be there on a longer term basis, for example members of the occupier's family.

11.37 Where a landlord takes possession proceedings against the occupier, we think that non-contractual occupants who are present in the property with the permission of the occupier(s) should be given notice of this. Where relevant (particularly, where the ground for possession is a discretionary one) the non-contractual occupants should also have an opportunity of intervening in the proceedings in order to argue against the making of an order.

11.38 A number of analogous rules already exist.

(1) In mortgage possession proceedings, the mortgagee must serve a notice at the premises 14 days before the hearing, addressed to all occupiers there, stating that possession proceedings are being taken against the mortgagor.[16] The occupiers may apply to be joined as defendants at the court's discretion.[17]

(2) In landlord and tenant cases if the landlord knows of anyone who may be entitled to claim relief against forfeiture as an under-lessee, the particulars of claim must be served on that person.[18]

(3) Under section 14(3) of the Housing (Scotland) Act 2001 the landlord is under a duty before starting possession proceedings to investigate and establish so far as is reasonably practicable whether there are qualifying occupiers of the property and, if so, their identities.[19] The landlord must serve copies of any notice seeking possession on any such person. They have a right to be joined as parties to any subsequent proceedings.

11.39 We recommend that:

(1) there should be a default term in the occupation agreement giving the occupier the ability to decide who else may occupy the property on a non-contractual basis; this should be subject to the overcrowding provisions of Housing Act 1985, Part X, and to the contractual occupier's

[16] CPR Part 55.10.

[17] CPR Part 19.

[18] CPR PD 55.4, paragraph 2.4.

[19] These are defined in section 14(6) as other people occupying the property as their only or principal home who are members of the tenant's family aged at least 16 or are (with the landlord's consent) lawful assignees, sub-tenants or persons given possession of the home or any part of it, or lodgers.

responsibilities for preventing anti-social behaviour by other non-contractual occupants;[20]

(2) the CPR should provide that notice of possession proceedings must be served on (a) any sub-occupier holding under an occupation agreement granted by a contractual occupier; (b) all members of the family aged over 16 years of a contractual occupier, and (c) any other person aged over 16 years entitled or permitted by a person coming within (a) or (b) to live at the property. [21]

AMENDMENTS TO THE FAMILY LAW ACT 1996

11.40 Currently section 30 of the Family Law Act 1996 contains matrimonial home rights for spouses, as opposed to tenants, to occupy properties. They include

(1) the right to have a payment or tender of rent by a spouse who is not a tenant treated as made on behalf of the other spouse who is a tenant (section 30(3)), and

(2) the right to have a non-tenant spouse's occupation of a home treated as occupation (as a residence or as an only or principal home as the case may be) by the tenant spouse for the purposes of housing legislation (section 30(4)).

11.41 These rights would normally end on the making of a possession order, because they usually only last as long as the tenant spouse is entitled to occupy the property by virtue of a beneficial estate or interest or contract, or a right to remain in occupation under an enactment (section 30(8)(b)). The rights can be enforced by an occupation order under section 33. Former spouses (under section 35(13)) and current or former cohabitants (under section 35(13)) can also apply for occupation orders (sections 35(13) and 36(13)).

11.42 In relation to secure and assured tenancies, where the tenant's spouse or former spouse has matrimonial home rights under the Family Law Act 1996 (or a former spouse or cohabitant or former cohabitant with rights under an order under sections 35 or 36 of the Family Law Act 1996) and the tenancy is terminated by the court, the spouse or former spouse has the same rights, while remaining in occupation, in relation to, or in connection with any adjournment, stay, suspension or postponement of possession proceedings as he or she would have if the tenancy had not been terminated.[22]

11.43 We recommend that section 30 of the Family Law Act 1996 should be amended to refer to occupiers under the new scheme. Where the occupier obtains an adjournment, stay, suspension or postponement of a possession order, the rights of other parties to occupy and tender rent should be preserved until the possession

[20] Anti-social behaviour is discussed in Part XV.

[21] In respect of any occupants of whom the landlord has no specific knowledge, a notice addressed to the other occupant(s) (excepting [*name(s) of authorised occupier(s) under agreement*]) delivered at or posted up at the property should suffice.

[22] See the Housing Act 1985, ss 85(5) to (5A) and the Housing Act 1988, ss 9(5), (5A).

order is enforced. The holders of these statutory rights should be given the right to be joined to possession proceedings and the same rights as the occupier to defend themselves against the making of a possession order and to apply after a possession order for any adjournment, stay, suspension or postponement.

PART XII
SPECIFIC ISSUES 3: LODGERS AND SUB-OCCUPATION AGREEMENTS

INTRODUCTION

12.1 This part deals with two issues.

(1) The right of occupiers to take in lodgers;

(2) The right of occupiers to enter sub-occupation agreements.

LODGERS

12.2 Under existing law, tenants of local authorities have a statutory right to take in lodgers. They may do this without the need to seek the permission of the landlord. Housing association tenants (and other assured tenants) do not have the same right to do this.

12.3 This is a right that we have concluded should be taken into the proposed scheme. The arguments in favour are that:

(1) it encourages full use of accommodation;

(2) it may assist with the mobility of labour;

(3) it enables occupiers to obtain some additional income from their homes;[1] and

(4) it also supports a degree of personal autonomy for occupiers.

12.4 We have previously recommended that any agreement should be excluded from our scheme if the landlord shares actual living accommodation[2] with the occupier.[3] For the purpose of the following recommendation, a lodger is an occupant living in such accommodation under such an excluded agreement.

Type I agreements

12.5 Given our "landlord-neutral" approach, we recommend that there should be a compulsory-minimum term in all type I agreements that the occupier shall have the right to take in a lodger, without the need for the landlord's consent.

[1] This is supported by the tax authorities, which allow income from the letting of a room of less than £4,250 a year to be tax-free. See the Income Tax (Furnished Accommodation) (Basic Amount) Order 1996 (SI 1996 No 2953).

[2] That is to say, any accommodation, other than storage, staircase, passage, corridor, or other means of access.

[3] See para 6.29(2) above.

Type II agreements

12.6 We recommend that, in relation to type II agreements, there should be a default term that the occupier can ask to take in a lodger, but subject to the landlord's consent which cannot be unreasonably withheld.

12.7 In either case, the lodger will not be legally entitled to a written agreement, though it may be good practice for a landlord to provide one. Our aim is to ensure that lodging agreements can be entered with a high degree of informality.

Status of the lodger

12.8 The lodger will have the right to lodge, only so long as the original occupier who granted the right continues to live in the premises. If the agreement between the landlord and the occupier is ended, the lodger will have no rights as against the (head) landlord to remain in the premises.

SUB-OCCUPATION AGREEMENTS[4]

12.9 A sub-occupation agreement arises where an occupier (A) enters into an agreement with another (B) which gives B the right to occupy the premises instead of A. The (head)landlord, who entered the original contract with A, should be able to control who finally ends up in possession of the property, if A departs leaving B behind. For example, a social landlord will not want a person not in housing need to occupy the accommodation; a private landlord will not want a person to occupy who cannot comply with the terms of the sub-occupation agreement. We have concluded[5] that the default position should be that the landlord should have the right to veto any request by an occupier to enter a sub-occupation agreement.

12.10 If, despite this, the head landlord gives consent to the creation of a sub-occupation agreement, this agreement might purport to grant more contractual security that the original occupier has. To ensure that this only occurs where this has been positively agreed by the (head) landlord, there should be a default term in the model agreement that any lawful sub-occupation agreement (that is, a sub-occupation agreement to which the head landlord has consented) will be a type II periodic agreement. This will contain the term providing for the landlord to seek possession on the notice-only basis.

12.11 The head landlord could become bound by the sub-occupation agreement if the original occupier (A) leaves. Thus any consent to the sub-occupation agreement given by the head landlord – essential if the sub-occupation agreement is to be lawful – should be subject to any conditions regarding its length, security, and terms that the head landlord may require. Failure to observe any conditions imposed by the landlord as to the content of the sub-occupation agreement should not invalidate the consent. But the landlord must be protected against the occupier

[4] We are not using this phrase in any narrowly technical sense. The discussion covers any arrangement whereby the occupier (A) parts with possession of the accommodation.

[5] We considered whether the general rule should be that a sub-occupation agreement should be not be able to be made lawfully without the landlord giving his consent, but, in accordance with general principles, with such consent not being unreasonably withheld. We have, however, concluded that this would undesirably weaken the ability of the landlord to continue to manage his estate.

attempting to create a sub-occupation agreement with a greater degree of security or other more generous terms than those allowed by the landlord's consent and any conditions attaching to that consent.

12.12 Thus, where the original agreement is brought to an end, a lawful sub-occupier will be able to stay in the accommodation on the basis set out in the sub-occupation agreement – to which the head landlord will have consented when it was granted, and subject to any conditions that the head landlord imposed when giving consent. The head landlord will then be able to take proceedings for possession against the sub-occupier where he can show a ground for possession exists.

12.13 The direct contractual liabilities between the (head) landlord and sub-occupier ought only to arise and relate to breaches of the agreement occurring after their direct contractual relationship began, following the termination of the original agreement.

12.14 To achieve these objectives, we recommend that there should be a default term in all type I and type II agreements providing for a landlord's right to veto any request by an occupier to grant a sub-occupation agreement, whether of the whole or of part of the property. This will mean that the landlord can give his consent to the occupier creating a sub-occupation agreement or other parting with possession, but does not have to do so. In any case where the landlord does in fact give consent to the creation of a sub-occupation agreement, any sub-occupation agreement should be a type II periodic agreement.[6]

12.15 There should be a further default term that if the landlord does give consent for the creation of a sub-occupation agreement, the landlord should have the power to impose conditions as to the type or term of that agreement; and that, while a breach of these conditions should not invalidate the consent, any sub-occupation agreement granted without compliance with them should be deemed to be a type II periodic agreement.

12.16 If the head landlord and original occupier decide not to adhere to these default terms and the sub-occupation agreement becomes binding on the head landlord, then the *type* of agreement by which he or she will become bound will be the type of agreement created by the original occupier with the sub-occupier.[7] It should be open to the landlord to stipulate, as a condition of giving his consent to a sub-occupation agreement, that the terms imposing obligations on the sub-occupier shall be for the benefit of the head landlord under the Contract (Rights of Third Parties) Act 1999.

12.17 If the landlord gives consent to the creation of a sub-occupation agreement or has included a term in the occupation agreement allowing sub-occupation agreements to be made lawfully without consent, then the landlord should become bound by

[6] CP 168, para 5.46.

[7] CP 168, paras 5.55, 5.56 and 5.65.

the sub-occupation agreement if and when the original occupier under the original agreement terminates it, either by giving notice, or by exercising a break clause.[8]

12.18 If the lawful sub-occupier so requests, the head landlord must supply a written copy of the occupation agreement and the sanctions for failure to do so should also apply, but only after the lawful sub-occupier (B) is in a direct contractual relationship with the head landlord, that is, following the termination of the original agreement with (A).

12.19 The Civil Procedure Rules should be amended to provide that if the head landlord has given consent to a sub-occupation agreement, or has included a term in the agreement allowing a sub-occupation agreement to be made without consent, then if the head landlord brings proceedings for possession against the original occupier (A) or if the landlord uses the abandonment procedure, the head landlord must serve notice on the sub-occupier (B), who should be entitled to be joined in the action.

12.20 We recommend that the sub-occupier (B) should be able to seek an order of the court converting him or her into the direct occupier of the landlord, but on the terms of the sub-occupation agreement. The court should be required to do so unless it would otherwise have granted a possession order against the sub-occupier, for example, where the sub-occupier is in breach of the sub-occupation agreement. The CPR should be amended to implement these recommendations.[9]

12.21 Where the head landlord becomes the new landlord of the sub-occupier, we recommend that he should not take the benefit or burden of any breaches of the sub-occupation agreement that occurred before the change of the sub-occupier's landlord. The liability of the head landlord and the former sub-occupier to each other should be confined to breaches of the agreement taking place after they have come into a direct contractual relationship. Breaches of the sub-occupation agreement before this date should give rise to liability between the original occupier (A) and the sub-occupier only (except in so far as the head landlord had the benefit of obligations of the sub-occupier).

[8] CP 168, para 5.66.

[9] CP 168, para 5.66.

PART XIII
SPECIFIC ISSUES 4: TRANSFERRING RIGHTS OF OCCUPATION

INTRODUCTION

13.1 In this Part we discuss the circumstances in which a contractual occupier should be able to transfer his or her rights of occupation to another person, not a party to the contract.

13.2 Under the current law in relation to tenancies this is dealt with by the rules on assignment. In relation to licences it is dealt with by more restrictive contractual principles on novation and the assignment of benefits of contracts. These provisions are complex and poorly understood, both by landlords and occupiers and by their legal advisers.

13.3 For agreements covered by our new scheme, we wish to replace assignment, and the contractual principles of novation and assignment of benefits, with a statutory scheme of transfers, operating largely through compulsory-minimum and default terms in the agreement. The statutory-contractual scheme should cover the conditions for, methods of, and effect of a transfer.

13.4 The ideas on which these recommendations are based were set out in Part VI of CP 168. Most respondents to CP 168 agreed with our provisional proposals on transfers without substantive comment on them.

THE DEFAULT POSITION

13.5 We recommend that, subject to the three exceptions discussed in the immediately following paragraphs, there is a default term in all type I and type II agreements which gives the landlord the right to impose a veto on any request by a contractual occupier to transfer his or her rights to occupy to another.

EXCEPTIONS

13.6 In the case of type I, but not type II, agreements there should be compulsory-minimum terms to allow for transfer:

(1) to a potential successor; and

(2) by way of (mutual) exchange.

In respect of both types of agreement, it will be possible for transfers to take place by order of the court under family law.

13.7 The compulsory-minimum terms permitting transfers to potential successors and transfers by way of mutual exchange should be subject to the landlord's consent, which must not be unreasonably withheld. The compulsory-minimum term in relation to transfers by way of mutual exchange should not apply to type I occupation agreements entered into by private landlords.

Transfers to potential successors[1]

13.8 A version of this exception is currently to be found in section 91(3)(c) Housing Act 1985. We believe that this is an important provision[2] and that an equivalent exception should be provided in our new scheme.

13.9 We recommend that it should be possible, subject to the consent of the landlord not to be unreasonably withheld**,** for an occupier to seek to transfer his or her occupation rights to a person or persons who would have the statutory right to succeed if the current occupier died. The exception should extend to all type I agreements, not just those granted by local housing authorities.

13.10 At present, succession can only be to a single person; thus, only one potential successor can benefit from this exception. In our new scheme, more than one person will be able to succeed jointly, and it should be possible to transfer the right to occupy to joint occupiers.

13.11 Where there are joint occupiers (whether because they took the agreement in this way originally, or because a joint occupier was added in later) and one of them dies, the remaining one(s) will take by operation of the principle of survivorship.[3] As any survivor always takes priority, while the joint occupiers remain alive, they will have no potential statutory successors. Thus, they will not be able to transfer to a potential successor. However if all the joint occupiers act in unison, they could seek to transfer the agreement to anyone else who could be their statutory successor.[4]

13.12 If there is more than one potential successor, and all the potential successors agree that they should all take jointly, then the transfer can proceed, subject to the landlord's consent not to be unreasonably withheld. If this is not so, and the current joint occupiers cannot all agree on who the transferees should be, the transfer cannot go ahead.

13.13 If all the occupiers and potential successors agree to leave out one or more of the potential successors, then the transfer could still proceed to the remaining successor(s) subject to the landlord's consent as before. Thus the transferors could cut out one or more of the people who might otherwise succeed them, but this degree of choice should be respected.

13.14 If, even though all the current occupiers agree, the potential successors cannot agree on who should be left out, the transfer should not be classified as a transfer to a potential successor but as an ordinary attempt to transfer the right to occupy.

[1] Persons with the right to succeed are discussed in Part XIV.

[2] For instance, allowing people to pass a tenancy to their carer-successor before they move into residential care.

[3] See below para 14.21. This is subject to para 14.58 – 14.59 which provides for the possibility of the parties to a type II agreement agreeing that, on the death of any joint occupier, his or her interest is to be transferred in accordance with his or her will or on intestacy.

[4] There may be more than one such person. In paras 14.46 – 14.47 we discuss the situation where potential successors cannot agree between themselves who should actually be the successor.

In this case, the attempted transfer will, in accordance with the default position set out above, be subject to the landlord's veto.

13.15 It will only be necessary for an occupier to use the right to transfer to a potential successor where they do not intend to remain as contractual occupiers themselves. (This may assist the elderly person who has to give up occupation to go into a residential or retirement home, thereby leaving their own home.) Otherwise they can seek to add the potential successor to the agreement as a joint occupier.

13.16 As we explain in Part XIV, paragraphs 14.48 – 14.52, transfer to a potential successor will not count as using up a succession right, unless the landlord makes this a condition of the consent. Nor will the transferee be regarded as a successor just because the transferor was a successor; and the transferee will cease to count as a successor, even though he or she had held an occupation agreement under which he or she held this status.[5] This is because, subject to the exception mentioned above, only actual succession will count as use of a succession right. Instead it will be up to the landlord to impose a condition on the transfer, as a reasonable condition of granting consent, that the transferee must accept that he or she should be regarded as having used up a succession right.

(Mutual) exchanges

13.17 The current version of this exception is set out in section 91(3)(a), section 92 of and Schedule 3 to the Housing Act 1985. We believe that this is an important and useful right available to secure tenants. We recommend that it be extended to all type I agreements made by social landlords, not just local authorities. In the light of responses to CP 168, we have decided that it would be inappropriate to extend the right to occupiers of private landlords, particularly given that they do not select their occupiers on the same (social policy) bases that social landlords do.

13.18 We recommend that type I agreements[6] entered into by social landlords should include a compulsory-minimum term allowing for mutual exchanges, subject to the consent of the landlord being sought and obtained, which cannot be unreasonably withheld.

13.19 Currently, the right takes the form of an assignment of the tenancy to someone else who is also mutually exchanging. Effectively, it means that the secure tenant must find another tenant to swap with who is also secure or assured tenant with a social landlord, or that all the people participating must form a “ring” of such tenants.

13.20 We recommend that this mutuality condition should be amended so that it can apply to what practitioners refer to as “chains” as well as “rings”. The last person in a “ring” under the current system must assign to the first person in the ring,

[5] This would be comparatively rare as the potential successor would have to have their home at the transferor’s property, and so would not normally have another property on which they had an agreement covered by the new Act.

[6] No provision should be made for this exception as a compulsory feature of type II agreements. It will therefore be covered by the default veto on transfers. The landlord will therefore be able to choose to include a similar right if they wish, but will not be forced to do so.

thereby completing the circle of exchanges. From our consultation, we conclude that social landlords, and their tenants, now wish to sacrifice this circularity, so that "chains" can be included. This is to encourage mobility and facilitate "choice-based letting" approaches which partly try to mimic patterns of buying and selling houses.

13.21 The "chain" approach means that the ring of transfer does not have to be complete. There can be a void at the top of the chain, and an otherwise empty house can be filled at the bottom of the chain. This may particularly suit social landlords in, respectively, high demand and low demand areas, and adds to the flexibility of the present arrangements.

13.22 The right to exchange should be set out in a compulsory-minimum term, and be subject to the landlord's consent, which must not be unreasonably withheld.

13.23 The same general criteria of reasonableness should apply in this context as apply to other circumstances involving the unreasonable withholding of consent. In Part X, paragraphs 10.13 – 10.16, we discuss "structuring" this reasonableness. Among the factors that should be considered in this context, should be:

(1) what voids are left over after a transaction, and

(2) what prejudice, if any, is caused to the landlord's allocation policy.

13.24 This will be particularly important in the context of mutual exchanges where both or all the occupiers have the same landlord and the same sized properties. In such cases, there will be no prejudice to the landlord's waiting list as a result of the exchange. This is one reason why mutual exchange was created as a statutory right in the first place.

Family court orders

13.25 We recommend that relevant family law statutes are amended to ensure that family courts can continue to make appropriate orders in relation to our new agreements, as they can in relation to existing tenancies.

FORMALITIES FOR TRANSFERS

13.26 Under current law, a tenancy can only be assigned by deed, even where the original tenancy did not have to be granted by deed.[7] If no deed is used, a contract to assign a tenancy may be enforceable in equity, but only if it complies with the requirements of Law of Property (Miscellaneous Provisions) Act 1989, section 2 by being in writing, signed by both parties and containing all the terms of the contract[8] (subject to the possible effect of equitable estoppel).

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

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

13.27 We wish to avoid any requirements for deeds. We do not regard them as useful in the context of residential renting. Instead, we wish to see transfers taking effect from the point at which all the parties' intentions are confirmed in writing.

13.28 We recommend that a transfer should be effective as a legal transfer from the earliest of the following points in time:

(1) the intentions of the transferor and transferee to transfer are stated in writing; or

(2) the transferor gives up occupation and the transferee takes up occupation of the accommodation; or

(3) the first instalment of rent is paid to the landlord by the transferee and not by the transferor.

13.29 In cases where there are land registration requirements to be completed, these must also be carried out.

13.30 These propositions are all subject to any necessary consents being obtained from the landlord. If consent is required by the agreement, or if there is a landlord's veto, then the transfer should not be effective unless and until the landlord's consent is granted and communicated to the transferor or transferee.

13.31 If the required consents are not obtained, the purported transfer will be of no legal effect. Thus the landlord will be able to take proceedings against the purported transferee who will have no legal entitlement to occupy the premises. Alternatively, the landlord could agree to enter an agreement with the purported transferee; but this will be entirely a matter for the landlord.

13.32 Once a lawful transfer has taken place, the landlord should be required to serve on the transferee a written statement of the agreement, amended to show the change of occupier, within two weeks of the transfer. The same sanctions for failure to comply with this requirement should apply as for failure to give a written statement of the agreement to the original occupier at the start of the agreement.[9] Where, exceptionally, the original agreement permits the occupier to transfer without having to obtain the consent of the landlord, the time limits for this sanction should not start to run until the landlord is notified of the transfer.

EFFECT OF A TRANSFER

13.33 The effect of a properly conducted transfer should be to substitute the new contractual occupier for the old one from that point on, in a clean break. The former occupier should only be liable under, and benefit from, the obligations and rights of the agreement in respect of things happening before the transfer.

13.34 The new occupier should only be liable under, and benefit from, the obligations and rights of the agreement in respect of things happening after the transfer.

[9] See para 7.23 above.

Transfers of parts of the premises

13.35 The new scheme of transfers will not make any specific provision for transfers of part of the property. It is rare for this to be practical in relation to residential tenancies covered by the current housing legislation, and we would anticipate that it would continue to be rare under the new Act. We do not see that there should be any implied right for the occupier to transfer part only of the property.

13.36 The landlord and occupier can, of course, agree that they want to reduce the space available to the occupier and bring a new occupier into part of the property under a separate agreement direct with the landlord. In that case, they can vary the original agreement (or terminate it by mutual consent subject to entering a new agreement for the smaller part of the property) on the basis that the landlord will enter a separate agreement with a new occupier for the other part.

PART XIV
SPECIFIC ISSUES 5: THE EFFECT OF DEATH ON THE OCCUPATION AGREEMENT

INTRODUCTION

14.1 Succession rights have been an integral feature of housing law for a long time. As usual in housing law, complexity has arisen:

(1) through the proliferation of statutory schemes, each of which provided different succession rights;

(2) through the interface of contract, property and statutory provisions which suggest different legal approaches to the impact of death on occupation agreements and succession; and

(3) as a result of statutory silence on a number of issues which are significant in practice.

14.2 In making recommendations for reforming the law, we want to provide a single and coherent statement of the impact of death upon the occupation agreement which sets out a clear system of succession rights that will apply to both types of agreement.

14.3 Clarity matters to all those involved.

(1) Landlords will be concerned that the income flow from the property is not interrupted, that they minimise voids and that they have sufficient information about what is happening in the property to enable them to manage it.

(2) The occupier will be concerned to protect the position of his or her partner and/or family following his or her death.

(3) Other people who continue to live in premises following the death of the occupier need to know their status and, where necessary, have sufficient time to make alternative living arrangements.

(4) The beneficiaries of the estate of a deceased occupier will not want the estate depleted by rent being paid out for what may be an empty property or property occupied by others who should be paying rent rather than the estate.

14.4 We have also taken this opportunity to recommend measures to remedy certain injustices which have emerged as more fluid family formations have evolved. We have sought to reflect the contemporary social reality of the family in a manner that is consistent with the Human Rights Act 1998. Thus we recommend extending the definition of spouse found in the Housing Act 1985 to include relationships that have the characteristics of husband and wife, even where both

partners are of the same sex or where either party has undergone gender reassignment.

14.5 We also want to recognise demands placed upon relatives or others who look after elderly, ill or disabled people. It is often easier to provide the level of care required if the carer moves into the home of the vulnerable person. Many carers find it impossible to maintain their own home if they do this. We should recognise the reality of the sacrifices that such people make in order to provide care and to protect the position of unpaid carers who give up their own home to provide care for another in that other person's home.

14.6 We are concerned that the current rather limited succession regime of the Housing Act 1985 precludes succession to a spouse being followed by a succession to a member of the family, even if that person has lived with the tenant all his or her life. We want our scheme to recognise the possibility of passing the agreement on to one's children, while ensuring that this is done within sensible constraints of estate management. We believe that the scheme should be able to protect the normal expectations of a family within rented housing, that the partner and then a child of the family, if he or she has not set up home elsewhere, should be able to succeed to the occupation agreement.

14.7 We believe that clarity in succession is best served by providing a strictly limited number of ways by which an agreement can be passed to another person following the death of the contractual occupier.

14.8 To achieve this, we recommend that our scheme of statutory succession should be the only way that someone can succeed to an occupation agreement. This is subject to two exceptions:

(1) where there is a surviving joint occupier, to whom the right to occupy passes by operation of the principle of survivorship; or

(2) where there is a fixed term agreement, which, if the contract specifically provides for it, can be transmitted by will or intestacy.

Estate management ground for possession

14.9 Whilst concerned to produce a modern and clear system of succession rights, we must also take account of the need for social landlords to be able to use their housing stock efficiently and for the social purposes for which it was provided. We therefore recommend that social landlords should have available to them a ground for seeking possession based on under-occupation of the home following the death of the occupier.

14.10 The ground will be based on the current ground 16 of Schedule 2 to the Housing Act 1985. It will only be available where the successor is not a priority successor.[1] Proceedings, including the issue of notice of intention to take proceedings, will not be able commenced until six months after the death. Proceedings will have to be commenced no later than 12 months after the date of the death. The court will

[1] See para 14.29 below.

have to determine that it is reasonable to make the order sought. In addition, the social landlord will be required to ensure that suitable alternative accommodation is provided for the successor.

14.11 The rest of this Part considers four topics:

(1) the position where an occupier dies, leaving no other joint occupier or statutory successor;

(2) joint occupiers and the principle of survivorship;

(3) the statutory succession scheme; and

(4) the position where an occupier under a fixed-term agreement dies.

THE POSITION WHERE AN OCCUPIER DIES, LEAVING NO OTHER JOINT OCCUPIER OR STATUTORY SUCCESSOR

14.12 We recommend that both type I and periodic type II agreements not held jointly and where there is no statutory successor should terminate automatically on the death of the contractual occupier.

14.13 Current common law rules on the effect of death on a tenancy are extremely complex, and do not reflect ordinary people's expectations of what is fair or sensible. We want our scheme to reflect reality. Most occupiers have modest estates; few make wills. Automatic termination will provide certainty. This will be advantageous both for the estate of the deceased occupier and for the landlord. It will also avoid the procedural rigmarole of serving notice on the executors or Public Trustee that landlords are obliged to comply with at present.

14.14 We acknowledge that this approach could cause hardship to both landlords and the family of occupiers if the automatic termination of the agreement were to occur instantaneously with death. The landlord may not know of the death and so unfairly lose income, as he or she will not know the premises are available for reletting. The family of the deceased occupier may need time to clear the property and deal with matters arising from the death. If there are other (non-contractual) occupants living in the property at the time of death, they will require time to organise alternative accommodation.

14.15 On the other hand, allowing the agreement to run on for any significant amount of time after the death will be expensive either for the estate of the deceased occupier if the landlord pursues the rent, or for the landlord if, as is more likely, the landlord does not choose to recover the rent from the estate.

14.16 We have sought to strike an appropriate balance between the competing demands of the various parties. We have also sought to propose a rule that is clear and easily understood by landlords and occupiers.

14.17 We therefore recommend that an occupation agreement should terminate automatically one month after the death of the occupier.

14.18 It could terminate earlier, on a notice being served on the landlord either by the deceased's personal representatives, or by any remaining non-contractual occupants left in the property. Such notice would have to be signed by *all* the

remaining occupants. Whilst one remaining occupant might seek to sign a notice without the knowledge or agreement of the other remaining occupants, that fact will become apparent when the landlord tries to repossess the property. The notice will not be effective in these circumstances.

14.19 We recommend that, subject to the exceptions listed in the following paragraph, there should be a compulsory-minimum term in type I and periodic type II agreements providing that:

(1) occupation agreements should terminate automatically without the need for a court order following the death of the contractual occupier; and

(2) the agreement should terminate either at the expiry of one month after the death of the occupier or on service of a notice by either the personal representative of the deceased occupier or by all of the remaining non-contractual occupants of the property, whichever is the earlier.

14.20 The exceptions to the automatic termination of the agreement following death are:

(1) where there is a joint occupier who continues to occupy under the agreement through operation of the principle of survivorship;

(2) if the occupier was a sole occupier and there is a person who is entitled to succeed to the agreement as a result of the statutory succession rules; or

(3) the agreement was a fixed-term agreement, which contains a term permitting the remainder of any period of right to occupy to be left by will or on intestacy.

JOINT OCCUPIERS AND THE PRINCIPLE OF SURVIVORSHIP

14.21 As discussed above,[2] joint occupiers are occupiers, who jointly and severally benefit from the occupation agreement and are jointly and severally liable under it. In the event of the death of one of the joint holders, the surviving joint occupier(s) will automatically take over both the benefits and burdens of the agreement. We also recommend that succession by survivorship should not count as a succession under the statutory rules, discussed next.

14.22 We provide for a limited exception to these rules in our provisions for joint holding of fixed term type II agreements, where this standard position will nevertheless be the default position.[3]

THE STATUTORY SUCCESSION SCHEME

14.23 A statutory right of succession is clearly a benefit to the occupier and a burden on the landlord. We recommend that the parties should not be able to contract out of the statutory succession scheme save in those circumstances where, as a condition

[2] See paras 11.3 – 11.12 above.

[3] See paras 14.58 – 14.59 below.

imposed as part of a landlord's consent to adding a joint occupier, transfer or exchange, it is reasonable to require the giving up the right of succession.[4]

14.24 The statutory right of succession will be the only means whereby the benefit of an occupation agreement can be passed on following the death of the occupier, except

(1) where there is one or more joint occupiers who survive(s)[5]; or

(2) where the remainder of a fixed term agreement is passed on by will or intestacy.[6]

The rationale of our proposals

14.25 To create a coherent regime for statutory succession, we recommend amendment of the current rules.

14.26 Further, while bearing in mind the legitimate needs of landlords to control use of their homes, we think there should be an expansion of the current succession provisions in the Housing Act 1985. The limited nature of the succession rights in that Act can be seen from the fact that:

(1) only one succession is available (which can be either to a spouse or to a member of the family who has been living with the deceased tenant for the period of 12 months prior to the death);

(2) the Act sets out a range of circumstances where the tenant is treated as a successor, most significantly that he was a joint tenant and has become the sole tenant. (This prevents any child from being a successor where their parents have been joint tenants and where one has predeceased the other so that there is a deemed succession.)

14.27 We consider that the people who should be within the scope of the statutory rules of succession are:

(1) partners of deceased occupiers;

(2) members of the family of the occupier and/or the occupier's partner; and

(3) unpaid carers.

Partners should be given priority over the other classes of potential successor.

14.28 We do not recommend there should be two successions in all circumstances. Two successions will only occur if there is a surviving partner who succeeds and, following their death, there is a member of the family or carer who also qualifies to succeed. The succession of the member of the family or carer will operate as a final

[4] See, for example para 11.19 above and para 14.50 below.

[5] See para 14.21 above.

[6] See para 14.58 below.

succession whether or not there has been a succession to a partner of the original occupier.[7]

Spouse/partner – the "priority successor"

14.29 In general, we expect spouses and partners to occupy under joint occupation agreements. Thus a surviving spouse or partner will continue to hold the occupation agreement after the death of their partner.[8] The operation of survivorship in these circumstances will not count as a succession for the purposes of our statutory scheme.

14.30 Where spouses and partners have lived together but do not occupy under a joint agreement, the statutory right of succession will be available to any surviving spouse or partner. The surviving spouse or partner will have to have been living in the premises as his or her only or principal home at the time of the death.

14.31 Spouse or partner should be defined to include not only the person who was the spouse of the occupier at the time of the occupier's death, but also the survivor of couples who have lived together as husband and wife, or of same sex couples who have co-habited. This definition should embrace couples where either partner has undergone gender re-assignment.

14.32 We recommend that the surviving spouse or partner, as thus defined, should always take priority over any other person with a statutory succession right. Such a successor can be described as the "priority successor".

14.33 The characteristics of priority successors are:

(1) that they have been the partner of the deceased occupier; and

(2) that the property which is the subject of the occupation agreement was their only or principal home at the time of the deceased occupier's death.

14.34 A priority succession will always operate as the first succession to an occupation agreement.

[7] We do not therefore consider that our succession regime should operate in the same way as that in Scotland. The Housing (Scotland) Act 2001 provides for two successions to qualified persons and further provides that following the death of the second successor the landlord is obliged to make other suitable accommodation available to someone who would qualify as a successor if there had not already been two successions. In particular we do not recognise a need to provide for succession rights to partners of successor children. We consider that our provisions for adding a party to the agreement provide a more appropriate mechanism for occupiers to achieve security for those whose home they may wish to protect after their death. The requirement for consent, that must be given reasonably, means that there is an opportunity for the landlord to weigh the competing needs of the landlord and the occupier. Our scheme has the potential to be more extensive than the Housing (Scotland) Act 2001 in that, in the Scottish system, the vesting of the tenancy in the surviving joint tenant counts as a succession for the operation of the succession rules. For the purposes of our scheme, a surviving joint occupier who takes over the agreement on the death of another joint occupier will not count as a statutory successor to the occupation agreement.

[8] See para 14.21 above.

Member of the family and carers – the "standard successor"

14.35 We also recommend that, in defined circumstances, members of the family of the occupier and unpaid carers of the occupier (whether the original occupier or the successor occupier) can statutorily succeed to the occupation agreement. We recommend that "member of the family" be defined by a list, based on the definition in the Housing (Scotland) Act 2001.[9] Such a successor can be described as the "standard successor".

14.36 Clearly the reality and complexity of human relationships means that there will be circumstances where a successor spouse enters into a new partnership relationship, and then dies. If the new couple have arranged to become joint occupiers under the occupation agreement, the survivor will take under the principle of survivorship.

14.37 However, if they are not joint occupiers, we do not consider that the new spouse or partner of a survivor spouse or partner should be in a privileged position, over and above other members of the family. In short, any new spouse or partner of a priority successor cannot him or herself be a priority successor.

14.38 Nevertheless, we do consider that the partner or spouse of a priority successor should receive some protection under the statutory succession rules. The list of members of the family should therefore also include the new spouse/partner of a priority successor. Therefore, in the absence of a joint occupation agreement, the spouse/partner of a priority successor can qualify as a standard successor.

14.39 In the light of the consultation responses, and the development of the law in Scotland, we also recommend that the concept of the standard successor should include unpaid carers who have given up their own home in order to reside with and provide care to an occupier or a member of the occupier's family. The carer must be aged at least 16 years; the premises must be the carer's only or principal home at the time of the occupier's death; and the carer must have had a previous only or principal home which was given up.

14.40 The Scottish law does not define "carer". Recent statutory provisions covering carers in English law have distinguished between the rights of unpaid carers and those of professional carers. We are only seeking to provide succession rights to unpaid carers who provide more than minimal support and care for the occupier or someone else in his or her family. Statutory succession rights should only extend to carers who are unpaid and who provide or intend to provide a significant amount of care to the occupier or the member of the rental occupier's family.

[9] Section 108(1)(b) and (2). This provides: (1) For the purposes of this Act, a person ("A") is a member of another's ("B's") family if –… (b) A is B's parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew or niece; (2) For the purpose of subsection (1)(b), (a) a relationship by marriage is to be treated as a relationship by blood, (b) a relationship of the half-blood is to be treated as a relationship of the whole blood; (c) the stepchild of a person is to be treated as that person's child, and (d) a person brought up or treated by another person as if the person were the child of the other person is to be treated as that person's child. "Half blood" is an expression found in the Housing Act 1985 as well as the Housing Scotland Act. It refers to a relationship existing between persons having only one parent in common.

Therefore "carer" should be defined as in section 1 of the Carers (Recognition and Services) Act 1995. Such carers should qualify as standard successors.

Period of residence

14.41 To be a standard successor, a period of residence must be established. In essence, the current law rations the right to succeed (other than to spouses) to those who have spent a year living with the deceased occupier. The requirement of residence for a 12 month period seems an appropriate and effective rationing mechanism.

14.42 We recommend that a standard successor (including unpaid carers and spouses/partners who do not succeed as priority successors) must either:

(1) have been living in the premises as their only or principal home for a period of at least 12 months prior to the death of the occupier; or

(2) have been residing with the occupier for a period of at least 12 months prior to the death of the occupier and have been living in the premises as their only or principal home at the time of the tenant's death.

JOINT SUCCESSORS

14.43 Where more than one person is entitled to succeed as standard successor we recommend that more than one person can succeed as joint occupiers. Succession by joint occupiers should be treated as one succession. All the joint occupiers will be successors. This will mean that when one joint successor occupier dies the others will continue to hold the occupation agreement through survivorship, but that when the final surviving successor dies there will be no further succession.

INTERFACE BETWEEN PRIORITY AND STANDARD SUCCESSION

14.44 To summarise: we recommend that there should be the possibility of one succession to a priority successor and one succession to a standard successor. A priority succession will only occur if there is a priority successor and if there has not previously been a priority succession or a standard succession. A standard succession will only occur if there is a standard successor and there has not previously been a standard succession. A priority succession will always take precedence over a standard succession, and can never follow a standard succession.

14.45 Additionally there can only be one standard succession to an occupation agreement. It can follow either an occupation agreement held by a contractual occupier who is not a successor or an occupation agreement held by a priority successor. It may operate as the first or second succession to an occupation agreement but must always operate as the final succession.

Disputes

14.46 Where there is more than one potential successor, and there is a dispute about who should become the contractual occupier, we recommend that the landlord should resolve the matter.[10]

14.47 Where there remains dissatisfaction with the solution proposed by the landlord, the matter should be resolved in the county court.

Succession and its relation with our recommendations on adding joint occupiers, transfer and exchange.

14.48 The combined effect of our recommendation enabling an occupier to add another party to the agreement, subject to the consent of the landlord which cannot be unreasonably refused, and our succession provisions could mean that the landlord would "lose control" of the premises, especially the ability to reallocate the premises, for a considerable period of time. Concern about this may well influence landlords' decisions with respect to requests for adding parties to the agreement. We accept that these concerns are reasonable.

14.49 At the same time, we regard our recommendation relating to the addition of a joint occupier as adding to the personal autonomy of occupiers. We do not want landlords' worries about loss of control to undermine their willingness to give consent to occupiers who have applied to add another to the agreement.

14.50 We think an appropriate balance between these two concerns can be achieved by enabling landlords to make it a condition of granting consent to the addition of another that there should be an exclusion of succession. Such an exclusion as a condition of giving consent would still be subject to the reasonableness requirement. We recommend that landlords should have power to grant consent to an application for adding an occupier subject to the condition that the addition counts as a succession. The imposition of the condition must be reasonable.

14.51 Such derogations from our succession scheme should extend to consents to transfer or mutual exchange.

14.52 These recommendation will not only be of advantage to landlords. They will also enable occupiers to make reasoned decisions about what type of arrangement allows them to best provide for the security of their family. They will be able to use their potential succession rights as a bargaining tool, to enable them to achieve a constructive outcome with their landlord.

Loss of status as successor

14.53 There will be circumstances in which a successor loses his or her status as a successor and becomes a straightforward contractual occupier, attracting fresh succession rights.

[10] This is based on Housing Act 1985, s 89 and is a system that appears to work well.

14.54 We recommend that, so long as the successor remains in the same premises under the same or a different landlord, or acquires an occupation agreement by exercise of the right of mutual exchange, that person should retain the status of successor.

14.55 However, if the occupation agreement is terminated and a wholly new agreement relating to different premises is made, whether by the same or a different landlord, the occupier should no longer be regarded as a successor.

14.56 Where a successor dies, and there are no further rights of succession, but the landlord inadvertently grants an occupation agreement to a new occupier on the mistaken view that that person was entitled as a successor, the agreement will be a fully valid one and the occupier should not be deemed a successor.

14.57 If the occupier has misled the landlord as to his or her status as a successor, this should provide the basis for possession proceedings in the normal way.

THE POSITION WHERE AN OCCUPIER UNDER A FIXED-TERM AGREEMENT DIES

14.58 Our recommendations on the rules to apply when an occupier dies are likely to be equally appropriate for most occupiers who rent their home on fixed-term agreements. We therefore recommend that there should be a default term in the fixed-term type II agreement, the effect of which will be that following the death of an occupier the same consequences should arise as follow the death of an occupier with a periodic agreement.

14.59 Different considerations may apply when the occupier is someone who has paid a substantial premium for a fixed-term agreement, or where the fixed-term, though by definition for less than 21 years, was nevertheless for a substantial period. We consider that such occupiers should be able to agree with the landlord, as a substitute for the default term, that the remainder of the fixed-term can pass by will or on intestacy. Though the term will not form part of our model agreement and therefore will be subject to the scrutiny of the Office of Fair Trading, as it adds a benefit to the consumer it is unlikely to be regarded as unfair.

PART XV
ANTI-SOCIAL BEHAVIOUR

INTRODUCTION

15.1 Housing law has an important role to play in the control of anti-social behaviour. The relationship between rented housing and anti-social behaviour and the background to our proposals are both explained in Part XIII of CP 162 at paragraphs 13.1 – 13.9.

15.2 Our original proposals proved very controversial. They stimulated the most polarised, and the greatest volume of, responses. Following careful analysis of the responses, we have modified our original proposals. In particular, we have decided not to proceed with our proposals for summary eviction or further structuring of discretion in anti-social behaviour cases.

15.3 In respect of summary eviction, we have accepted the arguments of consultees that whilst our proposed procedure would have enabled a swift response to anti-social behaviour, it was likely to be burdensome administratively and was potentially a disproportionate response to the problem. We have also accepted the view expressed by the Civil Justice Council and the Association of District Judges, amongst others, that seeking to structure judicial discretion in anti-social behaviour cases above and beyond what we had recommended generally in relation to the structuring of discretion in possession proceedings would, in effect, remove all discretion from judges. We accept that this would be inappropriate.

15.4 We have noted that the concerns of respondents, particularly from lawyers who represent tenants, arose to a large extent from unease at adding to the legal powers of social landlords when, in their opinion, local authorities in particular were failing to utilise fully legal powers already available to them. These views were also shared by voluntary sector organisations that represent tenants' interests.

15.5 On the other hand nearly all respondents recognised that there was a need for landlords to take anti-social behaviour seriously. Responses from organised tenants' groups and many local authorities expressed great concern about anti-social behaviour.

15.6 Our consultation coincided with the DTLR (now the ODPM) consultation "Tackling Anti-social Tenants" and our proposals and the responses to them have to an extent informed proposals within the Anti-social Behaviour Bill.[1] That Bill, currently before Parliament, has inevitably been drafted within the context of the current statutory framework.

15.7 We intend that the housing measures contained in the Anti-social Behaviour Bill should be adapted to the statutory framework we have proposed. We want to ensure that the measures are consistent with our general approach to housing law,

[1] References within this Report to the Anti-social Behaviour Bill are references to the Bill as amended in committee in the Lords and printed as HL Bill 108 53/2 (7 October 2003).

which is based on the consumer approach, requires clear statements of the respective rights and responsibilities of the parties, is flexible and aims as far as possible for landlord-neutrality.

POLICY OBJECTIVE

15.8 We are concerned that effective powers to deal with housing-related anti-social behaviour are available to social landlords. They must be enabled to fulfil their functions as landlords with responsibilities not only towards their tenants but also their local communities. However, we stress that the broader functions of local authorities to police their areas, and any extension of these broader policing roles to registered social landlords, fall outside of the scope of our project.

15.9 We consider that social landlords require a legal framework that is sufficiently flexible in order to enable them to develop effective strategies to tackle anti-social behaviour within rented housing and to respond to the needs of victims and of the local community. The legal framework should be designed to meet the following objectives:

(1) speed of response;

(2) predictability of outcomes of legal proceedings;

(3) ability to protect witnesses;

(4) where possible, provision of support to enable perpetrators to change their behaviour and continue as occupiers; and

(5) appropriate protection of the rights of the alleged perpetrator.

15.10 The legal powers we recommend for social landlords must be balanced against the extensive rights that occupiers under type I agreements enjoy. Moreover, our recommendations aim to ensure that social landlords give sufficient priority to the protection of the majority of their occupiers, so that enjoyment of their rights is not diminished by the anti-social behaviour of a very small minority of occupiers.

Domestic violence

15.11 Anti-social behaviour is generally understood to relate to behaviour that impacts upon people, not necessarily strangers, who are outside the domestic circle of friends and family of the tenant. Violence and harassment within the domestic circle is not generally considered to be anti-social behaviour. However, from the perspective of housing management, there is little difference in the types of remedies which should be available. We therefore recommend that the same powers should be available to respond both to anti-social behaviour and to violence within the home.

Which landlords?

15.12 One major feature of our statutory scheme is landlord-neutrality. However, we consider that this approach cannot apply in an undifferentiated way to the responsibilities and powers of landlords to respond to anti-social behaviour.

Private landlords

15.13 Private landlords are not covered by the requirement to let on type I occupation agreements. Most will rent properties on the basis of type II agreements. They will have the notice-only method of terminating the agreement available to them. They will also have the benefit of the special anti-social behaviour term (see paragraphs 15.20 – 15.22 below).

15.14 Several responses to CP 162 advocated strong measures to require private landlords to control the conduct of anti-social tenants. We consider that to suggest extending the legal responsibility of private landlords towards anti-social behaviour beyond the terms of the occupation agreement raise quite different issues to those that need to be considered in relation to social landlords. We have concluded that these issues fall outside the scope of this project.[2]

Social landlords

15.15 At the moment, local authority landlords have different powers and responsibilities from registered social landlords and non-registered housing association landlords. We recommend that the powers and duties available to social landlords should be aligned.

15.16 The current Anti-social Behaviour Bill provides for the extension of certain powers to charitable housing trusts to obtain injunctions coupled with powers of arrest and/or exclusion provisions, where there is breach of the tenancy agreement. We have thought carefully about the role of charitable housing trusts and, in particular, their function in providing housing to some very vulnerable tenants and their public accountability. In the light of these considerations, and on the assumption that the proposals in the Bill are enacted, we have decided to recommend that charitable housing trusts should have the same powers as other social landlords.

A GENERAL DUTY ON SOCIAL LANDLORDS TO DEAL WITH ANTI-SOCIAL BEHAVIOUR

15.17 The primary reason why social landlord's powers to respond to anti-social behaviour should be expanded is the protection of their occupiers. The Anti-social Behaviour Bill provides in clause 12 (which inserts a new section 218A into the Housing Act 1996) for the publication of social landlords' policies and procedures on anti-social behaviour.

15.18 While this is very useful, we consider that social landlords should be required to give some priority to tackling anti-social behaviour. We are mindful of the concerns expressed by local authorities and some lawyers about the risk of proliferation of claims for compensation if an actionable duty were to be imposed on social landlords. We therefore recommend the creation of a general "target"[3] duty on

[2] We have recommended that part of the proposals for further work should examine anti-social behaviour in the private sector: para 2.39 above.

[3] See *Inner London Education Authority ex p Ali* (1990) 2 Admin LR 822. For an example of a case concerning whether a statutory duty should be categorised as a "target duty" or not, see *R(on the application of A) v Lambeth Borough Council* [2003] UKHL 57.

local authority landlords to take into account, in the management of their rented property, the need to deal with anti-social behaviour. We also recommend that a similarly worded duty be placed on registered social landlords, expressed so 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.

15.19 We consider that such a target duty would assist social landlords in giving anti-social behaviour the priority that it requires, but without involving them in unnecessary claims for compensation.

A SPECIAL ANTI-SOCIAL BEHAVIOUR TERM

15.20 We recommend that a special term prohibiting anti-social behaviour is inserted into all occupation agreements, both type I and type II. All types of landlord will be able to take proceedings against an occupier in breach of this term. Further, if the landlord has already obtained an injunction to restrain breach of the term which the occupier breaches, the landlord will be able to ask for a possession order from the court as part of his enforcement of the injunction, without issuing separate possession proceedings. It will not be possible to contract out of or amend this term. We recommend the term should be based on the definition of anti-social behaviour contained in the Anti-social Behaviour Bill which proposes to insert new sections153A to153E into the Housing Act 1996.

15.21 We recommend that the special term should only apply to anti-social behaviour committed by holders of occupation agreements in the home or in the locality of the home. The term will also treat other unlawful behaviour that does not cause nuisance or annoyance as anti-social but only when it involves the use of the housing accommodation for criminal purposes. Finally our recommended term will apply to violent behaviour within the home.

15.22 The effect of the term will be that the occupier agrees not to:

(1) engage in conduct that (a) is capable of causing nuisance or annoyance to any reasonable person in the locality; or (b) involves the use, or threatened use, of violence or causes a risk of significant harm to a person within the home; or (c) allows, incites or encourages a person residing in or visiting the home to engage in such conduct;

(2) use, or threaten to use, the home for criminal purposes or allow, incite or encourage any other person to use, or threaten to use, the home for such purposes.

REMEDIES FOR ANTI-SOCIAL BEHAVIOUR

15.23 We have recommended that occupiers may be evicted for breach of contractual terms when it is reasonable for a court to make a possession order.

15.24 In addition, injunctions will be available to all landlords for breach of the special term prohibiting anti-social behaviour. If the injunction is breached, a landlord will be able to seek a possession order as a remedy for the breach without issuing separate possession proceedings. The court will be able to order possession where it is reasonable to do so. The injunction must contain a warning that breach may lead to eviction as well as warning of the potential for committal for breach. The

streamlining of breach and possession proceedings for anti-social behaviour will enhance the deterrent value of the injunction.

15.25 Further, social landlords[4] should have a free-standing power, not linked to the agreement, to seek an injunction to protect a wide range of potential victims from anti-social conduct, with anti-social conduct defined on the same basis as in the anti-social behaviour special term.

15.26 Potential victims include:

(1) those with rights to occupy accommodation owned or managed by the social landlord,

(2) those who live in other housing accommodation in the locality of the social landlord's accommodation, and

(3) those engaged in lawful activities in housing accommodation, or the locality of housing accommodation, owned or managed by the social landlord.

15.27 The perpetrators include both those who engage in anti-social conduct and those who allow, incite or encourage someone else residing in or visiting the social landlord's housing accommodation to engage in such conduct.

15.28 In cases where the anti-social conduct consists of, or includes, the use, or threatened use, of violence or there is a risk of significant harm to a person in the locality of the property, additional remedies will be available. These include: powers of arrest, which may be attached to any injunction; and exclusion orders.

15.29 Because exclusion orders will operate to remove a person from their home, they will only be available on a with-notice basis. While an exclusion order is in force, the respective rights and responsibilities of the parties to the occupation agreement will continue. Therefore, rent will still have to be paid and repairing obligations honoured.

15.30 Breach of the free-standing injunction may lead to possession where the order is made against an occupier, the landlord requests possession following breach and the court considers that it is reasonable to order possession. The occupier must be given notice that breach of the injunction may lead to possession.

15.31 The purpose of these powers is to provide flexibility for social landlords in their responses to anti-social behaviour. Thus there will be no need for landlords to commence separate possession proceedings as well as seeking an exclusion order; nor will they have to start separate possession proceedings where there has been breach of an injunction. However, where needed, possession proceedings will still be available.

[4] For these purposes, social landlords will include unregistered housing associations and charitable housing trusts.

15.32 We have already recommended that courts must take certain factors into account when exercising their discretion in possession proceedings.[5] To ensure that the judge takes full account of the broad impact of such behaviour, in the context of anti-social behaviour he/she must consider the impact of the behaviour on:

(1) the landlord's other occupiers;

(2) other neighbours who are not renting from the landlord;

(3) the local community.

15.33 We have considered whether eviction should be a potential consequence of breach of an anti-social behaviour order made under the Crime and Disorder Act 1998. We have decided that it would be too complex to try to categorise anti-social behaviour orders into those where breach could lead to possession proceedings and those which should not, because the behaviour is not sufficiently connected to the occupation of housing. In any event, we think our recommendations on injunctions will be sufficiently flexible and responsive to the needs of landlords. We have therefore decided not to proceed further with this idea.

EXCEPTIONAL USE OF TYPE II AGREEMENTS TO PREVENT OR RESPOND TO ANTI-SOCIAL BEHAVIOUR

15.34 The introductory tenancy introduced by the Housing Act 1996 provided a useful mechanism for local authority landlords who are concerned to ensure that tenants demonstrate they understand both the responsibilities and the rights of the secure tenant.

15.35 We have recommended that all social landlords should have exceptional power to use the type II agreement to provide a similar probationary form of agreement.[6] The probationary type II agreement will be available for 12 months in the first instance. After 12 months, a social landlord will be able to extend the probationary period for a further 6 months, but only if it is of the opinion that the behaviour of the occupier was such as to warrant such an extension.

15.36 Social landlords will have flexibility to choose whether their use of the probationary exception should be limited to individual cases, or to operate on a more general basis. Indeed they will be able to decide not to use any probationary type II agreements.

Demotion

15.37 Social landlords will also be able to use type II agreements when they have asked a court for an order to this effect, in the context of proceedings for breach of the special anti-social behaviour term. This order will provide that an occupier, currently under a type I agreement, should have that agreement demoted to a type II agreement.

[5] See paras 9.81 – 9.90 above.

[6] See paras 5.33 – 5.35 above.

Maximum period for demotion

15.38 We recommend that where an occupier is demoted under a court order, 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 six months; or

(3) automatically after one year.

15.39 Demotion orders should only be made where the court is satisfied that otherwise it would have been reasonable to terminate the agreement for anti-social behaviour and where the social landlord produces a plan to provide appropriate support for the occupier. The Secretary of State will be given a power to specify the requirements of the support to be provided to demoted occupiers. The Secretary of State will also be given a power to vary the period of time for which such an order is to last. Failure to provide the planned support will be one possible basis for the occupier's application for re-promotion.

DOMESTIC VIOLENCE

15.40 Section 145 and section 149 of the Housing Act 1996 created a discretionary ground for eviction for both secure tenancies and assured tenancies let by social landlords where a violent partner forces the other partner to leave the home and the court is satisfied that the partner who has left is unlikely to return. The ground (2A in Schedule 2 to the Housing Act 1985 and 14A in Schedule 2 to the Housing Act 1988) applies to couples who are married or living together as husband and wife and does not therefore cover same sex couples or other relationships. Either or both of the couple must be a tenant. It is available where there has been violence towards the leaving partner or a member of that person's family who was residing in the accommodation immediately before the partner left. The ground requires that the landlord prove that the violence was the cause of the partner leaving and that he or she is unlikely to return.

15.41 The Government in the course of their consultation on domestic violence[7] have specifically raised the question of how to increase the effectiveness of this ground of possession.

15.42 Clearly the limits on its operation constrain its use at present. More significantly, in many situations at present, there is no need for social landlords to use the domestic violence ground. Where a partner who is a joint tenant leaves the family home as a result of violence, and the landlord is able to reach an agreement with the victim that he or she will serve a notice to quit, this terminates the tenancy of the remaining joint tenant, the perpetrator of the violence. The landlord will then be able to grant a new sole tenancy of the home to the victim.

15.43 We have recommended that, under our scheme, the service of a notice by a joint occupier should operate to terminate the occupation agreement in relation to that occupier only. As regards the other joint occupier(s), the agreement will be

[7] Safety and Justice: The Government's Proposals on Domestic Violence (2003) Cm 5847.

unaffected.[8] Thus, the current method of responding to the continued occupation of the perpetrator of domestic violence will no longer be available to the social landlord. Potentially, therefore, the perpetrator could profit from his or her wrong doing by gaining occupation of the whole property.

15.44 However, we have recommended above that breach of the anti-social behaviour special term will be available to landlords as a basis for termination of the occupation agreement. There is nothing to prevent its being used to control anti-social behaviour perpetrated against other people within the property.

15.45 Social landlords will have greater scope to take action than under the current domestic violence ground. There will be no restriction on the availability of the ground against spouses and co-habitants only; there will be no need to prove that violence caused the victim to leave the property; and there will be no need to demonstrate that the victim has no intention to return to the property. For this reason, there will be no need to replicate the current domestic violence ground.

15.46 Social landlords will also be able to use the free-standing injunction power with exclusion orders and power of arrest in cases of domestic violence.[9]

15.47 In either case, social landlords will be able to seek a possession order in proceedings for breach of any injunction. The possession order will operate to terminate a joint agreement in the normal way. In cases of domestic violence it will also terminate the victim's agreement. However, the court's consideration of reasonableness will include consideration of the landlord's plans for re-housing the victim. The landlord will have two options.

(1) If the victim wishes to be re-housed elsewhere, the landlord will be able to re-gain possession of the property following a suitable offer to the victim.

(2) Where the victim wishes to remain in the current home then the landlord will be able to offer her or him a new agreement for that property.

15.48 These seem more sensible outcomes than those available under the current domestic violence ground.

[8] See paras 11.25 – 11.30 above.

[9] This will in effect implement Family Law Act 1996, s 60 for social landlords.

PART XVI
SUPPORTED HOUSING

INTRODUCTION

16.1 In Consultation Paper 162, we suggested that all projects providing an appropriate level of supported accommodation to vulnerable groups should be excluded from the statutory scheme and from the Protection from Eviction Act 1977.[1] We also provisionally proposed that the Secretary of State should hold a list of such projects.

16.2 The reason for proposing exclusion from statutory protection was to provide a legal environment that would facilitate supported accommodation for all kinds of short-term social projects such as hostels, drug rehabilitation projects, and foyers. The holding of a statutory list would have meant that there would be a level of certainty about the lack of statutory protection available to such projects, overcoming current difficulties in identifying the legal status of certain projects. These considerations remain important to our approach to supported housing.

16.3 Responses to our proposals indicated that we had failed to appreciate the diversity of supported housing and the extent to which providers were committed to the principle that occupiers of supported housing should be given as extensive security as possible. The suggestion of a list of excluded projects was rejected as too cumbersome.

16.4 The following recommendations have been developed following careful consideration of the responses to CP 162 and the contributions made by a group of providers of supported housing, who assisted us greatly by participating in a seminar convened by the Law Commission on 9 July 2002, in other meetings, and by providing written comments as our proposals progressed. We are very grateful for their assistance.

DEFINITIONS

16.5 The proposed system of statutory protection for supported housing projects is dependent upon the following definitions.

(1) *Direct access accommodation* is housing accommodation provided by a relevant landlord as part of a project or scheme where the normal practice of the project is to accept anyone who requests accommodation as long as the project has available accommodation and the person asserts that they meet the basic criteria for the project. Accommodation must be provided on a day to day basis meaning that there is no commitment on the landlord to house beyond that particular night. The purpose of the accommodation is that it is immediately available to the occupier.

[1] See CP 162 paras 9.101 – 9.107.

(2) *Supported housing accommodation* is housing accommodation where a relevant landlord is contractually obliged to provide support services and/or the purpose for which accommodation is provided is the provision of support.

(3) *Support services* means the provision of training or the provision of advice, guidance or counselling which relates to either physical or mental health, employment or training or the promotion of welfare or any other type of provision which is consistent with this list. It does not include the provision of higher education.

(4) *Relevant landlord*s are social landlords, as defined by the Bill (that is, local authorities, registered social landlords and housing action trusts), with the addition of charitable housing trusts who are not registered social landlords, and registered charities who provide supported housing.

16.6 The broad definition of relevant landlords is designed to balance the need to embrace the wide range of organisations which provide supported housing and the need to ensure that the categories of landlord involved have sufficient public accountability to justify the extensive powers provided for in our Bill.

16.7 The definition is extended more widely than social landlord to include: (1) charitable housing trusts; and (2) charities who provide supported housing but cannot be charitable housing trusts because their main source of income does not come from housing. Such charities include the YMCA. It is important to include both charitable housing trusts and charities who provide supported housing since they provide a range of valuable services to vulnerable people, while being subject to appropriate regulation by the Charity Commission.

LEGAL STATUS OF THE OCCUPIERS OF SUPPORTED HOUSING

16.8 We consider that different types of provision of supported housing should attract different levels of security. Certain accommodation should be excluded from our statutory scheme altogether; other accommodation should be excluded from the usual statutory requirement on social landlords to provide accommodation on a type I basis; and accommodation provided by relevant landlords on a type II basis should include a power to temporarily exclude someone from the accommodation who is behaving dangerously.

Exclusions

16.9 Direct access accommodation will be excluded from our statutory scheme. A person's length of stay in direct access accommodation is irrelevant. This is because the landlord of direct access accommodation is not in a position to make an informed choice about the suitability of a person for anything other than immediate and short-term occupation of the premises.

16.10 Temporary supported housing accommodation which is intended to provide very short term accommodation such as short stay or respite accommodation will be excluded from our statutory scheme. We understand that this exclusion will in practice exclude only a small number of units of accommodation; however, it is a useful exception that will allow flexibility of provision.

16.11 Once the provision of supported housing accommodation exceeds four months the provision will be brought within our statutory scheme. We accept that the time limit of four months is an arbitrary figure which may not represent the most useful period of exclusion. We will therefore recommend that the Secretary of State has power to adjust the time period of the exclusion.

16.12 Accommodation provided temporarily by a relevant landlord for the purpose of assessment should be excluded from our statutory scheme. Whilst assessment may be a relatively short process, we also consider that the period for which such accommodation is excluded should provide the landlord with sufficient time to prepare the occupier for more permanent accommodation or to organise alternative accommodation if the landlord decides not to continue to accommodate the occupier.

16.13 We consider that an exclusion from the statutory scheme of four months will provide sufficient time for a landlord to complete these processes. Once the provision of accommodation for assessment exceeds four months it will be brought within our statutory scheme. Again we accept that the time limit of four months is an arbitrary figure which may not represent the most useful period of exclusion. We will therefore recommend that the Secretary of State have power to adjust the time period of the exclusion.

16.14 We will not impose a requirement on landlords to inform occupiers of excluded supported housing of their status. This would not be practical in the light of the limited resources of many supported housing providers, and the short term nature of the accommodation provided. We would expect that as a matter of good practice landlords will provide the necessary information in a practical and useful format.

Exceptional use of type II by social landlords

16.15 All other supported housing should in principle be treated consistently with the normal features of our statutory scheme. Therefore social landlords will be required to use type I occupation agreements unless the arrangements fall within a statutory exception to that requirement. Relevant landlords who are not social landlords will be able to provide accommodation on a type I or a type II basis as they choose.

16.16 We consider that there should be a limited statutory exception to the requirement that social landlords provide accommodation on a type I basis where supported housing is provided by a social landlord. The type II agreement provides some important advantages to the landlord of a supported housing project. First it provides limited security, so that if the occupier no longer requires support services, or chooses not to use the support services, the agreement can be terminated on a notice-only basis. Second the landlord who uses a type II agreement will be able utilise a contractual term allowing it to move the occupier from room to room (see below paragraph 16.27). Finally in certain circumstances following a request by a manager the police will be able to order the exclusion of an occupier from the project for 48 hours – see paragraphs 16.29 – 16.38.

16.17 The use of the exception to the statutory requirement for social landlords to provide type I agreements will be subject to the requirement that the social landlord provide written notification to the occupier that the statutory exception applies.

16.18 Whilst we recognise the need for such flexibility to facilitate the provision of supported housing, it is important that the exception is limited partly because of the additional powers of the landlord and partly because it restricts access to the benefits, primarily long term security, of the type I agreement. In most circumstances there will be no good reason why someone should be permanently excluded from these benefits.

16.19 We therefore propose that in normal circumstances, and where the accommodation is provided by a social landlord, the exception to the requirement to accommodate on a type I agreement will cease on the expiry of two years from the commencement of the type II agreement. This would mean that, if the landlord was a social landlord, after two years the resident would become a type I occupier either of that accommodation or of other suitable alternative accommodation. The landlord would no longer be able to move the resident around the project, nor would it have the benefit of the police exclusion order. The normal anti-social behaviour powers of injunction and eviction would be available to the landlord. Landlords not required to use type I agreements would be able to choose whether or not the agreement should become a type I agreement.

16.20 The two year exception should provide a satisfactory solution for the vast majority of people who require some support for a period of time but who in the long term are capable of sustaining independent living arrangements with more minimal support.

16.21 However we do recognise that landlords will only be prepared to house certain residents on a long term type II basis. If after two years they were automatically obliged to offer type I agreements they may respond by evicting and arranging for re-housing elsewhere on a type II or an excluded basis. This would be counter-productive.

16.22 We recommend that the statutory exception to the requirement upon social landlords to use a type I agreement should be able to be continued beyond two years where the landlord carries out an assessment of the support needs of the occupier and provides a written statement of reasons justifying the continuation of the type II agreement. In particular the statement must justify the continued need for the availability of the police exclusion order.

16.23 This means that the organisation most closely affected by decisions to enhance the rights of occupiers will be making those decisions. It will prevent evictions solely to avoid the change in status and would enable landlords to be responsive to the continuing support needs of residents.

Management control

16.24 We recognise that landlords of supported housing projects may have particular management constraints over and above the requirement to provide support. They are likely to have greater needs to move residents around their accommodation to ensure effective use of accommodation or to deal with particular needs of the resident. These needs can be dealt with by the use of appropriate terms in the agreement.

16.25 Similarly where it is anticipated that at some stage in the future the support needs of the occupier will change in such a way that the current accommodation is no

longer appropriate for their needs, then those changes should be dealt with by the inclusion of an appropriate term in the occupation agreement.

16.26 We recommend that a set of model default terms for supported housing provided on a type II basis should be drafted by the Secretary of State, following consultation with the key stakeholders in the provision of supported housing including, to the extent possible, representatives of residents.

16.27 Our scheme provides sufficient flexibility to allow a landlord to enter a type II agreement which gives the occupier the right to occupy a room in a particular building, for instance with communal facilities, but reserves the right to move the occupier should the need arise. If such a term were to be written into the model type II agreement, it would be deemed to be fair under the UTCCR regulations. Any variation of such a term would be at risk of being found unfair. A term that was not provided for in the model agreement could be written into the agreement but would need to comply with UTCCR requirements of fairness and transparency.

16.28 Our scheme does not require distinct accommodation to be provided for occupiers who are excluded from the scheme, or who are included on a type II basis. The exclusions focus on the relationship between the provider and the occupier, not on the particular premises. Therefore a room which is provided for an occupier during an assessment period and is excluded from the scheme, can continue to accommodate the occupier during the period of supported housing accommodation, when the appropriate agreement between the provider and the occupier is a type II agreement.

Police exclusion order

16.29 Effective management of supported housing accommodation may require more speedy exclusions than injunctions will provide. We have therefore designed a procedure modelled upon an Australian procedure referred to in CP 162 at paragraph 4.79. Designated managers of supported housing projects let on type II agreements will be able to request the police to exclude an occupier from the project.

16.30 The power, which we describe as a police exclusion order, will be available to social landlords during the period of exceptional use of type II and to other relevant landlords for the first two years of provision of accommodation and for a longer period if they carry out an assessment of the support needs of the occupier and provide a written statement of reasons justifying the continued need for the availability of the police exclusion order.

16.31 The police exclusion order will give the police power to exclude an occupier from the premises of a supported housing projects for 48 hours without the necessity of going to court. Breach of the police exclusion order will be a criminal offence.

16.32 Police exclusion orders will be available to the police following a request from a designated manager of a supported housing project if they reasonably believe that a serious act of violence has occurred or the safety of someone on the premises is in danger from a resident or a visitor or the ability of a resident to benefit directly from the support provided by the project has been seriously impeded by the behaviour of a resident or a visitor.

16.33 Police exclusion orders will not be available where the resident has failed to pay rent or has abandoned the project. Nor will they be available where, for instance, a resident breaches the "no men" rule of a women's refuge, or a "no alcohol" rule, unless the breach of the rules results in danger to the safety of someone on the premises or seriously impedes the ability of a resident to benefit directly from the support provided by the project. Other breaches of rules will be dealt with through the normal possession or injunction procedures.

16.34 We recommend that there should be constraints against the arbitrary exercise of the police exclusion order to protect the occupier. First the police exclusion order will only be available on the request of a designated manager of a supported housing project. Second, the order will exclude the occupier only from the premises and not for instance from the surrounding area. Third, no more than three police exclusion orders may be issued against one occupier in any six month period.

16.35 We consider that the occupier requires some protection from landlords who obtain a police exclusion order by acting in bad faith. We recommend that there should be a statutory duty upon the manager of the project to act in good faith which will be enforced by means of a statutory tort.

16.36 However we also consider that the use of this provision must be flexible and responsive to the potentially difficult situations which can arise in these projects. Therefore there will be no need for the police to attend the project in order to issue the order unless they decide that it is necessary to do so. The designated manager will be able to get the police exclusion order issued over the telephone.

16.37 Police exclusion orders may be followed by an injunction to exclude the occupier from the project if the management of the project decide that this is advisable. The application for the injunction may be issued contemporaneously with possession proceedings and the injunction in such circumstances will last until effective eviction. A project would be at liberty to re-admit the excluded person after the expiry of the police exclusion order or after the expiry of the injunction if they decided that was the right course.

16.38 We consider that these recommendations are consistent with the emerging community safety role of the police and with the increased use of local partnership approaches in responding to disorder.

Type I occupation agreements

16.39 All supported housing occupation agreements covered by our statutory scheme whether type I or type II will include the special anti-social behaviour term. Injunctions will be available to restrain occupiers from breach of the term. Following any breach of the injunction, providers will also be able to apply to the court for a possession order, without having to issue separate possession proceedings. Social landlords will be able in certain circumstances to obtain injunctions that exclude occupiers from the project and have powers of arrest attached to injunctions. Type I agreements will additionally have the benefit of the demotion procedure. Therefore there are relatively extensive mechanisms to respond to anti-social behaviour in type I agreements.

16.40 Supported housing providers have indicated to us that a major area of concern arises when the occupier is accommodated on a type I basis in supported housing,

but no longer wishes to receive support, no longer needs support, or no longer pays for the support provided. We offer two solutions to this problem.

(1) Under our scheme, occupiers will be able to be evicted from their occupation agreement for breach of a term where the court determines that it is reasonable to do so.

(2) Additionally an estate management ground similar to Ground 15 of the Housing Act 1985 will be available to landlords.[2] Suitable alternative accommodation will have to be provided to an occupier evicted on this basis.

CONCLUSION

16.41 We consider that these provisions for supported housing projects will clarify the current confused state of the law on supported housing, maximise the rights available to occupiers in a manner that is consistent with the management requirements of the providers of supported housing and ensure that the responsibilities of both landlords and occupiers within supported housing projects are explicit.

(*Signed*) ROGER TOULSON, *Chairman*
HUGH BEALE
STUART BRIDGE
MARTIN PARTINGTON
ALAN WILKIE

MICHAEL SAYERS, *Secretary/Chief Executive*
6 October 2003

[2] See paras 9.30 – 9.33 above.

ANNEX A
THE HOUSING ADVISORY GROUP

(Members of the group met during 2001-2002; they are listed with their job descriptions as at the time of the meetings of the Group.)

Stephen Brockway
Legal Services Advisor
Housing Corporation

John Bryant
Policy Officer
National Housing Federation

Russell Campbell
Chief Solicitor
Shelter

John Daniels
Branch Head – Housing (Private Sector)
Office of the Deputy Prime Minister

Paul Docker
Head of Civil Procedure
Lord Chancellor's Department

Ian Fletcher
Director (Commercial & Residential)
British Property Federation

David Fotheringham
Head of Policy
Chartered Institute of Housing

Gary Glover
TAROE

Stella Groves
Policy Advisor – Immigration & Housing
The Law Society

Maureen Haire
Senior Executive Officer –
Housing Directorate
National Assembly for Wales

Gareth Hardwick
Secretary
Small Landlords' Association

Andrew Heywood
Senior Policy Advisor
Council of Mortgage Lenders

Sian Marie James
Executive Officer – Housing Directorate
National Assembly for Wales

Ken Lewis-Allagoa
Senior Policy Manager
Lord Chancellor's Department

Sam Lister
Policy Officer
Chartered Institute of Housing

Phil Morgan
Chief Executive
Tenant Participation Advisory Service

Sally Morshead
Chair – Housing Law Committee
The Law Society

Chris Morter
Head of Branch – Succession, Contempt & Law
Commission Liaison Branch
Lord Chancellor's Department

Peter Owen
Senior Executive Officer – Housing Directorate
National Assembly for Wales

Leona Patterson
Branch Head – Housing Management Branch
(Branch 2)
Office of the Deputy Prime Minister

John Tanner
Head of the Civil Justice
Lord Chancellor's Department

Celia Tierney
Advisor
Local Government Association

Mike Wrankmore
Policy Advisor - Succession, Contempt & Law Commi
Liaison Branch
Lord Chancellor's Department

ANNEX B
SUPPORTED HOUSING SEMINAR, 9 JULY 2002 – LIST OF ATTENDEES

Name	Organisation
James Berrington	Housing Corporation – Policy Advisor
Michele Walsh	Housing Corporation – Head of Housing Policy
Naomi Goode	Jenkins & Hand Solicitors
Maurice Condie	Byker Bridge Housing Association
Amanda Nott	Advance Housing and Support Limited
Chris Melville	Hexagon Housing Association
Katherine Bloomer	Salvation Army Housing Association
Chris Litherland	YMCA Housing
Kate McAllister	The Carr-Gomm Society Limited
Paul Webb	National Assembly for Wales
Carolyn Hayman	Foyer Federation
Fahmeeda Gill	National Housing Federation
Sue Baxter	SITRA
Colin O'Neill	Stonham Housing Association Limited
Georgina Savill	Trowers and Hamlins Solicitors
Jenny McCabe	The Law Society

ANNEX C
TABLE OF EVENTS

2002

	Date	Organisation	Event
1.	23 February	TPAS Nottingham	RSL tenants' conference
2.	20 March	Small Landlords Association London	Meeting
3.	22 March	Social Landlords Crime & Nuisance Group Coventry	Committee meeting
4.	26 March	Association of Law Teachers London	Conference presentation
5.	5 April	Socio-Legal Studies Association Aberystwyth	Conference presentation
6.	18 April	Social Landlords Crime and Nuisance Group Birmingham	Annual Conference
7.	25 April	North East Housing Law Practitioners Association Newcastle	Meeting
8.	9 May	Housing Law Practitioners Association London	Executive Committee meeting
9.	15 May	Socio-Legal Studies Association/Society of Public Teachers of Law London	Academic seminar
10.	15 May	Housing Law Practitioners Association London	General meeting
11.	20 May	Welsh Assembly/Welsh National Housing Federation	Conference
12.	22 May	Essex Citizens Advice Bureau Witham	Housing Policy meeting
13.	27 May	Law Society London	Housing Law Committee meeting
14.	28 May	London School of Economics London	MSc Housing Alumni meeting
15.	5 June	Local Government Association London	Executive meeting
16.	7 June	Rent Assessment Panel Birmingham	Meeting
17.	12 June	Chartered Institute of Housing Harrogate	Annual Conference
18.	13 June	National Union of Students London	Meeting
19.	13 June	Bolton Council Bolton	Housing special interest group meeting
20.	18 June	Law Centres Federation London	Seminar
21.	18 June	Tenant Participation Advisory Service Birmingham	Anti-social behaviour Conference
22.	19 June	Brighton Council Brighton	Private Sector Forum meeting

23.	19 June	Northumbria University Law School Newcastle	North East consultation event
24.	20 June	Sheffield Hallam University Sheffield	Yorkshire consultation event
25.	21 June	Shoreditch Our Way London	Anti-social behaviour meeting
26.	21 June	Association of Housing Advice Services London	Meeting of Advice workers
27.	25 June	Birmingham & Midlands CABs Birmingham	Housing Policy Advice workers meeting
28.	25 June	Camden Council London	Camden Private Tenants Forum Meeting
29.	26 June	Greenwich Council London	Greenwich Private Sector Forum
30.	27 June	Leicester Federation of Local Authority Tenants Leicester	Annual General Meeting
31.	29 June	Catholic Housing Aid Society Birmingham	National Groups Conference
32.	29 June	Castle Vale Housing Action Trust Birmingham	Meeting
33.	1 July	North Yorkshire CABs York	Housing Policy Advice workers meeting
34.	1 July	Bradford Catholic Housing Aid Society Bradford	Annual General Meeting
35.	2 July	Foyer Federation Birmingham	Executive Meeting
36.	3July	Foyer Federation Birmingham	Annual practice conference
37.	3 July	Law Society & Law Commission London	Seminar – anti-social behaviour
38.	3 July	Housing Law Practitioners Association Liverpool	Meeting
39.	4 July	London &Quadrant Housing Association London	Meeting
40.	8 July	London CABs London	Housing Policy Advisers meeting
41.	9 July	Law Commission London	Seminar – supported housing
42.	11 July	Tenant Participation Advisory Service Birmingham	Seminar
43.	11 July	ODPM Tenant Sounding Board London	Meeting
44.	15 July	Shoreditch Our Way London	Committee meeting
45.	24 July	Hammersmith and Fulham Tenants Federation London	Meeting
46.	30 August	National Federation of Residential Landlords Shrewsbury	Annual Conference

47.	24 September	Camden Federation of Private Tenants, London	Annual General Meeting
48.	29 October	Confederation of Co-operative Housing, London	Meeting
49.	13 November	TPAS Cymru/WTF	Conference
50.	14 November	TPAS Cymru/WTF	Conference workshop
51.	18 November	London Tenants Forum	Meeting
52.	28 November	RICS London	Breakfast meeting

2003

53.	20 January	Southern Private Landlord's Association West Sussex	AGM
54.	23 January	Manchester Private Landlords Forum manchest	Regional meeting
55.	30 January	Association of Residential Landlords	Launch of model agreement
56.	6 February	T&GWU London	Seminar on agricultural occupancies
57.	26 February	National Homelessness Advice Service Grantham	Annual conference
58.	26 February	Small Landlords Association	Annual conference
59.	3 March	Southampton Private Landlord's Association	Meeting
60.	4 March	Brent Housing Forum London	Meeting
61.	4 March	Ealing Tenants Association	Meeting
62.	22 March	CCH	Conference
63.	2 April	Nottingham Private Landlords	Conference
64.	15 April	SLSA Annual Conference Nottingham	Conference
65.	26 April	TPAS RSL conference	Conference
66.	12 May	Small Landlords Association Bristol	Conference
67.	12 June	Chartered Institute of Housing Conference Harrogate	Conference
68.	21 July	Small Landlords Association Bristol	Conference
69.	2 August	TPAS annual conference	Conference
70.	29 August	National Federation of Residential Landlords, annual conference	Conference
71.	16 September	Threshold tenants Dublin	Conference
72.	22 September	Central Law Training London	Conference

ANNEX D1: RESPONSES TO CP 162

Judges and Judicial Bodies
Association of District Judges
Hon. Manuel J. Kyriakakis, Trial Court of the Commonwealth of Massachusetts
Total: 2

Local Authorities and Social Landlords
Birmingham City Council
Byker Bridge Housing Association Ltd
Castle Vale Housing Action Trust
Charter Housing Association
Circle 33 Housing Group
City and Council of Swansea
City of Sunderland
Coin Street Secondary Housing Co-operative
Crawley Homes
De Montfort Housing Society
East Thames Housing Association
The Foyer Federation
GISDA
Greenwich Council
The Guinness Trust
Gwerin Housing Association
Harding Housing Association
HATRA
Hexagon Housing Association
Homes for Change Housing Co-operative
Housing Advice Service Kensington & Chelsea
The Hyde Group
Jephson Homes Housing Association
Knightstone Housing Association
L & Q Group
London Borough of Camden
London Borough of Hammersmith and Fulham
Manchester City Council
Neath Port Talbot County Borough Council
NOMAD
North Cornwall District Council
Northern Counties Housing Association
North Norfolk District Council
Nottingham City Council
Oxford City Council
Portsmouth City Council
Preston Borough Council
Redditch Borough Council
Royal Borough of Kensington and Chelsea
Shaftesbury Housing Association
SHAL Housing
Sheffield City Council
South Gloucestershire Council
Southern Housing Group
Southwark Council
Stonham Housing Association
Surrey Community Development Trust
Tai Cartrefi
Twin Valley Homes
Two Piers Housing Co-operative Ltd
West Kent Housing Association
Welwyn Hatfield Council
Western Challenge Housing Association Ltd
Whitefriars Housing Group
William Sutton Trust
Willow Park Housing Trust
Wyre Borough Council
Total: 57

Legal Practitioners Organisations
The General Council of the Bar
Housing Law Practitioners Association
The Law Society of England and Wales
Total: 3

Legal Practitioners in Private Practice
Wendy Backhouse, Hodge Jones & Allen
P Bourne, Fentimans Solicitors
Edward Counsell, South Western Chambers
Tim Crook, Richard Body & Co, Solicitor Advocates
Naomi Goode, Jenkins & Hands Solicitors
Ian Graham, Trowers & Hamlins
Gary Meyler, Bristol & West Plc
Brian Nelson, Boyce Hatton Solicitors
Tessa Shepperson, solicitor, Landlord-Law Online
Total: 9

Professional Organisations and Representative Bodies

Advice Services Alliance
Association of Residential Letting Agents
Association of Tenancy Relations Officers
Borough Forum for Housing Association Tenants (Hammersmith & Fulham)
Bournemouth Housing Forum
Brent Private Tenants' Rights Group
Brighton & Hove Private Sector Housing Forum
British Property Federation
Brockley Tenants' Co-operative
Calderdale Landlords Association
Camden Federation of Private Tenants
Campaign for Fairer Fair Rents
CDS Co-operatives
Chartered Institute of Environmental Health
Chartered Institute of Housing
Chartered Institute of Housing Cymru
Civil Justice Council
Community Law Partnership
Confederation of Co-operative Housing
Council of Mortgage Lenders
Cymorth (Cymru) Interim Steering Group
East Lancashire Landlords Association
Eastern Landlords Association
Greenwich Tenancy Relations Officers
Homestamp
Labour Housing Group
Landlords of Camden, Islington, Fulham and Westminster
Law Centres Federation
Legal Action Group
The Letting Network
Local Government Association
London Federation of Guinness Trust Tenants' Associations
London Private Tenants Workers Group
Management Executives South Hackney
MIND – The Mental Health Charity
National Association of Citizens Advice Bureau
National Association of Estate Agents
National Federation of Residential Landlords
National Farmers' Union
National HMO Network
National Housing Federation
The National Trust
National Union of Students
North East Housing Law Practitioner's Group and Newcastle Law Centre
Partners in Change
Property Litigation Association
RICS Policy Unit
Rugby and Harpur Residents' Association
Sheffield Housing Aid
Shelter
Shoreditch Our Way
SITRA
Small Landlords' Association
Social Landlords Crime and Nuisance Group
Southern Private Landlords Association
South Yorkshire Housing Law Group
TAROE
TPAS
Tredegar Monteith Lefevre, Resident Involvement Group
Trinity Newington Residents' Association
Warrington Federation of Tenant and Resident Associations
Welsh Tenants' Federation Ltd
Welsh Tenure Law Review Advisory Group
Winterton House Tenants' Association
YMCA England

Total: 65

Private Companies

Advance Housing and Support Ltd
Blaxhill Estates
Charles Lamb Residential Lettings
Leaders Group Ltd
Strutt & Parker

Total: 5

Separate responses in this category to Tessa Shepperson's website questionnaire:

Angela Burnett & Co
Ashley Devies Property Management
Bellwood Associates
Coastal Management Ltd
Fell Property Management
Giles Newby Lettings
Gorham & Co
JRM Property Management
Kurtis Lettings & Management
LA Property Management
Mansons Property Consultants

Premier Letting
Property Management Surveyors
Robinson Lettings
Samuel Lawrence & Co
Timothy Lea & Griffiths
Wenlock and Taylor
Wright Residential Ltd
Wrights of Hatfield
Total: 19

Independent Advisors and Housing Consultants
Marianne Hood
Total: 1

Government Departments
Lord Chancellor's Department
Office of Fair Trading
Welsh Assembly Government
Total: 3

Other Public Bodies
The Charity Commission
Housing Corporation
Independent Housing Ombudsman
Residential Property Tribunal Service
Total: 4

Academics
Susan Bright, University of Oxford
Dr Ian Budden, University of London
M R Davis, De Montfort University
Professor David Hughes, De Montfort University
Caroline Hunter, Sheffield Hallam University
Richard Moorhead, Cardiff Law School
P F Smith, University of Reading
Total: 7

Publications
Letting Update Journal
Total: 1

Members of the Public
S F Ashford
John Barbour
S Beechy
Colin Bennett
Cindy Biggins
Christopher Bostock OBE
Nigel Bain
Eleanor Brewington
N G Bryant
Jonny Bucknell
Sue Burton
Olga Calnan
Michael Carley
Adam Cleary
Sebastian Cody
Stephen Cook
Hilary Connor
Belinda Coppock
George Cydale
Kester Dean
Graham R Dunn
Michael O'Dwyer
Martin Earl
Anna Edwards
John Everard
Richard Frost
Michael Gelling
Paul Gill
Mr M Gora
Alice Gottfried
Clifford Gould
Andrew Grant
Richard Grant
Andrew Hall
Mrs C Harms
William Hitchin
Stephen Infield
Ann Jerrard
Daniel Kaminski
Lesley Kelly
N L Keun
Jerome Knight
Alan Kraft
J Joshua
David Lea
Rupert Lecomber
S T London
Mr S A Mahmud
Peter Mann
Chris Meehan
Mary Christina Melotte
Richard Merson
N Mills
Doris Mortimer
Ronald Mott
C Nobes
Chris Nurse
P J Petit
Jean Preston
Vivien Price
Angela Pugsley
C H Raeuchle
Kirti Roser
H Samsami
H Schomi
Andrew Shrimpton

Tony Smith
Ramesh Somaia
L A Stringer
Paul Taylor
Anne Tench
Jane Turner
Adam Varley
Guy Wardle
James Watson
Mrs Wetthercock
Mrs A P Williams
Total: 77

Separate responses in this category to Tessa Shepperson's website questionnaire:

Andrew Bell
C Bolton
Mr R Cole
J N Crofts Davies
R V Glaister
M Hay
W Mattison
G Whittaker
Atma Singh Gill
M Thomas
P Waugh
David Wilkinson
Total: 12

Others

One anonymous response from the general consultation process
83 anonymous responses from the Camden questionnaire
Total: 84

Overall Total: 349

ANNEX D2: RESPONSES TO CP 168

Judges and Judicial Bodies
Association of District Judges
Total: 1

Local Authorities and Social Landlords
Birmingham City Council
Brighton and Hove City Council
Castle Vale Housing Action Trust
Circle 33 Housing Trust
Cornerstones
Cotman Housing Association
Crawley Borough Council
East Thames Housing Association
Fosseway Housing Association
Genesis Housing Group
Grosvenor Group Holdings Ltd and the Grosvenor Trusts
Greenwich Borough Council
Guildford Borough Council
Haig Homes
Kelsey Housing Association
Leeds Federated Housing Association
London Borough of Camden
London Borough of Hammersmith & Fulham
London and Quadrant Housing Trust
Moat Housing Group
Nottingham City Council
Parchment Housing Group
PCHA Temporary Housing
Redditch Borough Council
SHAL Housing
SLFHA Ltd
Southwark Housing
Sunderland Housing Group
Sutton Borough Council
Twin Valley Homes
West Kent Housing Association
Whitefriars Housing Group
Windsor Housing
Total: 33

Legal Practitioners' Organisations
The Bar Council
Housing Law Practitioners Association
The Law Society of England and Wales
Total: 3

Legal Practitioners in Private Practice
Edwin Coe Solicitors
Trowers and Hamlins Solicitors
Total: 2

Professional Organisations and Representative Bodies
Borough Forum for Housing Association Tenants (Hammersmith & Fulham)
Camden Federation of Private Tenants
Chartered Institute of Housing
Civil Justice Council
Council of Mortgage Lenders
Legal Action Group
The Letting Network
Local Government Association
London Federation of Guinness Trust Tenants' Associations
National Farmers' Union
National Federation of Residential Landlords
National Housing Federation
The National Trust
National Union of Students
Royal Institution of Chartered Surveyors
Shelter
Trinity Newington Residents Association
Unison
Welsh Tenants' Federation
Welwyn Hatfield Council Tenants' Panel
Total: 20

Private Companies
Blaxhill Estates
T Clark & Son Ltd
Coffin Mew and Clover
Total: 3

Independent Advisors and Housing Consultants
Marianne Hood
Total: 1

Ministers and Government Departments
Nick Ireland, Minister of State for Housing, Planning and Regeneration
Lord Chancellor's Department
Office of Fair Trading
Welsh Assembly Government
Total: 4

Other Public Bodies
The Housing Corporation
Total: 1

Academics
Dr Ian Budden, University of London
Martin Davis, De Montfort University
Graham Ferris, Nottingham Trent and Sheffield Universities
Catherine Williams, Nottingham Trent and Sheffield Universities
David Hughes, De Montfort University
Total: 5

Members of the Public
Miss J A Brabazon
M Gora
Miss Ann Jerrard
Ms Pauline Taylor
Total: 4

Overall Total: 77