Chancery Bar ASSOCIATION

THE LAW COMMISSION'S CONSULATION PAPER 266 – *BUSINESS TENANCIES: THE RIGHT TO RENEW*; *CONSULTATION PAPER 1 – MODELS OF SECURITY OF TENURE*

RESPONSE OF THE CHANCERY BAR ASSOCIATION

1. This is the response of the Chancery Bar Association ('the Association') to the Law Commission's first Consultation Paper (the 'First Consultation')[1] on this topic, which invites views as to which model of security of tenure should be adopted.
2. The Association is a specialist Bar association. Its 1,500 or so members practise Chancery law, which covers finance, business, and property work (contentious and non-contentious)[2]. The Association's response to the first Consultation has drawn on the experience of KCs and junior counsel experienced in 1954 Act-related disputes.

Q1: "*We invite consultees to tell us about any particular considerations or experiences in Wales, which consultees think are relevant to potential reform to the model or scope of security of tenure in Wales.*"[3]

3. The Association has no contribution to make.

Q2: "*We invite consultees' views as to which model of security of tenure they consider should operate, along with the reasons for their choice of model: (1) mandatory security of tenure; (2) no statutory security of tenure (abolition); (3) contracting-in (so that a tenancy only has security of tenure if the parties opt into a statutory scheme); or (4) contracting-out (so that a tenancy has statutory security of tenure unless the parties opt out of a statutory scheme)(the current model).*" [4]

4. The Association does not consider it appropriate to endorse any one of these four models on behalf of its membership

Q3: "*We invite consultees' views, together with evidence wherever possible, as to what impact a change to the model of security of tenure will have: (1) on the parties to tenancies and their advisors; and (2) on the commercial leasehold market*." [5]

5. Here, the Association makes four observations.

[1] Published on 19 November 2024.

[2] About Us — Chancery Bar Association.

[3] Page 12 , §1.57 of the First Consultation.

[4] Page 50, §3.127 of the First Consultation.

[5] Page 51, §3.128 of the First Consultation.

6. First, the 1954 Act has enduring relevance. The Association's members act in disputes which directly involve the security of tenure regime – e.g.: regarding whether contracting-out has been effective; the validity of section 25 and section 26 notices; the terms of the new tenancy; and the grounds of opposition under section 30(1). Further, the regime continues to give rise to litigation indirectly – e.g.: professional negligence claims relating to its operation.

7. The volume of litigation involving the 1954 Act suggests a substantial number of protected tenancies remain. This is because only a relatively small proportion of protected tenancies will give rise to any dispute, and a smaller proportion still will require barristers' services.

8. Secondly, if there are to be any changes to the existing model, the transitional provisions will merit careful consideration.

9. In our experience, transitional regimes are particularly conducive to litigation. The Association is conscious that the technicalities of implementing any change would be considered in the second Consultation - we anticipate being able to provide more input at that stage. For now, we highlight two examples: post the introduction of the Electronic Communications Code in the Communications Act 2003, there continue to be disputes about the 1954 Act status of pre-Code agreements because if such agreements have 1954 Act protection, they benefit from the different 1954 Act regime on renewal. That is an issue which might have been reduced by considering such transitional issues at the Communications Bill stage. They have been addressed by the enactment of the Product Security and Telecommunications Infrastructure Act 2022, but there has been a failure to bring these amendments into force. The second is issues with the tenancy deposit requirements brought in for assured shorthold tenancies by the Housing Act 2004, and the extensive litigation about the applicability of those requirements in relation to tenancies existing prior to the changes, particularly on statutory continuation.

10. Thirdly, we have reservations about the Commission's suggestion of options to renew as an alternative to the current model[6]:

    (a) In general, options to renew are technical instruments that are no less likely than the Act to lead to litigation. This is true not only of disputes between landlords and tenants, but also of disputes between each side and their respective lawyers;

    (b) A significant disadvantage of an option to renew is that either the terms of the new lease need to be agreed at time that the option is granted, or there needs to be a mechanism to allow the terms to be agreed (or determined) later. This may lead to undesirable results:

        (i) The costs of taking on a lease are front-loaded, which benefits better-resourced parties; and

[6] E.g.: §3.4 on pages 23 – 24 of the First Consultation.

(ii) Relative to the current statutory process, it would be more difficult to modernise the lease;

(c) It is uncommon for options to renew to provide the landlord with the same opportunities to oppose renewal as currently exist under section 30. In principle, one could replicate the statutory provisions. In reality, the drafting of such terms would be difficult and fertile ground for dispute; and

(d) The exercise of an option will usually depend on the tenant serving a notice at (or within) a particular time. A tenant might not appreciate (or might forget) about their option rights. In contrast, the receipt of a section 25 notice can serve as a reminder to the tenant of their rights.

11. Fourthly, any change to the model of security or scope of the Act should be justified by empirical evidence available to the Commission or be based on some other compelling reason.

Q4: "*We invite consultees' views as to whether the existing scope of the 1954 Act is appropriate. In particular, we invite consultees' views as to whether: (1) the extent of the Use Excluded Tenancies is appropriate; (2) the extent of the Duration Excluded Tenancies is appropriate; and (3) there are other types of business tenancy (or business tenancies with certain characteristics) that should be excluded from the scope of the 1954 Act. We invite consultees' views as to whether their answer would differ depending upon which underlying model for the 1954 Act is recommended.*" [7]

12. As to Use Excluded Tenancies, the Association is not in favour of any expansion. Over time, the market is likely to change the types of use which might benefit from exclusion. Unless the use is preferable to a clear alternative statutory scheme (and perhaps even where it can be), the definitions of excluded use are likely to give rise to disputes, not least as the nature of businesses change over time. We think for example of the definition of "house" in the Leasehold and Reform Act 1967, an apparently simple concept which has led to much litigation.

13. In respect of other types of business tenancies (or business tenancies with certain characteristics), the concerns about expansion expressed above apply with perhaps even greater force. The potential for disputes where a tenancy is defined by reference to – for example, rental limits, is significant.

14. As to Duration Excluded Tenancies, we encourage the Commission to consider the Act's current application to periodic tenancies, many of which are created informally. In respect of what length of short lease should be excluded, the appropriate length could be revised to take account of the fact that it now takes far longer for renewal proceedings to be resolved than it did in the 1950s. Accordingly, if short leases (e.g.: for 12 months) are within the Act, the term of the lease might be shorter than the length of the court proceedings required to determine any renewal.

[7] Page 63, §4.62 and §4.63 of the First Consultation.

15. We invite the Commission to consider whether the Act should go further in offering protection to tenants under mixed-use leases, where business and residential use are combined in a single tenancy. In these cases, the living accommodation may or may not form part of the holding, depending on whether it is occupied for the purpose of the business. This can lead to difficult distinctions being drawn between different types of tenant. The problem is exacerbated because other statutory regimes relating to residential leases exclude business tenancies – e.g.: enfranchisement. Accordingly, fine (if not arbitrary) distinctions can see a tenant left with:

    (a) No security of tenure under the 1954 Act, because the residential accommodation is deemed not to form part of the holding; and
    (b) Without the statutory protection available to other residential lessees because the residential accommodation is demised under a business tenancy.

Q5: "*We invite the consultees' views as to whether our assessment of the potential benefits and disadvantages of reforming the scope of the 1954 Act is correct*." [8]

16. The Association adds nothing further to its response to Question 4.

Q6: "*We invite consultees' views, together with evidence wherever possible, as to what impact a change to the scope of the 1954 Act would have: (1) on the parties to tenancies and their advisors; and (2) on the commercial leasehold market*." [9]

17. The Association adds nothing further to its response to Question 4.

Q7: "*We invite consultees to tell us if they believe, or have evidence or data to suggest, that changes to the model of security of tenure, or the scope of the 1954 Act, could result in advantages or disadvantages to certain groups or to individuals based on certain characteristics (with particular attention to age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation*." [10]

18. The Association has no contribution to make.

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[8] Page 63, §4.64 of the First Consultation.

[9] Page 64, §4.65 of the First Consultation.

[10] Page 64, §4.69 of the First Consultation.