Business tenancies legislation in England and Wales: consultation paper
On 5th May 2006 the responsibilities of the Office of the Deputy Prime Minister (ODPM) transferred to the Department for Communities and Local Government.

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Consultation Letter

Dear Sir or Madam

1. On 21 November 2000 the Minister for Housing and Planning, Nick Raynsford MP, announced an intention to consult on use of the order-making procedure in the draft Regulatory Reform Bill to implement a number of detailed improvements to the workings of business tenancies legislation. The proposals flow substantially from the Law Commissions recommendations in their 1992 report Business Tenancies: A Periodic Review of the Landlord and Tenant Act 1954, Part II, but take account of the outcome of a consultation exercise in 1996 under the previous Administration, and further consideration since then. As the Minister has made clear, the proposals are not intended to address issues of leasing flexibility and they do not imply the abandonment of options to legislate against upward only rent review clauses in the absence of effective voluntary proposals.

2. I now enclose a consultation paper inviting comments on the proposals. Please send responses to the paper to Alan Shelley at the address below by no later than 30 June 2001:

   Land and Property Division
   Department of the Environment, Transport and the Regions
   Zone 3/G10
   Eland House
   Bressenden Place
   London SW1E 5DU

If you have any queries about the contents of the paper, Patrick Martin (tel: 020 7944 5567) would be pleased to help (tel: 020 7944 5567; fax: 020 7944 5539; e-mail: patrick.martin@communities.gsi.gov.uk).

3. Normal practice will be for details of representations received in response to this consultation document to be disclosed, or for respondents to be identified. While the Regulatory Reform Bill provides for representations to be made in confidence, no respondent will be able to exclude their name from the list submitted to Parliament alongside the draft Order. You should note that:

   - the Minister will not be able to disclose the contents of your representation without your express consent and, if the representation concerns a third party, their consent too. Alternatively, the Minister may disclose the content of your representation but only in such a way as to anonymise it;
   - where your representation concerns information that may be damaging to the interests of a third party, the Minister is not obliged to pass it on to Parliament if he does not believe it to be true or he is unable to obtain the consent of the third party.

4. If you wish to give information in confidence, please identify any information which you or
any other person involved do not wish to be disclosed.

5. You should be aware that the Parliamentary scrutiny Committees will be able to request sight of your representation as originally submitted. This is a safeguard against attempts to bring improper influence to bear on the Minister. We envisage that, in the normal course of events, this provision will be used rarely and on an exceptional basis.

6. Further copies of this paper may be obtained by telephone, fax or e-mail:

   Tel: 020 7944 5559  
   Fax: 020 7944 5539  
   E-mail: lpd@communities.gsi.gov.uk

7. The Landlord and Tenant Act 1954 applies to both England and Wales. DETR will therefore be running this consultation exercise in conjunction with the National Assembly for Wales. Comments will therefore be welcome from respondents in both England and Wales.

J Martin Leigh-Pollitt
List of Consultees

Property Interests
Association of British Insurers
Association of Property Bankers
British Council for Offices
British Property Federation
NACORE Europe UK
Property Managers Association
Property Market Reform Group

Professional/Legal Bodies
Chancery Bar Association
City of London Law Society
General Council of the Bar
Law Commission
Law Society
Royal Institution of Chartered Surveyors

Other Business Interests
Alliance of Independent Retailers
British Chambers of Commerce
British Retail Consortium
Confederation of British Industry
Federation of Small Businesses
Forum of Private Business
Institute of Directors
Small Business Bureau
Small Business Service

Devolved Bodies
National Assembly for Wales
Northern Ireland Executive
Scottish Executive
Greater London Assembly

Local Authority Associations
Local Government Association
Improvement and Development Agency
Society of Local Authority Chief Executives
Welsh Local Government Association

Consumer Bodies
Consumer Congress Secretariat
National Association of Citizens Advice Bureaux
National Consumer Council
Welsh Consumer Council
Environmental Bodies
Entrust
Environment Council
Friends of the Earth
Greenpeace

Trades Unions
Trades Union Congress
Introduction

1. The Government proposes to amend legislation dealing with the leasing of commercial premises in England and Wales. It considers the current legislative framework to be philosophically sound: the legislation aims to be fair to both landlord and tenant, while underpinning the free operation of the property market. But there is some scope for modernising the detailed operation of the law. In particular, the Government proposes to remove certain anomalies that have come to light, especially those resulting in unequal treatment for the parties; to ensure that the Acts procedures are consistent with the new civil justice system; to reduce the amount of litigation; and generally to promote a less adversarial relationship between suppliers and occupiers of commercial property.

Landlord And Tenant Act 1954

2. The most significant legislation affecting business tenancies is Part II of the Landlord and Tenant Act 1954. This permits landlords and tenants to negotiate initial lease terms freely. Once parties have agreed to a lease, however, the tenant normally enjoys security of tenure: a statutory right to renew the tenancy when it comes to an end. The renewal terms will reflect the initial terms agreed by landlord and tenant; the rent will be the open market rent for new lettings, but will disregard the value of goodwill and any improvements the tenant has carried out. In some cases, however, security of tenure will not apply. In strictly limited circumstances, the landlord may oppose the renewal of a tenancy. For example, a landlord wishing to redevelop the property may oppose the renewal of a tenancy. And since 1969, it has been possible for parties to agree to exclude security of tenure from the lease, provided they apply jointly to the court and receive permission beforehand.

3. The Government has no plans to change this basic framework. However, it has concerns that the legislation is not always easy or straightforward to operate, and both parties can suffer disadvantage. Some of the mechanisms in the Landlord and Tenant Act 1954 do not work well, particularly with the recent reforms to the civil justice procedures (the Woolf reforms). The Government therefore proposes various amendments to streamline the legislation. They are mainly technical in nature, and raise few policy issues. They flow substantially from the Law Commissions 1992 report Business Tenancies: A Periodic Review of the Landlord and Tenant Act 1954 Part II (Law Com No 208). They take account of the outcome of a consultation exercise by the Department of the Environment in 1996 mainly on issues arising from that report.

4. The Government invites views on its detailed proposals, as set out below. More specifically, it invites comments on the extent to which the proposals fulfil the tests set out in the draft Regulatory Reform Bill (see the table at Annex A). A note on use of the order-making procedure in the draft Bill is at Annex B. The Regulatory Impact Assessment is at Annex C.
Contracting out of security of tenure

5. Normally business tenants enjoy security of tenure, as a result of provisions in the 1954 Act. The Government considers this an important right for business tenants, particularly for small business occupiers. Since 1969, landlords and tenants have been able to seek court approval to agreements excluding security of tenure from their leases. The Government has no plans to remove the facility to contract out, as it considers that the ability to exclude security of tenure provides a useful degree of flexibility in certain cases. However, it considers that most business tenants should continue to enjoy security of tenure. It does not favour any weakening of this basic right, and aims to ensure that any changes in the safeguards for tenants contracting out should be at least as effective as those currently in force.

6. The Law Commission studied the mechanics of contracting out from security of tenure. They found that the courts do not exercise any discretion; the Act does not require them to. The courts therefore intervene rarely, and only where the application is technically deficient or there is some doubt that one of the parties has understood its rights. The courts thus almost invariably authorise applications to contract out. The Commission pointed out that abolition of the requirement to obtain court permission would reduce the burden on the courts while saving legal expenses for parties wishing to contract out.

7. The Law Commission however did not wish to weaken safeguards for tenants; on the contrary, it considered it important that tenants should fully understand the implications of agreeing to lease without security of tenure. While proposing to remove the requirement for the parties to apply for court permission, the Commission proposed that instead the lease would contain a prominent "health warning" to the tenant about the consequences of giving up statutory rights of renewal. The lease would include a note confirming that the "health warning" had been given and an acknowledgement by the tenant that he/she had read and understood the statement.

8. The Government has considered this recommendation very carefully. On the one hand it would not want abolition of the court procedure to suggest any weakening of its commitment to security of tenure. However, it recognises that as the courts rarely intervene, present procedures do not provide effective protection for tenants. It agrees with the Law Commission that a "health warning" would be more effective.

9. The Government is nevertheless concerned that tenants should receive the "health warning" in time to influence their decision. It would not be appropriate for tenants to see it for the first time when they are signing the lease; by that time, the tenant may well have entered into business commitments that would make it difficult to withdraw from the contract and begin afresh the search for suitable premises. On the other hand, any requirement for advance notice would make it impossible for a tenant to occupy new premises at very short notice; this is sometimes necessary, for example, where there has been an emergency.

10. The Government proposes that an agreement to contract out of security of tenure will be valid where one of the following procedures has been followed:

- normally, the landlord should give the tenant notice, at least fourteen days before the lease is due to be executed, that security of tenure will not apply. The notice
would bear a prominent "health warning" (see below) drawing the tenant's attention to the consequences of contracting out. When executing the lease, the tenant would sign a statutory declaration that he/she has received the notice, has read the "health warning" and accepted its consequences; or

- where it has not been possible to give fourteen days notice, both landlord and tenant should sign a statement setting out why advance notice could not be given and that they agree that it is reasonable for this to be waived. The statement would contain the "health warning" set out below. As an additional safeguard against abuse, the tenant would then be required to sign a statement that he/she had read the "health warning" and accepted its consequences.

The wording of the "health warning" would be as follows:

**Important Notice**

You are being offered a lease without security of tenure. Do not sign the lease unless you have read this message carefully and discussed it with your professional adviser.

Normally business tenants enjoy security of tenure the right to continue occupying their business premises for a further period when the lease ends. Tenants can pursue these rights through the courts if necessary.

*If you sign the lease you will be giving up these important statutory rights.* When the lease comes to an end, you will **not** be able to continue occupying the premises, **unless** the landlord voluntarily offers you a further term (in which case you would lose the right to ask the court to determine the new rent). You will need to leave the premises. You will be unable to claim compensation for the loss of your business premises, unless the lease specifically gives you this right.

If you want to ensure that you can remain in the same business premises once the initial lease expires, you should consult your professional adviser about another form of lease which does not exclude the protection of the Landlord and Tenant Act 1954.

**Scope of the Landlord and Tenant Act 1954 Part II: ownership and control of the business**

**11.** The Landlord and Tenant Act 1954 deals with rights of occupation when the tenancy comes to an end. Normally the tenant has the right to renew; but the landlord may oppose renewal on one of several specific grounds, including the intention to occupy the premises to carry on a business there. It is therefore important that the Act is clear about which business entities may take advantage of these rights, whether landlord or tenant. In the simplest cases, where the same business entity claims the right to renew (or, in the case of the landlord, the right to oppose renewal so that he/she may run a business at the premises), there is no difficulty. But complications arise where property and business are in separate ownerships although, through company shareholdings, they are in the control and beneficial ownership of the same person. The Law Commission drew attention to a number of inconsistencies.
Sometimes these result in some inequity for one of the parties.

12. The Landlord and Tenant Act 1954 provides protection in certain cases where strict ownership may differ:

- a landlord may claim repossession of property on the grounds that a company he/she controls will carry on business there;
- where the tenant is a company, another company in the same group of companies may occupy the property and carry on a business there. This satisfies the condition that the tenant is in occupation for business purposes;
- similarly, a landlord which is a company can oppose the grant of a new tenancy on the grounds that another group company needs to occupy the premises for business purposes;
- where trustees are tenants, occupation of the property by trust beneficiaries for business purposes will qualify the trustees for renewal under the 1954 Act;
- trustee landlords may oppose the grant of a new tenancy where beneficiaries are to occupy the property for business purposes; and
- on certain conditions, joint tenants carrying on business at the property in partnership enjoy renewal rights.

However, a number of anomalies exist. A tenant who is an individual will have no right to renew the tenancy if it is his/her company which is carrying on the business at the premises. Furthermore, a company tenant may not claim renewal rights on the grounds that the controlling shareholder in the company carries on business at the premises. Similarly, a company landlord may not reclaim possession to allow the controlling shareholder to trade on the premises. And with both landlords and tenants, members of a group of companies have no rights where, instead of the companies being subsidiaries of one holding company, the same individual controls each company.

13. The Government agrees with the Law Commission that the rights of tenants to renew their leases and those of landlords to occupy the premises for their own business purposes should be on a comparable footing. The Government therefore proposes to treat an individual and any company he/she controls as equivalent, when assessing qualifications for the statutory procedure. The same principle should apply to both landlords and tenants.

14. Furthermore, the 1954 Acts definition of a group of companies only covers companies directly or indirectly owned by a holding company. It does not embrace associated companies, under the control of one individual, where there are no inter-connecting shareholdings. The Government proposes to extend the definition to give the tenant, where it is a company, a statutory right of renewal where another company under the control of the same individual is carrying on the business.

15. There are also anomalies in the description of the businesses for the purposes of qualification for renewal or the right to oppose. The 1954 Act applies where the tenant occupies the premises let "...for the purposes of a business carried on by him". As indicated above, the Government proposes that the Act should also apply where:
a. the tenant is an individual controlling the company carrying on the business; or

b. the tenant is a company controlled by an individual carrying on the business.

A landlord intending to occupy the property "...for the purpose...of a business carried on by him" has a right to oppose the tenants application for a new tenancy. This already includes cases where the business will be carried on by a company under the landlords control. As indicated above, the Government proposes to enable landlords which are companies also to oppose renewal if the individual in control of that company or another one in the same group will be carrying on the business.

16. The 1954 Act contains a safeguard to protect tenants from third parties buying up the reversion to an existing tenancy (ie the value of the landlord's interest in the property at the end of the lease) with a view to taking over the tenant's business premises (and perhaps even the business itself) when the lease comes to an end. It provides that until a landlord has owned the premises for five years he/she may not use, as grounds for opposing renewal of the tenancy, his/her intention to occupy the premises to carry on a business there. Applying the general principle of treating an individual or any company he/she controls as equivalent, the Government proposes that this restriction should also apply where:

a. a landlord with a controlling interest in a company seeks possession to enable the company to occupy the premises; or

b. a company which is a landlord seeks possession to enable the individual controlling it to occupy the premises.

17. The Law Commission drew attention to the need to update the 1954 Acts definition of control of a company. The Act specifies that a person has control of a company if he/she either:

- is a member of the company and alone can appoint or remove the majority of directors; or
- holds more than half of the equity share capital beneficially.

This reflects the definition in the Companies Act 1948 (re-enacted by the Companies Act 1985), but it does not incorporate changes introduced by the Companies Act 1989. The latter Act defines the definition of control of a subsidiary company by its holding company as:

- holding a majority of the voting rights in the subsidiary; or
- being a member of the subsidiary with the right to appoint or remove a majority of its board; or
- being a member of the subsidiary and controlling a majority of its voting rights; or
- controlling a company which itself controls the subsidiary.
18. The Government proposes to substitute a direct reference to the Companies Act 1989, so that the 1954 Act definition will reflect the current definition of control of a subsidiary in companies legislation without the need to reproduce all the provisions in detail. This will ensure that the criteria to determine whether an individual controls a company are based on those determining whether one company is the subsidiary of another.

**Notices requiring information**

19. Before starting the procedure to renew or terminate the tenancy, the parties may need to obtain information from one another. The Law Commission recommended revised provisions dealing with the service of notices requesting information; keeping the information up to date; transmission of the information; the obligation to give it where the interest in the property changes hands; and the amount of information to be given.

20. The Government is minded to implement these recommendations, and therefore proposes to:

- require a tenant, on receipt of notice during the last two years of the lease term, to disclose within one month:
  
  o whether he/she is occupying all or part of the property for his/her own business purposes;
  
  o details of any sub-letting;
  
  o the identity of any known reversioner (the person with the right to repossess at the end of the tenancy).

- require a reversioner, or his/her mortgagee, on receipt of a prescribed notice from the tenant during the last two years of the lease term, to disclose within one month:

  o whether he/she is the freeholder or the freeholders mortgagee; or the identity of the landlord; and the length of the lease;
  
  o the identity of any mortgagee in possession;
  
  o the identity of the reversioner of any other part of the property.
require recipients of statutory notices to revise any information supplied for six months after service of the notice. That duty would end if the recipient transfers his/her interest and informs the person who served the notice of the transfer and the name and address of the transferee. If the person to be notified transfers his/her interest and gives notice, the duty to supply information would be satisfied only by giving it to the transferee; and

enable parties to use an express civil remedy for breach of statutory duty in the event of any failure to supply or revise information in response to a statutory notice.

Surrenders

21. The 1954 Act makes provision for tenants to surrender their leases by agreement, but includes intended safeguards to prevent tenants being under pressure to surrender leases against their will. The Law Commission argued that there was inconsistency between:

- section 24 (2) (b), which accepts that a surrender is valid provided the tenant has been in occupation for at least a month before the agreement to surrender was made; and
- section 38 (1), which invalidates all agreements to surrender unless authorised by the court (section 38 (4) (b)).

22. The Law Commission recommended the repeal of section 24 (2) (b), which renders invalid any surrenders effected during the tenant's first month of occupation. Abolition would make it clear that henceforth all surrenders would be effective. Once in occupation, the tenant would be in a strong position to withstand pressure to surrender the lease, and the Commission saw no need for special protection. However, the Commission was concerned that there should be safeguards to prevent landlords seeking to forestall renewal rights by requiring the tenant to enter into an agreement for future surrender at the same time as the grant of the lease. This would be a major loophole, enabling landlords to avoid letting with security of tenure. It recommended that agreements to surrender should be treated similarly to agreements to contract out of the security of tenure provisions, ie the parties should not need to obtain court permission for the agreement to surrender, but the agreement would contain a prominent "health warning".

23. The Government accepts in principle the Law Commissions proposals on surrenders and agreements to surrender. It proposes therefore to repeal section 24 (2) (b) of the 1954 Act. All surrenders would be valid. However, it considers that any agreements to surrender which would effectively remove the right to renew the tenancy should be subject to similar safeguards as those proposed for contracting out (see paragraph 9 above). Such agreements would therefore be valid where the parties had followed one of the following procedures:
normally, the landlord should give the tenant notice, at least fourteen days before the agreement to surrender is executed, containing a "health warning" drawing attention to the implications of surrendering the lease. When signing the agreement to surrender, the tenant would sign a statutory declaration that he/she has received the notice, has read the "health warning" and accepted its consequences; or
- where it has not been possible to give fourteen days notice, both landlord and tenant should sign a statement setting out why it has not been possible for advance notice to be given and that they agree that it is reasonable for it to be waived. The statement would contain the "health warning". As an additional safeguard against abuse, the tenant would then be required to sign a statement that he/she had read the "health warning" and accepted its consequences.

The requirements for an advance notice and/or a declaration would not apply where the parties had entered into a valid agreement to exclude security of tenure.

24. The "health warning" for agreements to surrender would read as follows:

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<th>Important Notice For Tenant</th>
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_Do not sign any agreement to surrender your lease unless you have read this message carefully and discussed it with your professional adviser_

Normally, you have the right to renew your lease when it expires. By signing an agreement to surrender, you will be giving up this important statutory right. You will not be able to continue occupying the premises beyond the date agreed for surrender, unless the landlord voluntarily offers you a further term (in which case you would lose the right to ask the court to determine the new rent). You will need to leave the premises. You will be unable to claim compensation for the loss of your premises, unless the lease gives you this right.

_You do not have to surrender your lease unless you want to._

Renewal procedures

25. The procedure for renewing a tenancy begins in one of two ways. Either:

- the landlord serves notice (under section 25) to terminate the tenancy, at least six months, but no more than twelve months, before the date specified for termination; or
- the tenant serves a request for a new tenancy (under section 26), again at least six months, but no more than twelve months, before the date requested for a new tenancy (which must be after the date of expiry of the current lease).

In either case, the tenant must apply to the court for a new tenancy within strict time limits: not earlier than two, but not later than four, months after the section 25 termination notice or
section 26 request for a new tenancy.

26. The Government agrees with the Law Commissions view that there is a need to rationalise and simplify renewal procedures. In particular, there is a need to remove traps arising from the imposition of strict time limits and the scope for manipulation. There is also a need to ensure that renewal procedures are compatible with the recent reforms to civil justice procedures (the Woolf reforms). The avoidance of purely protective proceedings, which are merely designed to preserve the right to renew, will assist the pro-active case management approach implied by Woolf.

27. The Law Commission recommended that landlords who are not opposing the grant of a new tenancy should set out their initial proposals in their section 25 notice terminating the existing tenancy. This would speed up negotiations on the terms of the new tenancy. However, there has been concern that tenants might sometimes mistake initial proposals set out in a section 25 notice for the landlords final offer, and perhaps consider the suggested terms to be obligatory rather than merely a basis for negotiations. In 1996 the Department of the Environment consulted on the amount of detail to include in the revised section 25 notice, and on safeguards for tenants.

28. Consultees had differing views about the amount of detail to include. Some considered that including too much information in the section 25 notice would be too prescriptive and might foster the impression that the proposals were a "take it or leave it" package, while others suggested providing comprehensive information about the landlords proposals. There was general agreement with the consultation papers proposal that the notice should contain a "health warning" explaining that the proposals were merely a preliminary indication of the terms the landlord was disposed to offer.

29. The Government proposes that where the landlord is not opposing renewal of the tenancy the section 25 notice should set out his/her initial proposals for key terms of the new tenancy: the property to be let; the terms of the new lease; the rent; and rent review arrangements. The notice would bear a prominent "health warning" pointing out that the landlords terms are not obligatory, but merely a basis for subsequent negotiation. It would explain that in the absence of agreement between the parties, the court would settle the terms of the new tenancy. The "health warning" would read as follows:

**Important Notice For Tenant**

The landlord is prepared to offer you a new lease and in this notice is setting out proposed terms. You are not bound to accept these terms. They are merely suggestions as a basis for negotiation. In the event of disagreement, ultimately the court would settle the terms of the new tenancy.

You may wish to put forward your own proposals. **It would be prudent to seek professional advice before agreeing to accept the landlords terms or putting forward your own proposals.**

30. The landlords section 25 notice must normally apply to the whole of the property let. The Law Commission had earlier examined problems arising where different landlords owned reversions to separate parts of the property comprised in a single lease. The Commission
concluded that comprehensive reform to allow landlords to serve separate notices without the scope for manipulation would require extensive and complex provisions, while consultation had revealed that problems were not widespread. It therefore recommended more limited reform. **The Government proposes to implement the Law Commissions recommendations that landlords of parts should collectively be entitled to operate statutory procedures; and that tenants similarly should be able to apply the procedures with regard to the joint owners of the superior interest.**

31. At present the tenant must serve a counternotice to the landlords section 25 notice, and similarly the landlord must serve a counternotice to the tenants section 26 request; in each case within two months. In its report, the Law Commission discussed whether counternotices were procedurally necessary. It favoured retaining the landlords counternotice, which it saw as helpful in setting out the landlords grounds for opposition to the renewal of the tenancy at an early stage, as well as facilitating the operation of compensation provisions which come into play where the landlord successfully opposes the grant of a new tenancy on certain grounds. On the other hand, the Commission recommended the abolition of the tenants counternotice, which, as it is not binding, does not necessarily reveal the tenants intentions. The Department of the Environment however was aware of misgivings that abolition of the tenants counternotice could enable the tenant to delay negotiations on the new lease, and consulted on this issue in 1996. Respondents were sharply divided. On the one hand those favouring abolition echoed the Law Commissions views, suggesting that the counternotice was superfluous. Those favouring its retention argued that the landlord should have some indication of the tenants intention; the tenant could otherwise walk away at the end of the tenancy, leaving the landlord no time to secure continuity of occupation.

32. The Government considers present arrangements unsatisfactory. The choice lies between adopting the Law Commissions proposals merely to abolish the counternotice, or to require an effective statement of the tenants intentions. At present, landlords know that tenants who have failed to serve a counternotice have lost the right to renew. However, service of a counternotice does not necessarily mean that the tenant is going to renew; many tenants serve counter notices just to keep their options open. One option would be to impose a time limit, say three months before the date set for termination, within which tenants would need to apply to the court for renewal of the tenancy. But this would reimpose a trap for the tenant, while still providing the landlord with no absolute certainty that the tenant would remain in occupation. The tenant’s ability to apply to the court for revocation of the order of a new tenancy within fourteen days gives him the ability to walk away for a limited period after the grant of a new tenancy. On balance, the Government favours the Law Commission’s recommendations. **It therefore proposes to abolish the tenant’s counternotice, without any alternative mechanism.**

33. The Law Commission recommended that either party should be able to ask the court to order a new tenancy and fix its terms. This would put the parties on an equal footing, giving each the ability to bring negotiations to a head; each party would have powers to counter delays by the other. This would generally encourage them to conclude a bargain without making a court application. **The Government accepts this recommendation and therefore proposes to enable either party to apply to the court for a renewal of the tenancy.**
Termination proceedings

34. The Law Commission recommended that a landlord wishing to oppose the renewal of a tenancy should be able to start proceedings to terminate the tenancy without renewal. Where the grounds for opposing renewal were conclusive, confirmation from the court would avoid any need for negotiations on renewal terms. However, where the landlord was unsuccessful in opposing renewal, the Commission proposed that the tenant should not need to start renewal proceedings afresh; the court would order the grant of a new tenancy and settle its terms. To avoid possible abuse, the Law Commission recommended that the landlord should not be able to discontinue the proceedings without the tenants consent; as otherwise this would preclude the tenant from renewing the tenancy. However, the Commission also saw the need for flexibility, recommending that the landlord should still be able to apply for renewal even though he/she had originally sought to terminate the tenancy. But once a party had started proceedings, for termination or renewal, the other party should not be able to bring an action.

35. The Government proposes to implement these recommendations:

- to permit a landlord to start proceedings simply to terminate a tenancy without renewal. The landlord would not be able to discontinue proceedings without the tenants consent;
- where the landlord is unsuccessful, for the court to order a new tenancy and settle its terms;
- to enable the landlord to apply for renewal of the tenancy even though he/she had originally sought to terminate the tenancy. However the landlord would not be able to take action to terminate the tenancy if he/she had originally applied for renewal of the tenancy; and
- for neither party to bring an action if the other had already begun proceedings.

Termination of fixed term tenancies

36. A tenancy under the Landlord and Tenant Act 1954 normally continues in force beyond the end of the contractual term until landlord or tenant invokes the statutory procedures to terminate or renew it. However, section 27 (1) overrides this where there is a fixed term tenancy and the tenant has given at least three months notice before the end of the fixed term. Some confusion has arisen over whether a tenant is required to give such notice to avoid the tenancy continuing in force beyond the end of the fixed term, and there is a need for clarification of the law.

37. In 1996 the Department of the Environment consulted about an amendment aimed at making more explicit what was then thought to be a requirement for tenants of fixed term tenancies to give three months notice of their intention to end the tenancy when the fixed term ends. The aim was to ensure that tenants would be fully aware of the need to give three months notice, and so would not suffer any disadvantage. Since then the Court of Appeal hearing of the Esselte v Pearl Assurance case has made it clear that a tenant who had vacated the premises by the end of the contractual fixed term had effectively ended the tenancy, and had no continuing obligation to pay rent.
38. The issue now is whether to require tenants wishing to leave at the end of the contractual term to serve notice, or to confirm the *Esselte v Pearl* decision that no notice is required. The Government considers that imposing an obligation to serve notice would not be an essential safeguard for landlords; any landlord who was in principle willing to renew but wished to ascertain the tenant's intentions would be able to apply to the court for a new tenancy. On the other hand, the Government is concerned about the potentially adverse effects on tenants who vacate premises at the end of the tenancy unaware of a continuing obligation to pay rent. This would be a potential trap for tenants.

39. The Government therefore proposes to amend section 27 (1) of the 1954 Act to make it clear that a tenant wishing to end the tenancy at the end of the contractual term can do so by:

   a. serving at least three months' notice before the end of the contractual term; or  
   b. vacating the premises by the end of the contractual term.

40. Where the tenancy continues beyond the end of the contractual term, the 1954 Act has a special procedure enabling the tenant to bring it to an end. Section 27 (2) requires a tenant wanting to quit to give three months notice ending on a quarter day (25 March, 24 June, 29 September or 25 December). The Law Commission drew attention to inconsistencies that can result: for example, a notice given on 25 March could not end until 29 September (188 days); while one given on 24 September could take effect on 25 December (92 days). The Commission recommended that it should be possible for the notice period to end on any day. **The Government proposes to amend section 27 (2) to permit the three months notice to end on any day. It proposes to provide for the apportionment of rent for the remaining part of the tenancy, so that it relates to the actual date for the ending of the tenancy, where the end of the notice period is not the same as the end of the rental period.**

**Time limits**

41. Time limits for the statutory procedures in the Landlord and Tenant Act 1954 are very stringent. Some tenants lose the right to renew because they do not take action in time. The strict time limits also result in abortive legal work: many court applications begin as a precautionary measure, but are later abandoned. Purely precautionary action is unnecessarily costly to the parties and does not sit easily with the new civil justice reforms. The Law Commission considered that while there has to be some degree of formality in observing time limits, there should be more scope for the parties to modify them by agreement.

42. The Government accepts and proposes to implement the Law Commission's recommendation that the parties should be able to apply to the court at any time before the date specified in the landlords notice to terminate the tenancy or the tenants request for a new tenancy.

43. The Government accepts the Law Commissions recommendations to permit the parties to extend time limits by agreement. **The Government therefore proposes that the parties should be able to agree in writing to extend the time limit for making an application to**
the court, as follows:

a. the parties should make an initial agreement before the date specified in the landlords notice or the tenants request;
b. they should make any further agreement before the previous agreement expires; and
c. the tenancy should continue during any agreed extended period.

44. The Law Commission also considered whether the legislation should continue to prescribe a time before which an application can be made. In view of the recommendation to abolish the tenants counternotice, they saw no need to delay the tenant making an application once the landlord has served notice of termination. However, where the tenant has requested a new tenancy, the Government has accepted the recommendation for the retention of the landlords counternotice. The Government agrees with the Law Commissions view that the tenant should only have to wait for the service of the landlords counternotice, or the expiry of the time allowed for service of it, before being able to apply to the court.

45. The Government therefore proposes that:

- once a landlord has given notice of termination, the tenant should be able to apply to the court without delay; and
- where the tenant has requested a new tenancy, he/she should not be able to apply to the court until the landlord has served a counternotice, or the two months for service of the counternotice has expired.

Interim rent

46. Because there is often a delay in settling the terms of the new tenancy, the Act provides for interim rent. The combined effect of the Governments proposed procedural reforms and the new civil justice procedures should considerably reduce this delay. Nevertheless, the Government favours continued provision for interim rent, to protect the parties should there be a significant delay in settling the terms of the new tenancy.

47. At present, interim rent is payable for the period between:

- the termination date set out in the landlord’s section 25 notice or the date requested for a new tenancy in the tenant’s section 26 notice or (if later) the date for an application for interim rent; and
- the commencement of the new lease following the court’s judgement.

48. The Law Commission drew attention to the scope for the parties to manipulate the timing of notices to influence the continuation of rent at the old level, and recommended that interim rent
should commence from the earliest date which could have been specified by either party. The Government accepts this recommendation.

49. The Law Commission made several other recommendations on interim rent:

- tenants as well as landlords should be able to apply for interim rent. However, parties should not be able to apply if the other party has already made an application and has not withdrawn it;
- amending court rules enabling the courts to consider applications for interim rent during the course of proceedings (whether to renew a lease or end it without renewal); and
- changing the method for calculating interim rent, to apply in most circumstances where the court orders the grant of a new tenancy.

50. The Government agrees with the Law Commission that either party should be able to apply for interim rent. Rents usually rise over a period of time, so it would normally be in a landlord's interest to apply for interim rent. However, this is not invariably the case, and as a matter of equity it is appropriate that tenants should also have the opportunity to apply for interim rent. The Government also agrees with the recommendation for applications for interim rent to be heard during the course of the main proceedings for determination of the terms of the new tenancy. This will reduce the parties' legal costs.

51. At present, interim rent is determined by reference to the rent under the new lease, but having regard to the rent payable under the old expiring lease and on the assumption that the new lease will be granted from year to year. Assuming that market rental values are rising, this method tends to "cushion" the tenant from the full impact of the current market rent. The Government agrees with the Law Commission that there is no justification for an automatic "cushioning" effect. It accepts in principle the Law Commission's recommendation that interim rent should reflect the terms of the new lease, where a new tenancy is granted and the following conditions are satisfied:

- the landlord's notice or the tenant's request related to the whole of the property let under the current lease;
- the tenant was in occupation of all the property; and
- the landlord stated in his/her notice, or his/her counternotice to the tenant's request, that he/she would not oppose the grant of a new tenancy.

52. However, following the outcome of the 1996 consultation exercise, the Government favours a slightly different basis for calculating interim rent than the one the Law Commission recommended. Because the new rent is usually the last of the terms of the new tenancy to be determined, it would not be possible to calculate interim rent until immediately before the court ordered the grant of the new tenancy. Interim rent would be backdated from the beginning of the new tenancy to the date from which it became payable. However, if there had been a significant change in market rents since the date from which interim rent became payable, one of the parties could experience some injustice. Usually, rental levels rise, so most often it
would be the tenant who would suffer disadvantage from this effect. In a falling market, however, the landlord would suffer a similar disadvantage.

53. To avoid this effect, the Government proposes that interim rent should reflect the terms for the new tenancy, but that the valuation should be based on the market values prevailing when interim rent first became payable. In a rising market, this would produce a lower interim rent than the new rent for the new tenancy; conversely, in a falling market the interim rent would be higher than the new rent.

54. This method of calculating interim rent would require a separate valuation to determine the values current at the date from which interim rent became payable. The Government considers that this should not involve disproportionate cost for the parties, and that it would be cheaper and simpler to operate than present procedures. However, where the conditions set out at paragraph 51 are not satisfied, or where a new tenancy is not granted, the existing method of determining interim rent would still be used.

55. The Government therefore proposes that:

a) tenants as well as landlords should be able to apply for interim rent;

b) parties should not be able to pursue applications for interim rent if the other party has already made an application and not withdrawn it;

c) rules of court should provide that applications to fix interim rent should be made in the course of proceedings to renew a lease or end it without renewal;

d) parties should have a means of continuing to pursue applications for interim rent even though the main proceedings are withdrawn;

e) payment of interim rent should take effect from the earliest date which could have been specified, irrespective of which party served the notice or applied for interim rent;

f) where a new tenancy is granted, and the three conditions set out in paragraph 51 are satisfied, interim rent would reflect the terms of the new lease, but would reflect the equivalent market values current on the date from which it became payable;

g) in other cases, interim rent would be set according to the present formula (section 24A(3) of the Landlord and Tenant Act 1954); but the court would be directed to have regard to the rent payable under any sub-tenancy of any part of the property; and

h) where the court orders interim rent at the full market rate, but subsequently a new tenancy is not granted, either party should be able to apply to the court, within one month, for reassessment according to the present formula.

Length of term for the new lease

56. The 1954 Act enables the courts to order a new lease for up to 14 years. The Law Commission considered whether there should be any change in the maximum length of term the courts are able to order. It concluded that a maximum of 15 years would be preferable, as
this is divisible by both three and five, thus accommodating modern rent review patterns of three and five year rent review periods. The Government agrees with this view and therefore proposes to increase the maximum length of term of a new lease which the court can order to 15 years.

Compensation

57. The 1954 Act gives tenants the right to claim compensation from landlords who successfully oppose renewal of the tenancy on certain specific grounds where the tenant is not at fault. The Law Commission recommended extending this to take account of their recommendations on ownership and control of the business and on revised statutory procedures. The Government accepts these recommendations and proposes to extend the right to compensation where there is no renewal of the tenancy following:

- successful opposition by the landlord to the grant of a new tenancy on the ground that it is the intention that a company under his/her control should occupy the property; or vice versa; or
- proceedings by the landlord to end the tenancy (on one of the grounds where the tenant is not "at fault") or the withdrawal of such an action.

58. The Government also accepts the Law Commissions recommendations about compensation where the tenant has been in occupation of different parts of the building for different lengths of time, for example where the tenant gradually takes over more floors in a multi-storey building; and where ownership of the reversion is split into different holdings or ownerships. The Government proposes:

- the separate calculation of compensation for each part of the building occupied for a different length of time; and
- where separate landlords own different parts of the building, each reversioner would be liable to pay compensation exclusively for his/her part.

59. The 1954 Act provides that compensation should also be payable for misrepresentation. At present, the Act provides that if it later appears that misrepresentation or concealment of material facts induced a court to refuse the grant a new tenancy, the court may order the landlord to pay the tenant compensation for any resulting damage or loss. The Government proposes to extend this, in line with the Law Commissions recommendation, that compensation should also be payable where the tenant is induced not to apply to the court or to withdraw his/her application.

60. In its 1996 consultation exercise, the Department of the Environment discussed an issue arising from the method of calculating compensation payable for non-renewal of leases. The formula for calculating compensation takes account of the rateable value in force when the landlord serves a section 25 notice or a section 26 (6) counternotice. The Department had received representations that if there was a subsequent revision to the rateable value (for example, if there was an appeal or if the Valuation Officer altered the rateable value to reflect a
change in circumstances before the date of the notice) there should be a corresponding adjustment to the amount of compensation payable. At present there is no provision to adjust the compensation to take account of the revised rateable value.

61. While this appeared to be an anomaly, the Department had misgivings about some of the implications of changing the law: for example, the position of a tenant having to repay compensation following a reduction in rateable value, having already spent the proceeds. The prospect of subsequent adjustment after the settlement of compensation might undermine the certainty and simplicity of the present system. Furthermore, the Department had no evidence that this was a common problem. It nevertheless invited respondents to express their views on whether the law should be amended.

62. While respondents had strikingly different views about the scale of this problem, there was very little support for amending the law to adjust the amount of compensation paid to the tenant in line with a subsequent adjustment to the rateable value. The general view was that present arrangements are simple and certain, even if there are occasional anomalies. The Government does not propose to amend the law in this respect.

Miscellaneous issues

a. Transitional provisions

63. The Government accepts the Law Commissions recommendations that none of the proposals should be retrospective. It therefore proposes to introduce transitional provisions to secure this.

b. Application to the Crown

64. The business tenancy provisions of the 1954 Act have always applied to the Crown, with certain express modifications. The Government accepts the Law Commissions recommendation that these proposals should bind the Crown to the same extent.
Responses to the consultation paper

65. Please send responses to the paper to Alan Shelley at the address below by no later than 30 June 2001:

Land and Property Division
Department of the Environment, Transport and the Regions
Zone 3/G10
Eland House
Bressenden Place
London SW1E 5DU.

Further copies of this paper may be obtained by telephone, fax or e-mail:

Tel: 020 7944 5559
Fax: 020 7944 5539
E-mail: lpd@communities.gsi.gov.uk

66. If you have any queries about the contents of the paper, Patrick Martin (tel: 020 7944 5567) would be pleased to help (tel: 020 7944 5567; fax: 020 7944 5539; e-mail: patrick.martin@communities.gsi.gov.uk).

67. Normal practice will be for details of representations received in response to this consultation document to be disclosed, or for respondents to be identified. While the Regulatory Reform Bill provides for representations to be made in confidence, no respondent will be able to exclude their name from the list submitted to Parliament alongside the draft Order. You should note that:

- the Minister will not be able to disclose the contents of your representation without your express consent and, if the representation concerns a third party, their consent too. Alternatively, the Minister may disclose the content of your representation but only in such a way as to anonymise it;
- where your representation concerns information that may be damaging to the interests of a third party, the Minister is not obliged to pass it on to Parliament if he does not believe it to be true or he is unable to obtain the consent of the third party.

68. If you wish to give information in confidence, please identify any information which you or any other person involved do not wish to be disclosed.

69. Finally, you should be aware that the scrutiny Committees will be able to request sight of your representation as originally submitted. This is a safeguard against attempts to bring improper influence to bear on the Minister. We envisage that, in the normal course of events, this provision will be used rarely and on an exceptional basis.