

Number 9

Law Commission Consultation Paper on Housing: Renting Homes: (1) Status and Security

The Consultation Paper sets out proposals for the reform of housing law and is the first of a series of three that will be published over the next year.

The Law Commission's statutory function is to modernise the law by simplifying it and to produce a scheme that would help to promote flexibility in the market. There are four principles which underpin the Law Commission's approach, which include security of tenure, due process in possession proceedings, a consumer perspective and human rights. All four of these principles are already part of the law.

The Consultation Paper's proposals contain a number of key elements. The first of these is focusing on the contract, which is at the heart of the proposals. This entails the idea that the agreement between the landlord and the occupiers of a home should mean what it says and not be overridden by statutory provisions, as is now often the situation. This results in inefficiency, confusion to the parties and adds complexity to the law.

Another key element is that the proposals endeavour to ensure that the contracts strike a fair balance. Since 1999, the Unfair Terms in Consumer Contracts Regulations have applied to tenancy agreements. The Law Commission proposes that these Regulations should cover all agreements that fall within the scope of the scheme.

The third key element is that the proposed scheme would do away with the distinction between leases and licences and would apply to all contracts that confer the right to occupy premises as a home, not just tenancies in the strict sense. In the Consultation Paper, although the Law Commission continues to refer to the provider of housing (whether landlord or licensor) as the 'landlord', it refers to 'the occupier' in preference to tenant or licensee, and to 'the agreement' rather than the tenancy as the contractual basis on which the right to occupy is founded. This should avoid the historic sources of complexity, where much legislation applied only to tenancies and not licences. Although the distinction is not as significant as it was, it can still cause problems.

The Law Commission proposes two agreement types, being a type I agreement and a type II agreement. The former is modelled on the existing (local authority) secure tenancy, with a high degree of security of tenure, and in relation to which a court will only be able to make discretionary orders for possession. The latter is modelled on the existing (private sector) assured shorthold tenancy, with a much reduced level of security, in relation to which the courts will be required to make orders for possession mandatorily in defined circumstances, and on a discretionary basis in others.

The proposals encourage landlord-neutrality, by defining the two agreements without the identity of the landlord being a key element in the definition. This does not mean the circumstances in which the agreement types may be used will also be landlord-neutral. The Commission is consulting whether social landlords should normally be required to use type I agreements, with their use of type II agreements being confined by law to defined circumstances, or whether they should be able to make their own choice.

PROPERTY DISPUTE

RadcliffesLeBrasseur
5 Great College Street
Westminster
London SW1P 3SJ

Tel +44 (0)20 7222 7040
Fax+44 (0)20 7222 6208
LDE 113

6-7 Park Place
Leeds LS1 2RU

Tel +44 (0)113 234 1220
Fax+44 (0)113 234 1573
DX 14086 Leeds Park Square

25 Park Place
Cardiff CF10 3BA

Tel +44 (0)29 2034 3035
Fax+44 (0)29 2034 3045
DX 33063 Cardiff 1

info@rlb-law.com
www.rlb-law.com

It is also proposed that all agreements should be required to be in writing and to adhere to the principles of fairness in the Unfair Terms in Consumer Contract Regulations 1999. The content of agreements will be prescribed in Regulations and will comprise three elements, being core, compulsory and default/negotiable terms.

It will be the responsibility of the landlord to provide the occupier with a copy of the written agreement, the failure of which would result in a sanction (after an initial period of grace). The sanction is still undecided, but one option would be for the occupier to be relieved of their obligation to pay the rent for a defined period.

The Commission also proposes that where the terms of the agreement are amended, the landlord should record this variation in writing, with a fresh copy of the agreement being provided to the occupier, on their request.

The Commission recommends that the circumstances under which the landlord may seek to obtain an order for possession are grouped into three categories. These are (1) occupier default, which would arise from breach of the terms of the agreement, (2) estate management, which would provide flexibility for landlords to use their estate as efficiently as possible and (3) social policy, which would underpin other social policy goals (eg preventing domestic violence). The distinction between mandatory and discretionary grounds for possession will be retained, but only discretionary grounds should attach to the type I agreement. The 'notice-only' mandatory ground for possession, which currently attaches to the assured shorthold tenancy, would apply to the type II agreement.

The Commission has also considered the desirability of retaining the six months' moratorium. At present, where a landlord seeks possession of a periodic assured shorthold tenancy on the 'notice-only' basis, the court may not order possession until six months after the start of the tenancy. In its favour, it provides a degree of protection for occupiers. However, it makes it harder to achieve the simplification of the types of occupation agreement that currently fall outside existing schemes, which the Commission suggest could come within their proposed scheme.

The Law Commission accept that for termination of agreements, the essential features of 'due process' must be retained. The occupier should be warned that proceedings may be taken, by the landlord issuing a notice of intention to take proceedings. In relation to termination by the occupier, the Commission proposes to retain the law on tenants' notices to quit, adapted to embrace contractual licensees. To overcome the problem of abandonment and the occupier simply walking away from the premises, the Commission proposes a new procedure based on the Housing (Scotland) Act 2001, for the landlord to obtain an order from the court that the premises have been abandoned. This would be a defence to any subsequent allegations of unlawful eviction and would effectively replace the current law on surrender of tenancy.

The Commission is also consulting on powers of the court. Greater consistency in judicial decision-making in possession cases might be achieved if the discretion which the court is required to exercise were to be set out in a more structured form. They also suggest that the courts should not use suspended possession orders in the way that they are currently used and that they should only be available where the landlord is serious about seeking an order for possession. Lastly, they make proposals about the effect of possession orders designed to remove the conceptual inelegance of the 'tolerated trespasser'.

The provisions anticipate that most tenancies and other agreements which currently fall outside the current schemes can be brought within the scheme, particularly if the six months moratorium is lifted. If this is the case then the only exclusions that will need to be retained are holiday lets, lettings by resident landlords who share their accommodation with the occupier, lettings granted on a temporary basis to trespassers and supported housing provision provided by social landlords.

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RadcliffesLeBrasseur
5 Great College Street
Westminster
London SW1P 3SJ

Tel +44 (0)20 7222 7040
Fax+44 (0)20 7222 6208
LDE 113

6-7 Park Place
Leeds LS1 2RU

Tel +44 (0)113 234 1220
Fax+44 (0)113 234 1573
DX 14086 Leeds Park Square

25 Park Place
Cardiff CF10 3BA

Tel +44 (0)29 2034 3035
Fax+44 (0)29 2034 3045
DX 33063 Cardiff 1

info@rlb-law.com
www.rlb-law.com

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BRIEFING

The Commission also considers that simplification of the law will not be achieved unless existing agreements are brought into the proposed scheme. The similarities between secure tenancies and the type I agreement are sufficiently close not to pose problems. However, Assured tenancies, in relation to which there is currently the mandatory ground for possession (two months' rent arrears) pose more of a challenge. The Commission is consulting on the extent to which this ground is in practice an essential feature of those assured tenancies let by registered social landlords. The Commission thinks that the remaining Rent Act tenants can also be included, but only on the basis that their rights are retained.

The Commission hopes that the proposals can simplify the existing law without fundamentally altering the existing rights of landlords and occupiers. It is intended to be the foundation stone for the creation of a new code of housing law. Comments are to be sent to the Commission by the 12 July 2002.

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May 2002

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Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing. For further information on property disputes or litigation please contact:

London office Andrew Parsons on 020 7227 7282 email: andrew.parsons@rlb-law.com
Michael Elks on 020 7227 7255 email: michael.elks@rlb-law.com

Leeds office Michael Thorniley-Walker on 0113 234 1220 email: michael.thorniley-walker@rlb-law.com

RadcliffesLeBrasseur
5 Great College Street
Westminster
London SW1P 3SJ

Tel +44 (0)20 7222 7040
Fax+44 (0)20 7222 6208
LDE 113

6-7 Park Place
Leeds LS1 2RU

Tel +44 (0)113 234 1220
Fax+44 (0)113 234 1573
DX 14086 Leeds Park Square

25 Park Place
Cardiff CF10 3BA

Tel +44 (0)29 2034 3035
Fax+44 (0)29 2034 3045
DX 33063 Cardiff 1

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www.rlb-law.com