

AREF's response to the consultation was submitted on 19 February 2025 using online forms accessible at: <https://lawcom.gov.uk/project/business-tenancies-the-right-to-renew/>.

## Law Commission – Business Tenancies: the right to renew

### Consultation Paper 1: models of security of tenure

#### Response to consultation questions

**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.**

No comment

**Q2. We invite consultees' views as to which model of statutory security of tenure they consider should operate, along with the reasons for their choice of model:**

#### **(1) mandatory security of tenure;**

We do not agree with mandatory security of tenure; the feedback from our members suggests that a system of mandated security is (i) out of line with existing market practice and (ii) would affect investment into commercial real estate, which cannot be the intended consequence of this review.

It is important there is the option for leases with bespoke terms to be agreed reflective of different market practice for different asset classes.

#### **(2) no statutory security of tenure (abolition);**

The feedback from our member group suggests that the investment market into real estate has a strong preference for excluded leases, and that market practice demonstrates an increase in contracting-out over time.

Having no security of tenure provides freedom to negotiate contractual clauses appropriate for both parties without the need to have to pay the costs of opting out of a statutory scheme. In some cases, members have expressed an increase in the use of other contractual mechanisms to provide tenants with certainty of duration of tenure, such as contractual options to renew, which they note are easy to standardise, are almost always at the tenant's election and are a much more straightforward process. There could be templates of contracts available that could be used as a starting point for negotiations similar to the Model Commercial Lease (MCL). Contractual options to renew still protect tenants with pre-agreed contractual terms (which often will be the same terms as the existing lease but with a day 1 rent review on the start of the new term) and dispute resolution provisions. The granting of contractual options to renew cuts down on paperwork and having to go through a court process and has the advantage that terms not under the Act can be included, such as updates to reflect then current environmental practice.

Our member base has highlighted a number of key concerns with the provision of security of tenure by default:

- There can be difficulty in removing a tenant with a lease that has the benefit of security of tenure which affects landlords' ability to respond quickly to asset management needs and can affect all other tenants of the development.
- The tenants who currently benefit from security of tenure tend to be the larger corporates who can afford legal advice. Some tenants do not fully understand the concept of security of tenure, particularly if they have experience of other jurisdictions where security of tenure is not available. They can waste time worrying about an event 5 or 10 years away when they do not fully know if they would want an additional future lease or not.
- Currently, it can be difficult for landlords to redevelop or refurbish a commercial property, or change to green leases, where some or all the tenants have security of tenure. It was noted by one of our members that when

looking at office refurbishments or repositioning opportunities these regularly fell down through one tenant having security of tenure, even if it was a small tenant, for example, a ground floor retail in an office building. The burden of proof for a landlord to obtain vacant possession of a building is overly burdensome and expensive.

- Security of tenure can attract business tenancies of just 6 months or more, and security of tenure can be inadvertently obtained through a small mistake in the process of serving notices to contract out.

That said, we are not in favour of an absolute abolition. There are some tenants where security of tenure is appropriate and our members' experience is that market practice has evolved to reflect this where appropriate.

There are varying views from our members on whether security of tenure attracts or disincentivises capital investment into commercial property in England and Wales. We note however that other jurisdictions, such as Scotland do not have security of tenure and landlords are able to let their buildings without too much trouble. Also, there are many examples of retail parks and shopping centres in England and Wales where no leases have security of tenure, or most do not, and this has not affected the ability to let all their units.

### ***(3) contracting-in (so that a tenancy only has statutory security of tenure if the parties opt into a statutory scheme);***

We acknowledge that certain tenants require protected leases, for example in the healthcare sector leases tend to be within the Act. Certain strategically important properties such as military, police, fire, hospitals, liquefied natural gas terminals and other essential infrastructure require security of tenure. [Although, should the requirements of these niche sectors dictate the law for the wider English commercial real estate market?] Another example we were given was where there are relatively high (tenant) entry cost due to specialist fit out e.g. various leisure uses such as restaurants and golf courses.

Following consultation with members, we believe a contracting-in model would enable these types of tenants to obtain the security of tenancy they require. This would address much of the administrative burden we have identified below with the current contracting-out model. Tenants who do not require security of tenure would not have it unintentionally imposed upon them and those that do require it can agree this with their property owners.

If the model was changed to contracting-in this should:

- only be available for leases longer than 5 years; and
- be a simplified procedure, perhaps just an endorsement on the front of the lease, to save parties time and cost.

### ***(4) contracting-out (so that a tenancy has statutory security of tenure unless the parties opt out of a statutory scheme) (the current model).***

The UK Government has set out five missions to rebuild Britain ((i) Kickstart economic growth, (ii) Make Britain a clean energy superpower, (iii) Take back our streets, (iv) Break down barriers to opportunity (v) Build an NHS fit for the future). Also, there are eight growth-driving sectors proposed in their Industrial Strategy. Most of the Government's missions and the growth-driving sectors will require a dynamic and well-functioning commercial real estate sector. In addition to the issues we have mentioned above in relation to providing security of tenure by default, our member base has highlighted a number of key concerns with the existing contracting-out procedure, many of which are constraining the real estate sector in assisting the Government to achieve its aims:

- When contracted out leases are renewed, terms typically get agreed prior to the lease end and new leases are signed usually before the expiration date or within a few months. Because of the court process, leases with security of tenure under the Act often do not get to terms agreed stage within 6 months to a year after expiry and then leases can take up to 2 years to complete – with significant risk to the landlord of losing the tenant.
- Our members find that 1954 Act leases are time consuming, costly and cumbersome both on renewal and particularly when a landlord wants to terminate them under one of the grounds allowed. The procedure for

agreeing interim rents is a significant issue for landlords pending the grant of a renewal lease with time and cost of professional advice required.

- The risk of security of tenure arising also puts parties off granting short term licences etc even where both parties may want that arrangement.
- The existing system is open to "strategising" with well advised tenants often using the statutory renewal process to their advantage. The original intention of the 1954 Act was to give certainty to tenants making capital investments in fit outs etc. However, as a result of case law, the Act is commonly used as a tool by tenants to secure flexibility at renewal such as break options and a shorter term than their previous lease which was not the original intended outcome of the Act.

As commercial leases get ever shorter the argument from tenants that they need security is weaker as to obtain security they should simply take a longer term. We believe that security of tenure should only be an option for leases longer than 5 years.

Where there are circumstances in which security of tenure facilitates investment from the tenant the parties should be free to negotiate this on a case-by-case basis and through market led practice. A default security of tenure position with rights to contract out doesn't help this because parties will always negotiate what they need for a deal to proceed. In reality, it hinders negotiations because it adds time and cost to the transaction where leases are excluded.

The process for contracting-out can be both time consuming and costly, which simply adds friction to entering into leases in England and Wales which is frustrating for property investors. The process needs to be streamlined; it could simply be a clause in a lease, clearly referenced and defined that can be executed virtually (i.e. via DocuSign) rather than a full blown legal process.

**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;***

We believe that as long as tenants that have legitimate reasons for security of tenure can still obtain this by a contracting-in model there shouldn't be an impact on a change of model for these types of tenants. Other tenants who currently have security of tenure under the Act, in some cases with relatively short leases, they could use contractual options to renew. These would more likely provide security that better meets the occupier's needs and be less costly and time consuming than currently renewing under the Act. There would be a reduction in the cost of appointing advisors in the negotiation process as this would most likely be less protracted.

***(2) on the commercial leasehold market.***

A move to a contracting-in model with a minimum requirement of at least 5 years for a lease to receive security of tenure we believe may lead to longer lease lengths.

**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;***

We agree that there are certain types of tenancies that should be prevented from benefiting from the protection currently afforded by the Act. We do not believe the current arrangements need changing.

***(2) the extent of the Duration Excluded Tenancies is appropriate;***

Our members believe that that the minimum length of a lease for it to be automatically excluded from the Act should be much longer than six months. In the main, our members believe that tenancies of 5 years or less should be excluded from the Act. Our reasons for this are explained in our response to Q2.

*(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 agree that the greater the number of exclusions from the protection of the Act, the greater the risk of unintended consequences.

Also, we agree that it is difficult to allow in the Act for leases for particular properties to be excluded. Every property and its lease is different.

*We invite consultees' views as to whether their answer would differ depending upon which underlying model for the 1954 Act is recommended*

We believe that it is best to keep the requirements under the Act simple whichever model there is. If it is decided to keep the current contracting-out model or go to a contracting-in model, there should be a limited number of excluded tenancies and a longer minimum length of lease of 5 years before security of tenure would be permitted.

*Q5. Whether the Law Commission's assessment of the potential benefits and disadvantages of reforming the scope of the 1954 Act is correct.*

We agree where there are competing regimes, tenancies should be excluded from the Act.

As we have explained in our responses to Q2 and Q3, tenancies less than 5 years should be excluded from security of tenure under the Act.

We agree that key infrastructure should receive some form of security of tenure. These are normally long leases so should be longer than 5 years. Although as stated in the consultation, such leases may benefit from bespoke clauses and not necessarily require security of tenure under the Act.

*Q6. What impact a change to the scope of the 1954 Act would have:*

*(1) on the parties to tenancies and their advisors; and*

The current contracting-out model with tenants on fairly short leases obtaining security of tenure is administratively burdensome and costing. Moving to a contracting-in model with leases of at least 5 years only being able to obtain security of tenure, will lead to a reduction in administrative costs and court time.

*(2) on the commercial leasehold market.*

The use of security of tenure varies by sector and by locality so the impact of any changes on the leasehold market will vary considerably.

We asked our members, fund managers, and some property managers the proportion of their leases that were currently inside the Act. The fund managers' responses varied from 50% to 100% of their leases benefitted from security of tenure. About 60% of a sample of nearly 40,000 leases overseen by the property managers, were inside the Act. However, as we mentioned in response to Q2 the feedback from our member group suggests that the investment market into real estate has been moving more towards excluded leases, and therefore we expect the proportion of leases inside the Act, as it currently stands, to reduce over time.

*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).*

No comment