

**THE SOCIETY OF CHARTERED SURVEYORS**



**RESPONSE TO THE CONSULTATION PAPER –  
BUSINESS TENANCIES  
MARCH 2003  
PREPARED BY THE LAW REFORM COMMISSION**

**submitted to**

**THE LAW REFORM COMMISSION**

**June 2003**

## **Introduction**

The Society of Chartered Surveyors is an independent professional organisation, whose members are involved with all aspects of commercial property in Ireland and particularly with Business Tenancies.

All Society members are also members of the RICS, Royal Institution of Chartered Surveyors, the world's leading professional body concerned with land, property, construction and the environment.

The Society is pleased to make a preliminary submission to the Commission following its review of the Summary of Preliminary Recommendations. We have confined our review to these recommendations due to the time available to us.

We convened a working party to discuss the Consultation Paper and we now respond by providing our views on the Preliminary Recommendations.

The following is a consolidation of the points discussed by the Society of Chartered Surveyors Working Group regarding Chapter 5 (Summary of Preliminary Conclusions) of the Consultation Paper on Business Tenancies.

	<b>Preliminary Recommendation of The Law Reform Commission</b>	<b>Society of Chartered Surveyors Recommendation</b>
<b>5.01</b>	<i>The Commission wishes to re-emphasise that this Consultation Paper is intended to form the basis of discussion and that the recommendations in it are preliminary only. The Commission will make its final recommendations on this topic following further consideration of the issues and consultation with interested parties.</i>	No comment required.
<b>5.02</b>	<i>The Commission feels that as commercial leasing law and practice is so out-of-line with that in other jurisdictions, serious consideration must be given to a radical overhaul.</i>	The Society agrees with this point. The legislation needs to be consolidated to take account of the realities of the 21 <sup>st</sup> century. This will necessitate a radical overhaul of the legislation.
<b>5.03</b>	<i>The Commission has reached the preliminary conclusion that since whatever future decisions may be taken on the issue of statutory protection of tenants, it will remain important to distinguish between a tenancy and other relationships; serious consideration should be given to providing a statutory definition of a tenancy or, at least, clear statutory guidelines or criteria by which particular cases may be judged with reasonable certainty.</i>	The Society concurs with the Commission on this point. The provision of a definition will require detailed discussion and work.
<b>5.04</b>	<i>The Commission has identified the most fundamental issue as being whether there is a continuing need for statutory protection of business tenancies. The Commission's preliminary view is that a repeal of the entire statutory scheme would not be justified. At the very least, there ought to remain those provisions, which are designed to prevent unreasonable behaviour or provisions in leases operating unfairly. The Commission takes the view that these provisions should be made more effective. On the other hand, the issue arises as to whether rights, such as the right to a new tenancy, should remain, at least in its present almost universal form. The Commission has reached no conclusion on this issue and at this point is simply raising the issue for discussion.</i>	The Society agrees that some form of tenant renewal rights should remain. There should be minimum interference with the open market, whilst retaining some form of statutory protection. The market will then find its natural balance. The Society would advocate 'contracting-out' applying to commercial property (similar to the UK system). 'Contracting-out' should always be accompanied by a mandatory 'health warning', obliging parties to seek independent legal advice prior to commitment. It is the view of the Society that certain business premises that are location specific i.e. restaurants licensed premises etc where there is a large business equity value should be given special consideration.

	<b>Preliminary Recommendation of The Law Reform Commission</b>	<b>Society of Chartered Surveyors Recommendation</b>
<b>5.05</b>	<i>The Commission reiterates its earlier 1989 recommendation to allow contracting-out of the statutory scheme of protection for business tenancies, provided the parties have independent legal advice before committing themselves to the agreement. The Commission takes the view that it would further serve to impress upon any uncertain tenants what they were committing themselves to if a prominent “health warning” had to be incorporated or endorsed upon the lease</i>	As above. The Society agrees with this point and adds that the parties must be advised in advance of the non- existence of compensation for quitting the tenement, under the terms of contracting-out.
<b>5.06</b>	<i>The Commission provisionally recommends that the State should be bound by landlord and tenant legislation, with certain limited exceptions. The Commission’s view, subject to an overhaul of the legislation, is that the onus should be put on the State to notify all inferior tenants where it acquires a landlord’s interest.</i>	It is the view of the Society that the law of the land should apply equally, with no exceptions. Exceptions may give rise to abuse of the system. If there are certain limited exceptions they should be clearly identified. They should not be a catch all and should have a limited scope e.g. national security etc.
<b>5.07</b>	<i>The Commission’s preliminary view is that the key concept of “tenement” needs reconsideration. Also the Commission is considering whether to recommend some statutory guidance as to the criteria for a tenancy, however at the moment the Commission is keeping an open mind.</i>	The Society agrees that the definition of tenement needs to be re-defined to take account of the modern business environment. It is the opinion of the Society that it is necessary for a focus group to be established for this purpose as much of Landlord & Tenant legislation is predicated on this definition.
<b>5.08</b>	<i>The Commission reiterates its two 1992 recommendations in relation to subsections (3) and (4) of section 5 of the Landlord and Tenant (Amendment) Act 1980 that: (i) where an individual lessee has transferred the lessee’s interest in a tenancy to a limited company without the lessor’s consent, the right to a new tenancy should remain vested in the individual; and (ii) that the provisions should be extended to cover one not presently covered, viz where the lessee’s interest is vested in a company (the original tenant), but the business is carried on by an individual who is the principal (owner) of the company. However, there is an argument for saying that, in every case, the starting point should be that the tenant with whom the landlord entered into the original tenancy arrangement should be the entity entitled to a new tenancy. The Commission takes the preliminary view that there is much force in this argument, and that it should at least be open to a landlord to make the case that it is unfair to his interests that he should have to accept some other entity (the trader) as the new tenant. What is envisaged is that the court should be given discretion to consider such an argument, and to make what it considers to be the most</i>	The Society agrees that parties in breach of contract should not get the benefit of rights of renewal. A compliance schedule could be developed, which may prove beneficial to both parties. The general consensus is that this paragraph should end after “entity entitled to a new tenancy”. The reference to “court” in the text that follows is not effective and the Society believes that there is a growing demand for an alternative resolution system to the courts. One suggestion would be to establish a Lease Review Panel to determine specific points. This body/authority could be established with Arbitration Acts powers.  Issues that arise under the currency of leases could be dealt with under that authority.

	<i>appropriate order in all the circumstances of the case. This might involve the grant of the new tenancy to the trading entity, but on condition that a suitable guarantee is provided. This might be provided by the original tenant.</i>	
<b>5.09</b>	<i>The Commission reiterates another of its 1992 recommendations, viz that there should be a requirement that a tenement should remain a tenement throughout the entire qualifying period</i>	This point ties in with point 5.07. The Society agrees with this point.
<b>5.10</b>	<i>The Commission considers that there may be an argument for reducing the maximum term of a new tenancy of a business premises, which can be fixed by the court to 15 years.</i>	The Society discussed this point in the context of property cycles particularly now that shorter lease terms are more sought after. However the lease length must be considered in the context of taxation. This is particularly so in relation to leases in the band 10 ó 20 years from a VAT perspective.
<b>5.11</b>	<i>The Commission's preliminary view is that head-landlords should be given some protection in cases of subletting where this leads to a fragmentation of the holding.</i>	The Society agrees with this point. The tenant must abide by the law and seek the landlord's approval to sub-let. Similarly, the landlord must not withhold consent unreasonably and should respond within a limited timeframe. The landlord may withhold consent on grounds of fragmentation of the holding, as this may be disadvantageous to his interests. The Society believes that subletting part of the holding should only last for the remainder of the lease and there should be no renewal rights in these situations.
<b>5.12</b>	<i>The Commission takes the preliminary view that the 1980 Act should be amended to clarify the position of periodic tenancies in relation to an application for relief following the decision in Mealiffe v Walsh (1986). The solution is probably to treat periodic tenancies as a separate category.</i>	The Society believes that in the case of periodic tenancies the tenant's accumulation of rights commences after 5 years of continuous occupation. It is at this point that the tenant can apply for relief. There should be a minimum of 6 months notice to quit, measured from the 5 year periodic occupation point. Periodic tenancies should be treated as a separate category.
<b>5.13</b>	<i>The Commission's preliminary view is that there is no harm in allowing the improvement equity to remain on the statute book to be invoked in the very rare case when it is applicable.</i>	The Society recommends that this clause be removed from the statute books.
<b>5.14</b>	<i>The Commission has reached the preliminary conclusion that the provisions of section 17 of the 1980 Act, relating to restrictions on the right to a new tenancy, should be recast. Instead of detailing a large number of specific grounds of opposition, it may be better to simplify the provisions by dividing them into two broad categories. Further, it appears that section 17(1)(a)(ii), relating to service of a notice to quit by a landlord for a tenant's breach of covenant, may operate unfairly. The Commission also provisionally recommends that the onus in</i>	<p>The Society agrees with the Commission that any simplification of section 17 (1)(a)(ii), relating to service of a notice to quit by a landlord on a tenant who is in breach of covenant, can only be beneficial to the industry and is in the interests of good estate management.</p> <p>The Society believes that a landlord should ideally have obtained planning permission as at the expiry date of the existing tenancy in order to refuse renewal on the grounds of reconstruction or rebuilding. The Society agrees,</p>

	<p><i>section 17(1)(b), which defines “good and sufficient reason” for a landlord refusing a new tenancy, should be placed on the landlord. The Commission provisionally recommends that cases where the landlord refuses consent on various reconstruction or rebuilding grounds (contained in section 17(2)(a)(i) and (ii)) should be subsumed within the “good and sufficient reason” grounds.</i></p> <p><i>Further, the Commission is concerned at the constitutionality of the distinction contained in section 17(2)(b) between business and other tenancies. The Commission also provisionally recommends that section 17(3), which enables the court to extend a tenancy in certain cases, be clarified to show that the relevant period should run from the date of the hearing, or the date of the existing tenancy’s termination. In relation to section 17(4), the Commission accepts that there is obviously a need for a deterrent of some kind in relation to a landlord who fails to carry through works of development after successfully opposing the grant of a new tenancy on such grounds, but is not convinced that the draconian sanction of an award of punitive damages is the appropriate one. No guidance is given as to the basis upon which the court would assess such damages and enquiries revealed no evidence of the provision ever having been invoked. A more appropriate provision might be to entitle the tenant to recover damages by way of compensation for misrepresentation. This could also cover cases where a tenant is induced not to apply for a new tenancy because of misrepresentations by the landlord.</i></p>	<p>in essence, with the recommendations regarding section 17 (4), where a landlord fails to carry through development works. The Society would make the point that they are not experts on the legal differentiation between punitive damages and damages for misrepresentation. The Society would emphasis that only genuine misrepresentation is subject to compensation. There are legitimate reasons why a landlord may fail to carry through intended development works. Compensation should be paid to a tenant for any loss in these circumstances and punitive damages paid only where in the opinion of the Courts or Lease Review Panel/Landlord and Tenant Arbitration Panel the landlord had no intention to develop.</p> <p>The Society wish to make the point that in relation to section 17(1)(b) that the onus has always been on the landlord to prove “good and sufficient reason” to refuse a new tenancy.</p> <p>The Society agrees with the Commission’s recommendations in relation to section 17 (3).</p>
<p><b>5.15</b></p>	<p><i>The Commission has reached the preliminary conclusion that some adjustments should be made to the way the provisions governing compensation for disturbance operate. The Commission takes the preliminary view that the requirement that a claim to a new tenancy be treated as an alternative to a claim compensation for disturbance is an unnecessary complication. One way of dealing with this would be to impose a requirement on the landlord to serve a counter notice objecting to the grant of a new tenancy, and then it should be open to the tenant to decide to accept this and proceed directly to a claim for compensation for disturbance. Further, the Commission is not convinced that the basis for calculation of compensation can be greatly improved upon, but it might be useful to add factors, which the court can take into account. The Commission has also reached the preliminary conclusion</i></p>	<p>The Society agrees with this recommendation and would add that the definition and basis for compensation should be defined for the sake of clarity.</p>

	<i>that the sanction imposed on a landlord to enforce a compensation award ought to be reformed.</i>	
<b>5.16</b>	<i>The Commission's preliminary conclusion is that the provisions of Part IV of the 1980 Act dealing with compensation for improvements have outlived their usefulness. The Commission's view is that tenants should be expected to take a more commercial view of improvements. The Commission's proposal is not intended to affect improvements carried out by a sanitary or housing authority in the exercise of its statutory powers.</i>	The Society believes that improvements to a property should be factored into business costs and not the property itself. They acknowledge that the tenant should get the benefit of improvements during the course of the lease, especially at rent reviews. A tenant will not carry out improvements unless it is economically viable to do so and thus it is important to differentiate between rent review and termination of the lease. This should be borne in mind when drafting a lease.
<b>5.17</b>	<i>The Commission provisionally recommends that the provisions of the 1980 Act intended to ensure that covenants in leases operate fairly should have the widest possible scope. The Commission takes the view that these provisions should apply to both oral tenancies and leases.</i>	The Society agrees with this point in principal but may need further information regarding its application to oral tenancies to understand the full ramifications of this provision.
<b>5.18</b>	<i>It is the Commission's preliminary view that legislation, analogous section 1 of the English Landlord and Tenant Act 1988 (relating to a tenant's remedy for arbitrary and unreasonable conduct by the landlord) be enacted in Ireland. Several other amendments to section 66 of the 1980 Act (dealing with covenants against alienation) have also been proposed.</i>	The Society agrees with this approach in principle but would like to see the precise wording in due course. The Society recommends a fast-track approach to resolution ó a referral to a specialist Lease Review Panel/Landlord and Tenant Arbitration Panel rather than the courts to improve timing and efficiency. Furthermore, a statutory timeframe of 12 weeks, upon receipt of all requisite information, should be imposed on lessors in order to eliminate tactical delay in the process. If a landlord is found to have acted unreasonably then the question of costs certainly, and possible damages should be open to the Panel to decide. Further definitions of "unreasonableness" would be required.
<b>5.19</b>	<i>The Commission is of the preliminary view that a process of consolidation should be undertaken in relation to landlord and tenant legislation, and provisionally recommends a series of consolidating Acts. Clearly the confusion surrounding different terms used in the existing legislation needs clarification. The Commission has also initially concluded that the new legislation should apply to all tenancies (both written and oral) unless there is some overriding reason to confine it.</i>	The Society is in absolute agreement with the recommendation to consolidate the legislation, but would point out that a clear and single Act is desirable rather than ó í a series of consolidating Acts.ö
<b>5.20</b>	<i>The Commission provisionally recommends that it ought to be made clear that a variation of the terms of a tenancy does not affect a tenant's or his successor's statutory rights.</i>	The Society agrees with this recommendation.

	<b>Preliminary Recommendation of The Law Reform Commission</b>	<b>Society of Chartered Surveyors Recommendation</b>
<b>5.21</b>	<i>The Commission feels that there should be a requirement in relation to a letting relating to an office, employment or appointment to state the nature of the office, employment or appointment.</i>	The Society agrees with this recommendation.
<b>5.22</b>	<i>The Commission provisionally recommends that section 13(1)(a) of the 1980 Act, which determines entitlement to a new tenancy under the “business equity” heading, needs review along the lines of the majority decision in the Supreme Court in Twil v Kearney (2001) as to when the right to a new tenancy crystallises.</i>	The Society agrees that the crystallisation point should be set at the point of termination of the tenancy.
<b>5.23</b>	<i>The Commission’s preliminary view is that section 14 of the 1980 Act, dealing with decontrolled business premises, can now probably be repealed.</i>	The Society agrees with this recommendation.
<b>5.24</b>	<i>It is the Commission’s provisional view that the provisions relating to the grant of a new tenancy (contained in section 18 of the 1980 Act) should be modified so as to identify properly all those who should be joined in the grant.</i>	The Society agrees with this recommendation.
<b>5.25</b>	<i>In relation to notices of intention to claim relief, it is the Commission’s preliminary conclusion that a tenant should be required to state in his notice what length of term he wants for the new tenancy.</i>	The Society agrees with this recommendation, as it is logical that the tenant requests the length of term required. This is normally decided by agreement and the minimum term should be 5 years in line with current practice and multiples of 5 years up to a maximum of 20 years.
<b>5.26</b>	<i>The Commission’s preliminary view is that section 22 of the 1980 Act be repealed.</i>	The Society agrees with this recommendation.
<b>5.27</b>	<i>The Commission considers that section 23 of the 1980 Act (dealing with the fixing of terms for a new tenancy by the court) should be recast – it should be made clear that the presumption upon which the court should base its order should be that, apart from rent, the terms of the old tenancy should carry forward to the new tenancy. The Commission also recommends that subsection (7) be clarified.</i>	The Society agrees with this recommendation. Unless agreement to the contrary the terms of the old lease should carry forward except for rent, rent reviews, and Health and Safety and similar legal requirements. Agreement as a basis for the new terms should be encouraged.
<b>5.28</b>	<i>The Commission reiterates its 1992 comments in relation to section 24 of the 1980 Act (as amended by section 15 of the Landlord and Tenant (Amendment) Act 1984). The Commission takes the view that there may be merit in extending the section so as to enable parties who agree the terms of a new tenancy themselves to provide for a review by the court under section 15, if that is their preference. The other point is that it should be made clear in the legislation that where the court is fixing the terms of a new tenancy it has jurisdiction to insert a rent review clause into the proposed lease.</i>	The Society agrees with the proposal to extend section 15 to facilitate parties who have agreed terms out of court to have recourse to court for the purposes of rent review. The Society is of the view that landlords and tenants should have the same options.

	<b>Preliminary Recommendation of The Law Reform Commission</b>	<b>Society of Chartered Surveyors Recommendation</b>
<b>5.29</b>	<i>The Commission provisionally recommends a number of clarifications to section 27 of the 1980 Act, which deals with continuation of existing tenancies.</i>	The Society agrees with this recommendation.
<b>5.30</b>	<i>The Commission's preliminary view is that section 28 of the 1980 Act, dealing with the right of a tenant to remain in occupation pending a court decision needs a number of amendments.</i>	The Society recommends that, pending a court decision, the tenant should have a continuation of the tenancy rather than a right to occupy. However, the Society is firmly of the view that while the tenant continues to occupy under the terms of the previous lease, a market rent must to apply from the expiry date of the old lease.
<b>5.31</b>	<i>It is the Commission's preliminary recommendation that certain amendments be made to various sections in Part IV of the 1980 Act, which deals with compensation for disturbance and improvements. These proposed amendments are set out in Chapter 4 of the Report and also at paragraph 5.16 above.</i>	The Society agrees with this point but is of the view that guidelines of some type of formula could be of assistance.

## **General Comments**

- The Society strongly recommends that a Lease Review Panel/Landlord and Tenant Panel or Arbitration Board be established with powers under the Arbitration Acts. This would provide an efficient resolution forum for lease issues and this body would ease the workload of the Courts.
- The Society recommends that regular review of Landlord and Tenant legislation take place to keep it in line with market practice.
- The Society, in an attempt to reduce costs and areas of dispute, recommends that lease terms would benefit from codification. This would involve a table of terms e.g. Repair, Insurance, Rent Review, Assignment etc. etc. being defined and updated regularly leaving only the specific lease terms dealing with rent, location service charge etc to be negotiated. A Leasebook could provide these terms and could be the basis of agreement for the standard terms.

## **Conclusion**

Due to the limited time available to us we confined our attention to the Summary of Preliminary Recommendations published by the Commission but we have added a small number of related points in our General Comments Section.

The Society would like to thank the Commission for the opportunity to contribute to the review of Business Tenancies and looks forward to future contacts.

17<sup>th</sup> June 2003