

## Property Litigation Association

### Survey on Proposed Reform of the Landlord and Tenant Act 1954

#### Summary of Key Points

**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.***

The majority of our members who responded to our internal survey did not have any particular experience in Wales. Of the 3 who did respond on this question all stated that they did not consider that there were any particular considerations or differences because a property was located in Wales.

**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:***

Of the members who responded to this question: 60% favoured the current contracting out model; 32% favoured a contracting in model, with 2 respondents preferring an abolition of security of tenure and 1 respondent favouring mandatory security of tenure.

Of those favouring a new "contracting in" process, the main reason, put forward by half of the respondents who favoured this approach, was to avoid unexpected security of tenure arising following the expiration of expired tenancies. The other reasons given were:

- 1 One respondent thought that "contracting in" would achieve clarity at the outset.
- 2 One respondent thought that "contracting in" would avoid the potential for unexpected security of tenure to arise because of a mistake in the contracting out process.
- 3 One respondent thought that a "contracting" in process could be simpler than the current contracting out process.
- 4 One respondent thought that the justification for security of tenure no longer exists, particularly given the preference for short term tenancies, but that outright abolition would extend too far.
- 5 Three respondents thought that a "contracting in" process would give landlords a greater bargaining position in negotiations or makes it a more balanced negotiation, as, increasingly, tenants had the stronger bargaining position in lease negotiations.

Of those who favoured a contracting out process, the general consensus, put forward in one form or another by the majority of respondents is that the current model is broadly fit for purpose and the best solution, albeit some changes would improve the process. Most respondents favouring the current "contracting out" process did so despite recognising that a large number of leases are now contracted out. In broad terms, they considered that the current approach offers stability and security, flexibility to opt out and an established legal framework and precedent. They thought that the issues with the process could be addressed in minor amendments rather than wholesale change. The majority noted that the contracting out model is generally the fairest – balancing the bargaining positions of landlord and tenants, whilst protecting unsophisticated tenants.

In addition, the following points were made:

- 6 Two respondents thought that the certainty and familiarity of the current model was preferable to the uncertainty that a change in the model would bring. There was a concern that a new model would be disruptive and likely to cause a shift in the balance between landlords and tenants.
- 7 One respondent thought that the current approach was preferable but only if the length of duration for excluded tenancies was increased from 6 months to 3 years. This respondent thought that tenancies of under 3 years should have an option to contract in to security of tenure.
- 8 One respondent noted that the inability to contract out of the Electronic Communications Code has resulted in a large drop in consensual agreements and a very polarised industry. They noted that parallels could be drawn to the 1954 Act.
- 9 One respondent pointed to the fact a change would mean that there would be two systems in place which would take time to phase out. It could also lead to potential issues with how leases entered into under the old system would be dealt with.
- 10 Several respondents pointed out that mandatory or abolition of security of tenure would be extreme.
- 11 Several respondents pointed out that the "contracting out" system protects unsophisticated tenants who may be unable to afford legal representation whilst allowing more sophisticated tenants to contract out.
- 12 Several respondents noted that they did not think that reform of the 1954 Act was a pressing concern.

The member who proposed mandatory security of tenure noted that contracting out undermines the whole purpose of the 1954 Act, which they noted was to protect small businesses. They noted that landlords have greater market power and that the general direction of travel in residential tenancies is for greater tenant protection. They criticised a general lack of regulation in England and Wales.

The only respondent who provided an explanation in support of abolishing security of tenure did so on the basis that the majority of commercial leases are now contracted out of the 1954 Act and that in the majority of cases new terms can be agreed for a new lease on expiry.

**Q3(1): *We invite consultees' views, together with evidence wherever possible, as to what impact a change to the model of security of tenure will have on the parties to tenancies are their advisors.***

Our members' views on this point was, unsurprisingly, divided depending on their responses to Question 2.

Of those who favoured remaining with the current "contracting out" process, nearly all noted that a new procedure would result in increased costs and uncertainty. In particular:

1. One respondent noted that increasing the duration threshold to 3 years would speed up the process for short term leases and benefit landlords. They also thought that it may result in an increase in the length of lease terms as tenants would like longer leases to get security

of tenure. They noted that shorter leases outside the Act may result in more periodic tenancies arising after expiry but thought that the Act could be amended to apply only to written tenancies.

2. One noted that the possibility of having two systems in place would create a two-tier property market.

The respondent in favour of mandatory security of tenure thought that abolition would result in increased costs for tenants and their advisors.

The respondent in favour of abolition thought that this would simplify matters considerably, resulting in lower costs.

Of those who favoured a switch to a "contracting in" approach, the majority noted the potential for there to be an increase in the costs and potential for disputes in the early stages. However, a number commented that they felt that in the long run a contracting in approach would result in a simpler and cheaper process than the current contracting out process.

**Q3(2): *We invite consultees' views, together with evidence wherever possible, as to what impact a change to the model of security of tenure will have on the commercial leasehold market.***

Overall, the majority of our respondents thought that there would be increased uncertainty caused by any change in the security of tenure model. However, there was not any real consensus on what that effect would be.

The following points were made:

- If the 1954 Act was abolished and no security of tenure was offered, tenants would be less likely to invest in leasehold properties due to concerns about their tenancies not being extended.
- If protection offered under the 1954 Act was increased and security of tenure was made compulsory, this may drive landlords to leave the commercial property market due to concerns that they would not be able to reclaim possession of their properties. This would lead to fewer properties being available on the rental market and the increased competition for properties would result in tenants have less negotiating power and increased rents due to lower supply and higher demand.
- Increasing the threshold for excluded tenancies would likely speed up deals for shorter term leases falling outside the Act, and would benefit landlords, who will no longer have to deal repeatedly with renewals during the term of a shorter-term lease. Raising the threshold for excluded tenancies may result in increased lease lengths. However, if the market adapts in this way, this will reflect the reality of market demand. A shift to longer lease terms could open the door to upwards/downwards rent reviews, which undermines the benefit to landlords from longer lease terms. There is also an ongoing tension between the 1954 Act and turnover rents, and rent-free periods which will need to be addressed where longer term leases are the norm
- Landlords, tenants, and investors may need time to understand the new rules, potentially leading to hesitation in making leasing decisions.

- Long-term real estate and business planning strategies could be affected as parties reassess their positions under the new rules, impacting investment decisions and potentially altering the dynamics of the commercial property landscape.
- There would be an adjustment period as both parties and their advisors adapt to the new system, potentially slowing down market activities and decision-making.
- Mandatory security of tenure would be very negative for the "investor-friendliness" of the commercial RE market and could drive landlords out of the rental market.
- One thought that abolition would create more flexibility in the market and reduce the cost of taking leases, which should help to increase reactivity in the market.
- One respondent commented that abolition of statutory protection will increase rents.

A small minority thought that it would not have a significant impact.

***Q4: We invite consultee's views as to whether the existing scope of the 1954 Act is appropriate.***

- (1) Yes (the extent of use excluded tenancies is appropriate) - 72%  
No – 16%  
Unanswered – 12%

The majority agreed the existing extent is appropriate, although a common theme in those responses was the request for more clarity around competing regimes, such as telecoms and farm business tenancies.

Those who consider that the extent is not appropriate question the purpose of providing security of tenure in the first place. If it is to protect goodwill, they suggest there would be merit to distinguish between client-facing businesses (including retail, hospitality and professional services) and others. A counter-argument is that businesses who do not typically rely on goodwill connected to a location, such as logistics and offices, still suffer loss and disruption if they have to move on lease expiry. It is generally agreed that over-categorisations of use is likely to be problematic and lead to unintended consequences/satellite litigation, particularly where there are multiple uses or the use changes during the term of the lease. Specific uses which were suggested for exclusion were wind turbines, serviced offices, and utilities, including substations.

- (2) Yes (the extent of duration excluded tenancies is appropriate) – 33%  
No – 59%  
Unanswered – 8%

The majority disagreed that the existing exclusions are appropriate. Whilst many of those did in fact agree that an exclusion based on duration was appropriate, they think the current length of 6 months is too short. The consensus is that tenancies between 2-3 years should be excluded, with some suggesting an opt-in regime for these shorter tenancies.

- (3) Yes (There are other types of tenancies that should be excluded) – 64%

No – 24%

Unanswered – 12%

The majority agreed that other types of tenancies should be excluded, namely those where security has been obtained inadvertently. These situations include periodic tenancies where the tenant stays in occupation after the expiry of a fixed term which has been contracted out of the Act, inadvertent surrenders and regrants and tenancies not originally granted for the purpose of a business tenancy.

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

Yes (their answers to question 4 would differ depending on which model is recommended) – 48%

No – 39%

Unanswered – 13%

Many respondents used this question to reiterate their preferred model. Whilst it is recognised that each model has different considerations, there is a shared view that the model for mandatory security of tenure would need more uses/duration exclusions than an opt-in/out model.

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

- Not all of our members surveyed had read the assessment of the potential benefits and disadvantages, or perhaps had not known where to look for it.
- Almost all of our members surveyed who had read the assessment, simply agreed that it was correct or broadly correct (and we note that the assessment does seek to set out a balanced position on behalf of stakeholders).

***Q6: We invite consultees' views, together with evidence wherever possible, as to what impact a change to the scope of the 1954 Act would have:  
(1) On the parties to the tenancies and their advisors***

- A number of our members raised concerns about any change in scope giving rise to uncertainty, which in turn could lead to litigation, and increased costs to tenants. Equally, some suggested that once understood by advisors any changes (particularly simple ones) would be beneficial and lead to decreased costs. Accordingly, the view on whether changing the scope of the Act will impact on the costs incurred by those interacting with it, depends on which changes are implemented and whether they are straightforward.
- Some of our members suggested that the best and simplest way to change the scope of the Act would be to raise the duration threshold (e.g. up to three or even twelve years)

potentially next to an opt in option, as this would encourage the use of empty spaces and avoid parties having to interact with the Act multiple times in relation to short leases.

- Members considered that other ways of changing the scope of the 54 Act, such as formulating a test to exclude business tenancies with certain characteristics, is likely to be difficult and likely to lead to disputes which would undermine the benefit of excluding those tenancies from the Act.

## **(2) On the commercial leasehold market**

- The responses were mixed, but this was clearly because the answer to this question depends on which model is adopted.
- The one very clear theme was that uncertainty is unwelcome in the market; whichever model is adopted needs to be simple to understand and aimed at increasing certainty.

**Q7: Does the absence of security of tenure disadvantage tenants (To be answered by those with experience where there is no security of tenure)**

Yes - 38%, No - 10%, N/A 51% - presumably because no experience of other jurisdictions

Those who agreed noted that no security tended to result in:

- shorter tenancies with the risk of greater business disruption. Hong Kong provided an example,
- reluctance to invest with risk of loss of investment & goodwill,
- landlords taking advantage of their stronger bargaining position in terms of higher rents and more onerous other terms,
- tenants being unprepared for the end of the tenancy

Those who disagreed noted:

- tenant choice e.g. short-term or transitional arrangement provided the tenant is aware at the start of the tenancy
- process was more streamlined and simpler

## **Survey Questions**

**Q54: Of the contractual tenancies you deal with, approximately what percentage are contracted out of the 1954 Act?**

25 replies

2 – 95%

1 – 60%

3- 50%

2- 40%

1 – 35%

5 - 30%

4 - 25%

2 – 20 %

1 – 15%

4 – 10%

**Q55 – Of the business tenancies you deal with how many contain contractual options to renew?**

77% - some

21% none

2% don't know

**Q56: *In relation to contractual options, if you answered “all” or “some” why are contractual options used?***

Comments included:

- To avoid the existing procedure
- Give the tenant guaranteed certainty of renewing so landlord cant oppose, particularly where the landlord may want to redevelop
- Tenant comfort
- Speed of renewal
- Where maximum 15 year term that court can award is insufficient

**Q57. Of the business tenancies you deal with, what is their average duration?**

- 4 responded – 5- 10 years
- 2 responded – 10 years
- 16 responded – 5 years

- 1 responded – 7 years
- 1 responded 3-5 years
- 1 responded 3 years

**Q58. If the average duration is less than 12 months, how many months?**

- No comments apart from “ short term arrangements are seldom by way of lease but by way of licence to occupy.”

**Q59. Has the duration of business tenancies changed over time, and if so how?**

- Overwhelmingly the responses were that the duration has shortened. Comments included

Shortened typically to 3-5 years

Average term length has considerably reduced

Become far shorter with more break options

Rare to see anything longer than 10 years

Terms now so short it can be difficult to get through a renewal within the contractual term of the lease

**Q86. Does the decision to contract out of a tenancy from the 1954 Act affect the rent payable?**

44.83% responded Yes

13.97% responded No

41.38% responded sometimes

Comments included:

- Often had discussions at HOT's stage about whether lease inside or outside Act may have an impact on rent
- In majority of case rents are agreed before instruction
- Valuers have given advice to that effect
- Tenants would expect to pay more for a new protected lease. A renewal of a protected lease is likely to be at a lower rent than a new contracted out lease because the t's statutory rights suppress the rent on renewal.

**Q85. Has the duration of business tenancies changed over time, and if so, how?**

See earlier comments

**Q86. If yes or sometimes does contracting out? Significantly increase the rent, slightly increase the rent, slightly decrease the rent or significantly decrease the rent?**



4.35% thought the rent was significantly increased

26.09% thought there was a slight increase to the rent

65.22% thought there was a slight decrease to the rent

4.35% thought there was a significant decrease to the rent

Comments included:

- We don't get involved in value conversations as this is one for the agents/valuers". The general feeling seems to be that a protected lease does attract a higher rent as it offers a greater degree of certainty.
- The tenant has no security so pays less.

**Q87. Does the existence of the 1954 Act affect the willingness of Landlords to let premises?**

21% answered yes

28% answered no

52% answered sometimes.

Comments included:

- If the site is earmarked for development, Landlords are only willing to grant contracted out leases.
- Often, the commercial drivers weigh heavier in the decision to rent in the 1954 Act status.
- It can be beneficial to have a contracted out lease with an option to renew as this completely assures certainty of a further term.
- It does affect willingness to let in the sense that a Landlord will not be willing to rent unless it has certainty regarding the status of the lease under the Act.
- Especially in a redevelopment scenario, or similar, where possibility is required.
- Issues interim rent if it takes a long time to agree a new lease as it can be hard to get reimbursement or underpayment.
- Particularly in the context of potential developments.

**Q89. If yes or sometimes, does the 1954 Act make Landlords significantly less willing to let premises, slightly less willing to let premises, slightly more willing to let premises or significantly more willing to let premises?**

56% answered significantly less willing to let premises

83% answered slightly less willing to let premises

11% answered slightly more willing to let premises

Comments included:

- We don't feel the existence of it makes any difference
- Neutral. The priority of the Landlord is ensuring a certainty regarding the status of the lease
- Depends on future intentions with the premises
- We usually only see this reluctance when a development is envisaged
- Makes Landlords less willing to let so may want to redevelop or use it for their own purposes even if they could rely on Grounds F or G, due to the delay, cost and risk of having to establish a Ground.

**Q 90 In your experience, what are the approximate average financial costs (of lawyers, surveyors, or other professionals) of taking the required steps to contract out a tenancy from the 1954 Act? (Approximate average cost in pounds)**

25 people answered this question. Two respondents were unable to comment. The 23 remaining respondents estimated the cost of contracting out a tenancy as follows:

£500 or less (nine people)  
Between £500-£1000 (seven people)  
Between £1000 and £5000 (five people)

**Q 91 In your experience, are there other additional costs or disadvantages (financial or otherwise) caused by the process that must be followed to contract out a tenancy from the 1954 Act?**

23 people responded to this question.

Several respondents commented broadly about the contracting-out process, raising concerns that it could inadvertently be done incorrectly. This can lead to disputes between the parties. Furthermore, challenges to an incorrectly executed statutory declaration are time consuming and costly.

There was uncertainty about completing form of notice. Comments on this are summarised below:

- Small unrepresented tenants face practical difficulties in swearing statutory declarations before independent solicitors.
- Dealing with unrepresented tenants in relation to the contracting out process was identified as increasing costs.
- There are insufficient safeguards for tenants who stand to lose their business if they do not have security.
- Several people identified issues with completion of the statutory declaration. There were calls for a standard form/prescribed form of wording for each of the sections. For instance, whether the form of notice annexed to the statutory declaration needs to have the "to" and "from" details inserted, or not.
- Queries as to why the form of notice needs to be attached at all where the declaration acts as a confirmation that an appropriate notice has been received.
- Clarity as to whether the contracting out papers need to be re-served if there are minor changes to the lease. The respondent confirmed that there is inconsistency in practice as some firms re-serve them for tiny changes.
- Due diligence is time-consuming checking whether the contracting out process has been carried out properly. It was simpler when the date of the court order was inserted into the relevant clause in the lease.

There was consensus amongst respondents that the current process lacked common sense, increased legal costs, was unnecessarily complex and delayed completion. Specific questions were raised around whether:

- The process is necessary for agreements to surrender.
- Guarantors could simply be served with contracting out papers if they are ever required to take up a lease.
- Contracting out an agreement for lease could be simplified to avoid requirement for multiple notices (pre-notices and then the 'real' notice) to be served.
- Huge tenants (e.g. Tesco) could dispense with the contracting out rigmarole for each lease given that sophisticated tenants well understand what contracting out is and its implications?

**Q 92 In your experience, approximately how much does it cost (in terms of professional fees) to renew an unprotected business tenancy?( Approximate cost in pounds)**

23 people responded to this question.

Several respondents that there were no costs from a litigation perspective, other than possibly a tenancy at will letter.

More particularly the estimated costs of negotiating an unprotected renewal were as follows:

Approximately £1,500 - £2,000 (three people)  
Approximately £2,000 - £5,000 (eight people)  
Approximately £5,000 – £10,000 (three people)

**Q 93 In your experience, approximately how much does it cost (in terms of professional fees) to renew a protected business**

25 people answered this question.

Respondents stated that costs here were more unpredictable costs depending on when in the renewal process lease terms are agreed. Respondents gave examples of issues that would increase time (and therefore costs). For instance, where the draft lease is presented based on landlord's proposed position and instructions from the tenant are to make the lease align with their current business requirements. *O'May* was also said to add to the complexity of negotiations as it impacts on extent of change possible for protected leases.

The cost of litigation aspect of the process were said to be in the region of £5,000 if the lease renewal settled before witness statements on the basis the litigator had produced (notice, extensions, service of claim form, schedule of disputed item, notice of discontinuance). Other interviewees commented that total costs could reach £200,000 if the lease renewal proceeded to trial.

The costs associated with negotiating a protected lease renewal were estimated as follows:

Approximately £2,500 (based on agreed heads of terms) (two people).

Approximately £4,000 (two people).

Approximately £7,500 (two people).

Approximately £10,000 (two people).

**Q 94 In relation to renewals of protected tenancies, what difference does it make to the costs if the renewal claim is opposed or unopposed? What do we mean by opposed and unopposed claims? We use the word "opposed" to refer to a claim where the landlord objects to granting a renewal tenancy on a specified ground (e.g. redevelopment of the premises). We use the word**

**“unopposed” to refer to a claim where the landlord agrees to grant a renewal tenancy subject to agreeing the terms of that tenancy.**

25 people answered this question.

All respondents thought that costs incurred in relation to an opposed tenancy would be significantly higher than an unopposed lease renewal. Several respondents estimated costs of £100,000 per party.

**Q 95 Any other comments on the financial or other costs/disadvantages of renewing unprotected business tenancies as opposed to renewing protected business tenancies?**

Nine people responded to this question.

The following comments were made in relation to the court process:

- The court process simply does not facilitate an effective renewal process for unopposed lease renewals.
- The FTT pilot worked well.
- How can PACT be more broadly adopted in the sector?
- Significant costs are incurred in engaging in the court process that are disproportionate to the rent.
- Directions sometimes arise at an inconvenient point in a renewal matter which makes it difficult to avoid an unnecessarily extensive schedule of disputed terms.
- Concern was raised around uncertainty generated as to whether notices had been served, but not yet come to the attention of the other party.

Several general comments were raised in relation to the economic impact on the tenant of contracting outside the 1954 Act:

- To oppose the contracting of leases outside the 1954 Act as this practice allows landlords to make the market. It also disincentivises/damages growth of the tenant's business.
- When renewing an unprotected tenancy, it must be done prior to the expiry of the term, or else the tenant is at risk of eviction without notice
- The disadvantages to the sitting tenant of renewing an unprotected tenancy are dependant on the cost to their business of relocating (both in actual costs and disruption to business). Most business operations are not co-cyclical with their lease expiry.

Other respondents commented in relation to the impact on landlords:

- In the world of smaller landlords, I think it is more common to deal with renewal outside of the process in the Act, whereas larger landlords factor in the costs and standardise the process so it is less cumbersome.
- Renewing unprotected tenancies is considerably more straightforward (though obviously the tenant does not have the bargaining position it has in a protected context).

**Q 96 Time taken to renew protected and unprotected tenancies**

14 people responded to this question.

The average time take to renew a protected lease was between 6 months and 3 years. Unprotected tenancies were agreed more quickly.

**Q 97 In your experience, what is the average time taken to renew an unprotected business tenancy?**

19 people answered this question. Some respondents were unable to comment. For those able to respond, the average time to renew an unprotected business tenancy was as follows:

Approximately 20-30 days (five people).  
Approximately 30-60 days (four people).  
Approximately 60-120 days (five people).

**Q 98 In your experience, what is the average time taken to renew a protected business tenancy? Please express your answer in days.**

19 responded, but only 17 were able to provide time estimates. The 17 respondents confirmed the time taken to renew a protected tenancy as follows:

Approximately 3-6 months (seven people).  
Approximately 6-12 months (five people).  
Approximately 12-24 months (four people).  
Approximately 24-36 months (one person).

**Q 99 In relation to renewals of protected tenancies, what difference does it make to the duration of a renewal claim if the claim is opposed or unopposed? What do we mean by opposed and unopposed claims? We use the word “opposed” to refer to a claim where the landlord objects to granting a renewal tenancy on a specified ground (e.g. redevelopment of the premises). We use the word “unopposed” to refer to a claim where the landlord agrees to grant a renewal tenancy subject to agreeing the terms of that tenancy.**

21 people answered this question.

Two respondents said that the duration of an opposed/unopposed renewal would be the same.

Otherwise, there was consensus amongst respondents was that an opposed renewal could take significantly more time because of separate court processes relating to the opposition and, if the opposition is defeated, then the renewal. The time frame was difficult to estimate with certainty, but there was consensus that the overall process would take three years (9-24 months for the opposition hearing, plus an additional 12 months to negotiate and complete the lease if opposition to renewal is unsuccessful).