LAW COMMISSION CONSULTATION PAPER – BUSINESS TENANCIES: THE RIGHT TO RENEW

BPF CONSULTATION RESPONSE

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INTRODUCTION

1. The British Property Federation (BPF) is the voice of the UK property sector. Our industry helps power the economy, adding 7% of Gross Value Added (GVA) annually, equivalent to more than £137.5 bn. We support one out of 12 jobs across the country and pay more than £7bn in direct taxes each year, contributing another £7bn indirectly to local communities through the planning system.

2. We welcome the Law Commission's review of Part 2 of the Landlord & Tenant Act 1954 (the Act) and the opportunity to feed into it. As we set out in more detail below, a thorough review of the Act in light of evolving commercial leasing practice and broader socio-economic shifts is long overdue.

KEY POINTS

Challenges and opportunities

3. The way the Act currently operates imposes costs, burdens and barriers which in turn:

- Makes it harder to redevelop buildings;
- Makes it harder to "green" buildings;
- Involves considerable administrative complexity and sets up bear traps for the unwary; and
- Makes effective place management more difficult.

4. Reforming the Act offers an opportunity to make sure that commercial leasing legislation better supports key government priorities such as economic growth and productivity, decarbonisation and the repurposing of vacant commercial space.

Proposed new model and scope

5. Evidence provided by our members suggests that just over 50% of commercial leases are contracted-out of the Act with variation between types of asset. This proportion rises to 65% for new leases agreed since January 2020.

6. Shorter leases (those of 5 years or less), which MSCI data shows account for 50% of all leases, are even more likely to be contracted-out. Our evidence suggests 82% of shorter leases are contracted-out, with high levels across all asset classes (78%, retail; 80%, industrial and logistics; 81%, other; 87%, leisure; and 91%, offices)

7. Based on these findings **we recommend switching from a contracting-out model to a contracting-in model**. This will facilitate desirable redevelopment and refurbishment work and reduce the administrative burden for the majority of occupiers to whom security of tenure does not currently apply.

8. We would **strongly oppose mandatory security of tenure** for all leases as this could result in extensive property market disruption, including potentially higher rents, lower property values and less flexibility for occupiers.

9. We also recommend **excluding tenancies of five years or less from security of tenure** (an increase from the current six-month exclusion). Our data shows a particularly high proportion of such leases contract-out of the Act. There is therefore a strong rationale for such leases should be outside the Act to remove the administrative burdens on such leases and the uncertainty regarding when licences to occupy can become protected leases.

10. We set out detailed responses to consultation questions below.

11. **Appendix 1** summarises data received from BPF members regarding the extent to which leases in their portfolios are contracted-out of the Act.

DETAILED RESPONSE TO CONSULTATION QUESTIONS[1]

Question 2: 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

12. Reform of the 1954 Landlord &Tenant Act (the Act) has been a longstanding call from the BPF. It creates day-to-day administrative burdens for both property owners and occupiers, makes it harder to improve the energy efficiency of buildings, and puts barriers in the way of property owners managing, refurbishing and redeveloping their buildings.

13. Today's commercial property market and wider economy is very different to when the Act was introduced more than 70 years ago and even from the Law Commission's last review in 1992. Given changes to the market, new and emerging challenges and experience in wider countries where security of tenure is not the norm, we strongly feel that security of tenure should not be the default position underpinning nearly all commercial leases.

14. It is clear to us that the day-to-day burdens associated with the Act impact on wider economic and social policy objectives, particularly the ability to drive investment, grow the economy and decarbonise it. Reform therefore offers an opportunity to make sure that legislation supports key priorities:

- Supporting economic growth and productivity through increased development and refurbishment;
- Removing red tape and unnecessary regulation ;
- Decarbonising our buildings;
- Supporting town centre regeneration and repurposing of space; and
- Removing burdens from the court system.

[1] We have not provided comments on question 1 related to Wales or question 7

15. We are keen to ensure that such opportunities are not lost within a narrow debate about the right to security of tenure.

Limitations and challenges of the current Act:

16. Before considering any changes to the current system of security of tenure, it is important to understand the many difficulties that the Act raises in practice and specific challenges it creates for property owners. These fall into four broad categories:

- Complicating redevelopment and refurbishment
- Sustainability considerations
- Administrative burdens
- Estate and place management

Complicating redevelopment and refurbishment

17. Although the current Act recognises at section 30(1)(f) that owners should be able to gain possession in order to redevelop their properties, the process for doing so presents significant barriers to investment.

18. Notably, it can involve a frequently protracted and expensive court process that provides opportunistic occupiers with opportunities to delay redevelopment even where it is clear that proposed work will meet the requirements for possession under the Act. A small number of occupiers objecting to plans on a major site are sufficient to delay development for protracted periods of time.

Case study 1 – Delays, costs and uncertainty associated with redevelopment

19. As noted above, developers routinely experience long delays to redevelopment where court processes are needed. For instance, a member reported that for a development they are advising on, the property owner was seeking to improve a retail park, having already secured planning permission for the redevelopment work. An occupier however was requiring grounds to be proved in court. The

relevant court is currently taking 20 weeks to issue termination proceedings. The next stage would be to go through the directions the courts set and following this, it will then take a minimum of another 18 weeks to fix a trial date.

20. Such delays are incurred even where it is clear (and likely understood by the occupier) that given the nature of the redevelopment work and steps already taken by the owner, that grounds would be successful.

21. In another case, a property owner seeking to redevelop a multi-tenant office block, had secured vacant possession of the office space, but a small retailer on the ground floor had sought to object to the plans, which subsequently led to an 18-month delay to development. During this time, the property owner was not able to undertake works and productive space was not able to be brought into the market.

22. In addition to the time delays associated with redevelopment, the cost of such cases can run to many hundreds of thousands of pounds, (in part due to the need to provide expert evidence and requirement to spend significant time in court).

23. In such cases, property owners must balance whether they choose to proceed with the statutory process, or seek an agreement of surrender. The payments under such agreements will often exceed the compensation required within the statutory process, and even though they provide what amounts to an uncovenanted financial benefit to occupiers, can be less costly than going through the statutory process. Importantly, such agreements provide certainty of both costs and timeframes for when development can commence.

24. When property owners do not have this certainty, as is the case where they do not know how long court processes will last, it creates significant risk about the future viability of works. In planning a development, various assumptions around costs will be made which will be valid at the time, but could subsequently change and mean that the redevelopment is no longer viable – such as the cost of materials or contractors.

25. The overall impact of the process is to make redevelopment work more costly, risky and time consuming, restricting the ability of property owners to invest, improve commercial property, and ultimately support economic growth.

26. It is also extremely difficult under the Act to undertake less visible redevelopment or reconstruction work for instance of only part of premises, because of the need to evidence that the work is sufficiently substantial. This makes it more difficult to undertake sustainable retrofit, which is increasingly demanded through the planning process and energy efficiency regulations – and which may be less externally visible. This all adds to the uncertainty of the current process for both owners and occupiers.

27. To mitigate these difficulties, where there is an intention to redevelop properties, owners will normally seek to agree leases outside the Act with potential occupiers. This enables space to be occupied while owners finalise plans, secure vacant possession on the wider site and seek planning permission.

28. Such arrangements provide clear benefits for both owners and occupiers, supporting investment and efficient uses of space. They ensure that supply of property is available to occupiers, often on discounted terms, that otherwise might be withdrawn from the market to protect development opportunities. They also provide income to owners of premises, offsetting or mitigating costs associated with redevelopment.

Sustainability

29. We have previously submitted a paper to you examining areas where the Act and the ability to make sustainability improvements to buildings come into conflict.

30. There are two reasons why sustainability is such an important issue for commercial property leasing. Firstly, there is a necessity, underpinned by legislation, to reduce greenhouse gases. Buildings account for around 25% of UK carbon emissions and considerable investment is needed to ensure these are brought down. Secondly,

there is an increasing risk that large numbers of commercial properties could end up as 'stranded assets'; effectively unlettable for either legislative or commercial reasons.

31. The current Act is a barrier to action on this issue due to:

- Difficulty incorporating sustainability / Green Lease clauses into protected leases as a result of the principle laid down in *O'May* that a renewal lease should be the same as the old lease.
- The difficulty for owners to gain possession of properties at lease end where there is an intention to retrofit properties to bring them up to ESG standards.
- The constraints in undertaking improvement work where tenants are still in place where these exceed the current 6-week period established under case law.

Administrative Burdens of the Act:

32. In our view, the Act in its current guise and method of operation imposes unnecessary administrative burdens, including around:

33. Contracting-out: Processes such as the tenant declaration procedure are cumbersome, bureaucratic and add unnecessary delay to the contracting-out process. Notably, there are also technical defects in the legislation that mean parties can invalidate the contracting-out process despite the clear intention of both parties to do so.

34. Serving notice and term declarations: Because the Act enables uncertainty around the valuation and start dates for new leases, it means that one party can benefit over the other. This can see parties taking complex tactical decisions and incurring the costs of advice which would be unnecessary were the valuation and commencement date of renewal leases to be fixed.

35. Unnecessary burdens on an already backlogged court service: County Court judges are rarely experts in landlord and tenant law or experts in valuation and are being asked to decide on matters that would be better resolved by specialist tribunals,

arbitration such as PACT, or specialist judges. As well as the delays this causes for parties to tenancies, it involves the courts taking on largely administrative functions, rather than their more central role in upholding justice.

36. Lease Renewals: Compared with leases outside the Act, lease renewals within the Act can place considerable burdens on owners and occupiers in terms of cost and time. Delays associated with the courts significantly protract the process. Members report that it can take more than three months just to schedule a hearing and then a further 6-12 months till the hearing itself. Even then, hearings and Case Management Conferences are frequently stayed. In relation to the time and cost for both parties it is hard to see how this is proportionate for leases that themselves might only be for 3 years.

37. By way of illustration of some of the above, we set out two case studies representing the experiences of members:

Case study 2 – Friction of contracting-out for flexible spaces and shorter leases

38. The unnecessary friction involved in contracting-out is something that is consistently raised by members – both property owners and their advisors. The cumbersome nature of the process is particularly noticeable and impactful where members provide flexible space, or where shorter lease terms are being sought. In such situations, the vast majority of leases are contracted-out and most occupiers, particularly in flexible spaces are not seeking a lease that has security of tenure.

39. Occupiers seeking to move in quickly must sign a statutory declaration in order to avoid waiting 14 days for a simple declaration to enter the premises. This requires locating a willing and available lawyer at short notice and physically bringing the declaration to them to sign it. Although this might only incur minimal cost e.g. a few hundred pounds, the time taken to do this could have been better spent on normal business affairs. Even where occupiers are able to expedite the process as quickly as possible, it introduces an unnecessary delay to occupation, prevents

occupiers moving in as quickly as they would like and commencing business activity.

40. For example, a lease with rent of £100,000 per year, each day of delay would amount to almost £275 of lost income for a property owner. Where occupiers do not sign the statutory declaration, this loss of income over the 2-week period increases to almost £4,000. During that time, the property remains vacant and unproductive, and the occupier loses the opportunity to occupy the premises and to utilize it productively.

41. Members report that errors, delays and difficulty with the process are most common for unrepresented occupiers and small businesses unfamiliar with the process. One member found that 10% of contracting-out paperwork relating to their portfolio contained errors the first time it was completed and therefore needed to be re-done, sometimes multiple times in the case of less experienced occupiers.

Case study 3 – Shopping centre – high cost of protected lease renewals and tactical behaviour

42. In the context of a lease renewal for a unit of around 8,500 sq ft at a large shopping centre a tenant sought disclosure of every document pertaining to every letting in the previous year – including any Covid-related concessionary agreements – regardless of the nature of the premises in terms of size and location thus even including kiosks. The cost to the property owner of collecting this information was in the region of £20,000-£30,000 and ultimately not recovered.

43. Had matters not been agreed out of court the legal costs for a full hearing would likely have exceeded £100,000, in addition to the cost of expert time and the internal resource needed to support the process. All of this expense in connection with a proposed £10,000 increase in the annual rent and a reduction in term from ten to five years.

44. The protections offered by security of tenure, allied to "bear traps" in the process build in opportunities for tactical behaviour and one member noted that they see occupiers using the use the threat of court as a means to negotiate more competitive terms – including where such terms are below market valuations.

45. Inevitably, this creates an adversarial approach to negotiations. For instance, for the lease renewal noted above involving the disclosure exercise, the tenant's opening offer was £1,000 per year despite the settled passing rent of £250,000. It is hard to see this as anything other than vexatious.

46. Often the current Act enables opportunistic behaviour between parties. While this is an understandable course of action for individual companies, it has a much wider impact on business certainty and investment. A relatively common occurrence is that because the Act provides security of tenure, this enables occupiers to refuse to engage during the lease renewal process.

Case study 4 – Opportunistic behaviour enabled by the Act

47. In one case an occupier in a multi-let building served notice to renew, but subsequently refused to engage in renewal negotiations, stating that they were considering their options. The original lease then expired and the lack of engagement continued. While the owner was within their rights to take matters to court this inevitably would involve time and money.

48. Such lack of engagement wouldn't be possible for leases outside the Act, as parties would be compelled to engage and either agree terms or provide clear details of intentions. The wider impact however is the significant uncertainty it creates. During the period of uncertainty, owners are not able to plan or allocate resources properly, cannot invest in the premises, make improvements (including, potentially across the wider building), and also cannot relet the property. A further consequence is the impact on property valuations which can come from the lease holding over.

Estate and place management

49. To a greater extent than in other sectors, the success of individual retail, leisure and hospitality businesses will heavily depend on the success of the wider location, and how much footfall the shopping centre or destination attracts.

50. To make destinations attractive, owners must curate the right 'mix' of occupiers by responding to evolving consumer tastes and ensuring that underperforming occupiers, who are not contributing to the wider destination are able to be replaced by occupiers who are better able to do so.

51. There are countless examples of locations that have not evolved the tenant mix and contain retailers that are less relevant to consumers. These locations contain high levels of vacancies, with knock-on effects on local economies and communities. Having a large proportion of leases outside the Act is central to the ability of owners to adapt their occupier mix. These destinations, many of the most successful ones, in turn drive economic growth, create jobs and serve as important locations for families and communities to spend leisure time.

Case study 5 – Bluewater: a destination largely outside the Act

52. Bluewater has been one of the largest and most successful shopping centres in the UK since it opened over 25 years ago. It has around 300 leases in place, of which around 280 are contracted-out.

53. Of the original occupiers list only a few remain – e.g. John Lewis and M&S as anchors, plus Boots, WH Smith and Next – while brands such as Apple who were less prominent in the past have entered. The other original occupiers have either left or fallen victim to the pressures of the retail industry over the years.

54. Many occupiers regularly relocate within the centre as their requirements change. This allows them to right-size – whether taking more space or downsizing to maintain a presence on more affordable terms. Occupiers also regularly "renew" or

"regear" leases often as part of their refresh and investment decisions. This would be far more complicated to achieve were their leases to be covered by the Act and governed by its cumbersome renewal provisions. As long as their businesses remain relevant and successful, not having security of tenure does not raise problems, and rather than lack of security being the issue, where it does not trade well it may not be able to afford the rent.

55. While the concern is that not having security of tenure impacts small retailers, smaller traders are owned by individuals with personal stakes and personal exposure to business failure. They depend on locations being vibrant and attracting footfall which well managed locations are able to offer them.

56. It is also notable that owners of locations value smaller and independent traders for what they bring to destinations and will often seek to support or take a chance on such traders. Many of the most successful retail destinations are heavily curated spaces that use their mix of smaller and independent retailers as a draw to the destination. The burdens of the Act, including the possibility that agreements could be used as evidence in lease negotiations with other occupiers restricts this ability.

Is security of tenure "anti-competitive"?

57. One related concern with security of tenure is that by providing automatic renewal rights to incumbent occupiers, it makes it harder for new entrants to gain a foothold, particularly in popular locations, even if those new entrants would perform better than existing ones.

58. This is of particular relevance in a retail and mixed-use context where new entrants might provide new products and services desired by visitors and help make the location more attractive than incumbents do. Turnover of business should be seen as a vital part of a healthy, dynamic, competitive economy that facilitates innovation. Enabling new entrants enables more productive use of space, which in turn supports economic growth.

Assessing options for change

59. Security of tenure was first introduced as a right for occupiers of commercial property through the 1954 Act. The circumstances in 1950s Britain were very different to today. As a result of extensive damage after the Second World War, high quality space was at a premium and the concern was that occupiers who would often invest considerable sums bringing properties into a state of repair should have protection on this investment.

60. Today's commercial landscape is markedly different. Commercial property underpins almost all economic activity and the availability of high quality space in the right place is essential to the overall productivity of the economy. Lease lengths have reduced markedly since the Law Commission's last review of the Act and increasing numbers of businesses invest either minimal amounts into their premises or move into fully fitted locations.

61. Notably, since 2002, MSCI statistics suggest a marked drop in leases of 15 years or longer, falling from 25.6% of new leases in 2002 to only 12.3% in 2024 (retail, 13.1%; offices, 10.7%; industrial, 13.5%).[2] Meanwhile, 49.6% of leases are for five years or less. The same data also indicates that 26.1% of leases granted in 2024 included a break clause, as opposed to 16.4% in 2002.

62. Shorter leases combined with more break rights provide a level of flexibility for occupiers that did not exist 20 years ago and suggests that flexibility is increasingly valuable. Members report that major occupiers, particularly in retail, who traditionally would only sign protected leases are increasingly willing to agree leases outside the Act where this allows better lease terms such as additional breaks. The strong growth in demand for flexible/fully managed office space over the past five years supports this view; at least for many office-based businesses.

[2] MSCI Lease Events Review 2024

63. In addition to changes in the leasing market, there are also significant challenges facing the sector and wider economy – the need to invest significantly to decarbonise buildings and the need to repurpose space in town centres where there is an oversupply of retail property.

BPF recommendation – move from "contracting-out" to "contracting-in"

64. In responding to this consultation we have engaged extensively with our members and have gathered from them evidence on the extent to which leases in their portfolios are contracted-out of the Act.

65. Based on this engagement, consideration of the arguments and evidence, **we recommend a switch from the current contracting-out approach to contracting-in**. We also note that there are persuasive arguments for ending security of tenure in its entirety, but we have stopped short of recommending this on the basis that there are particular circumstances where it is seen as valuable by both occupiers and property owners. This will be typically where larger occupiers take a long lease and invest substantially in premises (e.g. healthcare, large-scale leisure, large office lettings).

66. In coming to this position, our starting point has been the considerable costs and friction the Act creates for both parties and burdens imposed on the courts.

67. Significantly, the Act creates barriers and risk for property investment. This has a knock-on impact on economic growth, the productivity of commercial property, decarbonisation of buildings and repurposing of space in town centres. The Act also makes it more difficult to curate successful mixed-use locations, which play a vital role in local economies and town centres.

68. The evidence we have collected comes from BPF members managing a total of c. £90bn of commercial property, which represents just under a fifth of the total value of invested (i.e. rented out) commercial property in 2022.[3]

[3] PIA Property Data Report – available here

69. This data suggests that just over half of all leases are contracted-out of the Act, the proportion of which increases to around 65% for new leases agreed since 2020. For this majority of lease counterparties, switching to a contracting-in approach would therefore lead to a more streamlined leasing process.

70. While changing security of tenure from the default statutory option raises concerns that occupiers will lose the protections that it affords, there are good reasons to believe that even without security of tenure, the commercial property market will function well for occupiers, while they will also benefit from broader reform (see our comments in response to question 3 below).

71. It is estimated that around 70% of the total return from commercial property investment in the UK derives from rental income (as opposed to capital value growth)[4]. Owners are therefore keen to maintain stable income streams, and ensure their properties are continually occupied.

Comments on consultation models

1. Mandatory Security of Tenure

72. Mandatory security of tenure would be a considerable mis-step in our view; damaging to economic growth, and the ability to invest in a modern commercial property sector. There were good reasons for introducing contracting-out following the Law Commission's 1969 report on the Act and we do not think there is any sound rationale for going back on this.

73. Doing so would exacerbate the limitations associated with the current Act and would also eliminate the flexibility that the current contracting-out approach provides and which our evidence suggests that an increasing majority of owners and occupiers agree upon. We discuss the potential impact in more detail in our response to question 3 below.

[4] MSCI/IPD 2019

2. No Mandatory Security of Tenure (Abolition)

74. As noted above, although we support moving to a contracting-in approach, we think there are persuasive arguments for ending security of tenure in its entirety.

Remove burdens associated with the Act

75. The immediate impact of abolition of security of tenure would be to do away with the challenges set out under "limitations and challenges with the current Act" above, saving time and cost, removing burdens from the courts and facilitating effective property management and redevelopment.

76. As well as direct, quantifiable costs associated with the current Act, the current approach causes more significant intangible costs related to uncertainty, delay and risks associated with investment. These reduce the ability of property owners to invest because resources are diverted to (in our view) unnecessary administrative processes.

77. Abolishing security of tenure would remove these challenges, which we believe would in turn have a positive effect on economic growth, jobs, the modernisation of property to enable it to support a dynamic productive economy, decarbonisation of buildings and the repurposing of space in town centres.

3. Contracting-in

78. Contracting-in is our favoured approach. Notwithstanding the arguments set out above in favour of full abolition, an important proportion of our membership continues to see a role for security of tenure in some form. Its existence is particularly important in circumstances where high fit-out and investment costs are incurred by occupiers and the importance those occupiers place on protecting that investment. This reflects the fact that owners value occupiers that invest in premises, the wider benefits that investment might bring to a location and the certainty of occupation that it provides.

79. As noted above, the evidence we have collected suggests that just over half of all leases are contracted-out of the Act, the proportion of which increases to around 65% for new leases agreed since 2020. Contracting-in would therefore reduce the administrative burdens for most leases.

80. Contracting-in would strike a balance that means participants who do not require security of tenure do not have it unintentionally imposed upon them and those that do require it can agree this with their property owners.

4. Contracting-Out

81. We have noted the limitations of the current approach above and the benefits that would accrue from removing security of tenure as the default option.

82. If this is ultimately the Law Commission's preferred option, it is crucial that improvements are made to mitigate the issues set out in "limitations and challenges with the current Act" above.

Question 3: 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

Impact of switching to a contracting-in model

Simpler new tenancy process for more leases

83. The most notable impact of a change to contracting-in – at least as far as our evidence suggests – would be a more straightforward process for agreeing new tenancies for the majority of leases.

84. Our data indicates that we are currently imposing the costs and difficulty of varying the statutory default on the majority of leases. A default position of leases not benefitting from security of tenure should therefore reduce the costs, time and

difficulty involved with agreeing those leases. This should allow businesses to access property more quickly

85. There is a particular rationale for this as it supports those smaller and newer companies currently signing contracted-out leases, who have an interest in their lease commencing quicker and being able to trade sooner without any procedural delays. It also means that a greater proportion of the cost and complexity will be borne by larger organisations, better able to meet costs and complexity of negotiations.

Where are protected tenancies more common?

86. The evidence we have collected suggests that protected tenancies are more common for longer leases and larger floorspaces in industrial, retail and office sectors as well as sectors such as healthcare, infrastructure and large-scale leisure such as cinemas or bowling alleys. The converse is also true – there are high levels of contracted-out leases across industrial, office and retail, for shorter leases and for smaller floorspace.

Contracted out leases by lease length:

Leases up to 5 years (inclusive)	All Leases		New leases since 1st Jan 2020	
	No. leases	% Contracted out	No. of leases	% Contracted out
Leisure	115	87.0	128	89.1
Retail	1,084	77.6	1,733	77.5
Offices	601	90.8	705	89.2
Industrial & Logistics	439	79.5	567	76.0
Other	77	80.5	85	81.2
All	**2,316**	**82.0**	**3,218**	**80.4**

Above 5 years - 10 years (inc)	All Leases		New leases since 1st Jan 2020	
	No. leases	% Contracted out	No. of leases	% Contracted out
Leisure	195	70.3	114	64.9
Retail	1,013	66.0	756	63.5
Offices	547	69.3	357	68.1
Industrial & Logistics	744	56.5	526	48.7
Other	78	79.5	50	76.0
All	**2,577**	**64.7**	**1,803**	**60.5**

Above 10 years	All Leases		New leases since 1st Jan 2020	
	No. leases	% Contracted out	No. of leases	% Contracted out
Leisure	678	44.7	141	55.3
Retail	897	45.9	363	46.6
Offices	616	52.9	239	67.4
Industrial & Logistics	1,001	33.2	298	37.2
Other	1,403	24.9	320	18.4
All	**4,595**	**37.5**	**1,361**	**42.5**

Contracted out leases by size of property:

	All Leases		Leases since Jan 2020	
	No. of leases	% Contracted out	No. of leases	% Contracted out
Leisure				
Below 2,500 sq ft	315	58.4	148	73.6
>2,500 sq ft	504	40.7	165	55.2
All leases	819	47.5	313	63.9
Retail				
Below 2,500 sq ft	1,653	75.0	1804	75.1
>2,500 sq ft	1,194	46.6	975	59.1
All leases	2,847	63.1	2,779	69.5
Office sector				
Below 10,000 sq ft	1,127	79.6	923	82.3
>10,000 sq ft	579	54.1	340	70.9
All leases	1,706	70.9	1,263	79.3
Industrial & Logistics				
Below 20,000 sq ft	1,516	59.6	1,058	62.9
>20,000 sq ft	641	28.7	327	39.1
All leases	2157	50.4	1,385	57.3
Other				
Below 20,000 sq ft	652	43.1	235	55.3
>20,000 sq ft	885	19.5	212	13.2
All leases	1537	29.5	447	35.3

87. This picture reflects, to a large extent, the market determining where security of tenure is agreed upon. We don't anticipate that moving to a contracting-in approach will change the basic negotiating dynamic in such situations. To the extent that some occupiers want security as part of new lease negotiations, but are unable to obtain it under the contracting-in model, that will continue under a contracting-out model.

88. We do not dismiss concerns that a shift in approach could see participants without market power losing a right that they want. Rather, we would question how widely this would occur in practice and how large a segment of the market this potentially applies to given our evidence of the extent to which shorter leases and those for smaller floorspaces are currently contracted-out. As noted in our response to question 2, property owners want reliable, stable occupiers in place to ensure income and rent collection and incur costs and risks when they give notice.

89. The alternative concern is that under the current approach, occupiers who do not have a specific need for security, obtain it because it is the default statutory approach and it is unnecessarily difficult and complex to opt-out. Such occupiers may be paying to obtain a benefit that they do not want or need, at the expense of other factors that will have more value to them such as lower rent, different lease lengths, or other factors. Enabling the market to operate more efficiently, so that only those occupiers who genuinely want security of tenure pay the market price for it, would enable other occupiers to agree more optimal arrangements on other lease terms.

Impact on lease renewals

90. We don't know of any reliable way to predict how many leases would remain inside the Act under a change to a contracting-in model. Were it to lead over time to fewer leases inside the Act, this could considerably reduce the burdens of lease renewals. As highlighted by case study 3 above, lease renewals are generally less adversarial, cheaper and faster outside the Act.

91. Over time, a shift to contracting-in would also significantly reduce the difficulty of gaining vacant possession where the intention is to redevelop properties.

Use of contractual options

92. There are considerable benefits when using contractual options in leases over and above statutory processes as they:

- Provide more comprehensive security for occupiers that will better meet their needs, ensuring proper trading continuity for occupiers;
- Are clearer and simpler documents than the Act;
- Embed valuation approaches for lease renewal within contracts, (a key point of contention for leases renewals inside the Act) and thereby they lead to an easier renewal process.

93. Notably, there has been a rise in standardisation within leases through the wide adoption and influence of the Model Commercial Lease (MCL) which already includes "off the shelf" drafting to enable the use of contractual options.

94. If a switch to contracting-in led to a greater use of contractual options this could be a generally beneficial development.

Impact on occupiers

95. While a change to a contracting-in model might raise concerns around occupiers losing certain protections, we think that there are good reasons to suggest that even without security of tenure (let alone the contracting-in model we recommend), the commercial property market would function well for occupiers:

96. Few other jurisdictions have a security of tenure as comprehensive as England & Wales (including most notably Scotland). This does not prevent those jurisdictions from having well-functioning commercial property markets and successful economies that foster smaller and independent businesses.

97. While occupiers may in theory favour a statutory right to security of tenure, whether that right is available in practice even under the current approach is mostly determined (for new leases) by market forces. As our evidence shows, contracting-out appears to be the norm in many circumstances, particularly for leases of 5 years and under. According to MSCI data, such leases account for half of all leases signed and our own figures suggest the vast majority – 80% - of such leases are contracted-out.

There are also high levels of contracting-out for smaller floorspaces. Changing to a contracting-in model would have no impact in these circumstances.

98. Although we have not been able to gather data on how lease renewals vary between inside the Act leases and those outside the Act, members have noted that in many locations with high levels of contracting-out, such leases are generally renewed successfully and to the satisfaction of occupiers. Were obtaining renewals for leases without security of tenure a significant problem, we would expect more widespread evidence for this.

99. Smooth and satisfactory renewals of outside the Act leases should not be surprising. It reflects the fact that owners value reliable, stable occupiers, wish to avoid empty properties and incur significant costs and risks in giving notice. Indeed, the business model of many property owners is based on stable income streams, which relies on ensuring high levels of continuing occupation.

100. To the extent that occupiers find it hard to renew a lease, this more often than not reflects changes to market rents or other factors such as business rates or the economy. These apply equally to leases inside or outside the Act.

Impact on advisors

101. To the extent that changing to a contracting-in approach would reduce the complexity of new leases and lease renewals it would reduce the costs associated with advisors needed to navigate those processes. As noted previously, some of the implications of security of tenure under the Act can create an adversarial approach to negotiations, which can in turn give rise to disproportionate costs being spent on advisors that could be more productively deployed elsewhere.

2. On the commercial leasehold market.

Impact of switching to contracting-in

Reduced barriers to investment into commercial property

102. We believe that moving to a contracting-in model would increase investment into the sector because it would reduce the barriers and risks associated with redevelopment and asset/place management. It would also reduce other costs such as around lease renewals for leases currently inside the Act, at least some of which would be allocated to investment into the sector.

Attractiveness of commercial property for investment

103. Our members report that property investors consider whether assets have security before acquiring them. Where there is security, this is seen as a risk and gets "priced in" to the amount that investors are willing to pay for assets and which sub-sectors they invest into. For overseas investors and lenders used to other jurisdictions, the level of security of tenure in England & Wales often comes as a surprise.

More responsive rents

104. It is worth noting that under the Act, because renewals are based on comparable transactions, which are backward-looking, based on deals already made. This slows down market movements so that prices set at renewals do not reflect true levels as they would be agreed on the open market.

105. This impacts how responsive lease agreements are to changes to market prices – whether they are upwards or downwards – with important effects on the efficiency of the pricing mechanism. When prices are falling, occupiers may not get the full benefit of price adjustments and rents are 'locked in' at a higher price than they arguably should be. It means that the costs that occupiers incur do not reflect the (lower) returns that they might expect given current market conditions. Similarly, when prices are rising, owners are not able to agree prices that accurately reflect the proper

valuations of properties – in effect locking in lower property valuations in the medium and long term.

Case study 6: Lack of open market transactions and impact on investment

106. Where there are infrequent open-market transactions, this can make it very difficult for the market to 'discover' prices, making it difficult for valuations to find their 'true' level. One such recent example of this was within retail warehousing in England and Wales where until recently there had been few open-market transactions. The insolvency of Carpetright then led to owners with vacant possession of buildings, new lettings and arms-length transactions, which enabled owners to demonstrate true market prices were different to what they had been able to prove through the lease renewal process.

107. This perceived lack of transparency can deter investment because it raises the risk that valuations and prices received will not reflect the capital invested. In the retail warehouse market, members noted that there had been strong investment demand for such properties in Scotland, where prices were determined by open-market transactions and therefore property valuations were perceived to be more accurate. Weak investor demand in England was due to the lack of such transactions.

Case study 7: Scotland

108. Many of our members own substantial portfolios in Scotland and England and Wales. It is worth noting that their experience is that the system works well and that there is a healthy investment and occupier market in Scotland. The notion of a 'wild west' for commercial leasing is certainly not one that they recognise.

109. Indeed, there are some areas in which our members would say that the commercial property market operates more effectively in Scotland than in England and Wales. Specifically:

- The existence of a definitive timetable for serving notices and gaining vacant possession prevents occupiers avoiding engagement with owners and holding over indefinitely as highlighted in a case study above. In other words, there is less ability to "game" the process for advantage, which is prevalent in England and Wales.
- Due to the less adversarial approach and because of the lower ability and incentive to litigate matters, leasing and legal costs can be commensurately lower.
- It is easier for property owners to gain possession of property for redevelopment purposes, reducing the risk and cost of this economically beneficial activity.
- As noted, because in some circumstances there will be more open market transactions, market prices will be more transparent. Members have related that in turn, this can give investors more confidence to invest in Scotland as they can be more certain that the amount they are paying or investing reflects true market levels.

Impact of switching to a mandatory security model

Damage to investor sentiment and property investment viability

110. Any shift to mandatory security would run counter to recent developments in commercial leasing. It would damage economic growth and inflict real damage on the attractiveness of commercial property as an investment.

111. It would reduce property owners' effective control over their own assets and therefore increase the risk of owning them. The knock-on impact would either be an increase in rents (to compensate for the higher risk) where market forces permit or – where they don't – a reduction in property values to reflect the lower price a buyer would be prepared to pay for a now riskier asset. Reductions in value could pose particular risks for property owners where properties have debt finance secured against them.

112. More generally, redeveloping and refurbishing property would become more difficult and uncertain, with buildings that would have been suitable for redevelopment no longer being viable. It would also deter investment among global investors who might be unfamiliar with or unwilling to invest in properties with such a strong level of security of tenure.

113. On a practical level, if the Act were mandatory, the number of renewals requiring the courts would increase dramatically given the high numbers of leases currently contracted-out. Unless an alternative process were put in place, or there is sufficient investment to deal with the influx of renewals, an already overburdened system would be in danger of collapse.

A return to longer lease lengths and less flexibility

114. As outlined above, a notable development within the property sector over the past 20 years has been a trend towards shorter, more flexible leases, especially within the retail, office and industrial sectors. This caters for those businesses that might not feel the need for longer term certainty, do not wish to spend considerable amounts on fit out costs, and might be seeking the fastest commencement of trading possible. They might also value the flexibility of being able to move at relatively short notice to smaller or larger spaces as their circumstances change.

115. While short, flexible leases can be made to work with security of tenure, were it to be made mandatory then the challenges outlined above regarding protected lease renewals and their impact on the court system would become even more pronounced.

116. In addition, property owners might begin to seek longer lease terms from occupiers to maximise the certainty of their income. This would disadvantage those occupiers who currently value shorter leases and most likely have a disproportionate impact on smaller and newer businesses.

Question 4: 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;

117. Overall, we feel that basing exclusions on particular classes or uses of premises would be exceedingly difficult to achieve without creating arbitrary cliff edges that would inevitably give rise to litigation.

118. In addition, enhanced flexibility has recently been introduced into the planning system aimed at providing for easier change of use, which would cause issues where a property's security of tenure depended on use.

119. We are not aware of competing regimes that might warrant exclusion from the Act. The consultation paper refers to the Electronics Communication Code (ECC), which our members have a number of significant concerns with (though these fall outside the scope of this review). However, differences in how the ECC and the Act operate do create additional complexity. This stems from the need for property owners to monitor two separate administrative regimes, each with their own timelines, sometimes in relation to the same property. We would therefore caution strongly against creating more "parallel regimes" than those set out in the Act.

2. The extent of the Duration Excluded Tenancies is appropriate;

120. We believe that tenancies of five years and less (hereafter "short leases") should be excluded from the Act. There are both principled and practical reasons for this:

Balance of interest principle

121. A *"productive and beneficial commercial leasing relationship"* (as the consultation's terms of reference put it) between property owners and their occupiers depends on there being a sense that rights and obligations are fairly shared.

122. There is an implicit understanding that flexibility for the occupier (e.g. in the form of a shorter lease or availability of break options) should be reflected either in a higher

rent or flexibility for the owner at the end of a lease to compensate the uncertainty this causes for them. The converse naturally applies – where an occupier can commit for the longer term, then a lower rent is more likely and owners are more likely to agree that an occupier can remain in place at the lease end.

123. Our members generally perceive that an automatic right to renew a short lease unduly tips the balance too far in favour of occupiers. Occupiers benefit from the flexibility of a short lease and the flexibility to remain in occupation at the end of the lease term. The property owner on the other hand does not have the flexibility to take back the property at the end of the lease term. Excluding short leases from security of tenure would better balance owner and occupier benefits.

Practical benefits

124. Given the high proportion of short leases that are already contracted-out (80% overall, but between 75%-90% depending on asset type), excluding leases of five or less years from security of tenure would significantly benefit the majority of parties to such leases, who currently have to go through the process of contracting-out.

125. It would also reduce the occurrence of unintentional errors in the contracting-out process that can give rise to legal challenges. In addition, excluding shorter leases would eliminate the uncertainty and risk that currently exists around when a licence may unintentionally become a (protected) lease. The precautions currently taken to ensure this doesn't happen would become unnecessary were short leases excluded.

126. As we noted previously, renewing a protected lease can take between one and three years. For shorter leases, the cost imposed on parties at frequent lease renewals is not proportionate to any benefits accrued.

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.

127. Where parties explicitly agree contractual break rights in leases, they should be able to be exercised. That isn't the case currently for protected leases as security of tenure still applies even where there is such a break clause. This creates additional complexity as parties willing to agree such break clauses then need to contract-out of the Act.

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

128. Were security of tenure to be abolished, there would be no need to exclude leases by duration from the Act.

129. Under contracting-in, there would be reasons both for and against excluding tenancies under 5 years from the Act, however as noted above we would favour their exclusion.

- Allowing contracting-in for such tenancies would provide flexibility where both parties want this.
- There would already be some benefits from reducing friction through switching to a contracting-in approach. However, the full benefits of simplifying the approach for such leases would not be realised. There would be delays and costs where negotiations take place or parties seek to consider their options.

Question 5: Whether the Law Commission's assessment of the potential benefits and disadvantages of reforming the scope of the 1954 Act is correct

130. In our view, the Law Commission's assessment underestimates the beneficial impact of reforming the scope of the Act to exclude short leases from security of tenure. According to MSCI, leases five years or less accounted for 50% of leases granted in 2024, while our own data suggests that around 80% of these are contracted-out. The

administrative saving for parties to these leases of not having to contract-out or undertake protected lease renewals would be considerable.

131. Were short leases excluded, it is possible that property owners would seek to reduce lease lengths to below 5 years to ensure they are outside of the Act. However, owners would also need to balance restricting lease lengths with the impact on future income and also on property valuations, which are based on the value of future income streams.

Question 6: What impact a change to the scope of the 1954 Act would have:

1. On the parties to tenancies and their advisors; and

132. Excluding leases of five years or less from the act would mean parties would experience fewer costs and delays as a result of contracting-out – our evidence suggests the overwhelming majority (between 75%-90% depending on asset type) of tenancies for shorter duration are contracted-out.

133. Shorter leases would no longer be within the Act for lease renewals. This would significantly reduce the cost and difficulty of lease renewals. It could also remove significant burdens from the Courts. There would also be less potential for advisors to make mistakes and potential resulting damage (including litigation)

2. On the commercial leasehold market.

134. Any reduction of leases within the Act would make it easier to gain vacant possession for redevelopment purposes. This in turn would support redevelopment of properties.

135. Such a reduction in leases outside the Act would also make it easier to incorporate "green clauses" into leases and owners to gain possession where sustainability improvements to properties are needed but do not meet the current threshold for gaining possession under the Act.

136. Excluding short leases from security of tenure would eliminate the need to take action to make sure licences to occupy do not unintentionally become protected leases. The resulting time and cost savings would benefit both owners and occupiers. This would have particular benefits for the provision of flexible space and shorter leases for both owners and occupiers.

APPENDIX 1 – PREVALENCE OF CONTRACTING-OUT AMONG BPF MEMBER PORTFOLIOS

Overview:

Commercial property leases contracted out				
	All leases		New leases since 1st Jan 2020	
	No. of leases	% Contracted out	No. of leases	% Contracted out
All Leases*	22,965	51.7	6,808	65.2
Leases by sector*	14,216	64.0	6,783	66.1
Leisure	977	54.7	375	68.8
Retail	6,563	61.4	2,934	70.2
Offices	2,098	69.8	1,466	70.6
Industrial/logistics	3,000	50.5	1,391	57.4
Others	1,578	26.1	617	53.6

*All leases shows findings from all leases collated. Some members only provided overall lease data for their portfolios and not more granular data by sector, lease length and property size. "All leases" covers these organisations. "Leases by sector" only includes organisations providing granular data.

Commercial property leases contracted out (matched sample)**				
	All leases		New leases since 1st Jan 2020	
	No. of leases	% Contracted out	No. of leases	% Contracted out
All Leases	8,372	55.1	6,421	66.9
Leisure	956	54.5	375	68.8
Retail	2,888	64.9	2,849	69.8
Offices	1,594	69.6	1,302	79.5
Industrial/logistics	1,365	47.1	1,391	57.4
Others	1,572	30.7	479	39.7

**The matched sample shows the findings for organisations providing data for both all leases and new leases since 1st January 2020.

Value of respondents' assets under management	
	Total (£)
All Responses	88.9bn
Leases by sector	73.7bn
Matched sample	56.6bn

Leases 5 years and under

Leases up to 5 years (inclusive)	All Leases		New leases since 1st Jan 2020	
	No. leases	% Contracted out	No. of leases	% Contracted out
Leisure	115	87.0	128	89.1
Retail	1,084	77.6	1,733	77.5
Offices	601	90.8	705	89.2
Industrial and Logistics	439	79.5	567	76.0
Other	77	80.5	85	81.2
All	**2,316**	**82.0**	**3,218**	**80.4**

Contracting out by lease length and sector

Leisure				
	All Leases		New leases since 1st Jan 2020	
	No. leases	% Contracted out	No. leases	% Contracted out
Up to 5 years (inclusive)	115	87.0	128	89.1
Above 5 years - 10 years (inc)	195	70.3	114	64.9
Above 10 years	678	44.7	141	55.3
Total	988	54.7	383	69.5

Retail				
	All Leases		New leases since 1st Jan 2020	
	No. leases	% Contracted out	No. leases	% Contracted out
Up to 5 years (inclusive)	1,084	77.6	1,733	77.5
Above 5 years - 10 years (inc)	1,013	66.0	756	63.5
Above 10 years	897	45.9	363	46.6
Total	2,994	64.2	2,852	69.8

Offices				
	All Leases		New leases since 1st Jan 2020	
	No. leases	% Contracted out	No. leases	% Contracted out
Up to 5 years (inclusive)	601	90.8	705	89.2
Above 5 years - 10 years (inc)	547	69.3	357	68.1
Above 10 years	616	52.9	239	67.4
Total	1,764	70.9	1,301	79.4

Industrial and Logistics				
	All Leases		New leases since 1st Jan 2020	
	No. leases	% Contracted out	No. leases	% Contracted out
Up to 5 years (inclusive)	439	79.5	567	76.0
Above 5 years - 10 years (inc)	744	56.5	526	48.7
Above 10 years	1,001	33.2	298	37.2
Total	2,184	50.4	1,391	57.4

Other				
	All Leases		New leases since 1st Jan 2020	
	No. leases	% Contracted out	No. leases	% Contracted out
Up to 5 years (inclusive)	77	80.5	85	81.2
Above 5 years - 10 years (inc)	78	79.5	50	76.0
Above 10 years	1,403	24.9	320	18.4
Total	1,558	30.4	455	36.5

Contracting out by size of property

Leisure	All Leases		New leases since 1st Jan 2020	
	No. leases	% Contracted out	No. leases	% Contracted out
<500 sq ft	60	56.7	43	62.8
500-2,500 sq ft	255	58.8	105	78.1
2,500-10,000 sq ft	361	44.6	123	60.2
10,000-20,000 sq ft	61	41.0	19	47.4
>20,000 sq ft	82	23.2	23	34.8
Total	819	47.5	313	63.9

Retail	All Leases		New leases since 1st Jan 2020	
	No. of leases	% Contracted out	No. of leases	% Contracted out
<500 sq ft	532	78.0	784	74.4
500-2,500 sq ft	1,121	73.6	1020	75.7
2,500-10,000 sq ft	724	58.1	672	65.2
10,000-20,000 sq ft	224	30.4	184	48.9
>20,000 sq ft	246	27.2	119	40.3
Total	2,847	63.1	2779	69.5

Offices	All Leases		New leases since 1st Jan 2020	
	No. of leases	% Contracted out	No. of leases	% Contracted out
<2,000 sq ft	512	85.4	484	85.5
2,000-10,000 sq ft	615	74.8	439	78.8
10,000-25,000 sq ft	417	59.0	247	71.7
25,000-50,000 sq ft	106	48.1	72	73.6
>50,000 sq ft	56	28.6	21	52.4
Total	1,706	70.9	1263	79.3

Industrial and Logistics	All Leases		New leases since 1st Jan 2020	
	No. of leases	% Contracted out	No. of leases	% Contracted out
<20,000 sq ft	1,516	59.6	1058	62.9
20,000-100,000 sq ft	427	33.3	208	48.6
100,000-500,000 sq ft	157	19.7	90	23.3
500,000-1m sq ft	32	25.0	16	25.0
> 1m sq ft	25	12.0	13	15.4
Total	2,157	50.4	1385	57.3

Other	All Leases		New leases since 1st Jan 2020	
	No. of leases	% Contracted out	No. of leases	% Contracted out
<500 sq ft	261	54.0	168	66.1
500-2,500 sq ft	391	35.8	67	28.4
2,500-10,000 sq ft	566	21.4	125	15.2
10,000-20,000 sq ft	163	19.6	36	8.3
>20,000 sq ft	156	12.8	51	11.8
Total	1,537	29.5	447	35.3