Northern Ireland
Law Commission
promoting law reform in Northern Ireland

Report
Business Tenancies

NILC 9 (2011)

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BUSINESS TENANCIES

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NORTHERN IRELAND LAW COMMISSION

REPORT

BUSINESS TENANCIES

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FOREWORD

With a mixture of pride and pleasure, in equally substantial measures, as Chairman of the Northern Ireland Commission ('the Commission') I present this important Report to the Government and public of Northern Ireland.

The Commission is established and governed by the Justice (Northern Ireland) Act 2002. Its creation represents one of the most significant recent reforms in the constitutional legal order of this jurisdiction. The Commission's overarching statutory duty is to keep under review the law of Northern Ireland with a view to its systematic development and reform. This entails formulating proposals for the simplification and modernisation of the laws of this country.

In 2009, the responsible Government Minister, who was then the Secretary of State for Northern Ireland, approved the inclusion of this business tenancies law project in the Commission's First Programme of Law Reform. In so doing, the Minister was certifying that the Commission had made out a persuasive case for reforming the law in this field. The research, consultations and engagements which the Commission has undertaken subsequently confirm overwhelmingly the correctness of the Minister's assessment.

When the Commission began its public consultation exercise in June 2010,[1] it was observed that the representations previously received suggested that there was a relatively strong case for selective reform of the present law, which is contained in the Business Tenancies (Northern Ireland) Order 1996 ('the 1996 Order'). In particular, the Commission highlighted questions such as whether the present law was making it unreasonably difficult to do business in Northern Ireland; the desirability of the absolute prohibition on contracting out; the adoption of appropriate methods to protect the more vulnerable members of the business community, especially small and medium sized start up businesses; how to give effect to the principle of freedom of contract; and whether there exists sufficient justification for the differences between the law in Northern Ireland and that in vogue in the remainder of the British Isles.

In publishing the Consultation Paper the Commission exhorted the fullest range of responses possible. In the event, both the quality and extent of the responses made were encouraging. This enabled the Commission to proceed in an informed and confident manner. The Commission was gratified to receive a number of well constructed and carefully argued submissions to the effect that the absolute bar on

[1] See NILC 5 (2010).

contracting out is inimical to the best business interests of Northern Ireland. These submissions further highlighted that this bar did not promote the interests of the parties particularly where the lease forms but part of a broader, more complex commercial transaction. In such circumstances, the achievement of legitimate commercial objectives is unnecessarily frustrated by the present law. The negative consequence for Northern Ireland is that inward investment is discouraged, rather than encouraged.

Throughout the process culminating in this Report, the Commission has highlighted that one of the hallmarks of every civilised society is that the law protects the weak from unwarranted harm inflicted by the strong. The Commission was further guided by the truism that necessitous members of society are not truly free as they may submit to the onerous terms, conditions and requirements imposed on them by others in the interests of escaping from their present burdens and answering a current exigency. The Commission considers it important that these principles, which are identifiable in the present legislation, should be nurtured and fortified.

In Chapter 1 of this Report, the reader will find a comprehensive outline of the evolution of business tenancies legislation in Northern Ireland, dating from the 1964 statute and including an important contribution by this organiser's predecessor, the Law Reform Advisory Committee, which published a report in 1994.[2] The consultation exercise which preceded the finalisation of the present Report and accompanying draft legislation illustrates with clarity the need for the law to develop and respond in accordance with the needs of society, which are constantly changing and evolving. Thus, while this organisation's predecessor was disinclined to recommend any abolition or modification of the absolute prohibition on contracting out in 1994, the Commission is confident that it would adopt a quite different position today. Market conditions have altered significantly and there is an identifiable need for greater flexibility in the commercial property market. Furthermore, the justification for perpetuating differences between the law in this jurisdiction and that prevailing in England and Wales and the Republic of Ireland seems ever diminishing. Ultimately, the Commission is satisfied that its proposals make a positive beneficial contribution to strengthening and enhancing the Northern Ireland economy: this is truly law reform in action indeed!

The law reform proposals contained in this Report and reflected in the accompanying draft legislation are the product of an extensive and robust consultation exercise. The Commission has taken steps to ensure that all potentially interested and affected

[2] *Business Tenancies* (1994) LRAC No. 2 (HMSO), paragraph 3.5.9.

citizens, groups, organisations and professions have had the opportunity to ventilate their views and suggestions and, hence, influence the shape and content of this Report. This should provide significant reassurance to the local legislators who will make final decisions. Throughout the process culminating in this Report, care has been taken to ensure that the Executive has been periodically informed of the progress of the Project, its evolving orientation and its possible outcomes. Thus the Report will not take legislators by surprise.

The quality and depth of the processes outlined above constitute the first main virtue of this Report. Its second outstanding merit lies in the skills, expertise and industry of the Report's joint authors: Law Commissioner Neil Faris, Rebecca Ellis, a member of our legally qualified cohort and Darren McStravick who worked on the Consultation Paper. I have been privileged to view at close quarters the intellectual rigour which Neil and Rebecca have invested in this Project, coupled with the quality and energy of the researches, engagements and consultations in which they have enthusiastically engaged. Thanks are also due to Ronan Cormacain who provided legislative drafting services. I thank all of them and all of the Commission support staff for their tremendous endeavours and this major contribution to law reform in Northern Ireland.

Finally, I strongly commend this Report to Government. The Report is blessed with the strengths, virtues and qualities already highlighted. It is further enhanced by the accompanying draft legislation, consisting of a comprehensive and modern statutory model. The process of law reform in Northern Ireland will be barren indeed if reports of this nature do not culminate in legislation. The thorough and comprehensive process preceding this Report should ensure that there will be no good reason for failing to legislate in its wake and all members of the Northern Ireland Assembly can march forward confidently from this point to the statute book, without delays or detours, content and reassured that they have received from the Commission a product of the highest quality. The Commission looks forward to seeing the ensuing draft legislation on the agenda of the Executive Committee and the Northern Ireland Assembly in the very near future. The population of this country awaits, and deserves, the legislation which we earnestly recommend to Government.

Bernard McCloskey
Chairman, Northern Ireland Law Commission
March 2011

EXECUTIVE SUMMARY

Note: Those who have read our Consultation Paper[3] may skip Chapters 1, 2 and 3 if they wish.

CHAPTER 1 INTRODUCTION

This Chapter outlines the background to the Project and the main issues that have been considered. It briefly explains the legislative history of business tenancy protection in Northern Ireland which has always retained the absolute prohibition on contracting out. We summarise the submissions initially made to us which favoured amendment to the 1996 Order citing factors such as changed market circumstances, the position in other jurisdictions and the facilitation of commercial transactions. It raises the question as to how far should the reach of legislation be into tenancies or leases of business premises in Northern Ireland.

CHAPTER 2 THE WORK WE HAVE CARRIED OUT

In this Chapter we explain how we have carried out the Project since its inception. We set out the pre-consultation process that we undertook and the various stakeholders who have been involved in the Project. We outline the issues that we raised in the Consultation Paper and the options for reform on which consultees were invited to comment. We note the concerns of some that the absolute prohibition is too restrictive in a significant number of commercial situations, but this must be balanced against concerns regarding the removal of protection for vulnerable tenants. Finally, we detail the meetings and discussions held during the consultation period and the written responses we received.

CHAPTER 3 CONTRACTING OUT – THE CASE FOR AND AGAINST

In this Chapter we highlight the opposing arguments surrounding reform of the current legislation and the balancing exercise that must be addressed. We identify the various situations in which it is argued that the absolute prohibition is causing practical difficulties namely outsourcing / supply / franchise agreements, management buy outs, turnover rentals, Private Finance Initiatives (PFIs) / Public Private Partnerships (PPPs)

[3] NILC 5 (2010).

and sub leases. We recite case studies of such situations which were helpfully provided by stakeholders. We also present the arguments for retaining the absolute prohibition which centre on the protection of vulnerable tenants who may never seek professional representation and therefore may be unaware of the implications of contracting out.

CHAPTER 4 CONSULTATION RESPONSES

In this Chapter we summarise and analyse the responses received during the consultation period. We have taken account of written responses received and formal and informal discussions which occurred during the consultation period, and indeed throughout the course of the Project. We note that the majority of consultees were, on balance, in favour of some form of contracting out, but many wished to retain some form of protection for vulnerable tenants. We discuss the reaction to the various models proposed and note that it appears that there is no contracting out model which is preferred above others.

CHAPTER 5 DECISION

In this Chapter we set out our recommendations for reform of the 1996 Order. Ultimately, it seemed to us that there was a divide between whether we should err on the side of market freedom or on the side of market regulation. Taking into consideration the representations made and our equality duty, we felt that the protection of security of tenure should remain for the majority of business tenants in Northern Ireland. This largely ruled out the adoption of models similar to those currently in place in other jurisdictions. However, we did recognise that there were legitimate issues with the current level of protection and that in certain circumstances the level of protection was unnecessary and over-reaching.

The policy which we are recommending is contained within the draft legislation at the end of the Report. It seeks to allow contracting out where the lease is connected to other business arrangements, for example in a PFI / PPP and where both parties have professional representation and therefore will be well advised as to the consequences of contracting out. Contracting out will only be valid where solicitors for both parties have certified that the provision governing contracting out applies. We consider that this reflects a compromise between retaining the status quo for normal business tenancy landlord and tenant relationships and thus protection continues for the majority

of business tenants, whilst facilitating more complex business transactions in which the current legislation hinders legitimate commercial objectives.

CHAPTER 6 MINOR REFORMS

During the course of the Project representations were made to us in relation to other issues in the 1996 Order, unrelated to the absolute prohibition on contracting out. In this Chapter we set out the main issues raised and discuss our recommendations. We address the extension of short term lettings, compensation provisions, landlord applications, situations where parties fail to reach an agreement, grounds for opposing renewal of a new tenancy, agreements to surrender, public sector issues and turnover rent clauses. It should be noted that if our recommendations on these matters are accepted then the necessary legislative provisions to carry them into effect would have to be drafted. But we set out in detail our views on how these areas should be reformed, if at all.

CHAPTER 1. INTRODUCTION

INTRODUCTORY COMMENTS

1.1 Northern Ireland has enjoyed its modern scheme of business tenancy regulatory protection since 1964. The regulatory scheme was established by the Business Tenancies Act (Northern Ireland) 1964 ('the 1964 Act'). In the mid 1990s its provisions were considered for reform but the legislation was basically re-enacted in the Business Tenancies (Northern Ireland) Order 1996 ('the 1996 Order'). At the heart of the Northern Ireland legislation has always been the principle that one may not 'contract out' of the regulatory provisions. Thus the tenant is always protected from landlord pressure.

1.2 But in our neighbouring jurisdictions in both England and Wales and in the Republic of Ireland contracting out provisions have been introduced in their equivalent legislation: in England and Wales going back as far as 1969 and in Republic of Ireland being more recent. (In Scotland, tenants have only a very limited amount of regulatory protection.)

1.3 As we will show, when we sought proposals for reform for our First Programme of work, we received several well argued submissions that the absolute bar on contracting out was in fact inimical to the best business interests of Northern Ireland. It was making it 'difficult to do business in Northern Ireland' in circumstances where the tenant was a substantial commercial player, was well professionally represented and in short was quite capable of fighting its corner with the landlord without the need to rely on business tenancy protection legislation. Indeed, the core of the argument was that the absolute bar in the legislation was contrary to the interests of both parties in the circumstances where the lease was but part of a complex commercial transaction and to achieve their commercial objective neither party wished to be bound by the shackles of the legislation.

1.4 Several commercial property lawyers advised us that in their experience inward investors to Northern Ireland were disconcerted that a proposed Northern Ireland transaction could not be carried out in the way they expected (and as it could be done in all the other jurisdictions of Britain and Ireland) because of the absolute bar against contracting out which still pertains in Northern Ireland.

1.5 Of course, there is another side to the argument. In particular, the problem with any contracting out proposal is will it in effect deprive the needy tenant of necessary protection?

1.6 And Lord Neuberger a senior judge in England[4] has commented that there is philosophical inconsistency in 'contracting out' provisions. On the one hand the legislation provides statutory protection to tenants as a matter of public policy, but on the other, it says that landlords and tenants can contract out of that protection.[5]

1.7 Indeed, it has seemed to us that in approaching possible reform one can take one or other of two possible philosophical or political positions. If you favour as much market freedom as possible then you will question why in an open market there should be regulation of the matter of the commercial arrangements between landlords and tenants of business premises. What is the social policy objective so achieved? On the other hand, you may have a perspective that market regulation remains a proper part of social and political policy. In particular you would note that, as we have above indicated, Northern Ireland has enjoyed such a regulatory system for almost five decades – and why now intervene in such a major way as to introduce contracting out?

MATTERS CONSIDERED IN OUR CONSULTATION PAPER

1.8 We issued our Consultation Paper in June 2010[6] ('the Consultation Paper'). We commenced the Consultation Paper with these observations:

> It is the mark of a civilised society that the law protects the weak from unwarranted harm inflicted by the strong[7].
>
> Necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any term that the crafty may impose upon them[8].

[4] Master of the Rolls.
[5] T Desai "Not afraid to roll up his sleeves" (2010) 1028 *Estates Gazette* 77.
[6] NILC 5 (2010).
[7] M Porter "Culture Clash" (2009) 159 (7396) *New Law Journal* 1680.
[8] *Vernon v Bethell* (1762) 2 Eden 110, Lord Henley.

1.9 Certainly, it seems generally accepted that Northern Ireland's business tenancy legislation was motivated by such sentiments[9]. On the other hand one has to bear in mind that proper policy should preclude such being used as a means of evading a fair bargain come to between persons dealing at arms' length and negotiating on equal terms [10].

1.10 As we have indicated above, business tenancy protection in its modern form in Northern Ireland had its origins in the Business Tenancies Act (Northern Ireland) 1964. That legislation drew heavily on the equivalent legislation for England and Wales some ten years previously: Part II of the Landlord and Tenant Act 1954.

1.11 The aim of both pieces of legislation was to give business tenants some reasonable prospect of security of tenure, thought to be particularly important (at least in 1964 for the retail trade and some service businesses) where a tenant's goodwill in trading from a particular location was an issue. At the same time the landlord was entitled on the termination of a business lease to have the rent adjusted to the then current open market rent. In the event of dispute thereon the Lands Tribunal may fix the new rent and other terms of the new lease.

1.12 The legislation also provided that the landlord may refuse to grant a new lease on one or more of the grounds set out in the legislation: such as persistent failure to pay rent or breach of the terms and conditions of the lease.

1.13 Thus there is balance. But such balance could be illusory if the legislation permitted that the landlord could persuade the tenant to sign away or opt out of the tenant's rights and protections of the legislation. So the 1954 legislation in England and Wales contained an absolute prohibition on 'contracting out'[11]. This was followed in similar terms in the 1964 legislation in Northern Ireland[12].

1.14 But the story did not end there. In 1969 amending legislation in England and Wales introduced a 'contracting out' scheme: where there was agreement between the parties and where the matter was submitted to and approved by

[9] *Business Tenancies* (1994) LRAC No.2, (HMSO), paragraph 1.7.
[10] *Samuel v Jarrah Timber and Wood Paving Corporation Limited* [1904] A.C. 323, page 327.
[11] Landlord and Tenant Act 1954, section 38.
[12] Business Tenancies Act (Northern Ireland) 1964, section 20.

the County Court[13]. But no similar change was made in Northern Ireland, so the absolute prohibition on contracting out continued in this jurisdiction.

1.15 The issue was, however, reviewed by the Law Reform Advisory Committee for Northern Ireland (LRAC) which considered the matter along with other possible reforms of the legislation. In their Report issued in 1994[14] they came down firmly against any abolition or modification of the absolute prohibition on contracting out. As we have indicated, the 1996 Order replaces the 1964 Act but in effect re-enacts it subject to the revisions in other areas as recommended by LRAC. So the prohibition against contracting out has continued in force in Northern Ireland in the 1996 Order[15].

1.16 However, in the consultation process for our First Programme of Law Reform we received several submissions which queried why Northern Ireland did not have a provision permitting contracting out (with appropriate safeguards). These submissions made the following basic points:

(i.) Radically altered market conditions since the 1960s mean that the need for statutory protection is questionable. If it is required it should not be in as stringent a form;

(ii.) An ability to contract out of the legislation would bring greater flexibility to the commercial property market;

(iii.) It is unhelpful that our jurisdiction is at odds with the position in England and Wales and in the Republic of Ireland. This has brought the Northern Ireland law into disrepute in the eyes of business people who operate within the more liberal regimes elsewhere. This is particularly in light of the recent relaxation of the conditions to allow contracting out in both England and Wales and in the Republic of Ireland;

(iv.) The prohibition on contracting out is detrimental to the economy and the good management of landlord and tenant negotiations, and a complicating factor in major commercial transactions;

[13] Law of Property Act 1969, section 5 amending section 38 of the Landlord and Tenant Act 1954.
[14] *Business Tenancies* (1994) LRAC No.2 (HMSO), paragraph 3.5.9.
[15] Article 24.

(v.) If parties are properly advised and happy to proceed there is no reason why they should not be able to give effect to contracting out of security of tenure; and

(vii.) An academic commentator also made the point that in view of the radically altered market conditions since the early 1960s one might question the need for statutory protection of business tenancies either at all or in the stringent form still prevalent here. She commented that the 'Northern Ireland only' restrictions on the commercial property market seem more and more an anachronism within the United Kingdom / Republic of Ireland to-day.

1.17 Other issues raised during the consultation to the First Programme in relation to the 1996 Order in general were that:

(i.) The process of obtaining consent to agreements to surrender is cumbersome and should be abolished for those parties that are professionally represented; and

(ii.) The legislation is unfair on the landlord with particular reference to the undue weighting of the timescale for response to application in favour of the tenant.

1.18 These submissions can be summarised as indicating that there is concern that the 1996 Order creates at least a perception that it is more difficult to do business in Northern Ireland compared with the competing jurisdictions of England and Wales, Scotland and the Republic of Ireland. The World Bank publishes "Doing Business" reports annually[16] which analyse the ease of doing business throughout the world. It takes into account:

- the degree of business regulation
- regulatory outcomes
- the extent of legal protections of property
- flexibility of employment regulation
- the tax burden on business

1.19 In the 2010 Doing Business Report the United Kingdom was ranked at number 5 out of 183 countries, with the Republic of Ireland ranked at number 7. There

[16] www.doingbusiness.org.

are ten topics which are rated in determining the ranking which include the ease with which businesses can secure rights to property. In this particular category the United Kingdom is ranked at 23 on the basis of the number of procedures and length of time to secure the property for business purposes. The Republic of Ireland is ranked at 79 in this particular category. It is unfortunate that the ranking does not subdivide the United Kingdom per region in order to gain an insight into the perceived ease of doing business especially in respect of property rights throughout the United Kingdom. However, this does perhaps highlight the importance that each economy has an appropriate balance of commercial freedom and removal of barriers to business in order to attract investment, of which the legal protection in relation to property is an important consideration.

1.20 The submissions made to us did not challenge the overall intent of the legislation but suggested that there should be investigation as to whether Northern Ireland alone of the jurisdictions of the United Kingdom and the Republic of Ireland should continue to have such absolute protection for tenants[17]. We accepted the suggestions that pros and cons of law reform to remove or modify the prohibition on contracting out should be considered (together with other possible 'tweaking' of the legislation[18]). Accordingly, the Project was included in our First Programme of Law Reform and duly accepted.

1.21 In the Consultation Paper we indicated that the Project seemed to us to encapsulate in a neat way the issue of how far should the reach of legislation be into the contracts made between landlord and tenant. We indicated that it seemed to us to be striking that Northern Ireland was the only jurisdiction which continues to have such a degree of protection for business tenants. We sought in the Consultation Paper to elicit views on this.

1.22 We asked was it a case of Northern Ireland being out of step and should reform be introduced (with appropriate safeguards)? We noted that those who had made the original submissions to us largely favoured this position. They had given examples of how the absolute prohibition on contracting out causes (perhaps unintended) difficulties in a range of commercial transactions where the tenant is of equal if not greater bargaining power to the landlord. These were cases where (to outsiders at least) Northern Ireland may appear to be a

[17] England and Wales have contracting out provisions, Republic of Ireland has introduced legislation with contracting out provisions and Scotland has only minimal business tenancy protection legislation.
[18] See Chapter 10 of the Consultation Paper.

difficult place to do business – or at least more difficult than the other competing jurisdictions in Britain and the Republic of Ireland.

1.23 But, on the other hand, we asked in the Consultation Paper whether it was thought that the continuance of the absolute prohibition on contracting out was still justifiable as a continuance of the original spirit and intent of the legislation here going back to 1964?

1.24 We asked whether there was any middle way where contracting out might be permitted but with full protection for the more vulnerable tenants or with a greater degree of protection than the schemes in England and Wales and in the Republic of Ireland?

1.25 These were the central issues of the Project. In Chapter 2 we set out some details of the work we have carried out in the Project. In Chapter 3 we reprise the 'Case for' and 'Case against' contracting out. (Those who have read the Consultation Paper can skip these two Chapters if they wish.) In Chapter 4 we evaluate the very helpful consultation responses we received. Chapter 5 contains our Decision and reference should be made to the draft Bill which is annexed to the Report which sets out how our Decision might be enacted in legislation. In Chapter 6 we set out our suggestions for Minor Reforms which might be considered.

CHAPTER 2. THE WORK WE HAVE CARRIED OUT

PRELIMINARY AND RESEARCH WORK

2.1 Pending approval of the First Programme we commenced preliminary work in May 2009, preparing various research papers viz:

- a scoping paper including an examination of the history and philosophy of business tenancies protection, the current nature of business tenancy law in Northern Ireland, Scotland, England and Wales and the Republic of Ireland, as well as a review of how contracting out provisions have been operating in practice.

- a review of service tenancies and service occupancies.

- consideration of the levels of property awareness of small business tenants and the notion of unconscionable conduct in commercial leasing in England and Wales, including a contrast with 'unconscionable conduct principles' in retail leasing in Australia and some states therein.

- research on principles for the proper scope of regulation.

STAKEHOLDERS

2.2 From the beginning of July 2009 we identified various stakeholders in order to instigate preliminary discussions.

2.3 For the purpose of the discussions we prepared an Introductory Note setting out the Commission's remit, project selection criteria, the case for reform, the alternative view, other possible solutions and the position in other jurisdictions. We circulated this to the stakeholders in advance of our meetings.

2.4 The stakeholders included:

- Commercial Solicitors
- Local Solicitor Associations
- Chartered Surveyors and Agents
- Royal Institution of Chartered Surveyors
- Business Contacts – Confederation of Business Industry

- Lands Tribunal for Northern Ireland
- The Law Society of Northern Ireland
- Public Sector Contacts
- Barristers
- Legal Academics

2.5 These meetings were extremely helpful in our initial scoping phase of the Project and the Commission is most grateful to those who attended.

THE OTHER JURISDICTIONS

2.6 We enjoyed the benefit of kind assistance from the Law Reform Commission of the Republic of Ireland. Through them we made contact with the Department of Justice in Dublin, and with solicitors with experience (to date) in the workings of the recently implemented Civil Law (Miscellaneous Provisions) Act 2008. (This provides for a system of 'renunciation' for all categories of businesses tenancies.)

2.7 We had a number of contacts in England and received some helpful comments as to how the contracting out provisions are currently operating there.

2.8 We also made contact with the Scottish Law Commission to try and evaluate the current position in that jurisdiction. However, in Scotland there is only very limited business tenancies protection for certain categories of retail premises only; so the question of problems associated with 'contracting out' does not seem to arise in that jurisdiction.

PRELIMINARY EVALUATION

2.9 Our preliminary evaluation contained in the Consultation Paper set out the case for and against as follows:

2.10 The case studies from commercial solicitors demonstrated a range of commercial transactions where the parties are of equal bargaining power and fully represented by professional advisors. In these cases the absolute bar on contracting out seemed to be a regulatory prohibition to no apparent useful end.

2.11 Concern had been expressed to us that business clients and professional advisors from other jurisdictions accordingly perceive Northern Ireland as 'a

difficult place to do business' as they do not understand why there should be this restriction here compared with the other jurisdictions where they do business.

2.12 But concern had been expressed to us that the provision of contracting out could have the result of effective removal of business tenancies protection from tenants in the small and medium size enterprise sector: particularly those who are taking small scale premises for start up businesses. They may have little or no business experience and may not have (or cannot afford) the professional assistance of solicitors or agents. The particular concern was that whatever 'safeguards' might be proposed for a contracting out system (such as that the tenant must have independent legal advice) may in the event prove illusory if the landlords concerned adopt a 'take it (with contracting out) or leave it' approach. This concern had been raised by agents and some solicitors[19].

CONSULTATION PROPOSALS

2.13 In the Consultation Paper we considered there to be several options open for us to recommend:

- No contracting out i.e. keep the current law as it is
- Contracting out following 'health warning' – the English model
- Contracting out following independent legal advice – the Republic of Ireland model
- Contracting out of 'bigger' tenancies by way of reference to NAV, floor space or rent
- Contracting out of specified categories of tenancies
- Short term leases (e.g. of up to 3 years or 5 years) excluded from protection
- Exclusion of specified categories of tenancies by extending the categories in Article 4

2.14 The Consultation Paper also addressed the issue of 'Minor Reforms' following submissions in relation to other issues in the 1996 Order. These are dealt with in Chapter 6 of the Report.

[19] Including some commercial solicitors who would advocate the need for reform to permit some degree of contracting out.

CONSULTATION PERIOD

2.15 The Consultation Paper was launched on 1 June 2010 and distributed to a wide range of stakeholders (by hard copy and email) including a mix of legal professionals, property professionals, academics, government representatives and various associations and organisations.

2.16 The Consultation Paper outlined the various proposals which were under consideration and invited comments on various issues. 20 consultees responded from a mix of different professions and backgrounds.

2.17 During the consultation period we held a series of consultation meetings with stakeholders who had previously assisted with the Project on 22 June, 30 June and 7 July 2010. The attendees included commercial solicitors, property agents and professionals and public sector representation. We have also had more informal discussions with various individuals throughout the course of the consultation period (and the Project itself).

2.18 The discussions from these meetings, both formal and informal, have been very useful in gathering feedback on our proposals. We have taken the comments made during the meetings into consideration, alongside the formal responses we received, in formulating our recommendations.

POST CONSULTATION PERIOD

2.19 Following the end of our consultation period we have been engaged in analysing the responses received and formulating our recommendations. We have carefully considered all comments and opinions expressed to the Commission and we have tried to formulate a workable policy which addresses the concerns, whilst striking an appropriate balancing act between divergent views. A summary of the consultation responses can be found in Chapter 4. The decision can be found in Chapter 5.

CHAPTER 3. CONTRACTING OUT – THE CASE FOR AND AGAINST

INTRODUCTION

3.1 As we have indicated, the impetus for this Project came from submissions made in our consultation exercise when we were formulating our First Programme. But that should not lead to any 'mission capture' conclusion: that because we have started on the Project we should finish with a recommendation for law reform on the basis of those initial submissions or of any other submissions made to us during the course of the Project.

3.2 As will be seen there is a case for reform and a case against reform - or at least a case for being cautious about reform. So in our Consultation Paper we set out the case 'for' and the case 'against' to the extent that our research and consultations to date have taken us. Then we set out some initial thoughts as to conclusions which we might reach.

3.3 In all of this our aim was to set matters out for response by readers of the Consultation Paper: our aim was to animate discussion rather than to foreclose on it.

THE CASE FOR CONTRACTING OUT

3.4 The initial case that there should be law reform to permit contracting out has been amplified in the further consultations which we have carried out. We were very much assisted by case studies which solicitors have submitted to us.

3.5 What follows is a brief analysis, as set out in the Consultation Paper, of the categories of transaction where the case studies suggested that the absolute prohibition on contracting out served no useful purpose and where, indeed, it only served as an inhibiting factor in the efficiency of doing business in Northern Ireland. The categories of examples given to us cover:

- Outsourcing / supply / franchise agreements
- Management Buy Out transactions
- Factory outlets / turnover rentals
- Large tenants and retailers

- Private Finance Initiatives (PFIs) / Public Private Partnerships (PPPs)
- Sub-leases

3.6 We should add that the solicitors who kindly supplied these examples were not necessarily advocates of complete freedom to contract out. At our meetings with commercial solicitors there was acknowledgement that many of the small categories of business lease transactions never involve any input from solicitors. But these examples come from the categories of the larger transactions as examples of areas where it appears that the law is not serving the needs of any of the parties to a transaction. We considered each of these categories in turn:

Outsourcing / supply / franchise agreements

3.7 The essence of these arrangements is that the provision of commercial premises on a landlord / tenant legal relationship is but part of the commercial matrix between the parties.

3.8 An example of an *outsourcing* contract that was put to us was in a case taken to the Lands Tribunal[20]. In that transaction the essence of the contract between the parties was the provision of call centre services by Capita to the BBC. It suited the parties that the services should be provided by Capita to the BBC from BBC premises in Belfast (a floor in the BBC Blackstaff Studios in Great Victoria Street). But the relationship between the parties was governed by the outsourcing agreement between them. If that relationship was brought to an end – for whatever reason – there was no question of 'tenant's goodwill' to merit protection.

3.9 We were given details also of a *supply* agreement. The solicitor acted for a party which agreed as part of the terms of the agreement to build a new facility on its premises which the supply company could occupy so long as it was performing the terms of the supply agreement. But the client was unwilling to contemplate that if the supply agreement came to an end – for whatever reason – the supply company could continue to operate from the client's premises. That could result in the supply company operating to supply the client's competitors.

[20] *Capita Business Services Ltd v British Broadcasting Corporation* [2008] BT/57/2006.

3.10 Similarly, in the case of *franchise* agreements the relationship between franchisor and franchisee depends on the franchise agreement. In cases which involve the letting of premises by the franchisor to the franchisee as part of the franchise arrangements, the franchisor does not wish the premises to be burdened with obligations involving the 1996 Order if the franchise comes to an end. If the franchise is brought to an end – for whatever reason – there is no question of 'tenant's goodwill' to merit protection.

Management Buy Out transactions

3.11 We were given several examples of difficulties which have arisen in this category of transaction:

(i.) An international trading company wished to dispose of a business carried on by a Northern Ireland subsidiary to a management buy-out team. As part of the commercial negotiations it was agreed the seller would retain ownership of the property from which the business was carried on but was prepared to grant the management buy out team a three year lease to allow it time to relocate to other premises. This arrangement could not safely be accommodated within the terms of the 1996 Order as the management buy out team would have acquired security of tenure. As the transaction was structured as a share sale of the subsidiary company, the seller had to grant the lease to the subsidiary prior to completion of the management buy out and seek Lands Tribunal approval of an agreement to surrender the lease in three years' time. That approval was ultimately obtained but only with difficulty. Had it not been obtained, it had been agreed between the seller and the management buy out team that the subsidiary would surrender the lease back to the seller before completion of the management buy out and that, at completion, the seller would grant the management buy out team a nine month lease with the option to renew for a further nine months, that being the maximum permitted under the 1996 Order if security of tenure was to be avoided. Ironically, in those circumstances, the 1996 Order would have operated not to protect the management buy

out tenant but to disadvantage it by creating pressure to relocate within a relatively short period.

(ii.) Another international trading company wished to dispose of a Northern Ireland subsidiary to a management buy out team. The property from which the business was conducted had very significant development potential and the seller wished to retain ownership in order to realise that potential. Again, it was agreed as part of the commercial deal between the parties that the management buy out team would be granted a three year lease to allow it time to relocate. Contemporaneously within the management buy out transaction, the seller agreed the sale of the property to a developer who had concerns over the property arrangements between the seller and the management buy out team. This gave rise to considerable further negotiation, and consequently to increased cost, as between the seller and the developer on the one hand and the seller and management buy out team on the other. Ultimately, the matter was resolved satisfactorily, but only because the developer was prepared to take a commercial view that it would, once planning permission for the proposed development had been obtained, be able to recover possession from the management buy out team on the redevelopment ground contained in Article 12(1)(f) of the 1996 Order. Had the developer not been prepared to take such a view, the entire transaction might well have unravelled, to the detriment of all concerned, including the management buy out tenant.

(iii.) A foreign company was closing down its Northern Ireland operation and agreed to sell its factory premises here to another substantial multi-national trading company. The seller wanted to be able to retain possession of part of the factory for a period after completion in order to facilitate a smooth relocation to premises outside Northern Ireland. The terms on which the seller was to be permitted to remain in possession became one of the most significant commercial issues in the transaction and resulted in prolonged negotiations and increased costs. The buyer's concern was that, by

accommodating the seller's request to remain in possession for up to five years, it risked creating security of tenure if that arrangement was structured as a conventional lease reserving a commercial rent. A compromise was ultimately hammered out on the basis that the buyer retained a proportion of the sale price until a successful application had been made to the Lands Tribunal to approve a surrender of a tenancy in favour of the seller. Under the terms of the 1996 Order, the Lands Tribunal application could only be made when the tenant was in possession under the tenancy. Consequently, there was no certainty that the application would be successful. Ultimately, but not without difficulty, it was successful. Had it not been, the buyer would not have been able to obtain the benefit of all it had contracted to buy. The retention would, in those circumstances, have been of relatively little comfort. Its purpose was primarily as an incentive to the seller to vacate by the due date and thereby obtain payment.

(iv.) Another firm of solicitors was acting for a management buy out team. The company owned a single property and the management buy out team wished to acquire the property as part of the buy out but could not afford the full purchase price in the short term. The company owners were happy to sell and did not wish to create a long term tenancy. Had contracting out been permissible, the matter could have been dealt with simply on the basis of, for instance a five year lease incorporating tenant's option to purchase, but with the lease contracted out from the 1996 Order. As contracting out was not possible the parties had to adopt the stratagem of a nine month lease to be followed by a three year lease but subject to Lands Tribunal approval of an agreement to surrender applying to the three year lease. As the solicitors comment this was an unnecessarily messy transaction involving additional fees and time which could have been avoided if contracting out from the 1996 Order were permissible.

Factory outlets / turnover rentals

3.12 We received commentary from both a solicitor and a commercial property agent in regard to this category of transaction:

(i.) A solicitor who has personally dealt with a number of these schemes throughout Northern Ireland explains the common feature of these schemes is to have short term leases where the main rental is based on turnover. The short term nature of the leases is to allow both the landlord and the tenant flexibility to establish whether the business will be successful and the ability to terminate the lease if the turnover is insufficient to sustain the business. This arrangement is thought to be beneficial to both parties and allows for the distinct nature of factory outlet centres. She considered that the difficulty with the current business tenancies legislation is that it does not allow for a lease such as this to be terminated if the required turnover is not reached. Both landlords and tenants of these schemes are then forced to use agreements for surrender and other penalties 'as a means of circumventing the legislation'.

(ii.) A commercial property agent with considerable experience in property transactions of all categories across Northern Ireland was involved in negotiations to let a substantial site to an operator of a proposed factory outlet centre. The parties were some distance down the road in the transaction when it became apparent that the prospective operator could not effect sub-lettings of the units outside the scope of the 1996 Order. Quite literally, the inability to contract out of the 1996 Order was fatal to that particular transaction.

Large Tenants and Retailers

3.13 Businesses such as 'superstores' and other large retailers often wish to grant 'concessions' of small areas within their large stores. Again a solicitor in practice in Northern Ireland informed us that because of the inability to contract out of the business tenancies legislation such businesses consider they have no option but to grant tenancies at will or licences. These offer the prospective traders very short terms and uncertain occupation. As a result often the transactions do not proceed. The large retailers must avoid the trader getting

security of tenure and as a result the trader is forced to take a short term licence or tenancy which can be terminated at any time. The answer would be to allow for fixed term leases but with no security of tenure beyond the agreed fixed term: that should suit both parties.

PFI / PPP Schemes

3.14 It was also pointed out to us that the inability to contract out of the 1996 Order creates significant difficulties for both parties in relation to PFI / PPP schemes. A firm of solicitors explained that they were well aware of the problems. The issue is that in order to secure bank finance, which may often run to several £100 million, the project company has to be given a sufficient interest in the land which is the subject of the development to allow security to be taken. The usual procedure is that the private sector project company arranges to build the scheme and then the public sector body occupies the new building which is serviced and maintained for them for an agreed period of years. The solicitors explained that they had spent the last period of years trying to deal with the concerns of the public sector that if the project company are given access to and occupation of the site for a period they will get security of tenure and the requirements of the project company that they need to be given full access to the site and the bank must have an interest to secure. The outcome may be that a form of licence is used but one has to address the issue of whether the transaction is that of a licence to occupy in the true sense. This is another instance where both parties are trying to deal with the same concerns but the legislation does not really allow for it.

Sub-leases

3.15 A solicitor of very many years experience in commercial property leasing work explained to us that a landlord may not wish to grant consent to a tenant subletting part of its property because of the landlord's concern over the security of tenure protecting the sub tenant under the current legislation. This is because upon the expiry of the 'head lease' the sub tenant may be the party entitled to apply for a new tenancy under the provisions of the legislation. Tenants themselves may also be reluctant to see their sub-tenants having such right. This can adversely affect the landlord's ability to deal with the property on the expiry of the lease. So this may be forceful argument for permitting contracting out – at least in relation to sub leases of part of a holding.

3.16 A summary of the case for contracting out was well put to us by one solicitor:

> As you know I practised in London for some time before returning to Northern Ireland and I found the system of contracting out in England to be straightforward and fair for both landlords and tenants. It encourages small businesses to take leases and to provide a landlord with some comfort that he can get the premises back after a specified period of time. As more and more tenants take leases in Northern Ireland they are amazed at the difficulties which result from our inflexible legislation and it often discourages them from implementing their usual arrangements.

THE CASE AGAINST – RESERVATIONS ABOUT CONTRACTING OUT

Introduction

3.17 As we have already indicated, some whom we consulted were, in the interests of more vulnerable tenants, opposed to a relaxation of the current prohibition on contracting out, or at least they had reservations about the Project.

3.18 Accordingly, we sought, throughout the Project, to encourage as wide and free a debate as possible. And it should not be thought that those who made the case for the Project necessarily disregarded the case for at least some continuing protection for the more vulnerable categories of tenants.

3.19 We did, however, acknowledge in the Consultation Paper that the collection of evidence as to vulnerability was much more problematic. In a sense this is the dark side of the business tenancy world in that so many of the vulnerable do not seek legal or even agents' advice before entering into business tenancy arrangements. This seems from the soundings we have taken to pertain or be more prevalent in transactions involving small shops, cafes, taxi offices and small start up businesses or trades.

3.20 But we did consider that the fact we could not collect any statistical data about these categories should not mean that the 'better evidence' we did obtain (through for instance the case studies) inevitably means that the case for contracting out should prevail.

3.21 So we placed some considerable weight on the (albeit limited) amount of evidence we have been able to collect – largely with the kind assistance of the RICS and some of its members.

3.22 Accordingly in the Consultation Paper we set out and evaluated the evidence so far collected. This included the following points:

- That agents have a more 'hands on' view of the whole of the market than solicitors. Indeed, this was accepted by many of the solicitors to whom we spoke.
- The view was expressed that there is a huge degree of ignorance among small businesses as tenants.
- Concern was also expressed that many solicitors are not fully or adequately informed as to the provisions of the legislation.
- A two tier system prevails: the larger commercial clients desire the opportunity to contract out as compared with the smaller tenants who struggle to receive any meaningful representation: protection is at a premium for that category. It was described to us that this situation pertained especially in the provincial towns and that the system of the 1996 Order was necessary or desirable to protect the 'lower tier' of tenants.
- In this context concern was expressed that landlords could force unrepresented tenants to contract out.
- One agent commented that there was no doubt that there were instances where redevelopment had been curtailed because of the inability to contract out of the 1996 Order. He agreed that this was frustrating and often expensive from a developer's point of view. But he felt that the 1996 Order was often the only protection for small business tenants against the less scrupulous landlords seeking to charge excessive rents over and above what the market would sustain. Without the 1996 Order some small business tenants (in the circumstances where such tenants often did not seek professional representation when taking on or renewing leases) would be faced with the choice either to pay the excessive rent or to be ejected from the premises which were the essential base for their business.
- An agent with some 80% of his work on behalf of tenants felt there was clear evidence that tenants were given an unfair ride

by landlords. So, on that view it is justifiable that the legislation should be heavily loaded in favour of such tenants.

- The agents felt there is increasing evidence of informality in the system. Partly this may be due to the current recession where formal long term leases are now more a rarity for understandable reasons. Partly it is due to devices such as 'turnover rent' leases and licence arrangements.
- These agents felt that the legislation, despite its contracting out bar, has not in fact stymied long term development.
- The agents agreed that the flexible and pragmatic approach taken by the Lands Tribunal was helpful to both landlords and tenants in achieving case by case resolutions appropriate to the circumstances of each case. (Concern was expressed that any reforms of the tribunal system could prejudice this if the 'reforms' made the Tribunal more rule bound and less adaptable and 'user friendly' as it currently can be with its informed and flexible but fully independent role).
- It was agreed that the current economic recession is currently a determining factor: a landlord will be keen to have a tenant renew on any terms – but it was agreed that law reform should not be predicated on the current economic circumstances.
- The view was also expressed that if contracting out procedures are introduced the danger would be that the professional advisors would protect the interests of the larger categories of tenants while the smaller tenants would continue to go unrepresented and any 'protections' in any reform legislation would be overridden or ineffective.
- There are many good cases for contracting out but the concern is to provide protection against a malevolent landlord who applies contracting out for simple evasion of the legislation.

3.23 There was concern that a provision for contracting out, but with the protection that the tenant must first obtain prior legal advice, may be ineffective if the legal advice does not include informed commercial advice. An example submitted to us demonstrated this point. A couple spent a considerable amount of money (their life savings) acquiring premises (by way of assignment of the existing lease) in order to carry on the existing café business and they spent considerable sums on refurbishment. Soon after, the landlord was able to

exercise an early termination clause in the lease to permit redevelopment, for a major shopping centre. This proposal was on the horizon at the time that the couple took the assignment of the lease. The landlord was able to establish grounds for refusing a new tenancy. The tenants had purchased the goodwill at considerable cost, lost, and received only a pittance in compensation. Perhaps this was a case where the solicitor only advised on the legal points and not in regard to the commercial risks.

3.24 Professionals within the Northern Ireland Housing Executive indicated general support for the current legislation and that they would not favour provisions to permit contracting out. The Housing Executive as a public body, has dual landlord and tenant functions. In both capacities they would be generally supportive of the status quo. In the capacity of the Housing Executive as a tenant it is their view that the security of tenure provided by the legislation is, and would remain desirable, particularly in circumstances where the Executive may make a substantial financial commitment in terms of the building infrastructure which is the subject of the relevant lease. Accordingly they are not aware of any obvious commercial advantage, in the above circumstances to the proposed contracting out provision. In its capacity as landlord the Housing Executive has a significant commercial property portfolio. Internally, the view has been expressed that the existing 1996 Order provides a level of certainty in relations between landlord and tenant, legal precedents have been established and the forum of the Lands Tribunal provides an expert and relatively cost efficient means of settling disputes. In the context of commercial lettings, it was their experience that the current legislation represents on the whole a fair balance of the rights and responsibilities between landlord and tenant. They were not aware of any commercial justifications or imperative to amend the existing legislative framework (by way of the proposed contracting out provision) in that regard. They did however propose a specific exemption for 'community lettings'[21].

[21] See Chapter 6 paragraphs 6.33 to 6.34.

CHAPTER 4. CONSULTATION RESPONSES

4.1 As stated earlier, the Consultation Paper was published on 1 June 2010 and widely distributed via hard copy and e-mail, to a range of consultees ranging from a mix of legal professionals, property professionals, academics, government representatives and various associations and organisations. The Paper was also published on the Commission's website.

4.2 The Consultation Paper contained 25 questions for consultees to respond to based on the various issues discussed and proposals raised. 20 responses were received, 16 of which were substantive comments and 4 of which were nil returns.

4.3 We are most grateful to the individuals and bodies who responded to the Consultation Paper. These responses have been invaluable in formulating our recommendations. We would also like to acknowledge those who have provided assistance on a more informal basis through meetings, discussions and comments at various stages in the Project, and especially during our consultation period. A list of all those who helped us can be found in Appendix A.

4.4 The questions in the Consultation Paper centred on the following areas:

Chapter 3 – Contracting out – the case for and against

Questions A & B: The case for contracting out

Questions C & D: Representation against contracting out

Chapter 9 – Possibilities for Northern Ireland

Questions E – Q: The various options

Chapter 10 – Minor Reforms

Questions R, S & T: Compensation

Question U: Landlord applications

Question V: Failing to reach an agreement

Question W: Grounds for opposing the renewal of a tenancy

Questions X & Y: Agreements to surrender

4.5 Our suggestions in regard to minor reforms to the legislation are dealt with in Chapter 6.

4.6 We have carefully considered and analysed all of the responses received. We have considered both formal and informal discussions and the meetings that took place during the consultation period. We would highlight that quantitative analysis of responses has not been the determinate of our recommendations. Instead we have tried to take account of all the issues raised and comments submitted in order to provide an suitable solution which maintains an appropriate balance.

THE ISSUES

Contracting out in principle

4.7 The majority of consultees were in favour of relaxing the absolute prohibition on contracting out in some format. Some consultees preferred the market freedom approach and felt that the prohibition was an unnecessary regulatory measure. However, there was general acknowledgement that a certain level of protection may still be required. A range of views was expressed as to whether contracting out should apply to all tenancies or just specified categories of tenancies. On the other end of the scale there were those who favoured market regulation and felt that the absolute prohibition on contracting out is an important aspect of the legislation. Of those who objected to a relaxation of the absolute prohibition some consultees put forward alternative suggestions of how the legislation could be amended to accommodate the situations outlined in the Consultation Paper, without introducing contracting out per se.

Type of contracting out

4.8 We raised the issue as to what degree of contracting out would be appropriate. Complete contracting out would remove all of the protections contained within the 1996 Order. This did not receive a high level of support as it was considered to be much too drastic to remove all protection currently available to tenants. Substantial contracting out would entail contracting out of Articles 5 to 9 of the 1996 Order which would be similar to the position in England and Wales. In practice this would have a similar effect to complete contracting out. Substantial contracting out was not well supported either for much the same

reason. Most consultees supported the view that favoured limited contracting out. This would only allow landlords and tenants to opt out of the right to be granted a renewal of the tenancy, with the remaining provisions of the 1996 Order applying to the tenancy.

The various options

4.9 Our analysis of responses highlighted that there was no clear consensus as to which was the most appropriate option to pursue. Some consultees were in favour of a combination of different proposals such as both the English model and the Republic of Ireland model. Others commented that they were indifferent to the system introduced between several models – mostly the English model and the Republic of Ireland model.

Republic of Ireland model

4.10 Consultees seemed to be most enthusiastic in relation to the contracting out system in the Republic of Ireland which allows for a system of renunciation of the tenant's right to a new tenancy on receipt of independent legal advice. Although many consultees suggested that should this proposal be pursued, most thought that it would be appropriate to tweak the Republic of Ireland model in certain regards.

English model

4.11 The majority of consultees had reservations about the use of 'health warnings' currently in place in England and Wales. There are concerns that contracting out will become the norm and the interests of vulnerable tenants will not be sufficiently safeguarded. It should be noted, however, that we did receive some helpful suggestions as to how the English model could be improved and adapted.

'Bigger' tenancies

4.12 We had put forward a suggestion which involved bigger tenancies being able to contract out by reference to Net Annual Value (NAV), floor space or rent. However, most respondents were against this option. They felt that it is arguably an arbitrary determinant of 'vulnerable tenants' and would have

practical difficulties. Consultees were in agreement with the Commission that it would be difficult to determine the appropriate threshold. It was also highlighted that vulnerable tenants may fall under the contracting out thresholds due to the nature of their business, in situations when they should still receive the protection of the 1996 Order.

Short term leases excluded from protection

4.13 We also suggested that a possible relaxation of the prohibition could take the form of extending the length of short term leases excluded from protection. This was met with a mixed response, although the majority view was that the current threshold of 9 / 18 months is too low and should be extended. It was submitted that goodwill takes several years to build up and that an 18 month tenancy is still a reasonably short term letting which should not attract protection. One consultee noted that if this period was extended it would go some way to aid some of the specific circumstances in which the absolute prohibition is causing problems, for example in the case of management buy-outs. This issue is further considered in Chapter 6.

Specified categories of tenancy

4.14 A further proposal considered the exclusion of specified categories of tenancies. This proposal was as a result of the case studies submitted by solicitors outlining the various situations in which the absolute prohibition is causing problems. It was proposed that contracting out could be achieved by the extension of Article 4 categories, which are exempt from the legislation. Some consultees felt that Article 4 should be updated to cope with changed circumstances but many felt that this approach would be too piecemeal and would quickly become outdated.

Lands Tribunal involvement

4.15 One consultee has proposed that the issue of contracting out should be determined on a case by case basis by the Lands Tribunal. This would take a similar format to the procedure currently used for agreements to surrender. However, many consultees felt that it would not be appropriate to involve the Lands Tribunal, as it would not be a practical solution in situations where negotiations require commercial certainty in a limited timeframe.

Where the lease is ancillary to a commercial transaction

4.16 The final proposal centred on an exclusion where the lease is ancillary to a commercial transaction and should not be subject to the protections of the 1996 Order. This particular proposal has been subject to much debate in our consultation meetings and discussions. It has received support from some consultees who feel that it offers a compromise between contracting out in limited circumstances whilst also protecting the majority of vulnerable tenants. Some consultees did raise concerns over the terminology that might be used and whether it would provide enough certainty for practitioners. Consultees were also concerned regarding the idea of defining the circumstances where a transaction would be ancillary as this may quickly become outdated. This option may also not apply to some situations where the prohibition is causing difficulties such as turnover rents.

CHAPTER 5. DECISION

INTRODUCTION

5.1 The primary aim of the Project was to consider the 'absolute bar' on contracting out as contained in Article 24 of the 1996 Order. As already indicated, we received some 20 responses to our Consultation Paper and in addition gained valuable help from all those who attended consultation meetings with us or who have helped us in other ways.

5.2 The key issues are:

- Should there be any relaxation of the 'absolute bar'?
- If so, to what extent should the bar be relaxed?

5.3 We have considered all the responses which we have received. It is not of course a 'clapometer' contest so quantitative analysis is not to be a determinant of the decision we should make. Nevertheless, it is clear that the preponderance of responses favour relaxation of the bar though within that 'majority' there is no one clear preference as to the degree of relaxation or as to the method of relaxation.

5.4 As Ronan Cormacain our legislative drafting consultant has commented, usually by this stage in legislative drafting / policy development the 'right idea' becomes readily ascertainable from the debate. Here, however, we have very cogent reasons on behalf of about four different options as well as cogent expression of view from those who are opposed to any wide scale relaxation. The task of deciding which way to take has been difficult as we have to plot our way between some very divergent views.

5.5 However, we have identified two major positions:

- The majority of those in favour of wide scale relaxation adopt a reasoning or position based on the desirability of 'market freedom'. Why should the state intervene in market relationships in this particular area of commercial activity? They point to the fact that there is substantial provision for contracting out in England and Wales and in the Republic of Ireland (and

Scotland has only limited business tenancy protection legislation). So their view is why should Northern Ireland be different?

- The contrary view, espoused by those who do not favour relaxation, or who favour only a limited degree of relaxation, is that 'market regulation' still serves a useful and proper function in this area of commercial activity. Their view is that the smaller business tenant should continue to enjoy the degree of business protection that has been afforded under legislation in Northern Ireland since 1964.

5.6 There are two factors that we, in reaching our independent conclusions, consider to be significant:

- Firstly, there is a preponderant view (even among those who are reluctant about much, if any, relaxation) that there should be some mechanism for contracting out or exemption of leases for the purposes of complex business transactions. These are categories such as leases connected with outsourcing / supply / franchise agreements and of the other categories which we discussed in the Consultation Paper[22]. So there seems to be general recognition that the absolute bar in the cases of such categories of complex transactions is unjustified and constitutes a circumstance where inappropriate regulation is making it difficult to do business in Northern Ireland. So ripe for law reform.
- We also have to act consonant to our 'equality duty' as a public body under section 75 of the Northern Ireland Act 1998. In accordance with this duty we have screened the Consultation Paper proposals and the responses for assessment of potential differential impact on any of the categories as specified in section 75. This screening exercise has raised the issue of a possible differential impact of removal of the bar in its impact on business start up in minority ethnic communities. Evidence seems to suggest that there is a poor take up of business support services within these groups. Consequently, the relaxation of the absolute bar might be considered to have such differential impact.

5.7 So it appears to us that, consonant with our equality duty, we should not propose an absolute 'market freedom' solution but that we should recommend the continuance of an appropriate degree of 'market regulation'.

[22] NILC 5 (2010) paragraphs 3.4 to 3.16.

5.8 However, it also appears that this should not constrain us from adopting law reform measures specifically targeted to address leases in the complex business transactions scenarios (as identified above). This is on the basis that anyone involved in such complex transactions is more likely to have a range of business support services whatever their ethnic background.

OUR PROPOSAL

5.9 For these reasons we are minded that the format of the reform should be along the following lines:

- There would be an additional exemption for leases in the case of complex transactions by way of an appropriate textual amendment to the 1996 Order.
- This would provide for exemption of a lease where the solicitors for the parties could provide a joint certificate that the lease formed part of a suite of contractual documentation for a complex transaction and that in their joint opinions, the legislative requirements for the exemption were satisfied.
- This certificate could not oust the jurisdiction of the courts. We do not feel it would be proper to attempt to preclude any court inquiry into whether the exemption has in fact been satisfied. But it is difficult to see why any court would wish to quibble with any such joint certificate by reputable solicitors.
- The crux of the test for the exemption would be that the lease forms part of broader commercial arrangements and the purpose of the lease is to in some way facilitate those other commercial arrangements becoming effective.
- We have considered wording such as the certificate could apply only where the lease was ‘necessary for’, ‘supplementary to’, ‘ancillary to’, ‘associated with’ the complex transaction. But we wish to eschew wording which only might give rise to doubt in any particular transaction as to whether or not the relationship between the lease and the remainder of the transaction fitted the chosen legislative wording.
- We are minded to a conclusion that the solicitors’ joint certificate should simply list the suite of documentation with which the lease was associated in the transaction.
- On this basis also we do not feel that we would have to define ‘complex transaction’. The transaction would be as identified in the list of documents specified in the solicitors’ joint certificate. Our original draft definition of

'complex transactions' stretched to many pages, was overly prescriptive and technical and would no doubt be overtaken within a short period of time by innovative business models devised by adroit commercial property solicitors.

- One area of difficulty is possibly that of turnover leases which do not relate to other legal documentation. It has been suggested to us that their position could be dealt with by way of adding another ground of opposition to Article 12(1) of the 1996 Order related to the tenant's failure to meet the turnover requirements. We deal with this issue in Chapter 6[23].

CONCLUSION

5.10 We have set out the reasons why we do not consider that we should support relaxation to the extent now provided for in England and Wales or the Republic of Ireland (because of the specific equality duty in this jurisdiction). To that extent 'market regulation' has to prevail over 'market freedom'.

5.11 But we maintain that we are correct to ring fence the area of 'complex transactions' as being a specific area in which 'market freedom' should prevail over 'market regulation'. So in this specific area we do wish to make the exemption procedure as business friendly as possible. We maintain that this is a legitimate aim of law reform in response to the specific area of business difficulty which has been identified.

[23] Paragraphs 6.35 to 6.36.

CHAPTER 6. MINOR REFORMS

INTRODUCTION

6.1 Chapter 10 of the Consultation Paper set out possible minor reforms to the 1996 Order. We have considered the responses and additional suggestions put forward and the following sets out some recommendations.

EXTENSION OF SHORT TERM LETTINGS

Issue

6.2 Under Article 4(1)(c), the 1996 Order does not apply to a tenancy granted for a term of 9 months or less except where the tenant (or a predecessor) has been in occupation for more than 18 months. Many respondents supported an increase in this time period. The most popular threshold seems to be to extend it to a term of 18 months and not for a total period exceeding 36 months, although some have suggested that it should be increased to a term of 12 months and not for a total period exceeding 24 months.

6.3 Consultees have pointed out that the current ultimate threshold of 18 months is restrictive and they argue that tenancies of up to 3 years for example, are still sufficiently short term in that goodwill is not an issue and therefore should not be subject to the protection of the 1996 Order. One consultee also pointed out that increasing the threshold might assist management buy-outs as a longer period such as 3 years would normally be sufficient time to arrange to relocate.

Comment

6.4 We view this as a relatively straightforward amendment that has a high level of support, albeit mostly among commercial solicitors. However, a policy issue arises as to whether the level of protection currently given to tenants should be reduced and if so to what extent. Consequently, we are minded to take a cautious approach. We recommend accordingly that Article 4(1)(c) be amended so that the 1996 Order shall not apply to a tenancy granted for a term not exceeding 12 months except where the tenant (or a predecessor) has been in occupation for more than 24 months.

COMPENSATION PROVISIONS

6.5 **Consultation Paper Questions**

- Where a landlord can successfully oppose the renewal of a tenancy is the measure of compensation acceptable?
- Do you consider the measure of compensation adequate where improvements have been carried out?
- Does the 1996 Order operate to prevent effective improvement / refurbishment of business property? [24]

Issue

6.6 Only two consultees supported an amendment to the provisions concerning compensation. Most consultees seemed content with the current provisions. One consultee suggested that compensation for improvements and loss of goodwill should be removed. Another consultee proposed that the Lands Tribunal should determine verified costs on a case by case basis.

Comment

6.7 There is not any widespread support for amendments to these provisions. So our view is that reform is inappropriate especially as it would be complex and time consuming to amend and the matter does not justify the considerable resources that would be required. Therefore, we would not recommend any such reform.

LANDLORD APPLICATIONS

Consultation Paper Question

6.8 The Commission has received some submissions that the 1996 Order can create difficulties for landlords in circumstances where the landlord is willing to proceed with the grant of a new tenancy but the tenant is unresponsive after service of the landlord's notice to determine. We asked consultees if they believed that it would be beneficial to amend Article 10(1) to allow a landlord to initiate a 'tenancy application' in such a situation? [25]

[24] NILC 5 (2010) paragraphs 10.3 to 10.6.
[25] NILC 5 (2010) paragraphs 10.7 to 10.8.

Issue

6.9 The majority of consultees were in favour of some amendment to this provision. Currently, under Article 10 a landlord can make an application that a tenant is not entitled to a new tenancy but there is no provision allowing a landlord to make an application for a new tenancy. On the other hand a tenant can apply for a new tenancy after having served a request for a new tenancy or having received a landlord's notice to determine.

6.10 A landlord who is willing to grant a new tenancy will normally serve a notice to determine along with the terms of a new tenancy but should a tenant fail to respond the only mechanism that is open to a landlord is to apply to the Lands Tribunal to vary the time which a tenant has to respond under Article 10(5). Though the Lands Tribunal is helpful to expedite such applications, this is an unnecessary (and perhaps unintentional?) regulatory difficulty. So it is a point where reform would be appropriate.

Proposals suggested

6.11 Some consultees rightly highlighted that a tenant should not be forced to take a new tenancy, but suggestions proposed include:

- Reinstate the two month time limit provision in 1964 Act requiring the tenant to respond – under section 4(6) of the 1964 Act on receipt of a notice to determine the tenant had, within two months of the service of the notice, to notify the landlord in writing whether or not, at the date of termination, the tenant would be willing to give up possession of the property comprised in the tenancy. It should be noted that this provision was unpopular as the tenant was deprived of the rights of renewal, if the tenant failed to meet the time limit. No doubt this is the reason why the two month deadline was removed by the 1996 Order, so we would not propose to reinstate it.
- There should be a reciprocal time period in which the tenant must respond to the landlord's notice to determine as is required by the landlord under Article 7(6) (see below).
- In default of an application by the tenant the tenancy will expire on its contractual expiry. This would meet with the same objections as reinstating the two month deadline.

Comment

6.12 An amendment would be of benefit and is well supported. We accordingly recommend that Article 10(1) be amended to include in a 'tenancy application' an application by the landlord for an order for the grant of a new tenancy.

FAILING TO REACH AN AGREEMENT – ARTICLE 7

Consultation Paper Question

6.13 Do you agree that Article 7(6)(a) should be amended for situations when the parties fail to reach an agreement regarding the terms of a new tenancy? [26]

Issue

6.14 Of the consultees who addressed this question all of them agreed that this provision should be amended. When a tenancy is coming to an end a tenant may serve a notice under Article 7 to renew the tenancy. Under Article 7(6) a landlord is required to serve a counter notice within two months stating whether the landlord opposes the tenancy or is willing to grant a new tenancy on the tenant's or modified terms agreed between the parties. Where a landlord is willing to grant a new tenancy and the two month period is nearing, but negotiations are not finalised, the landlord can only serve a counter notice which states that agreement has been reached. Consequently, if the landlord serves a counter notice stating that agreement has been reached both parties have lost the right to bring a tenancy application, and if negotiations later break down then there is uncertainty as to the position of a tenant who remains in possession. One consultee noted that there is a general inconsistency in that a landlord has to respond to a tenant's notice but a tenant does not have to respond to a landlord's notice (as highlighted above).

6.15 **Proposals suggested**

- Clarify Article 7(6)(a) so that a tenancy application could be initiated by the landlord after a counter notice has been served – this has the support of several consultees. This could be linked into any amendments to Article 10 which give the landlord the right to initiate a tenancy application.
- One consultee suggested that either the landlord or the tenant should be able to bring the tenancy application.

[26] NILC 5 (2010) paragraphs 10.9 to 10.11.

- Another consultee proposed an extension of a further two months in such a situation before mandatory submission to the Lands Tribunal.

Comment

6.16 There is substantial support for this reform. Given our proposal for amendment of Article 10(1) to include in 'tenancy application' an application by the landlord to the Lands Tribunal, we do not see the need for the landlord's counter notice procedure under Article 7(6)(a) and (b). As has been suggested, it is inconsistent to require a landlord to serve a counter notice where the tenant is not required to do so. Consequently, we recommend that Article 7(6) be deleted, that Article 10(2) be amended to include where a tenant has served a noticed containing a request for a new tenancy and Article 10(3) be deleted.

GROUNDS FOR OPPOSING RENEWAL OF A NEW TENANCY

Consultation Paper Question

6.17 Do you consider that the terms of Article 12(1)(g) and (h) should be reconsidered? If so how should they be amended? [27]

Issue

6.18 The provisions allow a landlord or someone with a controlling interest in a landlord company, the right to reoccupy the premises to carry on the landlord's own business there.

6.19 The majority of consultees were in favour of retaining the current provisions. One consultee suggested that Articles 13(4) and (5) which provide that Article 12(1)(g) and (h) cannot be relied on where the landlord has held the estate of the property for less than 5 years should be revoked entirely, whilst another consultee suggested that the 5 year period should be shortened.

Comment

6.20 The provisions do not appear to be causing great difficulties in practice and accordingly we do not recommend any amendment.

[27] NILC 5 (2010) paragraph 10.12.

AGREEMENTS TO SURRENDER – THE PROCEDURE

Consultation Paper Question

6.21 It has been submitted to the Commission that the process of obtaining consent to agreements to surrender is cumbersome and should be abolished for those parties that are professionally represented. Do you agree? [28]

Issue

6.22 This suggestion provoked a mixed response from consultees although many did highlight that, should general contracting out be introduced, agreements to surrender would be rather redundant anyway. However, as general contracting out is not being proposed there will still no doubt be a place for agreements to surrender.

Comment

6.23 A particular representation made to us concerned the requirement of Article 25(a) that the tenant must be in possession of the holding at the time when the agreement to surrender is entered into. The point was made to us that this requirement causes practical difficulties in such scenarios as change of units in a shopping mall or centre, for instance where landlord and tenant agree same in their mutual interest. In such cases there may be a series of moves required.

6.24 Of course, the requirement for the tenant to be in possession at the time of the agreement to surrender is an anti-avoidance protection particularly relevant to the smaller or vulnerable tenants. But the approval of the Lands Tribunal is a requirement of any agreement to surrender under Article 25(b) and we do not recommend deletion of that requirement. For that reason we consider it appropriate to recommend the deletion of Article 25(a) of the requirement that the tenant be in possession at the time of the agreement to surrender. The Lands Tribunal will be competent to exercise its discretion in proper cases but to withhold its approval if it is concerned that an agreement to surrender is a contrivance to avoid the protection of the legislation to the detriment of the tenant.

[28] NILC 5 (2010) paragraphs 10.13 to 10.14.

AGREEMENTS TO SURRENDER – LEASES PRE-DATING THE LEGISLATION

Consultation Paper Questions

6.25 Should Article 25 of the 1996 Order apply to leases pre-dating the legislation?[29]

Issue

6.26 The vast majority of consultees were in favour of providing that Article 25 should apply to leases which pre-date the coming into operation of the 1996 Order. Under paragraph 7 of Schedule 2 (Transitional provisions and savings) Article 25 applies only to leases entered into after 1 April 1997 (the commencement date of the 1996 Order[30]).

Comment

6.27 Certainly, the effect of paragraph 7 of Schedule 2 on Article 25 came as a surprise to the legal profession which had expected that it would be permissible to apply the agreement to surrender provisions to any lease. It may be that the legislative drafter at the time was concerned that applying the procedure to leases which pre-dated the 1996 Order might be to legislate retrospectively. But the Article 25 process requires the consent of both parties and the approval of the Lands Tribunal and so we do not see any detriment to provide now that Article 25 should apply to leases which pre-date the 1996 Order: with the passage of time, in any case, a diminishing number of leases. There is widespread support for this amendment and we recommend it.

PUBLIC SECTOR ISSUES

Issue 1 – Article 12(1)(i)

6.28 Under Article 12(1)(i) public authorities can oppose the grant of a new tenancy where possession of the premises is reasonably necessary for the public authority to carry out its functions under any statutory provision or rule of law. This is beneficial in many instances, but it has been pointed out to us by some public sector lawyers that there are difficulties for public authorities where a public authority does not require possession of a property in the immediate future, but seeks to retain the property for possible future use for statutory

[29] NILC 5 (2010) paragraphs 10.13 to 10.14.
[30] The Business Tenancies (1996 Order) (Commencement) Order (Northern Ireland) 1997 SR 1997 No.74.

functions. In such cases it would be in the public interest that the public authority seeks to derive rental income in the interim from such 'land banked' property. In such cases it should be in the public interest that the property is let out but the public authority may have concern that if it agrees a letting it may not be able to rely on Article 12(1)(i) to oppose a new tenancy. Consequently public authorities can be reluctant to let out property altogether.

6.29 One consultee stated that they were in favour of retention of the statutory protection in Article 12(1)(i). Another consultee proposed that the ability to contract out of land banked lands would be helpful, where the relevant department has vires to do so.

6.30 On further discussion of this issue it appears that in cases there are doubts about whether certain departments of government and some other public sector bodies may have statutory powers in every case for the commercial letting of land banked property. That is an issue outside the terms of this Project but it seems clear to us that it would be in the public interest for income to be derived from land banked property, particularly in current economic circumstances where public projects may be deferred, perhaps for many years.

6.31 Any such proposal would require careful consideration of the various statutory powers and widespread public consultation, but with obvious public benefit if appropriate reform could be achieved.

6.32 So far as concerns our current remit in this Project we do not recommend any amendment to Article 12(1)(i). Where a department of government or other public sector body has the statutory power for commercial letting of land banked property it can make a commercial decision in regard to such letting without the need for legislative amendment of this provision.

Issue 2 – Community lettings

6.33 The Northern Ireland Housing Executive drew our attention to 'community lettings' of houses under Article 23 of the Housing (Northern Ireland) Order 1981 and community lettings of commercial premises (usually shops) under Articles 28(2) and (4) of the same order. Such 'community lettings' are to charitable or community groups at a subsidised or nominal rent. It has been suggested that these should be specifically exempt from the 1996 Order by

adding a further exception to Article 4(1) as they are not lettings in the true sense.

6.34 This seems to us to be a reasonable amendment addressed at the specific issue of 'community lettings'. The amendment would not create a loophole in the general protection that the legislation affords to tenants and so we would recommend it. Further consultation, however, should be held to ascertain in particular the views of the community and voluntary sector in Northern Ireland.

TURNOVER RENT CLAUSES

Issue

6.35 Leases on a turnover rent basis are specified in our Consultation Paper[31] as one of the categories of complex transactions where reform may be justified. But the category will not sit easily in our solicitors' joint certificate proposal. One consultee has suggested that this problem could be addressed by adding another ground of opposition to Article 12(1) whereby a landlord can oppose a new tenancy on the basis that the lease provides for a turnover rent with turnover thresholds and the tenant has not met the turnover thresholds. In the alternative, Article 23 could be extended to allow the Lands Tribunal to sanction break options that were linked to turnover thresholds that were not met. There would be a complication with this option in that the tenant has to be in possession of the holding at the time. This would need to be qualified or removed in this situation.

Comment

6.36 The proposed contracting out joint certificate proposal would not encompass turnover rents. It seems that an additional ground of opposition in Article 12 would be a sensible amendment. By adding a further ground of opposition to Article 12, the result would be that a breach of the turnover condition would allow the landlord to oppose the grant of a new tenancy.

6.37 We recommend this specific amendment.

[31] NILC 5 (2010) paragraph 3.12.

ADDITIONAL SUGGESTIONS

Issue

6.38 The following are additional proposals submitted by consultees as part of their consultation responses.

- Clarification on the validity of Lands Tribunal documentation being signed by a tenant's agent on behalf of the tenant.
- Should the Order make provisions for the use of arbitration and alternative dispute resolution?
- Is it unfair that periodic tenancies enjoy the protection of the 1996 Order when they are designed to be short term – such as week-to-week?
- Clarification as to when the Lands Tribunal has jurisdiction to adjudicate on Article 26 – where consent is not to be unreasonably withheld or delayed.
- Proposal that the Lands Tribunal should have a general declaratory power.

Comment

6.39 The first three of these issues go beyond the remit of the Project which is limited to issues already within the 1996 Order. The fourth issue appears to us to be one where any clarification should be for the Courts. In regard to the final issue it has been pointed out that the Lands Tribunal has a declaratory power under Article 4 of the Property (Northern Ireland) Order 1978 to define the scope etc of impediments to the enjoyment of land. It has been suggested that the Lands Tribunal might be given a similar declaratory power in relation to the 1996 Order. We see merit in such proposal but it should be considered in the context of a general review of the powers and functions of the Lands Tribunal and as such is outside the remit of this Project.

DRAFT LEGISLATION

Business Tenancies (Amendment) Bill

[AS INTRODUCED]

Contents

A
BILL
TO

Amend the Business Tenancies (Northern Ireland) Order 1996.

BE IT ENACTED by being passed by the Northern Ireland Assembly and assented to by Her Majesty as follows:

Agreements excluding the Order

1. – (1) For Articles 24 and 25 and the cross-heading immediately preceding Article 24 of the Order (restrictions on agreements excluding provisions of the Order) substitute –

"Agreements excluding this Order

Agreements excluding this Order void

24. – (1) An agreement is void if it –

(a) purports directly or indirectly by any means whatsoever to preclude any person from making an application or request under this Order;

(b) provides for the termination or surrender of a tenancy in the event of the tenant's making such an application or request;

(c) provides for the imposition of any penalty, restriction or disability on any person in the event of that person making such an application or request; or

(d) purports to exclude or reduce compensation under Article 23.

(2) If only part of the agreement purports or provides as set out in paragraph (1), only that part is void.

(3) This Article applies whether the agreement is contained in the instrument creating the tenancy or not.

(4) This Article applies except as provided for by –

(a) Article 23(7);

(b) Article 25;

(c) Article 25A;

(d) Paragraph 6 of Schedule 2.

Exception: agreements to surrender tenancies

25. Article 24 does not apply to an agreement to surrender a tenancy if the agreement is approved by the Lands Tribunal.

Exception: agreements connected to other business arrangements

25A. (1) Article 24 does not apply to an agreement if –

(a) the agreement is connected to business arrangements outside the tenancy;

(b) the making of those arrangements is dependent upon the making of the agreement;

(c) those arrangements involve the parties to the tenancy, whether solely or with other persons; and

(d) the agreement is certified in accordance with paragraph (2).

(2) An agreement is certified if it–

(a) contains a statement, signed by a solicitor of each of the parties to the agreement, stating that in the opinion of those solicitors, Article 24 does not apply because the agreement satisfies the requirements of this Article; and

(b) sets out those business arrangements or lists the documents in which those arrangements are recorded.

(3) If the agreement is not contained in the instrument creating the tenancy, that instrument must –

(a) state that Article 24 does not apply to the tenancy; and

(b) make reference to the agreement.".

(2) Immediately before Article 26 insert as a cross-heading –

"Restrictions on alienation or improvements".

Interpretation

2.- In this Act "the Order" means the Business Tenancies (Northern Ireland) Order 1996 (NI 5).

Short title and commencement

3.- (1) This Act may be cited as the Business Tenancies (Amendment) Act (Northern Ireland) 2011.

(2) This Act shall come into operation on such day as the Department of Finance and Personnel may by order appoint.

EXPLANATORY NOTES

on the draft

Business Tenancies (Amendment) Bill

CLAUSE 1 – AGREEMENTS EXCLUDING THE ORDER

Restatement

The opportunity has been taken to restate Articles 24 and 25 of the 1996 Order. This is not strictly necessary as we are making no substantive amendment to them. However, it is considered to be beneficial for four reasons:

- Firstly, it allows the full law on contracting out to be clearly set out in this Bill, without having to cross refer backwards and forwards with the 1996 Order.
- Secondly, it allows for a better stylistic fit of the new substantive provision Article 25A into the 1996 Order.
- Thirdly, Article 24 is made gender neutral.
- Fourthly, it allows the existing provisions to be restated in what is considered to be a clearer fashion. The opportunity has been taken to delete what may be regarded as extraneous language.

Savings

There are no savings provisions – we are adding a new exception, we are not removing existing exceptions.

Clause 1(2)

Clause 1(2) is a consequential amendment as the new cross-heading introduced by the Bill will not cover Article 26.

'Solicitor'

We have not defined solicitor as a solicitor of the Supreme Court of Northern Ireland on the basis that solicitors from other jurisdictions should not necessarily be excluded.

The term solicitor is used without definition in several places in Northern Ireland legislation. See for example paragraph 2 of Schedule 2 to the Private Tenancies (NI) Order 2006.

APPENDIX A. THOSE WHO HELPED US

We would like to acknowledge those who have helped us throughout the Project.

CONSULTATION PAPER

SOLICITORS

Written Submissions

Organisations
Northern Ireland Commercial Property Lawyers Association

Solicitors in private practice in Northern Ireland
Phyllis Agnew, Tughans
Rosemary Carson, Carson McDowell
Adam Curry, Mills Selig
Nemonie Fulton, Cleaver Fulton Rankin
Brian Garrett, Elliott Duffy Garrett
Laurence Mahood, Elliott Duffy Garrett
Andrea McIlroy-Rose, McGrigors Belfast LLP
Anne Skeggs, Mills Selig
Graham Truesdale, John J McNally & Co
Eamonn Ward, Tughans
Rowan White, Arthur Cox (NI)

Solicitors in public sector practice in Northern Ireland
Frances Gallagher, Northern Ireland Housing Executive
Dominica Thornton, Belfast City Council
Jimmy Wilson, Departmental Solicitors Office

Solicitors in private practice in England
Paul Fleming, Mace and Jones

Solicitors in private practice in Republic of Ireland
Vivienne Bradley, McCann Fitzgerald
Ernest Farrell, Dockrell Farrell Solicitors
Marc McLaughlin, Arthur Cox

John Walsh, Arthur Cox

Attendance at Meetings

22 July 2009

Phyllis Agnew, Tughans
Kathryn Collie, Cleaver Fulton Rankin
Adam Curry, Mills Selig
Jim Houston, Cleaver Fulton Rankin
Laurence Mahoood, Elliott Duffy Garrett
Dawson McConkey, McGrigors Belfast LLP
Gordon McElroy, MKB Russells
Graham Pierce, McGrigors Belfast LLP
Alan Reilly, Carson McDowell
Anne Skeggs, Mills Selig
Alastair Todd, Carson McDowell
Rowan White, Arthur Cox (NI)
Jimmy Wilson, Departmental Solicitors Office

21 August 2009

Rosemary Carson, Carson McDowell
Johnny Forrester, Cleaver Fulton Rankin
Ian Huddleston, McGrigors Belfast LLP
Declan Magee, Carson McDowell
Andrea McIlroy-Rose, McGrigors Belfast LLP
Ciara McCloskey, C & H Jefferson

AGENTS AND CHARTERED SURVEYORS

Organisations

Royal Institution of Chartered Surveyors (RICS)

Written Submissions

Chris Callan, CB Richard Ellis
Rory Clark, Brown McConnell Clark McKee
Kenneth Crothers, Crothers Chartered Surveyors
David McKinney, James H McKinneys & Sons
Nuala O'Neill, Royal Institution of Chartered Surveyors

Nicholas Rose, RHM Commercial

Attendance at Meetings

5 October 2009

Chris Callan, CB Richard Ellis

Tim Hopkins, Hopkins Partnership

Nuala O'Neill, Royal Institution of Chartered Surveyors

30 July 2009

Kenneth Crothers, Crothers Chartered Surveyors

LANDS TRIBUNAL FOR NORTHERN IRELAND

Meetings on 6 August 2009, 4 November 2009 and 11 January 2011

ACADEMICS

Professor Norma Dawson, The Queen's University of Belfast

Dr J A Dowling, The Queen's University of Belfast

BUSINESS SECTOR

Meeting on 3 August 2009

Deirdre Stewart, CBI

LAW SOCIETY OF NORTHERN IRELAND

Meeting on 10 October 2009

Colin Caughey, Law Society of Northern Ireland

GOVERNMENT

Regina Terry, Civil Law Reform Division, Department of Justice, Dublin

ORGANISATIONS

Law Reform Commission, Dublin

LOCAL SOLICITOR ASSOCIATIONS

Antrim and Ballymena Solicitors Association
Bangor Solicitors Association
Belfast Solicitors Association
Foyle Solicitors Association
Portadown Solicitors Association

REPORT

Written Submissions
Cleaver Fulton Rankin
Rosemary Carson, Carson McDowell
Laurence Mahood, Elliott Duffy Garrett
Dawson McConkey, McGrigors Belfast LLP
Graham Pierce, McGrigors Belfast LLP
Rowan White, Arthur Cox (NI)
Jimmy Wilson, Departmental Solicitors Office

William Gowdy, Barrister-at-Law

Royal Institution of Chartered Surveyors
Tim Hopkins, Hopkins Partnership

Ards Borough Council
Newry and Mourne District Council
Office of the First Minister and Deputy First Minister

Chancery Division Liaison Committee
Northern Ireland Commercial Property Lawyers Association

Law Society of Northern Ireland

Department of Agriculture and Rural Development
Department of Justice
Disability Action Northern Ireland
Northern Ireland Judicial Appointments Commission

Attendance at Meetings

22 June 2010

Kathryn Collie, Cleaver Fulton Rankin

30 June 2010

Chris Callan, CB Richard Ellis

Kenneth Crothers, Crothers Chartered Surveyors

Tracey Flannigan, Colliers

Tim Hopkins, Hopkins Partnership

Nuala O'Neill, Royal Institution of Chartered Surveyors

7 July 2010

Jim Houston, Cleaver Fulton Rankin

Dawson McConkey, McGrigors Belfast LLP

Graham Pierce, McGrigors Belfast LLP

Tracey Schofield, Tughans

Rowan White, Arthur Cox (NI)

Jimmy Wilson, Departmental Solicitors Office

26 July 2010

Carolyn Brown, Federation of Small Businesses

George Dorrian, Federation of Small Businesses

27 July 2010

Ian Huddleston, McGrigors Belfast LLP

11 January 2011

Frances Gallagher, Northern Ireland Housing Executive

Jimmy Wilson, Departmental Solicitors Office

APPENDIX B. SOURCES OF INFORMATION

GENERAL SOURCES OF INFORMATION

Online Legal subscription services:

Westlaw.ie and westlaw.co.uk online legal information service. (www.westlaw.ie and www.westlaw.co.uk)

LexisNexis www.lexisnexis.com

Justis www.justis.com and Justcite www.justcite.com

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APPENDIX C. EQUALITY OF OPPORTUNITY SCREENING ANALYSIS FORM

POLICY SCOPING

Information about the policy

C.1 Name of the policy

Proposals for reform of the Business Tenancies (Northern Ireland) Order 1996.

C.2 Is this an existing, revised or new policy?

The policy represents the final recommendations which were formulated following the issue of the Business Tenancies Consultation Paper in June 2010, and the subsequent consultation responses received.

C.3 What is it trying to achieve?

Aims:

The policy aims to address representations made to the Northern Ireland Law Commission regarding the difficulties surrounding the absolute prohibition on contracting out of the Business Tenancies (Northern Ireland) Order 1996.

Objectives:

To present recommendations to Government regarding amendments to the Business Tenancies (Northern Ireland) Order 1996, in particular the absolute prohibition on contracting out, along with other minor amendments.

Context:

This policy is one of the policies / projects contained within the Northern Ireland Law Commission's First Programme of law reform (2009 – 2011). The policy is being taken forward by the Business Tenancies Project team, within the Northern Ireland Law Commission.

Desired outcome:

To amend the Business Tenancies (Northern Ireland) Order 1996 to accommodate transactions where the absolute prohibition on contracting out serves no useful purpose along with minor reforms to the Order.

C.4 Are there any Section 75 categories which might be expected to benefit from the intended policy? If so, explain how.

The policy will largely affect those in their professional capacity such as entrepreneurs, business people and service providers such as solicitors, property agents etc. The policy will have economic benefits for the general population as it facilitates certain commercial transactions, thereby making it easier to do business. By encouraging investment into the economy, this will in turn benefit section 75 categories.

C.5 Who initiated or wrote the policy?

The Northern Ireland Law Commission has responsibility for devising the policy. This Report sets out our final recommendations pursuant to section 52(1) of the Justice (Northern Ireland) Act 2002.

C.6 Who owns and implements the policy?

The Northern Ireland Executive is responsible for the implementation of the policy.

The Northern Ireland Law Commission sits within the Department of Justice and is jointly sponsored by the Department of Finance and Personnel and the Department of Justice. The recommendations will be laid before the Northern Ireland Assembly.

IMPLEMENTATION FACTORS

C.7 Are there any factors which could contribute to / detract from the intended aim / outcome of the policy / decision?

Yes

If yes, are they:

- *financial*

Budgetary and resource constraints.

- *legislative*

Timetable and legislative process, prioritisation.

- *other, please specify*

Assembly timetable and priorities.

MAIN STAKEHOLDERS AFFECTED

C.8 Who are the internal and external stakeholders (actual or potential) that the policy will impact upon?

- *Staff*

Staff will benefit from the proposals as members of the general population who will gain from increased business activity.

- *Service users*

Those acting in their professional capacity who are involved in commercial property transactions will benefit from the policy as it will better facilitate certain commercial transactions.

- *Other public sector organisations*

Public sector organisations who currently hold land will be impacted by the policy. The Lands Tribunal may also be impacted by changes made to the current business tenancies legislation. The Department of Justice and the Department of Finance and Personnel will also be impacted as joint sponsoring body of the Northern Ireland Law Commission.

- *Voluntary / community / trade unions*

Those involved in commercial property transactions will be affected by the policy.

- *Other, please specify*

Not applicable.

C.9 Other policies with a bearing on this policy:

- *What are they?*
- *Who owns them?*

Northern Ireland Law Commission – First Programme of Law Reform.
Department of Justice – Justice Act (Northern Ireland) 2002.

AVAILABLE EVIDENCE

C.10 What evidence / information (both qualitative and quantitative) have you gathered to inform this policy? Specify details for each of the Section 75 categories.

A detailed list of sources used throughout the course of the Project can be found in Appendix B.

We have contacted the following bodies to obtain evidence regarding the potential issues raised in the policy:

- Lands Tribunal
- Land and Property Services
- Northern Ireland Statistics and Research Agency
- UK Department for Business, Innovation and Skills
- Northern Ireland Council for Ethnic Minorities

We carried out an equality of opportunity screening analysis on our initial policy proposals contained in the Consultation Paper. At this stage, the Commission considered that there were no adverse impacts on any section 75 category. We did, however, receive a consultation response which highlighted the increasing number of ethnic minorities involved in business and suggested that the Commission gives further consideration to the impact on racial groups. We have taken this issue under specific consideration when formulating our policy. While the Commission recognises that racial groups may experience certain barriers to business especially in accessing support services, this policy does not create any additional negative impact for racial groups. In formulating the policy we took mitigating action by retaining important protection for all tenants, which in turn will benefit all section 75 groups, including racial groups.

Section 75 category	Details of evidence / information
Religious belief	See above
Political opinion	See above
Racial group	See above
Age	See above
Marital status	See above
Sexual orientation	See above
Men and women generally	See above
Disability	See above
Dependants	See above

NEEDS, EXPERIENCES AND PRIORITIES

C.11 Taking into account the information referred to above, what are the different needs, experiences and priorities of each of the following categories, in relation to the particular policy / decision? Specify details for each of the Section 75 categories

The needs, experiences and priorities of individuals in relation to the policy are not determined by their section 75 group, apart from those of different racial groups. It will impact upon those acting in their professional capacity of which religious belief, political opinion etc is not relevant.

Section 75 category	Details of needs / experiences / priorities
Religious belief	Not applicable
Political opinion	Not applicable
Racial group	Potential lack of access to professional support services
Age	Not applicable
Marital status	Not applicable
Sexual orientation	Not applicable
Men and women generally	Not applicable
Disability	Not applicable
Dependants	Not applicable

SCREENING QUESTIONS

C.12 What is the likely impact on equality of opportunity for those affected by this policy, for each of the Section 75 equality categories? Minor / major / none		
Section 75 category	Details of policy impact	Level of impact? minor / major / none
Religious belief	The policy affects those who are acting in their professional capacity and therefore religious belief is of no consequence.	None
Political opinion	The policy affects those who are acting in their professional capacity and therefore political opinion is of no consequence.	None
Racial group	This policy does not create any additional hurdles but seeks to ensure that there are protections in place so that they are not adversely impacted by the policy.	None
Age	The policy affects those who are acting in their professional capacity and therefore age is of no consequence.	None
Marital status	The policy affects those who are acting in their professional capacity and therefore marital status is of no consequence.	None
Sexual orientation	The policy affects those who are acting in their professional capacity and therefore sexual orientation is of no consequence.	None
Men and women generally	The policy affects those who are acting in their professional capacity and therefore gender is of no consequence.	None
Disability	The policy affects those who are acting in their professional capacity	None

	and therefore disability is of no consequence.	
Dependants	The policy affects those who are acting in their professional capacity and therefore the issue of dependants is of no consequence.	None

C.13 Are there opportunities to better promote equality of opportunity for people within Section 75 equalities categories?

The policy is essentially a technical amendment to current legislation which will affect service providers or those in acting in their professional capacity and therefore does not easily lend itself to promoting equality of opportunity between differing section 75 groups. The Commission was ultimately faced with the choice of market regulation and market freedom and the policy seeks to maintain an element of market regulation to ensure that there is adequate protection for all groups and especially those who may not be professionally advised.

C.14 To what extent is the policy likely to impact on good relations between people of different religious belief, political opinion or racial group?

Good relations between people of different religious belief, political opinion or racial group will be unaffected as the policy does not have a differential impact upon section 75 categories.

C.15 Are there opportunities to better promote good relations between people of different religious belief, political opinion or racial group?		
Section 75 category	If Yes, provide details	If No, provide reasons
Religious belief		No – the policy has no relevance to promoting good relations due to its technical nature.
Political opinion		No – the policy has no relevance to promoting good relations due to its technical nature.
Racial group		No – the policy has no relevance to promoting good relations due to its technical nature.

Age		No – the policy has no relevance to promoting good relations due to its technical nature.
Marital status		No – the policy has no relevance to promoting good relations due to its technical nature.
Sexual orientation		No – the policy has no relevance to promoting good relations due to its technical nature.
Men and women generally		No – the policy has no relevance to promoting good relations due to its technical nature.
Disability		No – the policy has no relevance to promoting good relations due to its technical nature.
Dependants		No – the policy has no relevance to promoting good relations due to its technical nature.

ADDITIONAL CONSIDERATIONS

Multiple identity

C.16 Generally speaking, people can fall into more than one Section 75 category. Taking this into consideration, are there any potential impacts of the policy / decision on people with multiple identities?

The policy will not have a negative impact upon differing section 75 groups or upon those with multiple identities.

C.17 Provide details of data on the impact of the policy on people with multiple identities. Specify relevant Section 75 categories concerned.

Not applicable.

SCREENING DECISION

C.18 If the decision is not to conduct equality impact assessment, please provide details of the reasons.

The Northern Ireland Law Commission is not minded to conduct an equality impact assessment as the Commission does not consider there to be any negative impacts.

C.19 If the decision is not to conduct an equality impact assessment the public authority should consider if the policy should be mitigated or an alternative policy be introduced.

The Commission has considered the barriers that racial groups may encounter in business due to cultural and language issues. The policy has taken account of this and has retained significant protection to mitigate against the policy having any negative impact on this specific group.

C.20 If the decision is to subject the policy to an equality impact assessment, please provided details of the reasons.

Not applicable.

MITIGATION

C.21 Can the policy / decision be amended or changed or an alternative policy introduced to better promote equality of opportunity and / or good relations?

Not applicable.

C.22 If so, give the reasons to support your decision, together with the proposed changes / amendments or alternative policy.

Not applicable.

APPENDIX D. REGULATORY IMPACT ASSESSMENT (RIA)

D.1 Title of Proposal

Proposals for reform of the Business Tenancies (Northern Ireland) Order 1996.

D.2 Purpose and intended effect of measure

Objectives:

To present recommendations to Government regarding amendments to the Business Tenancies (Northern Ireland) Order 1996, in particular the absolute prohibition on contracting out, along with other minor amendments.

The background

This policy is one of the projects contained within the Northern Ireland Law Commission's (NILC) First Programme of law reform (2009 – 2011). The Project was adopted as a result of submissions made to the Commission outlining various circumstances in which the absolute prohibition on contracting out contained in the Business Tenancies (NI) Order 1996 is causing difficulties in conducting business and is of no benefit to either party involved in the transaction. Northern Ireland is currently out of step with the position in England and Wales, Scotland and the Republic of Ireland, creating an impression that it is harder to do business in Northern Ireland. The final policy seeks to amend the legislation to allow for contracting out in limited circumstances, whilst retaining protection for vulnerable tenants.

Risk assessment

The Business Tenancies (Northern Ireland) Order 1996 was designed to ensure that tenants would have important protection in the area of commercial leases. However, the Commission is minded that in some instances the contracting out aspect of the regulation is overreaching and is discouraging more complex business transactions. The policy seeks to retain the protection in the majority of cases whilst allowing limited contracting out in the minority of business transactions where parties are professionally represented and well advised of the consequences. The Commission is unable to

quantify the risk, however we have obtained statistics that small and medium sized enterprises account for 99% of all private sector enterprises in Northern Ireland[32]. It is envisaged that the policy will only apply in the minority of cases, and the majority of tenants will still receive the benefit of the protection contained in the 1996 Order.

D.3 Options

Option 1: Do nothing

The Commission kept an open mind throughout the course of the Project and remained open to the idea that the legislation should be retained in its current form, with no amendment. However the evidence suggested that it would be beneficial if it could be amended in some form to accommodate the situations where the absolute prohibition is problematic.

Option 2: Limited contracting out

The alternative option centres on amending the legislation in order to accommodate contracting out. As the Project was focused on one issue of the protection for commercial tenants any reform was only ever going to take the form of an amendment to the current framework. The Commission put forward several suggestions in our Consultation Paper in regard to the form of amendment, ranging from complete removal of the protection for all tenants, to limited contracting out in limited circumstances. The final policy takes account of the comments and issues in relation to the various options and seeks to balance all the competing interests.

D.4 Benefits

Option 1:

The benefit to Option 1 is that it retains important protection for all tenants. However the problems and issues that were submitted to the Commission would not be addressed and arguably business is being lost as the absolute prohibition represents a hurdle to business in Northern Ireland, compared to other jurisdictions.

[32] The Department for Business Innovation and Skills released Small and Medium-Sized Enterprise (SME) Statistics for the UK and Regions 2009.

Option 2:

Amending the current legislation to accommodate contracting out in some format would be beneficial to businesses and the economy as a whole. There is also a strong argument that it will make Northern Ireland an easier place to do business, by facilitating certain commercial transactions, and will encourage future investment.

Business sectors affects

The policy will largely affect larger scale transactions and larger businesses and public sector organisations as it only applies when the commercial lease is part of a series of business arrangements for example PFIs / PPPs. The policy will affect the minority of business transactions.

Other Impact Assessments

An Equality Impact screening exercise has been carried out in relation to this policy. It can be found in Appendix C.

D.5 Costs

(i) Compliance costs

Option 1:

There would no cost involved.

Option 2:

If the legislation was to be amended the only additional cost involved would be to the parties to a commercial lease to which the policy applies. Any cost, however would be negligible as the policy dictates that parties can only contract out if a solicitors' joint certificate has been obtained stating that the lease is connected to other business arrangements. It is envisaged therefore that contracting out will only apply where parties are already professionally represented due to the nature of the complex transaction. Consequently, there will not be any additional costs to parties in the majority of cases, if at all. It is more likely that the policy will lead to cost savings, as at present parties are having to pay for professional advice to give effect to bona fide

business arrangements, which can lead to more complex arrangements than are necessary.

(ii) Other costs:

It is not anticipated that there would be any other costs.

(iii) Costs for a typical business

The policy will not affect the majority of small or medium sized enterprises which account for 99% of all business in Northern Ireland. It will be the minority of business transactions which will be able to take advantage of the policy, which ensures that important protections are retained. Of those who will be able to invoke the benefit of the policy, the cost will be negligible, if any. As stated above there is likely to be little if any, additional cost placed on parties who can avail of the policy as they will already have professional representation therefore a solicitors certificate will not be a burdensome cost. It is more likely that it will result in cost savings.

D.6 Consultation with small business: the Small Business Impact Test

The Commission met with representatives of the Federation of Small Businesses of Northern Ireland during our consultation period. We have also sought to maintain contact with them during the policy making process. They have not raised any issues or concerns as to the policy proposed. It has been very difficult to make contact with small businesses directly but the Consultation Paper was widely circulated to various organisations with small business contacts. We have also met with professional advisors of small businesses throughout the course of the Project and have taken account of the issues they raised when devising our policy.

D.7 Enforcement and sanctions

This policy does not require any enforcement or sanctions. It is aimed at facilitating certain commercial transactions.

D.8 Monitoring and Review

The policy represents recommendations by the Northern Ireland Law Commission which may be accepted by Government and the relevant department. It will be the

relevant Department who will be responsible for the monitoring and review of the policy.

D.9 Consultation

(i) Within Government

The Consultation Paper was widely circulated to all Government Departments, MLA's and local authorities. We received several helpful formal responses from Government.

(ii) Public consultation

The Consultation Paper was widely circulated to a wide range of consultees both by hard copy and email. The consultation period ran from 1 June until 30 September 2010. An electronic copy was also placed on the Commission website and distributed through various organisations. Throughout the course of the Project, and especially during the consultation period, we have arranged consultation meetings with various stakeholders and carried out informal discussions with interested parties. We received 20 formal responses to the Paper from a wide range of consultees.

D.10 Summary and recommendation

The Commission has concluded that an amendment to the current legislation is necessary due to the strong evidence in favour of amendment. The policy will retain the current protection for the majority of commercial tenants, whilst addressing those submissions put to the Commission at the inception of the Project. Any cost will be negligible and will be outweighed by the benefit to the parties involved.

D.11 Contact point

Equality Officer
Northern Ireland Law Commission
Linum Chambers
2 Bedford Square
Bedford Street
Belfast
BT2 7ES
Telephone: 028 90544860

NORTHERN IRELAND LAW COMMISSION

BACKGROUND

The Northern Ireland Law Commission is an independent body which was established in 2007 following the recommendations of the Criminal Justice Review Group (2000). Its purpose is to keep the law of Northern Ireland under review and make recommendations for its systematic development and reform.

The Commission was established under the Justice (Northern Ireland) Act 2002. The Act requires the Commission to consider any proposals for the reform of the law of Northern Ireland referred to it. The Commission must also submit to the Department of Justice programmes for the examination of different branches of the law with a view to reform. The Department of Justice must consult with the Attorney General before approving any programme prepared by the Commission.

MEMBERSHIP

The Northern Ireland Law Commission consists of a Chairman, who must hold the office of judge of the High Court, and four Commissioners, one of whom must be a person from outside the legal professions. The Chairman and Commissioners are appointed on a part-time basis. There is also a Chief Executive, who is appointed from the legal professions.

These positions are currently held by:

Chairman:	The Honourable Mr Justice McCloskey
Chief Executive:	Ms Judena Goldring MA, BLegSc, Solicitor
Commissioner:	Professor Sean Doran (Barrister-at-Law)
Commissioner:	Mr Neil Faris (Solicitor)
Commissioner:	Mr Robert Hunniford (Lay Commissioner)
Commissioner:	Dr Venkat Iyer (Law Academic)

Legal Staff

Clare Irvine LL.B, Solicitor
Imelda McAuley LL.B, LL.M
Katie Quinn LL.B, M.Sc

Legal Researchers

Rebecca Ellis LL.B, Solicitor
Patricia MacBride BA, J.D., Attorney-at-law
Catherine O'Dwyer B.A., M.A., Ph.D
Nicola Smith B.A.(Int), LL.B, LL.M

Business Support Team

Business Manager:	Derek Noble
Communications & HR Manager:	Cathy Lundy
Personal Secretary to the Chairman and Chief Executive:	Paula Martin
Administrative Officers:	Andrew McIlwrath
	Joanne Kirk

Legal Team for this Project

Neil Faris MA, LL.B, Dip Intl. Law (Cantab), Dip Mgmt (Open), Solicitor
Rebecca Ellis LL.B, Solicitor (from December 2009)
Ronan Cormacain LL.B, LL.M, B.L, Legislative Drafting Consultant
Darren McStravick LL.B, LL.M (November 2008 – November 2009)

CONTACT DETAILS

Further information can be obtained from:

Business Manager
Northern Ireland Law Commission
Linum Chambers, 2 Bedford Square, Bedford Street
Belfast, BT2 7ES

Tel: +44(0)28 9054 4860
Email: info@nilawcommission.gov.uk
Website: www.nilawcommission.gov.uk

Northern Ireland
Law Commission
promoting law reform in Northern Ireland

Linum Chambers
2 Bedford Square
Bedford Street
Belfast BT2 7ES
T : +44 (0) 28 9054 4860
E : info@nilawcommission.gov.uk
W : www.nilawcommission.gov.uk

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