

Explanatory Memorandum for Assembly Members

THE REGULATORY REFORM (BUSINESS TENANCIES) (ENGLAND AND WALES) ORDER 2003

ASSEMBLY CONSIDERATION OF DRAFT REGULATORY REFORM ORDER TO IMPLEMENT REFORMS TO LANDLORD AND TENANT ACT 1954 SCHEDULED FOR PLENARY 4th November 2003

Explanatory Memorandum for Assembly Members tabled in accordance with Standing Order 24

Summary

The UK Government proposes to reform primary legislation dealing with the leasing of commercial premises in England and Wales.

The Office of Deputy Prime Minister (ODPM) has introduced a draft Regulatory Reform Order (RRO) ***THE REGULATORY REFORM (BUSINESS TENANCIES) (ENGLAND AND WALES) ORDER 2003*** under the Regulatory Reform Act 2001. It will reform certain elements of the Landlord and Tenant Act 1954 in respect of statutory procedures relating to the termination and renewal of business tenancies and the security of tenure they afford to business tenants. The purpose of the reforms in the draft RRO is to modernise and streamline the provisions of the Act, making them more user friendly. The draft RRO would apply to Wales and England and was consulted upon during the summer and autumn of 2001.

As the draft RRO would modify an existing function of the Assembly under the 1954 Act, the agreement of the Assembly to the RRO is required under section 1(5) of Regulatory Reform Act 2001. Standing Order 24 requires the agreement of the Assembly to be signified in plenary.

Parliamentary procedure

ODPM has now cleared all the Parliamentary scrutiny stages of the draft RRO. Both Parliamentary Scrutiny Committees have recommended that the draft RRO be approved by both Houses of Parliament as the final stage of the Parliamentary procedure. Assembly agreement to the draft RRO is needed before the Deputy Prime Minister (referred to in the draft RRO as First Secretary of State) can proceed to make the RRO. In accordance with usual practice in such cases, the Assembly is being asked to signify its agreement to the draft RRO before the two Houses of Parliament are asked to give their approval to the draft Order. The draft of the RRO that the Deputy Prime Minister has requested the Assembly to agree was tabled in the Assembly on 27th October 2003.

Subject to Assembly agreement and Parliamentary approval, it is understood that ODPM hope to get the RRO made by the Deputy Prime Minister towards the end of the year. In accordance with article 1(3) of the draft RRO, it would then come into force six months after being made.

Proposals

The purpose of the draft RRO is to reform Part 2 of the Landlord and Tenant Act 1954 ('the 1954 Act). It will also make some consequential modifications and repeals to other legislation.

Part 2 of the 1954 Act gives business tenants security of tenure with certain exceptions i.e. a statutory right to remain in their premises when their lease ends and to seek a new tenancy.

The draft RRO seeks to change the workings of the 1954 Act to make the renewal or termination of business tenancies quicker, easier, fairer and cheaper. The changes will remove some technical and administrative obstacles in the surrender and renewal of business leases for both landlords and tenants. There are no proposals to modify the general principle of security of tenure for business tenants. The proposals should reduce the amount of litigation and make the procedures user-friendlier fitting better with the new Civil Procedure Rules (the Woolf reforms).

The attached Annex summarises the main proposals in the draft RRO for specifically reforming the 1954 Act.

Assembly Agreement

The Assembly has a number of functions under Part 2 of the 1954 Act by virtue of the entry for that Act in Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999/672). The only Assembly function that the draft RRO modifies is the power to prescribe notices under Section 40 of the 1954 Act. These are the notices to enable landlords and tenants to obtain information from each other, which they would need to operate the renewal and termination procedures for commercial leases set out in the Act. The RRO will substitute a new Section 40. This will in effect leave the Assembly's powers unchanged. This nevertheless amounts to a technical modification of the Assembly's existing functions and the Assembly's agreement is required.

Welsh dimension

The draft RRO would apply to England and Wales, but not to Scotland or Northern Ireland, where separate provisions for business tenancies apply.

The Landlord and Tenant Act 1954 applies across England and Wales and forms the framework upon which leases of commercial properties are let for business purposes. The draft RRO will not affect this underlying situation.

The draft RRO will be supplemented by Regulations made under the 1954 Act revising the statutory notices. It is intended these Regulations would provide for bi-lingual notices in Wales. The current notices are in English only.

The Welsh Assembly Government expects to consult on the draft Regulations and bi-lingual notices in early 2004 with a view to the new Regulations coming into force at the same time as the new RRO.

The draft RRO makes provision for a Subordinate Provisions Order (SPO). Section 4 of the Regulatory Reform Act 2001 provides that an RRO can designate that specified provisions of the RRO are 'subordinate provisions'. These subordinate provisions can then be modified by a SPO, which proceeds under a simplified procedure compared to that for the RRO, itself. It is only intended to apply to technical rather than main policy aspects of the RRO for example the form of notices.

What is of particular significance to the Assembly is that while Parliament has not given the Assembly power to make a RRO, that power being reserved to a Minister of the Crown, it has provided that the power to make a SPO can be vested in the Assembly as well as a Minister of the Crown. The draft RRO (Article 28) is proposing that the matters specified in Schedules 1 to 4 of the draft RRO can be revised by an SPO. Those matters are the forms of the notices and statutory declarations to be used in relation to agreements to exclude security of tenure or the surrender of a tenancy. The draft RRO is proposing that the power to make an SPO shall in relation to Wales be exercisable by the Assembly or a Minister of the Crown. It has been agreed with ODPM that normally it would be for the Assembly rather than a UK Minister to make any SPO in relation to Wales.

Delegation of Functions

The draft RRO does not affect the existing delegation of functions under the 1954 Act by the Assembly to the First Minister. These stand delegated to the First Minister under the Assembly's resolution of 16th June 1999. If a SPO were proposed to be made by the Assembly at a future date then an appropriate delegation to the First Minister of Assembly functions in respect of that SPO would then be sought from plenary.

Consultation

The proposed reforms in the RRO have undergone extensive consultation over a number of years.

- The Law Commission originally consulted on the need for and specific proposals for changes to the legislation before publishing their 1992 report, which forms the basis of this package of reforms.
- This was followed by a separate consultation by the then Department of the Environment in 1996.

- Further consultation was undertaken in 2001 for the purposes of promoting a Regulatory Reform Order. A total of 46 individuals and organisations responded to the 2001 consultation document with the majority being supportive of the amendments.

Following the 2001 consultation ODPM has the responsibility for taking the draft RRO through its Parliamentary stages. The National Assembly for its part ensured that the consultation exercise was highlighted within Wales by distributing copies of the consultation paper to the business and property sectors and local authorities in Wales.

Financial Implications

There are no financial implications for the Assembly Government other the cost of producing the new Regulations and bi-lingual forms. These costs will be accommodated within existing Assembly budgets.

More generally there should be savings in legal costs to landlords and tenants in Wales and England arising from the new procedures for excluding security of tenure and the revised time limits for making Court applications to renew a tenancy. ODPM estimate that these reforms will save landlords and tenants at least £6.5m. It is anticipated the introduction of bi-lingual forms will be at most a marginal cost to the business community.

ANNEX

Summary of the Reforms to the Landlord and Tenant Act 1954 proposed under the draft Regulatory Reform (Business Tenancies) (England and Wales) Order 2003

Agreements to exclude security of tenure

1. Landlords and tenants would no longer have to obtain court approval for agreements to exclude security of tenure. Instead, the landlord would have to serve the tenant a "health warning" at least 14 days before the parties are committed to the lease. The tenant would then make a simple declaration, before signing the lease that he or she had read the warning and accepted the consequences. Alternatively, to cater for emergencies, the parties may agree within the 14 day period, but (as an additional safeguard) the tenant must sign a statutory declaration before an independent solicitor or other person empowered to administer oaths that he or she has received and read the "health warning" and has accepted its consequences. The new procedures would ensure that the tenant becomes aware of the consequences of excluding security of tenure, while removing the need for court approval. This does not affect the underlying principle of security of tenure, which remains in place as the default position for business tenants.

Surrenders

2. The proposals would change the law on surrenders of tenancies. They would make it clear that the parties may agree to an immediate surrender of the tenancy (where for example the tenant can no longer afford the rent) without the need for any special arrangements. In the case of agreements for surrender (ie an agreement to surrender the tenancy at some defined time in the future), the parties would no longer need court approval, but would have to follow procedures essentially similar to those for agreement to exclude security of tenure (see above). Safeguards are required for agreements to surrender, as the tenant may not immediately realise that an agreement to surrender involves the abandonment of renewal rights.

Termination by tenant

3. As long as the tenant continues to carry on business in the premises, the 1954 Act automatically extends a business tenancy beyond the agreed end of the lease until one of the parties takes action to renew or terminate it. Once the lease has been extended in this way, the tenant must give the landlord three months' notice of termination. The proposals clarify what the tenant must do to avoid continuing obligations beyond the agreed end of the lease. They make it clear that a tenant who has either given three months' notice before the end of the lease or has quit the premises by the end of the lease, would not face any continuing lease obligations.

Notices requiring information

4. The 1954 Act lays down procedures enabling landlords and tenants to obtain information from each other which they would need in order to operate renewal or termination procedures. The proposals would make these more effective by requiring the parties to update information provided for six months, by catering for parties transferring their interests and by introducing more effective enforcement procedures.

Landlord's termination notice

5. There would be a new requirement for landlords who are not opposing renewal to set out their proposals for the new tenancy in the termination notice. This should help to speed up the renewal process. A "health warning" would explain to the tenant that the proposals are for the purposes of negotiation and do not bind either party.

Renewal and termination procedures

6. The proposals remove some notorious legal traps for tenants, which can result in the tenant unwittingly losing the right to renew:

- the requirement for a tenant to serve a counternotice in response to a landlord's termination notice; and
- the requirement for the tenant to apply to court for a new tenancy not earlier than two but not later than four months after the landlord's termination notice or the tenant's request for a new tenancy.

7. The proposals retain a final deadline for applications to the court, but enable the parties to agree to extend this, so giving them more time to negotiate an agreement without having to go to court. Such agreements would remove the need for tenants to make applications to the court solely to retain the legal right to renew, thus reducing unnecessary court business and legal costs.

Applications to court by landlord

8. At present, only the tenant may apply to the court for the renewal of a tenancy. The landlord can only prompt proceedings indirectly by serving a notice triggering renewal or termination. The proposals allow the landlord:

- to apply for renewal, thus being able to counter any delay by the tenant; or
- to apply for termination and no renewal. If the court agreed that the landlord had grounds to oppose a new tenancy, it would refuse to order the grant of a new tenancy. But if the landlord failed to establish grounds of opposition, the court would order the grant of a

new tenancy and fix its terms, without the need for any separate application by the tenant.

Ownership and control of businesses

9. The 1954 Act defines, in the case of both landlords and tenants, which business entities enjoy the rights under the Act or are subject to its obligations. The reforms rationalise these arrangements. The general principle is that the 1954 Act provisions would apply to legal entities separate from the landlord or tenant named on the lease (for example a company owned by the landlord or tenant), provided they are under the same effective control. The reforms put tenants on the same footing as landlords.

Interim rent

10. The proposals involve several changes to interim rent (rent payable pending renewal of the tenancy):

- tenants would be able to apply for interim rent; (at present only landlords can apply);
- the rules on the timing of interim rent would be changed to remove any incentive for either landlord or tenant to delay renewal proceedings;
- the amount of interim rent would be fairer to both parties. Usually, it would be the rent for the new tenancy (ie open market rent), backdated, but subject to adjustment where market conditions change significantly during the interim period, and/or the occupational terms change significantly. In some cases, the existing method of determining interim rent would continue to apply.

Compensation

11. At present a tenant may claim compensation from the landlord where the court has refused the grant of a new tenancy as a result of misrepresentation. The draft RRO extends this to cover cases where the tenant is induced not to apply to court or to withdraw an application because of misrepresentation. There are also proposals to rationalise the rules for compensation payable in certain cases where the landlord successfully opposes renewal of the tenancy.

Other changes

12. The proposals include a number of other changes, for example:

- ensuring that a tenant wanting to end a continuation tenancy does not have to give more than the required three months notice. At present the three months' notice period must end on a Quarter Day,

in practice often resulting in the tenant having to give significantly more than three months' notice;

- enabling the courts to order the grant of new leases up to a maximum period of 15 years, instead of 14 at present. This is more compatible with modern leasing patterns, where leases tend to have three or five yearly rent reviews;
- enabling the procedures to be used where there is a single lease but several different landlords.