The Law Commission

(LAW COM No 312)

HOUSING: ENCOURAGING RESPONSIBLE LETTING

Presented to the Parliament of the United Kingdom by the Lord Chancellor and Secretary of State for Justice by Command of Her Majesty
August 2008

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THE LAW COMMISSION

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THE LAW COMMISSION

HOUSING: ENCOURAGING RESPONSIBLE LETTING

CONTENTS

PART 1: INTRODUCTION **1**

Introduction 1

Background 1

Terms of reference 2

The changing policy context 2

The focus on the private rented sector: the regulatory challenge 4

The costs of improved compliance 6

Approaches to regulation 7

Additional benefits 7

The regulatory issues 7

Provision of information about the letting contract 8

Tenancy deposits 8

Occupier compliance with the agreement 8

Anti-social behaviour 8

Principal conclusions 9

Structure of this report 9

PART 2: THE CASE FOR CHANGE **10**

Introduction 10

Defining housing management: the essential core 10

The private rented sector today 11

Existing ways of encouraging responsible renting 12

Use of the courts 12

Local authorities 14

Landlord representative bodies 17

Letting agents' representative bodies 17

Consultation paper: provisional proposal 18
Conclusions 20

PART 3: CHANGING APPROACHES TO REGULATION 22
Introduction 22
Smart regulation 22
Better regulation 23
Risk-based regulation 24
Regulating the private rented sector 24
Housing Act 2004 26
Voluntary codes 26
Adapting smart regulation to the private rented sector: the importance of partnership 26
Underlying policy principles 27
Responses to consultation 28
Regulatory Enforcement and Sanctions Bill 29
Conclusion 30

PART 4: OPTIONS FOR CHANGE 31
Introduction 31
Better provision of information 31
Model agreements 31
Other channels of communication 32
Option 1: enhancing voluntary self-regulation 33
Option 2: enforced self-regulation 34
Advantages 36
Challenges 37
Option 3: licensing 40
Mandatory licensing 40
Implied, or "negative," licensing 42
Home condition certification 43
Conclusion 44

PART 5: RESPONSES TO THE CONSULTATION PAPER: A SUMMARY **45**
Introduction 45
General comments 46
The need for regulation 46
A new regulatory approach 46
Other ideas 47
Comments on the options for change 47
Enhanced voluntary self-regulation 47
Enforced self-regulation 48
Licensing 50
Home condition certificates 50
Comment 51

PART 6: ENSURING RESPONSIBLE LETTING: RECOMMENDATIONS **52**
Introduction 52
The changing context 53
Underlying principles 53
Regulatory impact assessment 54
Fundamental issues 55
1. Implementing renting homes 55
2. Changing the regulatory approach - smart regulation 55
Introducing compulsion? 57
More detailed recommendations 57
The national provision of landlord accreditation schemes 58
Establishment of a housing standards monitor for the private rented sector 58
Appointment of a stakeholder board 62
Publication of a single code of good housing management practice for land law 63
Setting up a national landlords' register 64
Regulation of letting agents 65
Development of new channels for dealing with complaints and the redress of grievances 66

Piloting home condition certificates 67
Other matters 68
Enhancing the role of local authorities 68
Retaliatory eviction 68
Incentives 69
Evaluation 70
Concluding remarks 70
Recommendations 71

APPENDIX A: RESPONDENTS TO CONSULTATION PAPER 73
List of respondents to consultation paper 73
Landlords 73
Letting agents' associations 74
Tenants and tenants' representatives 75
Local authorities 75
Local authority groups 76
Other professional organisations 76
Lawyers 76
Judges 77
Academics 77
Others 77

.

APPENDIX B: ANALYSIS OF RESPONSES TO THE CONSULTATION PAPER 78
1. Enhancing voluntary self-regulation 78
Can voluntary self-regulation reach those landlords whose behaviour is most problematic? 81
Does membership of a landlord association or accreditation scheme necessarily deliver better landlord behaviour? 83
Who would regulate the regulators? 85
2. Enforced self-regulation 85
General comments 86
Issues raised by respondents 88
Alternative approaches and suggestions 112

3. Expanding licensing 115

The response 115

4. Home condition certification 119

Support for the principle of home condition certification 119

Less positive responses 121

Practical issues 122

THE LAW COMMISSION

HOUSING: ENCOURAGING RESPONSIBLE LETTING

To the Right Honourable Jack Straw MP, Lord Chancellor and Secretary of State for Justice

PART 1
INTRODUCTION

INTRODUCTION

1.1 This report completes the Law Commission's major programme of work on the reform and modernisation of housing law and practice.

1.2 Renting Homes set out recommendations for a new legal framework to underpin the relationship between landlords and those who occupy rented accommodation.[1] Our recommendations were based on two fundamental principles:

(1) *landlord-neutrality*, to enable the creation of a single social tenure[2] that would facilitate the flexible provision and management of social housing; and

(2) *consumer protection*, designed, among other objectives, to ensure that both parties to rental agreements have a clearer understanding of their respective rights and obligations.

1.3 However clear and rational the law is, problems and disputes will continue to arise. The Housing Disputes report made recommendations for dealing more proportionately with housing problems and disputes.[3]

1.4 This report deals with issues that arise from the other two reports. Does the current law work as effectively as it should? How can the consumer protection approach be delivered in practice? Are there better ways to regulate the landlord-occupier relationship? Can housing problems and disputes be prevented by encouraging better management? If so, how can this be done?

BACKGROUND

1.5 As explained in our Consultation Paper,[4] the focus of this report is on the private rented sector. We start by summarising the background to the project.

[1] Renting Homes: The Final Report (2006) Law Com No 297, http://www.lawcom.gov.uk/docs/lc297_vol1.pdf.

[2] This would alter the current law whereby local authorities can only let on secure and introductory tenancies, and housing associations have to let on assured tenancies. This prevents flexibility in the provision and allocation of social housing.

[3] Housing: Proportionate Dispute Resolution (2008) Law Com No 309, http://www.lawcom.gov.uk/docs/lc309.pdf.

Terms of reference

1.6 From the start of our programme of work on the reform of housing law, we intended to consider some of the issues which fall under the general head of "encouraging responsible letting". Our original idea was to examine, in particular, the law on unlawful eviction and harassment. In that specific form, it would have been a very narrow project.

1.7 By the time of the publication of the Commission's Ninth Programme of Law Reform (March 2005), the terms of reference were somewhat broader:

(1) To review the relevant housing law, and proposals for reform of the law, and to make recommendations in relation to:

(a) the appropriate legal framework necessary to promote and secure compliance by both landlords and occupiers with their existing or proposed legal obligations;

(b) the procedures available to landlords, occupiers and affected third parties in relation to compliance, with particular regard to preventing or remedying anti-social behaviour; and

(c) such provisions of the criminal law as may be necessary to reinforce the above.

(2) To consider the extent to which the principles and procedures available in connection with anti-social behaviour by rental-occupiers should also apply to similar behaviour by owner-occupiers.

1.8 Having embarked on the project, we realised that simply looking at details of the law, and its possible amendment, would be unlikely to address the fundamental regulatory challenge. There is already a vast amount of housing law.[5] If it does not work well, then simply recommending detailed changes to the law would be unlikely to promote and secure better management practice. We therefore moved away from a focus on the rules themselves to consider their effectiveness.

The changing policy context

1.9 To ensure the project remained manageable, we decided not to consider the regulation of the whole of the rented sector. The principal regulators of social housing – including central Government, the Welsh Assembly Government, the Audit Commission and Welsh Audit Office, and the Housing Corporation – had already done a great deal of work on the better regulation of the social rented sector.

[4] Encouraging Responsible Letting (2007) Law Commission Consultation Paper No 181, http://www.lawcom.gov.uk/docs/cp181.pdf. The Consultation Paper was supplemented by Supplementary Paper 1: The law on housing conditions and unlawful eviction, http://www.lawcom.gov.uk/docs/Supplementary_paper_1.pdf and Supplementary Paper 2: Estimating the costs and benefits of greater compliance with property condition standards, http://www.lawcom.gov.uk/docs/Supplementary_paper_2.pdf.

[5] For example, Sweet and Maxwell's *Encyclopaedia of Housing Law and Practice* contains five substantial loose-leaf volumes.

1.10 This decision was particularly fortuitous as, during the project, the Government announced a review of the social rented sector including a project, led by Professor Martin Cave, into the regulation of registered social landlords.[6] The Housing and Regeneration Act 2008 contains provision for a new Office for Tenants and Social Landlords, implementing Cave's principal recommendations.

1.11 These initiatives on the regulation of the social rented sector have been accompanied by much interest in the regulation of the private rented sector and other aspects of the housing market. We are aware of the following:

(1) During debate on the Consumers, Estate Agents and Redress Act 2007, the Government committed itself to a wider review of regulation across the property sector. It asked Professor Colin Jones of Heriot Watt University to undertake research to assess the scale and scope of regulation, to identify any gaps/imbalances across the different market sectors that work to the detriment of consumers, to consider the scope for simplification and strengthening existing redress provisions and improving consumer awareness, and set out recommendations on how best to address issues that emerge to improve the effectiveness and efficiency of regulation/redress arrangements in different sectors.

(2) In July 2007, the Royal Institution of Chartered Surveyors together with the National Association of Estate Agents and the Association of Residential Letting Agents[7] announced an inquiry into the regulation of those providing residential property services, chaired by Sir Bryan Carsberg.[8] In his Consultation Paper, he noted that, looking at the property market as a whole, "the sums of money involved are enormous, and yet it seems that we are not approaching the management of consumer risk in this sector through regulation in any coherent manner … [T]he residential market … remains a sector with regulatory structures that have developed piecemeal." His report was published in June 2008.[9]

(3) Shelter published a policy paper on options for the future of the private rented sector in October 2007.[10]

[6] *Every Tenant Matters: A review of social housing regulation: Report by Professor Martin Cave* (June 2007), http://www.communities.gov.uk/publications/housing/everytenantmatters (last visited 10 July 2008). A more general review of social housing policy, by Professor John Hills, was published on 20 February 2007: see *Ends and Means: The Future Roles of Social Housing in England*, http://sticerd.lse.ac.uk/dps/case/cr/CASEreport34.pdf (last visited 10 July 2008).

[7] The two latter associations have subsequently merged.

[8] See Carsberg Review of Residential Property*, Standards, Regulation, Redress and Competition in the 21st Century*: Consultation Paper (October 2007), http://www.rics.org/NR/rdonlyres/C65D9E57-4587-450D-8A3E-99706A2B33DB/0/CarsbergReviewofResidentialProperty.pdf (last visited 10 July 2008).

[9] Carsberg Review of Residential Property, *Standards, Regulation, Redress and Competition in the 21st Century:* Final Report (June 2008) http://www.rics.org/NR/rdonlyres/C65D9E57-4587-450D-8A3E-99706A2B33DB/0/CarsbergReviewofResidentialProperty.pdf (last visited 10 July 2008).

[10] Shelter, *Fit for purpose?* (2007), http://england.shelter.org.uk/professional_resources/policy_library/policy_library_folder/fit_for_purpose.

(4) In the debate on the 2007 Queen's Speech in the House of Lords, Lord Best urged the Government to look seriously at the regulation of the private rented sector. [11]

(5) The Government has asked Julie Rugg and David Rhodes, of York University, to undertake a review of the private rented sector. The questions they are asked to consider include: "What are the possible actions necessary to ensure the sector delivers the right type of homes of good quality that meet local demand now and in the future? Given the recent regulatory changes, what more should or could be done to ensure a professionally managed and quality sector to meet demand pressures?"[12]

(6) The Government has announced a review of the regulatory functions of the Audit Commission in relation to local authority housing with the help of an Advisory Group chaired by Professor Ian Cole of Sheffield Hallam University.[13]

(7) Citizen's Advice has published a report on retaliatory eviction,[14] which has attracted a great deal of public attention.[15]

(8) The Communities and Local Government Committee has published its report on the Supply of Rented Housing.[16]

1.12 The regulation of rented housing is now an issue subject to a great deal of attention both inside and outside government.

The focus on the private rented sector: the regulatory challenge

1.13 No comprehensive review of housing policy, and the place of renting within it, can ignore the contribution of the private rented sector. Our focus on the private rented sector did not arise from any desire to single it out for criticism. On the other hand, we were aware from our earlier work that many in the sector think that the issues raised here must be considered in order to help develop the professionalism of the private rented sector and improve its reputation. This is

[11] *Hansard* (HL), 13 November 2007, col 687.

[12] The review was announced on 23 January 2008. The Terms of Reference are available at www.communities.gov.uk/documents/housing/doc/672051 (last visited 10 July 2008).

[13] The announcement was made in Parliament on 15 October 2007: *Hansard* (HC) 15 October 2007, col 48WS, http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm071015/wmstext/71015m0001.htm (last visited 15 July 2008).

[14] This would give a tenant, who has sought to bring proceedings against a landlord for, for example, breach of repairing covenants, and who, as a consequence, becomes subject to possession proceedings being taken against her, the right to resist those proceedings, which would otherwise lead to a possession order being automatically made by a court.

[15] D Crew, The Tenant's Dilemma (2007), http://www.citizensadvice.org.uk/tenants_dilema_-_document.pdf (last visited 10 July 2008. It was the subject of an e-petition to 10 Downing Street: http://petitions.pm.gov.uk/ (last visited 10 July 2008) and was debated in the House of Lords in April 2008: *Hansard* (HL), 2 April 2008, col 1039.

[16] Eighth Report (2007-08) http://www.publications.parliament.uk/pa/cm200708/cmselect/cmcomloc/457/45702.htm (last visited 10 July 2008).

closely aligned with central Government's general commitment to enhancing businesses' reputation by raising standards. This is often achieved through empowering consumers to make informed choices about the provision of services.[17]

1.14 The private rented sector presents a serious regulatory challenge for two related reasons. First, the sector is already subject to a great deal of regulatory law. Although enacted with the best of intentions, in many respects the law does not operate as Parliament hoped. Too much rented property is poorly managed. This is most evident in the gap that exists between the minimum housing condition standards that Parliament has prescribed and official data on the condition of accommodation in the private rented sector.[18] We conclude that, although the enforcement of legal rights through the courts may theoretically be an option, for those living in sub-standard accommodation it is not usually a practical one. Further, local authorities do not have the resources to undertake adequate enforcement activity.

1.15 Secondly, the private rented sector is a sector of the economy in which there are large numbers of participants – both landlords and letting agents – providing rented accommodation for a wide variety of reasons to a wide variety of consumers.[19] Identifying and communicating with those who need to understand their rights and obligations when participating in the market is in itself a challenge. Although some in the industry understand the importance of improving standards, taken as whole large numbers of landlords and many agents do not engage with bodies that seek to promote higher standards.

1.16 The consequence of poor housing management and housing standards is that the private rented sector continues to suffer from a poorer reputation than it should, and some tenants continue to experience poorer housing conditions than they should.

1.17 While there have been important attempts to discover the considerable common ground that exists between landlords and those who rent from them,[20] sceptical voices – arguing that the private rented sector is riddled with abuse – are still

[17] See, in the context of estate agents providing services relating to the buying and selling of housing, the statement of the Minister for Trade, Mr Ian McCartney, during the Second Reading of the Consumers, Estate Agents and Redress Bill: *Hansard* (HC), 19 March 2007, col 589.

[18] The evidence is discussed in detail in Part 3 of the Consultation Paper. Further discussion of the underlying law is found in Supplementary Paper 1: The law on housing conditions and unlawful eviction, http://www.lawcom.gov.uk/docs/Supplementary_paper_1.pdf.

[19] We discussed the varied characteristics of the modern private rented sector in Part 2 of the Consultation Paper. See now also the Private Landlords Survey of the *English Housing Condition Survey 2006*, published in April 2008: http://www.communities.gov.uk/publications/housing/privatelandlordsurvey (last visited 10 July 2008).

[20] See the report of the Shelter and Joseph Rowntree Commission on the Private Rented Sector, *Private Renting: A New Settlement* (2002), https://www.landlordlaw.co.uk/content/PRSmediareport.pdf (last visited 10 July 2008).

heard.[21] Whether justified or not, these voices remain part of the political context within which housing policy has to be set. That in turn prevents the private rented sector from playing as full a role in the housing market as it should.[22]

1.18 Some economists have questioned whether this sector of the market should be regulated by the state at all. They suggest that the aims of regulation are more likely to be achieved through the operation of competition in the market than through the imposition of regulation by Government.[23] We have concluded that, while competition can and does indeed contribute to enhancing standards in the sector, it cannot be safely assumed that it is a sufficiently powerful mechanism to resolve the matter entirely.

1.19 On the basis that regulatory law affecting the private rented sector remains in place, the central question in this report is: can the existing law be made more effective?

The costs of improved compliance

1.20 In the Consultation Paper, we acknowledged that, if a new regulatory structure were to be put in place, which encouraged greater compliance with statutory housing standards, significant sums of money would need to be spent on bringing accommodation that fell below the statutory standards up to the mark. That would be a very important consideration in determining a way forward.

1.21 But we also argued that there is a considerable cost to *not* taking action. Those who live in accommodation that is not safe or weatherproof place financial burdens on those who provide health care and social care. There are significant social and economic costs that arise from poor accommodation.[24]

[21] See for example the *Hansard* reports of debate on 12 January 2004 on the Bill which became the Housing Act 2004. David Clelland MP referred to “absentee landlords who let to antisocial and sometimes criminal elements to reduce property values and build up their empires” while “decent people are either driven out or made subject to the criminal racist behaviour of such people”, concluding that this was a “cancer in some of our urban areas” (*Hansard* (HC), 12 January 2004, vol 416, cols 536 to 537). Gerald Kaufman commented that “we have a much smaller private rented sector than during the Rachmanite period 40 years ago, but in a way private landlords behave worse than Rachman … using houses not simply for antisocial purposes but often for criminal purposes.” (*Hansard* (HC), 12 January 2004, vol 416, cols 553 to 555). Frank Dobson MP referred to “Nasty absentee private landlords” who “establish themselves in a street or neighbourhood, and gradually spread like a virus, making life intolerable for lots of other people” (Hansard (HC), 12 January 2004, vol 416, cols 574 to 575).

[22] See A Sampson, “Reforming the Sector’s image” P Bill (ed) *More homes for rent: stimulating supply to match growing demand* (Smith Institute, 2006), ch 3.

[23] These arguments were considered in more detail in Appendix 2 to the Consultation Paper. See also *Ensuring Compliance: The Case of the Private Rented Sector*, Working Paper 06/148 (Centre for Market and Public Organisation, University of Bristol, 2006), http://www.bristol.ac.uk/cmpo/publications/papers/2006/wp148.pdf (last visited 10 July 2008).

[24] Part 4 of the Consultation Paper considered estimates of both the costs and the benefits associated with enhanced regulatory compliance, particularly on housing condition standards. See also Supplementary Paper 2, Estimating the costs and benefits of greater compliance with property condition standards, considered these estimates of cost in greater detail: http://www.lawcom.gov.uk/docs/Supplementary_paper_2.pdf

1.22 We left open the question of who should shoulder any increased costs: landlords, tenants, government or a combination of all of these.

Approaches to regulation

1.23 We looked at different approaches to regulation and how ideas about regulation and regulatory practice have developed.[25] We analysed how these ideas have been applied to the private rented sector over the last 150 years or so.[26] To summarise the argument, we noted there had been a shift from "command and control" to "smart regulation".

1.24 Command and control assumes that, if the Government changes the rules, people will alter their behaviour, and if they do not, agencies will force them to do so. There is considerable evidence that this is not an effective regulatory technique.

1.25 Smart regulation suggests that regulation has a greater chance of success if those who are the objects of regulation are also engaged in the process of regulation. We stressed the importance of ensuring that the regulated community also has as much influence as practicable on the development of standards.

Additional benefits

1.26 If a more effective regulatory regime were put in place, we argued that at least two further beneficial consequences would result.

1.27 First, Government might find that some of the rules currently on the statute book are not necessary and could be repealed without detriment. The smarter regulation we advocate could therefore help to relieve the regulatory burden.

1.28 Secondly, if enhancement of the reputation of the private rented sector is achieved, both through adoption of our recommendations in Renting Homes and the recommendations we make here, this would lead to greater confidence, and therefore greater investment, in the sector. Increased provision would increase competition, which would also have the effect of driving up standards.[27]

THE REGULATORY ISSUES

1.29 We initially identified six issues which we thought were at the heart of a new regulatory approach:

(1) provision of information about the letting contract;

(2) tenancy deposits;

(3) occupier compliance with the agreement;

(4) anti-social behaviour;

[25] Part 5 of the Consultation Paper.

[26] Part 6 of the Consultation Paper.

[27] There is evidence of this happening in the student rental market where there has been significant new private investment, leading to higher standards of provision.

(5) repair and maintenance of the property; and

(6) harassment and unlawful eviction.

1.30 In the end, we decided to concentrate on (5) and (6). Both lie at the heart of responsible management of rented property. A new approach to regulation must work in relation to both, particularly housing conditions. However, a new regulatory approach could be expected to deal with other issues as well.

1.31 There are specific reasons why we did not pursue issues (1) to (4).

Provision of information about the letting contract

1.32 At present, the law relating to the provision of information about the letting contract is very weak and fragmented. However, this was a central issue in our Renting Homes report. This recommended that every letting agreement should be evidenced by a written copy of the contract. There was no point in our revisiting an issue on which we had so recently reported.

1.33 Nevertheless it is right to re-emphasise the importance of our recommendations on tenancy agreements. Their adoption would make a significant contribution to encouraging more responsible renting and reducing housing problems and disputes.[28]

Tenancy deposits

1.34 The Government legislated on tenancy deposits in the Housing Act 2004. The scheme came into effect in April 2007. While people may have views on the scheme, there is at present little practical likelihood of significant change. It could not be a central priority for this project.

Occupier compliance with the agreement

1.35 Undoubtedly major problems in the relationship between landlord and occupier can arise from occupier non-compliance with the agreement, particularly if the occupier seriously damages the premises or refuses to pay the rent. However, the landlord always has the ultimate sanction of being able to regain possession of the premises and to bring the contract to an end, albeit that this process can take time and involve some expense. Our Housing Disputes project addressed many of those questions. There was no point in our considering this issue here.

Anti-social behaviour

1.36 Anti-social behaviour has become a major issue for Government over the last few years. There has been much legislative change and there are proposals for more changes. Given the rapid development of the law, and its high political significance, it is not currently suitable for work by the Law Commission.

[28] See also the National Consumer Council's *A Consumer Audit of Social Housing* (2006). Professor Cave in his report on the regulation of social tenants also noted the importance that our recommendations would have in providing better information to tenants and landlords about their mutual rights and obligations: *Every Tenant Matters: A review of social housing regulation: Report by Professor Martin Cave* (June 2007), http://www.communities.gov.uk/publications/housing/everytenantmatters (last visited 10 July 2008).

1.37 In this project, we do not seek to add more legal obligations; rather we wish to encourage better compliance with existing ones. Nonetheless, if recommendations for encouraging better management in the private rented sector are taken forward, this should help reduce anti-social behaviour. For example, a Code of Housing Management Practice could set out the responsibilities of landlords for tackling anti-social behaviour by tenants. This would not create new law, but would make landlords more aware of the current law relating to dealing with the anti-social behaviour of tenants.

PRINCIPAL CONCLUSIONS

1.38 To anticipate the rest of the paper, we conclude, first, that meeting the regulatory challenge demands a new approach. Historically there have been piecemeal initiatives responding to particular issues. These have been neither coherent nor effective. Our comprehensive review of the issues offers the prospect of a new regulatory approach that we think will be of significant social benefit.

1.39 Secondly, we accept that the costs of compliance must be reasonable and proportionate.

1.40 Thirdly, we think that bringing about effective change of culture in the residential lettings market may ultimately require the introduction of a compulsory system of self-regulation.

1.41 Fourthly, taking into account where we currently stand, we conclude that moving directly to a scheme of enforced self-regulation would not be practicable. Thus, in this report we recommend that there should be a staged programme of reforms, which build on current innovations and good practice, and which would enhance the current emphasis on voluntary self-regulation. It is essential that any changes that are introduced should be evaluated, in order to establish the evidence base on which to determine whether the further move to a compulsory scheme is necessary.

STRUCTURE OF THIS REPORT

1.42 Part 2 considers the case for change. It gives an account of our analysis of the private rented sector, and considers existing methods for ensuring responsible letting. Part 3 reviews the history of regulation, and explains how we seek to adopt a broadly “smart regulation” approach to the private rented sector. We note recent Government initiatives, such as the new health and safety rating scheme and provisions relating to the licensing of houses in multiple occupation (HMOs) in the Housing Act 2004, as well as the more general regulatory ideas being debated in the context of the Regulatory Enforcement and Sanctions Bill 2007.

1.43 The options for change outlined in the Consultation Paper are rehearsed in Part 4. Part 5 sets out the conclusions we have drawn from the responses to consultation, which are detailed in Appendix B. Part 6 sets out our recommendations for reform.

PART 2
THE CASE FOR CHANGE

INTRODUCTION

2.1 In this Part we summarise our analysis of the private rented sector, and the information available about existing methods of encouraging responsible renting. We then discuss the views of respondents as to whether we had established a case for further change. From this we draw conclusions that lead to the further consideration of our recommendations for reform. First, though, we set out the core features of housing management.

DEFINING HOUSING MANAGEMENT: THE ESSENTIAL CORE

2.2 The nature and scope of housing management cannot be defined with absolute precision. Nevertheless, there is an essential core of issues. Drawing on one of the most comprehensive guides,[1] we conclude that housing management embraces:

(1) pre-tenancy issues, and who should manage the property, obtaining relevant permissions, dealing with tax and insurance;

(2) understanding the legal responsibilities of the landlord/agent for repairs and maintenance, ensuring the safety of gas and other fittings and (where provided) furniture, and specific legal requirements, such as the particular rules relating to houses in multiple occupation;

(3) setting up the tenancy, including deciding which type of tenancy agreement to use, providing a written agreement, dealing with deposits, setting and raising the rent, and, where relevant, understanding housing benefit;

(4) keeping an eye on the premises, knowing how to deal with emergencies, preventing and controlling rent arrears, responding to nuisance and anti-social behaviour, and understanding different ways to resolve landlord-tenant relationship problems (going to court, using mediation, going to tribunals); and

(5) ending the tenancy, including taking possession proceedings and not engaging in unlawful eviction and harassment.

2.3 Although not all these matters involve law, it can be seen that legal issues are central to a significant number of core housing management functions.

2.4 Renting Homes largely dealt with issues arising under item (3) and many of the issues in item (5); our housing disputes report examined issues in item (4). As

[1] The Landlord Development Manual, produced by Accreditation Network UK and the Improvement and Development Agency with Local Authorities Coordinators of Regulatory Services (LACORS) published in April 2007; http://www.lacors.gov.uk/lacors/contentdetails.aspx?id=15349 (last visited 10 July 2008).

explained in Part 1, this Report considers issues relating to item (2) and specific issues in item (5), namely housing conditions and unlawful eviction and harassment.

THE PRIVATE RENTED SECTOR TODAY

2.5 Part 2 of our Consultation Paper contained an analysis of the modern private rented sector.[2] In summary, the main points to emerge from the discussion were:

(1) Although the private rented sector is highly fragmented, with large numbers of individual landlords letting only a small number of properties, when aggregated together the private rented sector is an enormous business.

(2) Over the last decade, it has increased in size, both as a percentage of the housing market, and more significantly (given the overall increase in the numbers of dwellings) in terms of absolute numbers. In 2006 there were around 2.5 million privately rented dwellings, compared with 2 million in 2000.

(3) Growth in supply has been significantly driven by the development of buy-to-let investment by individual and small-scale landlords. This has not been matched, save in particular niche sectors of the market such as student accommodation, by build-to-let investments made by larger corporate landlords.

(4) Growth in demand has been driven by a variety of factors, including increased student numbers, and the increasing difficulties that potential first-time buyers face in entering the owner-occupied market.

(5) The private rented sector makes a significant contribution to overall housing provision. It provides flexibility and choice. It provides accommodation for those who cannot access social housing. It performs quite different functions in different parts of the country – reflecting local housing pressures and demands.

(6) Rates of return on investment vary markedly in different parts of the private rented sector, as do the approaches to investment by different types of landlord.

(7) In nearly all areas of the country, the cost of renting is now less than buying a house on mortgage.[3] Nevertheless, the amount of money spent by tenants (other than those in receipt of housing benefit) is a significant

[2] Housing: Encouraging Responsible Letting (2007) Law Commission Consultation Paper No 181, http://www.lawcom.gov.uk/docs/cp181.pdf. The most recent Government data is in the *English Housing Condition Survey 2006: Private Landlords Survey* (April 2008), http://www.communities.gov.uk/publications/housing/privatelandlordsurvey (last visited 10 July 2008).

[3] Steve Wilcox, *Can't buy: can rent. The affordability of private housing in Great Britain* (Hometrack, 2007). We have not been able to assess the impact of the current credit crunch on this finding.

proportion of their earnings. Average rents for a two to three bedroom house are around 20 to 25% of average earnings.[4] For those who rent, and who do not receive housing benefit, the cost of renting is by far the most significant item of their household budget.

(8) Tenants in the sector are likely to be young and mobile. They tend not to be well informed about their rights and obligations, even if provided with a written contract.[5] In any event, many want the accommodation for only a short time, and have little incentive to enter protracted negotiations with their landlord in order to enforce their rights.

(9) Some issues, perceived as problematic from a policy perspective (such as structural disrepair), may not worry the tenant if they have a cheap roof over their head. In any event, lack of statutory security of tenure may discourage tenants from seeking to enforce their rights because of fear of eviction.

(10) For the significant minority of private tenants on low incomes, using private law remedies to get recalcitrant landlords to act responsibly is not a realistic option.

(11) Individual landlords are not typically members of a landlords' association.

(12) Letting agents are better organised, but even here a significant number are not members of any of the major representative bodies.

EXISTING WAYS OF ENCOURAGING RESPONSIBLE RENTING

2.6 There is an enormous variety of ways in which those who seek to ensure that landlords fulfil their statutory and other management responsibilities can attempt to take action. However, data on the use of each of these are extremely patchy and a great deal of detail is missing.

Use of the courts

2.7 First we consider use of the courts. It is difficult to give an accurate estimate of how frequently disrepair claims are brought in the county court. The county courts in England and Wales heard 470 small claims relating to non-possession housing cases in 2004, which are likely to have included some disrepair claims.[6] Given the limit for small claims, some disrepair claims may also have been included in the 3,080 fast or multi-track claims heard by the county court for matters other than debt or negligence.[7] Cases on breach of repairing covenants may also

[4] Steve Wilcox, *Can't buy: can rent. The affordability of private housing in Great Britain* (Hometrack, 2007) part 4.

[5] A key problem is that written tenancy agreements are often very unclear or positively misleading about landlords' and tenants' rights and obligations. This is an issue we addressed in our report on Renting Homes: The Final Report (2006) Law Com No 297, http://www.lawcom.gov.uk/docs/lc297_vol1.pdf.

[6] DCA, *Judicial Statistics for England and Wales for the Year 2004* (2005) Cm 6565, table 4.9, http://www.official-documents.gov.uk/document/cm65/6565/6565.pdf (last visited 10 July 2008).

[7] Above, table 4.13.

feature as a counter-claim to proceedings for possession, but separate data on these are not available.

2.8 It is widely believed that private sector assured shorthold tenants' reluctance to enforce their landlords' repairing obligations through the courts is due to their lack of security of tenure. They fear that, in the absence of a law prohibiting "retaliatory eviction", such as exists in New South Wales, their landlords will serve a notice under section 21 of the Housing Act 1988 requiring them to give up possession.[8] However, when asked during a national survey why they had not tried to enforce their rights, only 5% of dissatisfied tenants and 8% of very dissatisfied tenants who had not tried to enforce their repairing rights gave as a reason that they "thought the landlord would end the tenancy". 21% of the dissatisfied, and 25% of the very dissatisfied, "did not want to cause trouble with the landlord". This may be an indication that they fear the landlord will react negatively in a way that falls short of eviction. By contrast 33% of dissatisfied and 31% of very dissatisfied tenants said that they "did not think it was worth the effort" to enforce their repairing rights.[9] For those who only need specific accommodation for a short time, this may be a convincing explanation.

2.9 In our Housing Disputes Report we recommend that housing disrepair cases be transferred to the Residential Property Tribunal Service.[10] (Based on experience in other jurisdictions, we anticipate that this will lead to some increased use of legal proceedings.) But we think it will only ever be in a small minority of cases that formal legal proceedings will be used.

2.10 In relation to unlawful eviction and harassment, data is even scarcer. Insofar as criminal prosecutions are concerned, the number of offenders convicted or cautioned for the offence of unlawful eviction is negligible and declining. In 1994, the number was 108; in 2004, it was 26.[11] Given that local authorities have power to prosecute for unlawful eviction and harassment, they are not top priorities for the police. In any event, prosecutions cannot be brought unless both evidential and public interest considerations are satisfied.[12] In many cases, criminal prosecution may not be the most appropriate sanction to ensure that non-compliance is addressed, damage caused is remedied or that behaviour is changed.[13]

[8] As noted in Part 1, para 1.11, Citizen's Advice recently published a report on retaliatory eviction: D Crew, *The Tenant's Dilemma* (2007), http://www.citizensadvice.org.uk/tenants_dilema_-_document.pdf (last visited 10 July 2008).

[9] Department for Communities and Local Government, *Survey of English Housing*, table S803 (C8C[99/00]), *Whether tenants tried to enforce right to repair and reasons for not doing so*, http://www.communities.gov.uk/documents/housing/xls/140474.xls (last visited 10 July 2008).

[10] Housing: Proportionate Dispute Resolution (2008) Law Com No 309, para 5.54.

[11] Home Office Statistical Bulletin 19/05, *Criminal Statistics 2004* (England and Wales) (2005 2nd ed). From 2001-3, the equivalent numbers were 23, 23, 21.

[12] Crown Prosecution Service, *The Code for Crown Prosecutors* 2004, http://www.cps.gov.uk/publications/docs/code2004english.pdf (last visited 10 July 2008).

[13] Professor R B Macrory, *Regulatory Justice: Making Sanctions Effective: Final Report* (2006), http://www.lacors.gov.uk/lacors/ContentDetails.aspx?id=15073 (last visited 10 July 2008).

2.11 Where incidents involving landlords and tenants are investigated by the police, more familiar offences, like criminal damage or assault, will be charged.[14] It is impossible to identify such cases from the generality of these offences. Thus, even where the police and prosecuting authorities are involved in controlling harassment of tenants, it does not show up in the statistics. No data is available about use of civil proceedings.

2.12 Data on "attrition rates" (the relatively small number of actions brought to court compared with the number of problems or complaints reported) found in other areas of law, for example data relating to complaints about noise nuisance,[15] suggests that the small number of cases going to court does not tell the whole story.[16]

Local authorities

2.13 Local authorities have historically had the primary role in enforcing legal housing standards. There are at least three contexts in which this may happen: environmental health; tenancy relations; and other private rented sector initiatives.

Environmental health

2.14 Local authorities have long had power to deal with public health matters. The heart of their current powers is found in the Housing Act 2004, which introduced the Housing Health and Safety Rating System, and the Environmental Protection Act 1990.

2.15 Under the Housing Act 2004, local authorities, working through their environmental health officers, must review housing conditions in their area.[17] Inspections of premises for hazards may follow a review, or if the local authority thinks it is appropriate for any other reason, such as a complaint from a tenant or a member of the public, or on a complaint made in writing from a justice of the peace.[18]

[14] For an example, see *R v Pashmfouroush and Pashmfouroush* [2006] EWCA Crim 2330. The landlord tried to change the locks of the property in an attempt illegally to evict the tenants, which led to incidents as a result of which the landlord and his wife were prosecuted for assaults and affray.

[15] For data on attrition rates in relation to noise nuisance complaints, see Chartered Institute of Environmental Health, *Noise Nuisance 2004/2005* (2006), http://www.cieh.org/library/Knowledge/Environmental_protection/CIEH_annual_noise_complaint_statistics.pdf (last visited 10 July 2008).

[16] In Housing: Proportionate Dispute Resolution: Further Analysis (2006), http://www.lawcom.gov.uk/docs/further_analysis.pdf, the Law Commission explored the processes by which problems are transformed into disputes brought before the courts, and the reasons for this attrition rate. See pp 6 to 17.

[17] Housing Act 2004, s 3.

[18] Housing Act 2004, s 4(1), (2) and (3).

2.16 Local authorities *must* take appropriate enforcement action if they consider that any residential premises contain a category 1 hazard,[19] and *can* (but need not) if there is a category 2 hazard.[20] Enforcement actions available are:

(1) improvement notices (requiring remedial work);

(2) prohibition orders;

(3) hazard awareness notices.

2.17 In relation to category 1 hazards only, four further remedies are available:

(1) emergency remedial action;

(2) emergency prohibition orders;

(3) demolition orders; and

(4) declaration of a clearance area.[21]

It is an offence not to comply with an improvement notice or prohibition order, and can lead to a £5,000 fine on summary conviction.[22]

2.18 The person who must receive any improvement notice varies, depending on the type of accommodation and whether or not it is the subject of a licence.[23] Where a landlord does not comply with an improvement notice, or where there is a category 1 hazard and an imminent risk of serious harm to health and safety, the local authority can undertake remedial action[24] and recover its expenses.[25]

2.19 The Environmental Protection Act 1990 gives extensive powers to local authorities to deal with statutory nuisances, in particular, power to issue abatement notices. Failure to comply can lead to summary proceedings in the magistrates' court.[26]

2.20 It has not proved possible to obtain data on the overall impact of the work of environmental health officers in regulating problems in the private rented sector.

[19] Housing Act 2004, s 5.

[20] Housing Act 2004, s 7.

[21] Housing Act 2004, ss 5(2) and 7(2). Demolition and clearance area declarations are contemplated by ss 5(2)(f) and (g) and 7(2)(d) and (e), and would require the Secretary of State to prescribe conditions first. There are no current plans to make the more drastic enforcement measures available to tackle category 2 hazards.

[22] Housing Act 2004, ss 30 and 32.

[23] Housing Act 2004, sch 1. For a licensed house in multiple occupation, the notice must be served on the licence holder: see para 1.

[24] Housing Act 2004, s 40 and sch 3 part 2.

[25] Housing Act 2004, s 42 and sch 3 part 3.

[26] Environmental Protection Act 1990, ss 79 and 80.

Tenancy relations officers

2.21 Many local authorities also employ (in differing guises) tenancy relations officers. In general terms, they try to resolve disputes that arise between private landlords and their tenants, in particular where there are allegations of unlawful eviction and harassment.

2.22 In the Consultation Paper we noted that local authorities are responsible for prosecuting unlawful eviction offences.[27] We thought that low rates of prosecution might result from their need to work in partnership with private landlords; and to reduce pressure upon the homelessness function and the local social housing stock by keeping private tenants in their current homes. This could account, at least in part, for a strong orientation in many areas toward compliance and mediation rather than prosecution.[28]

2.23 We accept that the low rate of prosecutions and convictions does not reflect the extent of local authority activity in this field. For example, Sheffield City Council's tenancy relations service, whose role includes preventing harassment and unlawful eviction of private sector tenants, makes around 500 interventions a year, with around 200 to 300 resulting in the landlord being made aware that they have served a legally ineffective notice to recover possession.[29]

2.24 There is a national Association of Tenancy Relations Officers which meets to share experience and good practice. Again, however, we were not able to bring together any national data about how they operate and the results of their interventions.

Other initiatives within the private rented sector

2.25 One way in which local authority practice in relation to the private rented sector has developed in recent years has been through a wide range of initiatives designed to improve working relationships between private landlords and local authorities. In part these initiatives are designed to improve housing management standards, and to enable local authorities to use private landlords to relieve pressure on their housing waiting lists.

LANDLORDS' FORUMS

2.26 For example, a number of local authorities run local landlord forums or fairs – regular events, usually free for landlords, which provide the opportunity for local authorities to talk to landlords about housing issues and to hear from landlords about their concerns. Such meetings are also used to bring in external speakers on relevant subjects, for example taxation matters.[30]

[27] Protection from Eviction Act 1977, s 6.

[28] D Cowan and A Marsh, "There's Regulatory Crime and Then There's Landlord Crime: From 'Rachmanites' to 'Partners'" (2001) 64 *Modern Law Review* 831.

[29] Data provided to the Law Commission by D Hickling, Sheffield City Council, in response to Housing: Proportionate Dispute Resolution: An Issues Paper (2006) http://www.lawcom.gov.uk/docs/issues_paper.pdf.

[30] The Law Commission have spoken at a number of such events.

ACCREDITATION

2.27 A related activity has been the introduction of accreditation schemes for private landlords. Accreditation started in the 1990s, promoted by a number of universities interested in improving the quality of privately rented student accommodation. The principle of accreditation has been taken up by many local authorities. Many of these schemes were initially launched within individual local authorities. Increasingly, they are being promoted on a more regional basis.

2.28 The Accreditation Network UK was founded in 2002 to promote and co-ordinate accreditation schemes. Its website[31] provides links to a large number of individual accreditation schemes throughout the country.

Landlord representative bodies

2.29 Landlord representative bodies have also sought to improve housing management standards through the adoption of their own codes of practice, the provision of guidance, conferences and the like. There are a number of such bodies. They include: the National Federation of Residential Landlords,[32] the Residential Landlords Association,[33] the National Landlords Association[34] and the Guild of Residential Landlords.[35]

2.30 Although, as we noted in the Consultation Paper, these bodies have admirable aims and do valuable work, they do not at present seek to discipline members who fail to adhere to a code of practice. Nor do they operate complaints procedures. In any event, only a minority of private landlords are members of any such organisation. The best estimate we have suggests that only 2.2% of the 700,000 landlords in England and Wales belong to an association.

Landlord law

2.31 There are other networks of advice and assistance available to landlords. One of these is Landlord Law, an impressive online help resource for landlords and tenants run by a solicitor, Tessa Shepperson.[36]

Letting agents' representative bodies

2.32 There are a number of bodies that represent letting agents that also have codes of practice, guidance and other means to promote improved housing management standards. Some have well-developed complaints handling systems. They include the National Association of Estate Agents (which recently

[31] http://www.anuk.org.uk (last visited 10 July 2008).

[32] The Federation recently amalgamated with the Southern Private Landlords Association. See http://www.nfrl.co.uk (last visited 10 July 2008).

[33] http://www.rla.org.uk (last visited 10 July 2008).

[34] http://www.landlords.org.uk/index.htm (last visited 10 July 2008).

[35] https://www.all4landlords.com/drupal/?q=node/1 (last visited 10 July 2008). This site has a table which compares the costs and services provided by these four principal landlord bodies.

[36] http://www.landlordlaw.co.uk (last visited 10 July 2008). Many of the responses to this and our other consultation papers have been generated though the Landlord Law website.

amalgamated with the Association of Residential Letting Agents),[37] the UK Association of Letting Agents,[38] the Association of Residential Managing Agents[39] and the Royal Institution of Chartered Surveyors.[40]

2.33 It is estimated that the percentage of letting agents who belong to one or other of these bodies is around 50%. There is anecdotal evidence that the introduction of the Tenancy Deposit Scheme has encouraged a number of agents who were not previously in any professional association to register with one or other of these bodies in order to take advantage of the approved scheme being offered.

2.34 From April 2008, the Consumers, Estate Agents and Redress Act 2007 came into force. This is designed to strengthen the self-regulatory activities of estate agents in relation to the buying and selling of residential property. It enables the Secretary of State to require estate agents to join an ombudsman scheme. Estate agents are required to keep better records of their transactions, allows trading standards officers to inspect those records, and the Act expands the circumstances in which the Office of Fair Trading can take regulatory action against estate agents.[41]

2.35 Despite considerable debate on the issue during the passage of the Bill through Parliament, the provisions do not apply to agents' role in the letting and management of residential accommodation. As noted in Part 1, the Government has commissioned a wider review of regulation in the property field.[42] This involves a further examination of the extent to which letting agents should be subject to the same rules as those dealing with the buying and selling of property.

National Approved Letting Scheme

2.36 There is also a Government supported national accreditation scheme, the National Approved Letting Scheme,[43] which seeks to set standards of service for letting agents, to monitor compliance and to oversee complaints. It will withdraw or suspend accreditation where required. It is open both to agents who are members of one of the professional bodies and, perhaps more importantly, to those who are not. It has approaching 1,400 member offices throughout the UK.

CONSULTATION PAPER: PROVISIONAL PROPOSAL

2.37 In the Consultation Paper, we noted that, while there is a plethora of initiatives designed to improve standards of housing management in the private rented sector, they are all, with the exception of local authority enforcement and some aspects of licensing, voluntary.

[37] http://www.naea.co.uk (last visited 10 July 2008).

[38] http://www.ukala.org.uk (last visited 10 July 2008).

[39] They represent agents who manage leasehold blocks of residential accommodation: http://www.arma.org.uk (last visited 10 July 2008).

[40] http://www.rics.org (last visited 10 July 2008).

[41] These provisions implement some of the recommendations which came from the Office of Fair Trading's study of Estate Agency, published in 2004. Among other things this showed considerable consumer dissatisfaction with the work of estate agents.

[42] Para 1.11 above.

[43] http://www.nalscheme.co.uk/frameset.htm (last visited 10 July 2008).

2.38 Throughout the course of our work on the reform of housing law, we have heard the complaint that, while many landlords who offer accommodation with decent standards at a fair price are signed up to relevant codes of practice, there remains the problem that the less scrupulous do not sign up to any professional body or association. It is they, it is argued, who fail to provide decent rented accommodation and who damage the reputation of the sector as a whole. This led us to the conclusion that if the current situation was to be improved there needed to be a new regulatory approach. In the Consultation Paper we argued that this should have a compulsory element.

2.39 There was a minority of respondents who disagreed with our view that there needed to be a new regulatory approach (whether compulsory or voluntary). They developed four main lines of argument.

2.40 The first, and most fundamental, was that there was simply no need for any new regulatory initiatives. In particular, the Council of Mortgage Lenders argued that, because the private rented sector had expanded so successfully over the last 10 years, there was more competition in the market. Competition would drive up standards. It is of course the Council's members that have largely funded the expansion of the private rented sector through the provision of buy-to-let finance. These arguments reflect the views of those economists referred to in paragraph 1.18 above.

2.41 A second response was that none of the options we presented would be viable because the burden of what we were suggesting would be disproportionate. Even though in the Consultation Paper we had made it clear that we were very conscious of the need to ensure that costs *were* proportionate, not everyone was convinced. Eastleigh Borough Council thought the options proposed would impose an "unnecessary cost" on the private rented sector. Similarly, Professor Bright from the University of Oxford was concerned that higher compliance costs "may have a negative impact on supply by good landlords of good properties".

2.42 A third class of response was that, while there might be a case for reform, the time was not currently right. It was noted, for example, that the new licensing provisions of the Housing Act 2004 had hardly begun to take effect; nor had the new rules relating to Tenancy Deposits. Respondents who took this line, including the Welsh Assembly Government, argued that it was important to let recent changes work through the market, and not to do anything which might lead to a reversal of the growth of the private rented sector.

2.43 The Paragon Group of Companies, a major provider of buy to let mortgages, stated that:

> We believe that no regulatory reform should be considered while the Housing Health and Safety Rating System is still in its infancy … Any movement towards enforced self-regulation or beyond would, at the current time, serve only to complicate the regulatory environment for landlords and local authorities … We would be very concerned if an additional layer of regulation was added to the [private rented sector] prior to a review of how existing regulation could be reduced, as this could cause landlords to limit any further investment in the [private

rented sector] or indeed to reduce their current involvement in the sector.

2.44 Finally, some respondents argued that a better approach would be to provide more resources to local authorities to enable them to expand their regulatory work and to tackle a wider range of problems.

CONCLUSIONS

2.45 We have carefully considered these criticisms, and have asked ourselves whether, in the light of them, we should leave things as they currently are.

2.46 In relation to the first argument, that the market will solve the bulk of regulatory problems, we remain unconvinced. We stress again that we are *not* proposing new, more burdensome, legal standards. Our goal is limited to finding ways in which current standards can be given the effect Parliament wanted them to have.

2.47 Few sectors of the consumer economy are wholly regulation free. Indeed what is remarkable is that the rental market lacks the structures for consumer protection found elsewhere.

2.48 The history of the landlord-tenant relationship does not inspire confidence that the market will solve all problems on its own. In any event, the vast majority of our respondents clearly accepted that a legal regulatory framework should remain in place.

2.49 Looked at from the tenants' perspective, the fact is that those who rent and who do not receive housing benefit are in most cases paying a very significant percentage of their post-tax income in rent, even more than on the other essentials of life such as food and heating. Given this financial reality, there is a strong case for ensuring that tenants should be protected from those landlords and agents who may be tempted to provide services that do not meet statutory minimum standards. It was this argument that led to the scheme for protecting tenancy deposits. We now think it should be applied more generally.

2.50 In relation to the second, we have been very conscious that whatever we propose must not impose a disproportionate burden. We consider this question further in Part 3. Here we note that the responses we received suggesting that our scheme would be disproportionate did not consider the costs of doing nothing, which we consider to be substantial. There is a separate question of who should bear the cost of any additional regulatory activity.

2.51 In relation to the third argument, we recognise the value of the changes introduced in the Housing Act 2004. Nevertheless, they provide only a partial response to the regulatory challenge of the private rented sector. We see the value of considering the case for an over-arching system of regulation within which a new regulatory approach can be brought to bear in a flexible and responsive way. In any event, there is currently a lot of work being done on different aspects of the regulation of the residential lettings sector.[44] Given our other work on the reform of housing law, we think that now is a good time to

[44] See above 1.11.

contribute to this debate by developing the case for a more coherent approach to the regulation of the private rented sector.

2.52 In relation to the fourth argument, that more could be done if local authorities had more resources, we see the logic of the argument. But we do not think that there is any realistic possibility of sufficient additional resources being made available to local authorities to enable them to extend the scope of their work.[45]

2.53 We think our approach, giving more responsibility to those in the industry to set and enforce basic standards of housing management, would actually enable local authorities to deal more effectively with the more serious cases that deserve their attention, using the enforcement sanctions they can bring to bear.

2.54 In short, these arguments have not persuaded us that we should recommend no change to current regulatory practice. They have however caused us to revise substantially aspects of our provisional proposals. In Parts 4 to 6, we consider the options for change and set out our final conclusions and recommendations. First, though, in Part 3, we review what we said on the different approaches to regulation that have developed in recent years.

[45] This approach is also reflected in the Communities and Local Government Select Committee report on the Supply of Rented Housing: Eighth Report (2007-08) http://www.publications.parliament.uk/pa/cm200708/cmselect/cmcomloc/457/45702.htm (last visited 10 July 2008).

PART 3
CHANGING APPROACHES TO REGULATION

INTRODUCTION

3.1 Part 5 of the Consultation Paper discussed how ideas about regulation had changed. We suggested that the concept of "smart regulation" offered a good basis for thinking about the regulation of the private rented sector. We also saw how government has developed the principle of "better regulation". We noted how regulation is now based more on risk-assessment, which encourages flexible regulatory responses; the higher the risk, the greater the need for firm regulation. These approaches are being taken forward in the Regulatory Enforcement and Sanctions Bill, introduced into the House of Lords in November 2007. We summarise each of these concepts.

SMART REGULATION

3.2 Under smart regulation the challenge is to discover the most effective mix of regulatory techniques for achieving the regulatory objective. The techniques may range from simple monitoring of a situation, to informing and/or advising about regulatory standards and how these might be achieved, through to the making of threats, and ultimately hard enforcement in the form of prosecution or the use of other legal procedures.

3.3 Smart regulation is an approach that highlights the need to consider a regulatory structure in its entirety, including the provision of mechanisms for feedback and review to allow learning.[1] Smart regulation:[2]

(1) *prefers policy mixes incorporating a broader range of instruments and institutions.* Reliance upon a single regulatory instrument is unlikely to be as efficient or effective; each has its weakness. Sensible use of complementary instruments is more effective.

(2) *prefers less interventionist measures.* Where possible it is more efficient to use less interventionist measures because administrative costs will be lower. It is more effective to do so because those being regulated are more likely to perceive themselves as volunteers than conscripts.

(3) *ensures that there is a flexible use of sanctions, which are appropriate to the achievement of the regulatory goals.* A new regulatory approach enables regulators to support those subject to regulation, in particular by education and training. While sanctions that can be imposed by courts and tribunals may well remain in place, they are used in only the most difficult cases and against the most intransigent parties.

[1] M Lodge and K Wegrich, submission to the Scottish Parliament, Subordinate Legislation Committee Report (2005) *Inquiry Into the Regulatory Framework in Scotland* SP 397, http://www.scottish.parliament.uk/business/committees/subleg/reports-05/sur05-31-04.htm (last visited 11 July 2008).

[2] N Gunningham and P Grabosky with D Sinclair, *Smart Regulation: Designing Environmental Policy* (1998) pp 387 to 422.

(4) *empowers participants who are in the best position to act as surrogate regulators.* Smart regulation seeks to use the regulatory capacities not just of government agencies but also business and commercial and non-commercial third party organisations. If the range of regulatory bodies is expanded beyond state agencies to include organisations outside government, this can free government agencies to focus their available (but usually limited) resources upon situations where direct intervention is the only viable approach. Non-government bodies can use other tools where these can deliver acceptable policy outcomes.

(5) *maximises opportunities for win-win outcomes*. Smart regulation seeks to work with business to improve performance, for example by demonstrating that compliance standards can lead to increased profit.

BETTER REGULATION

3.4 Government policy on regulation in recent years has frequently been expressed in terms of "Better Regulation". All proposals for new legislation go through an impact assessment to satisfy Government that they deliver an adequate net benefit to society. The process of assessment is made with reference to five principles of good regulation:[3]

(1) *proportionality*. Intervention should only occur when necessary and the remedies should be appropriate to the risk posed. The costs associated with regulation should be identified and minimised. An educational rather than punitive approach should be taken where possible.

(2) *accountability*. Regulators should be able to justify decisions. Their actions should be subject to public scrutiny.

(3) *consistency.* The rules and standards set by Government should be "joined up". Regulators should be consistent with each other. Rules and standards should be implemented fairly.

(4) *transparency.* Regulations should be kept simple. The purpose and need for regulation should be clearly defined. Proposals for regulatory change should be consulted on.

(5) *targeting.* Regulation should be focused upon those activities causing the most serious risk of harm. Where appropriate it should be "goals-based" rather than "process-based" – leading to actual improvements in behaviour, not simply the completion of forms. Further, regulation should always be kept under review.

3.5 These principles incorporate many of the ideas found in discussions of smart regulation, for example preferring less interventionist measures. However, other

[3] Better Regulation Task Force, *The Principles of Good Regulation*, http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/principlesleaflet.pdf (last visited 11 July 2008).

aspects of smart regulation – such as the desirability of using a mix of regulatory instruments – are not so clearly identifiable.[4]

RISK-BASED REGULATION

3.6 Since the 1980s, there has been a shift towards the use of risk-management strategies in regulation. Government sees risk assessment as fundamental to regulatory effectiveness.[5]

3.7 Risk-based approaches to regulation emphasise the tensions between imposing additional burdens on the regulated community (which may have little practical effect) and ensuring that the underlying objectives of the regulatory strategy are achieved. They emphasise the uncertainties associated with regulating and are used to justify the taking of a more selective approach to regulation so that only those activities and actors most likely to have adverse impacts on the public are targeted.[6]

3.8 Risk-based regulation represents a logical progression from Better Regulation principles. Given that regulatory resources are scarce, risk-based regulation can inform enforcement programmes by providing for the systematic prioritisation of enforcement activity.[7]

3.9 Adopting a risk-based approach to regulation and its enforcement entails a shift in the way that regulators have traditionally thought of their roles. It promotes greater reliance upon the provision of advice and education rather than, as one report suggested, "enforcement for its own sake".[8]

3.10 For the purposes of the rest of this report, we do not use the term "smart regulation" in any narrow or technical sense. Rather we use it to encapsulate the flexible and proportionate responses required to achieve the necessary regulatory goals, which are implied by "smart", "better" and "risk-based" regulation.

REGULATING THE PRIVATE RENTED SECTOR

3.11 There has never been a comprehensive analysis of the regulatory techniques used in relation to the private rented sector. Part 6 of the Consultation Paper showed that there is a complex mix of ideas, which have their origins in different

[4] R Baldwin, "Is Better Regulation Smarter Regulation?" [2005] *Public Law* 485.

[5] P Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement* (March 2005), paras 2.13, 2.16, 2.38, http://www.hm-treasury.gov.uk/media/7/F/bud05hamptonv1.pdf (last visited 11 July 2008)

[6] D Vogel, "The Politics of Risk Regulation in Europe and the United States" (2003) 3*The Yearbook of European Environmental Law*.

[7] M Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems and Regulatory Compliance* (2000); J Black, "Managing Regulatory Risks and Defining the Parameters of Blame: A Focus on the Australian Prudential Regulatory Authority" (2006) 28(1) *Law and Policy* 1.

[8] R B Macrory, *Regulatory Justice: Making Sanctions Effective Final Report* (November 2006) p 5, http://www.cabinetoffice.gov.uk/~/media/assets/www.cabinetoffice.gov.uk/regulation/macrory_penalties%20pdf.ashx (last visited 11 July 2008).

eras, and reflect different ideas about the nature and scope of regulation. They encompass:

(1) measures of command and control,

(2) licensing,

(3) codes of practice and the promulgation of standards, and

(4) softer regulation such as requirements on the provision of information.

3.12 In recent years, the role that non-state actors can play in regulation has begun to be recognised. Some initiatives, such as the development of accreditation schemes or the production of professional or quasi-professional codes of practice, reflect ideas inherent in smart regulation.

3.13 The means by which the private rented sector is currently regulated is the result of a complex mixture of historical policy legacy and contemporary currents in regulatory thinking. The policy legacy reflects long-standing political distrust of private landlords, which led to an acceptance of the need to regulate certain aspects of the sector. This is now mixed with a broader commitment to maintain a deregulated sector in order to facilitate growth, and use selective, risk-based interventions to deal with specific problems.

3.14 The application of regulatory theory to the private rented sector is also disorganised, incorporating regulatory techniques that have their origins in different eras and understandings of effective regulation. These range from a heavy reliance upon the criminal law and sanctions to the use of the contractual relationship between landlord and tenant to regulate landlord activity.

3.15 Given the piecemeal way in which the current regulatory structure has evolved, we think that the time has come to develop a more coherent approach.

3.16 One reason why a new approach to regulation is needed results from the changing composition of the sector itself.[9] There has been a significant rise in the number of private landlords who have started to let accommodation. There has been significant new investment in specific ”niche” sectors of the market, in particular the provision of accommodation for students. To that extent, a lighter and more flexible regulatory approach has stimulated the supply side of the private rented sector. Nevertheless, there has not been any significant institutional investment in “build-to-let” schemes.

3.17 At the same time, bodies representing landlords and managing agents have played an increasingly prominent role in the sector and have increased their emphasis on the importance of good management practice in the rental market. They have developed codes of practice relating to the letting of rented accommodation.[10] However, as noted in Part 1, large numbers of private landlords and many letting agents are not members of any professional or

[9] ADH Crook, J Henneberry, J Hughes and P Kemp, *Repairs and Maintenance by Private Landlords* (2000).

[10] These are discussed in Supplementary Paper 1: The Law on Housing Conditions and Unlawful Eviction, http://www.lawcom.gov.uk/housing_renting.htm .

representative body. Mechanisms for spreading good management practice to those who should benefit from it are not as strong as they should be.

Housing Act 2004

3.18 The Housing Act 2004 is the first major piece of housing legislation to be passed after the emergence of the Government's commitment to the Better Regulation agenda.[11] It contains three initiatives of particular significance for the regulatory approach to the private rented sector:

(1) the replacement of the housing fitness standard by a risk-based housing health and safety rating system;

(2) the introduction of mandatory licensing for houses in multiple occupation and selective area-based licensing; and

(3) the establishment of tenancy deposit schemes in a statutorily prescribed form.

3.19 These initiatives have clearly been influenced by contemporary regulatory thinking: they embody some acknowledgement of risk-based regulation, proportionality and targeting. However, the instruments chosen by the Act (particularly in respect of licensing) are themselves rather old-fashioned and inflexible. The Act does not purport to provide a general regulatory framework for the private sector as a whole

Voluntary codes

3.20 A further development that has gathered momentum under the current Government is the recognition of the role that voluntary codes adopted by non-state actors can play in the regulation of the private rented sector. The codes of practice and good practice guidance by which local authorities and landlord associations seek to shape the conduct of landlords have come to be viewed as an important resource in ensuring that the management of private rented property is of an adequate standard. Similar initiatives have been taken by bodies representing letting agents. There has also been a mushrooming in the development of voluntary local and regional accreditation schemes.[12] For our purposes, the issue is whether there should be further development to create a smarter regulatory framework that engages those parts of the sector the current system fails to reach.

Adapting smart regulation to the private rented sector: the importance of partnership

3.21 As will be seen in subsequent Parts, we seek to adapt the principles of "smart regulation" to the regulation of the private rented sector. Our ideas therefore give a central role to letting agents and landlord associations as well as to accreditation schemes. But it is crucial that a smart regulatory framework

[11] For more on the Government's Better Regulation initiative see the Better Regulation website, http://www.betterregulation.gov.uk/ (last visited 11 July 2008).

[12] DETR, *Voluntary Accreditation for Private Landlords: Housing Research Summary 144* (2001).

embraces partnership working, in particular between non-state bodies and local government.

3.22 Responses to the Consultation Paper revealed that some, particularly those working in local government, thought we were proposing a reduction in the importance of the contribution of local government to encouraging responsible letting. It was certainly not our intention to suggest that. Indeed, our vision is that any reformed scheme will have quite the opposite effect.

3.23 Local authorities already have considerable enforcement powers available to them.[13] Given the empirical evidence on housing conditions in the private rented sector, we doubted whether local authorities would have the resources effectively to monitor general housing conditions. Our argument was that, by enabling industry self-regulation to carry much of the day-to-day regulatory burden, government, particularly local government, agencies would be freed to concentrate upon the tasks of dealing with those cases that require the most serious action, including the bringing of prosecutions.

3.24 We explicitly stated that current local authority powers should be retained and used to address the exceptional or the worst cases where more collaborative forms of enforcement have not worked. Local authority sanctions should remain at the top of the "regulatory pyramid" – that is, to deal with the most difficult cases and the most intransigent parties.[14]

3.25 The purpose of the proposals made in this Paper is to ensure that new methods of keeping housing conditions and other housing management issues under review develop. Through partnership working, local authorities will acquire improved channels of communication that would enable them to step in with appropriate enforcement measures and other sanctions, including the power to prosecute. Far from downplaying their role, local authorities would have their enforcement functions enhanced.

3.26 In addition, expansion of accreditation has very largely been the result of local government initiatives. As our proposals envisage accreditation being a key element in the new regulatory framework, it is clear to us that local government will have a central role to play in this context as well.

UNDERLYING POLICY PRINCIPLES

3.27 In thinking about the future of regulation of the private rented sector, we accept that any recommendations must be tested against the following propositions, which lie at the heart of current Government policy.[15]

(1) The private rented sector plays a very significant role in local housing markets.

[13] They were set out in the Consultation Paper in Part 3.

[14] The "regulatory pyramid" is a concept first discussed in detail by I Ayres and J Braithwaite, *Responsive Regulation* (1992).

[15] For some of the issues facing Government, see CLG, *Dealing with "Problem" Private Rented Housing: Housing Research Summary 228* (2006).

(2) In many areas, the private rented sector still needs encouragement to expand.

(3) It is important that, in general, accommodation currently available in the private rented sector should remain in the market.

(4) If increased regulatory effort led to the poorest quality accommodation being taken from the market, that could be to the benefit of the market taken as a whole. (It might even create some opportunities for first-time buyers.)

(5) It is important to enhance the reputation and professionalism of those who provide an important social benefit, namely the provision of residential accommodation.

(6) More effective regulation to encourage more responsible letting also goes to the heart of the recommendations we made in Renting Homes, that legal regulation of residential renting should be based on principles of consumer protection.[16]

3.28 We discuss below[17] how our proposals for reform address these principles and objectives.

RESPONSES TO CONSULTATION

3.29 We received a small number of comments specifically on these admittedly more theoretical points.

3.30 Some respondents suggested that current practice was already "smarter" than we had acknowledged. For example, Sheffield City Council argued:

> Even with a fairly active, prosecuting TRO [tenancy relations officer] service as we have here … PEA [Protection from Eviction Act 1977] prosecution cases are only a small proportion of the total we deal with. Nevertheless, the point to be drawn from our experience … is that the 1-2% that are prosecuted are vital to the effectiveness of the interventions in the other 99% of cases. The PEA and sustaining a credible threat of action is a crucial tool in helping us to deal effectively in the more serious cases. It is submitted that the value of the legislation is not so much in how often prosecutions are brought, but in how often the legislation is used to deter the sudden, traumatic and unlawful loss of the home through harassment and unlawful eviction … My experience is that putting [harassment and illegal eviction] into the criminal sphere is itself a significant deterrent.

3.31 Others were concerned that, if there was too much flexibility of approach through a greater reliance on self-regulatory organisations which set their own standards, this could result in a "race to the bottom" to take advantage of the lowest common denominator, which would not necessarily be in the overall public interest.

[16] Renting Homes: The Final Report (2006) Law Com No 297, paras 1.25 to 1.38, http://www.lawcom.gov.uk/docs/lc297_vol1.pdf .

[17] See Part 6.

3.32 More positively there was support from bodies such as the Chartered Institute for Environmental Health and the National Housing in Multiple Occupation Network for a move to "smarter" regulation, embracing the principles of the Hampton report[18] and exploring alternative penalties to court action as a means of increasing the effectiveness of regulatory action. A move to a clearer focus upon risk-based regulation would allow "refocusing [of] enforcement activity on a proportionate basis" in the statutory sector. Equally importantly, it will, as noted by the West of England Local Authorities Group, "make better sense to landlords and may overcome some of their concerns about over-regulation and avoid them leaving the market". In this context, the Commission's discussion of options for reform was viewed by the UK Association of Letting Agents as "a welcome change of approach with some refreshing and imaginative ideas".

3.33 Generally, many responses accepted, if only by implication, our view that regulation had to be smart and proportionate. There was also broad agreement that the private rented sector had an important role to play in overall provision of housing, and indeed that that role should expand. The objective of improving quality within an expanding market was regarded as both desirable and achievable. There was concern, however, that this should not be "at any price".

REGULATORY ENFORCEMENT AND SANCTIONS BILL

3.34 Since we published our Consultation Paper, the Government, as noted above, published the Regulatory Enforcement and Sanctions Bill. The principal purpose of the Bill is to address one of the key findings of the Hampton review, that the diffuse structure of local authority regulatory enforcement increases uncertainty and administrative burdens for business. Uncoordinated action leads to businesses receiving unnecessary inspections and conflicting advice, and lack of communication between local authorities results in duplication of effort.

3.35 To address these problems, the Bill proposes, in Part 1, the establishment of the Local Better Regulation Office. In Part 2 there is provision for more consistent and coordinated regulatory enforcement by local authorities. Part 3 provides for the introduction of an expanded framework of regulatory sanctions, enabling Ministers to confer new civil sanctioning powers on designated regulators in relation to specific offences. Part 4 includes a new duty on regulators not to impose or maintain unnecessary burdens.

3.36 The Local Better Regulation Office will have power to issue guidance to local authorities about how they should exercise their functions in particular contexts. These include the housing related matters which may arise under the Environmental Protection Act 1990 and the Housing Acts 1985, 1996 and 2004.

3.37 The Local Better Regulation Office is also required to prepare and publish a list specifying the matters to which local authorities should give priority when allocating resources. In effect this will be a revision of the list of local authority regulatory priorities published in the Rogers Review in 2007. The existing list

[18] HM Treasury, *Reducing administrative burdens: effective inspection and enforcement* (2005) http://www.hm-treasury.gov.uk/budget/budget_05/other_documents/bud_bud05_hampton.cfm (last visited 11 July 2008).

includes: air quality; alcohol licensing; hygiene of food businesses; improving health in the workplace; and fair trading. Regulation of housing related matters is not included in the current list of priorities.

3.38 The Local Better Regulation Office is also required to enter memoranda of understanding with other named regulators, including the Office of Fair Trading.

3.39 To achieve more coordinated regulatory treatment, the Bill provides in Part 2 that, when a regulated person operates in more than one local authority area, one local authority can be nominated as the "primary authority". The primary authority will have power to give advice and guidance both to the regulated person and to the other local authorities. The primary authority will also be notified of any intended enforcement activity by another authority, unless that would not be practicable.

3.40 The new civil sanctioning powers in Part 3 are confined to "designated regulators" (currently including the Housing Corporation, to be replaced under the Housing and Regeneration Bill by the Office for Tenants and Social Landlords) in relation to "relevant offences". In the housing context, these include offences under the Accommodation Agencies Act 1953. The new sanctions include fixed monetary penalties, variable monetary penalties, stop notices, and the acceptance of enforcement undertakings.

3.41 Regulation of the private rented sector is thus not currently at the heart of the priorities for local authority enforcement activity contemplated by the new Bill. Indeed there is nothing in the Bill which indicates that the proposals we have been developing in relation to the private rented sector are being overtaken by the provisions in the new Bill.

3.42 However, the Bill is important in that it introduces onto the statute book new ideas about proportionate regulatory practice. Its provisions echo much of the thinking that lies behind our proposals. And some of the Bill's provisions offer ideas that could be developed in the future for application in the context of regulation of the private rented sector.

CONCLUSION

3.43 We conclude that the new regulatory approaches outlined above offer a practical way of thinking about how the private rented sector might be better regulated. In particular, we think that the involvement of landlords' and agents' organisations in the process of both setting and enforcing regulatory standards will help to ensure the credibility of the regulatory framework with landlords and letting agents. Obviously, if these ideas are taken forward by Government, it will be essential that the adoption of new regulatory procedures does not lead to measures that turn out to be anti-competitive. However, given the multi-faceted proposals we have developed, with different options for different landlords and agents, we think these dangers can be avoided.

3.44 We turn now to summarise the options for change we set out in the Consultation Paper.

PART 4
OPTIONS FOR CHANGE

INTRODUCTION

4.1 In the Consultation Paper, we identified three options for change:[1]

(1) Enhancing voluntary self-regulation;

(2) Introducing enforced self-regulation; and

(3) Licensing.

4.2 In addition, we raised the idea that, either as part of a larger scheme, or as a separate initiative, a system of home condition certification might be introduced to try to ensure that rented accommodation met statutory housing condition standards.

4.3 At the heart of these proposals was our belief that a more effective regulatory structure for the sector required a move away from a system based primarily upon the enforcement of private law rights triggered by court action on the part of occupiers and local authorities. We suggested that instead the regulation of the private rented sector should be more clearly based on a system that fosters a culture of compliance and builds a commitment to quality provision.

4.4 In this Part we summarise the features of each option, as we saw them. In Part 5, we summarise the responses of consultees to our proposals. In Part 6 we set out our recommendations. First, though, we return to the key issue of the better provision of information.

BETTER PROVISION OF INFORMATION

Model agreements

4.5 Before turning to the options we outlined in the Consultation Paper, we return to one of the central recommendations of our Renting Homes report. It recommended a scheme whereby all landlords would be required to provide a written copy of the letting agreement to the occupier.

[1] Encouraging Responsible Letting (2007) Consultation Paper No 181, Part 7, http://www.lawcom.gov.uk/docs/cp181.pdf.

4.6 The problem in the private rented sector is not a lack of information[2] but finding ways to deliver it in a digestible form to landlords, agents, and occupiers who would not actively seek it out. Renting Homes recommended that all occupiers be provided with a copy of their rental contract, containing a clear and comprehensive written statement of both parties' rights and responsibilities.[3] The agreement would be available in plain language. Its terms would reflect the legislative provisions set out in our draft Rented Homes Bill. For the first time, this would guarantee that both parties to the agreement would have access to a reliable statement of their mutual rights and obligations, as prescribed by Parliament.

4.7 Any new regulatory approach must be concerned as much with prevention as with enforcement, and with encouraging adherence to standards to avert relatively much more costly and ultimately less effective enforcement action. One obvious preventive measure is the better provision of information. If those letting property in the private rented sector were more aware of their obligations then the level of non-compliance through inadvertence would be reduced.[4]

4.8 This suggestion was strongly endorsed by the British Property Federation who, in response to the Consultation Paper, said:

> Many of our members would … welcome any attempt to simplify the law in relation to private-rented sector housing and to make it more accessible to the lay person. As it currently stands landlords have to be familiar with 58 Acts of Parliament to fulfil their duties making compliance difficult. The British Property Federation would therefore be in favour of rekindling the debate around tenancy agreements, first discussed in [the Law Commission's] paper "Rented Homes", in the hope that … a model tenancy agreement [could be] developed to make both landlords' and tenants' rights and obligations clearer.

4.9 While acceptance of those recommendations would be unlikely to solve all the regulatory challenges we identified in this report, we are convinced that the targeted provision of better and more reliable information is an essential component of any new approach.

Other channels of communication

4.10 Other channels of communication could also be envisaged, albeit ones we have not ourselves explored in detail.

[2] The internet offers a number of up to date sources of free information on housing law obligations: see for example http://www.landlordzone.co.uk/ (last visited 11 July 2008) and http://www.letlink.co.uk (last visited 11 July 2008).See also the CLG website, private landlord section http://www.communities.gov.uk/housing/ (last visited 11 July 2008).

[3] Renting Homes: The Final Report (2006) Law Com No 297, Part 3, http://www.lawcom.gov.uk/docs/lc297_vol1.pdf.

[4] The most recent private landlords survey highlights lack of information and advice as a problem for landlords and agents: *English House Condition Survey 2006: Private Landlords Survey* (2006) p 39, http://www.communities.gov.uk/publications/housing/privatelandlordsurvey (11 July 2008).

4.11 First is tenancy deposit schemes.[5] Because landlords who take deposits must join an approved scheme,[6] scheme operators are now building extensive databases of landlords and properties let. They could be developed so as to become effective conduits for transmitting information to landlords, agents and occupiers about their respective rights and obligations.

4.12 Second is housing benefit. The Government spends considerable sums of money on housing benefit, of direct financial advantage to private landlords. In doing so, it acquires a great deal of basic information about both landlords and tenants, especially those operating at the lower end of the private rented sector. We consider that there is considerable potential to utilise the identification of landlords through the housing benefit system to provide information to that part of the sector where many of the worst problems of non-compliance with statutory standards arise.

OPTION 1: ENHANCING VOLUNTARY SELF-REGULATION

4.13 The first of the options we set out in our Consultation Paper involved expanding existing voluntary initiatives through professional associations and accreditation schemes. In principle, we were attracted to the idea of keeping self-regulation voluntary. However, we had to ask how, given existing levels of non-participation, those currently outside any scheme could be persuaded to join one. We thought this would require creating incentives to persuade landlords and agents, currently not signed up to a scheme, to join one.

4.14 The Consultation Paper listed some of the incentives that might be needed.[7] They included:

(1) access to fast-tracked court procedures;

(2) access to a local authority administered “rent guarantee bank” that could compensate landlords for rent arrears;

(3) access to local authority tenancy deposits bond schemes;[8]

(4) access to free dispute resolution/mediation services;

(5) improved access to local authority home improvement grants;

(6) exemption from selective licensing or mandatory Houses in Multiple Occupation licensing under the Housing Act 2004, on the grounds that they would already be regulated by an association’s code of practice;

[5] H Carr, S Cottle, T Baldwin, M King, *The Housing Act 2004: A Practical Guide* (2005) p 219.

[6] Housing Act 2004, ss 212 to 215 and sch 10.

[7] Consultation Paper, para 7.31.

[8] Some schemes already exist but they mostly cover a tenant’s deposit only: see for example http://www.richmond.gov.uk/home/housing/advice_for_owners_and_landlords/schemes_for_private_landlords/rent_deposit_guarantee_scheme.htm (last visited 11 July 2007).

(7) better return on interest from tenancy deposits held under a custodial tenancy deposit scheme;

(8) reformed tax treatment, aligning the tax treatment of small landlords more closely with that of other small business enterprises;[9]

(9) improved access to Housing Health and Safety Rating System evaluations, including financial help for remedying hazards;

(10) local authority funded gas safety inspections – the responsibility for obtaining an annual safety certificate would remain with the landlord, but the local authority could pay for the inspection.

4.15 We thought that new incentives would have to be generous. However, if so, we also thought they would cost significant sums to provide, probably going beyond what central or local government would be willing to pay for. Even so, we suspected that these incentives would still not make enough economic and practical difference to bring all or nearly all landlords into the system. We concluded in the Consultation Paper that the primary disadvantage with enhancing voluntary self-regulation was that the suggested benefits would offer too many incentives to landlords who did not need them, without providing sufficient incentives to the problem minority to improve their letting behaviour.

4.16 We also thought that voluntary self-regulation suffered from a number of other disadvantages. These included:

(1) uneven implementation;

(2) lack of regulatory oversight to ensure standards; and

(3) giving too much deference to business as opposed to consumer interests.

OPTION 2: ENFORCED SELF-REGULATION

4.17 The second option identified was enforced self-regulation. It would enhance existing good self-regulatory practice by imposing a legal requirement on landlords and/or agents to join either a professional association or accreditation scheme. Landlords and agents would be able to choose which association or scheme to join. But they would have to be part of at least one association or scheme.

4.18 Recognising the practical difficulty of ensuring that *every* individual landlord signs up to an association or scheme, we suggested that landlords would not personally have to be members of a professional association or accreditation scheme so long as they used a letting agent who was a member of an association or scheme

4.19 The central goals of enforced self-regulation would be:

[9] Examples of what might be involved were given by the Commission on modernising the private rented sector: see Shelter and Joseph Rowntree Foundation, *Private Renting: A New Settlement* (2002) p 7, https://www.landlordlaw.co.uk/content/PRSmediareport.pdf (last visited 11 July 2007).

(1) ensuring that day-to-day management of rented accommodation was undertaken by those who had received appropriate training;

(2) enabling the organisation or scheme to take responsibility for enforcing good practice;

(3) creating informal and formal procedures for resolving disputes; and

(4) having a central external regulator, such as the Office of Fair Trading or the new Office of Tenants and Social Landlords, to approve associations and schemes.

4.20 After an appropriate transitional period, letting property not managed by a member of an appropriate association or scheme would be punishable by sanction, which could include a prohibition on that person being a landlord or letting agent.

4.21 The idea of enforced self-regulation is not new, being a feature of many trades and professions. Enforced self-regulation in the private rented sector, as we envisaged it, would, however, have some novel characteristics. In particular:

(1) It would be based on multiple – and competing – self-regulatory organisations and schemes.[10] Membership of *any* approved professional association or accreditation scheme would be sufficient.

(2) It would require an independent central regulatory organisation to approve and externally oversee self-regulatory activity by establishing minimum standards and approving codes of practice. It would also need to ensure that appropriate disciplinary procedures and redress mechanisms were in place. Independent oversight would be needed to ensure accountability, prevent the race to the bottom, and thus secure its credibility.

4.22 We suggested that as the Office of Fair Trading has experience of encouraging industry groups to develop codes of practice under its Consumer Codes Approval Scheme,[11] and as it already has experience in the closely related estate agency field, it might be a candidate for the role of central regulator. To gain Office of Fair Trading approval, codes of practice have to address the following core issues:

(1) Content

(2) Complaint handling

(3) Monitoring

[10] For a discussion of competition in self-regulation see A Ogus "Rethinking Self-regulation" (1995) 15(1) *Oxford Journal of Legal Studies* 97. A recent analogy is the approval of electrical self-certification schemes under the Building Regulations. In order to carry out certain electrical work in dwellings, contractors must either be a member of an approved self-certification scheme or notify the local authority before carrying out the work. Self-certification schemes are approved by the Building Regulations Advisory Committee and compete amongst themselves for members.

[11] See http://www.oft.gov.uk/oft_at_work/consumer_initiatives/codes/ (last visited 11 July 2008).

(4) Enforcement

(5) Publicity.

4.23 Each of these could be adapted to the specific requirements of a code or codes of practice relating to the management of rented accommodation.

4.24 As enforced self-regulation would go beyond voluntary self-regulation, we recognised that it would entail significant change from the way most professional associations and accreditation schemes currently operate. There would need to be means of informing occupiers about the scheme or association of which the landlord was a member. This would include information about how problems should be solved and disputes resolved. However, this could readily be achieved through the model agreement we recommended in Renting Homes.

4.25 The existence of regulatory sanctions for organisations not operating appropriate systems for monitoring compliance with their codes, and dealing appropriately with complaints, would be the major incentive for ensuring the effectiveness of the self-regulatory process. But good regulation should only use punitive sanctions as a last resort. Primary emphasis should be on supporting those, found to be in breach of standards in any code of practice or accreditation scheme, to enable them to improve their housing management practices.

4.26 There would need to be quick and effective disciplinary proceedings to deal with instances of serious non-compliance when they are discovered. These proceedings would have to be procedurally fair and transparent. Careful consideration would need to be given to the allocation and exercise of supervisory and disciplinary functions as between any central regulator and the self-regulatory bodies themselves.[12] While financial[13] or procedural[14] sanctions would play a key part in ensuring participation, in the last resort, they would need to be reinforced by criminal sanction.

Advantages

4.27 We argued that there were many advantages to enforced self-regulation.

(1) It would apply across the sector, embracing all landlords and agents, not just volunteers.

[12] These issues have also been considered in the context of legal services reform. See R Baldwin, J Black and M Cave, *A Legal Services Board: Roles and Operationalising Issues* (July 2005), which discussed relationships between the Legal Services Board and the front-line regulators, http://www.dca.gov.uk/legalsys/baldwin-black-cave.pdf (last visited 11 July 2008).

[13] See for example, the Housing Act 2004, s 214(4), which requires that a court must order that a landlord who has not complied with a tenancy deposit scheme pay to the tenant a sum three times the amount of their deposit. Tenants could also be given the ability to not pay rent if they discovered that their landlord or agent was not properly affiliated or accredited: see Renting Homes, Final Report, Volume 2: Draft Bill (2006) Law Com No 297 cl 34, http://www.lawcom.gov.uk/docs/lc297_vol2.pdf.

[14] See for example, the Housing Act 2004, s 215, which provides that a landlord who has failed to comply with the requirements of a tenancy deposit scheme is unable to serve a notice under section 21 of the Housing Act 1988 to recover possession after the expiry of a fixed term shorthold tenancy.

(2) Given the numbers of landlords and agents in the market, a universal requirement would spread the costs of running schemes.

(3) It would harness the capabilities of existing schemes and non-state organisations to set and enforce standards within an approved framework.

(4) Landlords and agents would be complying with standards generated by their own associations or schemes provided that those standards accorded with the principles set by an external regulator.[15]

(5) By obliging landlords to join a self-regulatory organisation which had its own incentives to ensure that its code of practice is effective, enforced self-regulation would offer scope for developing positive peer group effects. Membership could go a long way to dealing with problems currently caused by amateurism or inadvertence, and shape the behaviour of landlords.

(6) Our vision of enforced self-regulation was not a one-size-fits-all approach. Landlords and agents could choose which approved national, regional or local organisation or scheme to join, depending on which one suited them best.

(7) While all landlords would not be required to join the same regulatory body, there would be a finite pool of approved self-regulatory organisations, which would make the job of the central regulator feasible. The central regulator would focus upon ensuring that SROs deliver their schemes effectively, rather than being extensively involved in the landlord-tenant relations.

(8) Occupiers would benefit from improved management standards and access to the complaints procedures run by their landlord's or agent's association or scheme.

(9) Assuming the complaints procedures were effective, they would become the preferred option for dispute resolution, with a consequent reduction in the burden upon courts and tribunals.

Challenges

4.28 We identified three main challenges: capacity, authority and cost.

Capacity

4.29 The first is the capacity of professional associations and accreditation schemes to regulate the numbers of landlords and agents that operate in the private rented sector. Would existing landlords' and agents' associations and accreditation schemes be able to absorb the significant number of unaffiliated landlords and agencies? Would new organisations emerge?

[15] Although the central regulator would set *minimum* standards for all approved associations and schemes: see Consultation Paper, paras 8.4 to 8.8.

Authority

4.30 The second challenge is that associations and accreditation schemes might not have sufficient authority to enforce standards against their members adequately. Enforced self-regulation requires industry associations and accreditation schemes to regulate their members actively. Organisations would need to demonstrate that they can deal effectively with less committed members of their organisation, whether landlords or agents. Occupiers would need to know which organisation their landlord was a member of, and to whom, and how, to complain.

Cost

4.31 The third related to cost. At present, the typical costs of membership of an association or accreditation scheme are modest: for example £70 per year, or £175 for three years, plus a £18 joining fee, for the National Landlords Association; £47 for five years' membership of Chester City Council's accreditation scheme,[16] and £65 per year for the Association of Residential Letting Agents.[17]

4.32 Associations and accreditation schemes might have to charge higher membership fees to cover the cost of enforcing their codes of practice.[18] But, if membership of an association or scheme became compulsory, the resultant increases in the size of schemes' memberships should enable significant economies of scale to be achieved. Competition between associations and schemes should ensure that fee levels were well controlled. Costs would, of course, be significantly less for landlords who joined lower cost accreditation schemes, or who employed accredited agents.[19]

4.33 As we discuss below[20], fee levels are more likely to depend on the scheme's approach to property inspection than on the number of complaints received and investigated and the number of additional staff needed in investigatory and enforcement roles.

[16] See http://www.chester.gov.uk/main.asp?page=654 (last visited 11 July 2008).

[17] Other organisations' fees are similar, for example membership of the National Federation of Residential Landlords costs between £70 and £100: £65 for the East Midlands Property Owners Association; £85, including a one-off £20 joining fee, for Eastern Landlords; and £100 in the Liverpool area. The Residential Landlords Association charges £85 for online membership (reducing to £75 for continuous card payments) and £95 otherwise. The Guild of Residential Landlords charges £70 per year for individuals and couples, and £120 for letting agents. Some accreditation schemes are free to join, such as the one operated by Pendle Borough Council, http://www.pendle.gov.uk/site/scripts/documents_info.php?categoryID=946&documentID=352 (last visited 11 July 2008). The National Association of Estate Agents' membership costs from £75 for non-corporate (student or affiliate grades) and £95 for associate corporate status to £175 for full corporate membership (all excluding VAT). The National Approved Letting Scheme charges £100 for each firm and £50 for additional offices. The United Kingdom Association of Letting Agents charges £135 with a one off processing fee of £45.

[18] There may also be additional costs, eg of attending up-dating sessions.

[19] The different charging regimes that have been put in place in the context of the new schemes for tenancy deposits also provide an indication of how the market might respond in different ways.

[20] Para 4.36.

COSTS OF COMPLAINTS HANDLING

4.34 We were unable to estimate with any precision how many complaints landlords' associations and accreditation schemes currently receive, and the extent of their enforcement activity. The National Landlords Association told us that complaints against their members are "very low"[21] and they could recall only one or two expulsions of members following complaints.[22] In contrast, Unipol told us that 39 formal complaints, against 24 owners, were made between 1 September 2005 and 31 August 2006 (out of 391 Unipol members that year). We would expect such organisations to receive more complaints if all landlords were required to join.

4.35 Having looked at a number of examples of complaints handling costs in other contexts, in particularly by the Independent Housing Ombudsman Service, we concluded that an annual "complaints handling levy" of £1.50 per dwelling would generate around £3.7 million for complaints handling.

COSTS OF PROPERTY INSPECTION PRIOR TO JOINING

4.36 The costs of joining a landlords' association or accreditation scheme would increase significantly if the self-regulatory organisations chose, or were required by the central regulator, to carry out property inspections before allowing a landlord to join. Some accreditation schemes inspect only a sample of a landlord's stock, and not necessarily before accepting someone as a member. The costs of Houses in Multiple Occupation licences in England (where the property condition is relevant) vary between £100 in Wigan and £1,750 in Dartford, averaging £528.[23] This is significantly higher than the costs of landlord registration in Scotland (which focuses on whether the landlord is a fit and proper person), for which the principal registration fee is £55, with an additional £11 for each property owned.[24]

COSTS OF THE CENTRAL REGULATOR

4.37 The central regulator would also require resources sufficient to enable it to exercise its functions. One question that would need consideration is the degree to which Government, anxious to secure the advantages of the scheme in terms of improvements to the management of the private rented sector, would be prepared to subsidise these additional costs.

4.38 To estimate the costs of a central regulator for the private rented sector, we looked at the costs of other "central" regulators. While any estimates should be treated with caution, as the costs of similarly sized regulators vary greatly, we thought expenditure of about £5.5 million a year should enable the Central Regulator to do its job. This would equate to an annual fee of about £2.30 for each private rented dwelling in England and Wales.

[21] E-mail from Michelle Harris to the Law Commission, 3 January 2007.

[22] At a meeting at the National Landlords Association office on 12 September 2006.

[23] *Inside Housing*, 1 September 2006.

[24] The Private Landlord Registration (Information and Fees) (Scotland) Regulations 2005 (SSI 2005 No 558).

OPTION 3: LICENSING

4.39 The third option we considered was licensing. Compulsory licensing of houses in multiple occupation was introduced in the Housing Act 2004. The same Act also introduced the possibility of selective licensing in areas of low demand or where anti-social behaviour is a problem. We considered two forms of licensing: mandatory and implied.

Mandatory licensing

4.40 Mandatory licensing would require all landlords to be licensed if they wanted to be a landlord, unless they were exempt. Like the current houses in multiple occupation and selective licensing regimes, local authorities would be the prime candidates to run the scheme, although the creation of a national[25] central regulator would remain a possibility.

4.41 On this basis, landlords would apply to the local authority, or central regulator, who would determine whether they met the initial entry requirements (usually referred to as the “fit and proper person” standard but essentially focused on whether the landlord has previously breached any housing or criminal law obligations). Landlords who met these initial requirements would be granted a licence to let their property or properties. The licence would impose conditions relating to the management of the property and/or the state of the property. Breach of licence conditions, or any housing-related legal obligations, could result in the imposition of sanctions, which again could range from mandatory training to a prohibition on acting as a landlord. Operating without a licence would be an offence.

4.42 Landlords would not have to show that they were fit and proper persons if they employed a registered agent, but agents would still require a licence. In practice, this would mean that all letting and managing agents would have to be registered with the licensing authority.

4.43 Enforcement of licence conditions and of the requirement to obtain a licence would be undertaken by the local authority central regulator through a mix of active monitoring and occupier complaints. A similar kind of mandatory licensing of the private rented sector has been implemented recently in Scotland.[26]

Advantages and disadvantages

4.44 The advantages of mandatory licensing are that it is a centralised and relatively straightforward way, at least conceptually, to encourage more responsible behaviour by landlords.

[25] In practice two, one for England and one for Wales.

[26] See Part 8 of the Anti-Social Behaviour (Scotland) Act 2004. The scheme is described as a registration scheme rather than licensing, but “licence” conditions are in effect imposed through a Letting Code, issued by the Scottish Executive that must be complied with in order for a landlord to remain a “fit and proper person”, the central requirement for registration: Anti-Social Behaviour (Scotland) Act 2004, s 85.

4.45 It allows local authorities or other regulators to set standards for all landlords within their jurisdictional boundaries. Standards can be tailored to local conditions and problems. Local authorities are in theory well placed to carry out the enforcement of these standards because licence requirements relating to property conditions and health and safety obligations dovetail with existing local authority enforcement responsibilities under the Housing Act 2004 and consumer protection legislation.

4.46 In addition to driving out the ill-intentioned landlords from the sector, licensing affords occupiers another avenue of redress against landlords who do not comply with their obligations. Occupiers can complain to their local authority if their landlord does not have a licence or is in breach of one or more of their licence conditions. In Scotland, where they have introduced a registration scheme, tenants can search the registration database to see whether their landlord (or prospective landlord) is in good standing with their local authority.

4.47 The problems with mandatory licensing are with implementing it in practice and the costs it imposes on a growing and important sector of the housing market. In contrast to the other options, licensing has negative connotations. The requirement for a licence suggests some form of probation or conditionality to becoming a landlord.

4.48 As can be seen from the example of the Scottish registration scheme, implementation is not easy. The sheer number and diversity of landlords in the private rented sector make administering the scheme difficult.[27]

4.49 In addition to the potentially substantial administrative costs, we thought there were potentially other drawbacks. Licensing can be seen as an outmoded and impractical regulatory form particularly where there are many actors to regulate.[28] It is not oriented towards the more proportionate and targeted approach to regulation implied by smart regulation. It may deter entry into the sector and some landlords may be driven away from a sector that has just begun to show growth, which from a policy perspective is seen as desirable and to be encouraged.

[27] In Scotland, one report suggests that the number of private landlords was severely underestimated, resulting in the system being overloaded: Chris Partridge, "Out of Control" (21 June 2006) *The Independent*, p 19.

[28] Current policy initiatives have tended to move away from blanket licensing towards more selective regulation that accommodates notions of risk. This can be seen in the context of the regulation of food safety.

4.50 Furthermore, if licence conditions vary from local authority to local authority, this would cause considerable difficulties for large-scale landlords who operate in a number of different local authority areas (as is already the case with houses in multiple occupation and selective licensing). This could be countered by the production at central Government level of standard sets of conditions, which could act either as guidance or be mandatory. But that would undermine the advantages which might be thought to flow from giving the function to local government in the first place. The structure being put in place with the Regulation and Enforcement Bill could help to ensure common standards and approaches to enforcement, but these would have to be adapted if they were to be operable in the context of regulating the private rented sector.

Implied, or "negative", licensing

4.51 The joint Shelter and Joseph Rowntree Foundation Commission on modernising the private rented sector proposed a variation on mandatory licensing.[29] Their proposal was to impose a requirement that any person (or company) managing rented accommodation be a "fit and proper person". Unlike mandatory licensing, landlords and agents would not have to apply for a licence or register with the local authority. Rather, there would be a presumption that every person managing a property was a fit and proper person until shown otherwise. A determination that someone was not a fit and proper person would only be made after an investigation by the local authority, triggered either by the local authority's own initiative or a complaint made by an occupier or other third party.

Advantages and disadvantages

4.52 Implied licensing shares most of the benefits of mandatory licensing while not being as administratively complex and thus not as costly to implement. Additionally, it would not necessarily exclude the operation of voluntary accreditation schemes and professional associations whose work is also aimed at encouraging improved management standards.

4.53 Local authorities would still have to set management standards and be responsible for enforcement. It is not clear that local authorities have the capacity to carry out the enforcement activities that would be required by such a scheme. There would be similar political and economic considerations of imposing local authority generated standards on landlords and agents. If "fit and proper" person standards varied from one local authority to another, this might dissuade large landlords from investing in the sector.

4.54 Local authorities would also need to allocate resources for inspections, investigation of complaints, and the enforcement of sanctions for this proposal to work. Unlike mandatory licensing, these additional resources could not be obtained through licence fees since there would be no formal licensing process. Local authorities would have to divert existing resources to ensuring compliance with the fit and proper person standard.

[29] Shelter and Joseph Rowntree Foundation, *Private Renting: A New Settlement* (2002) pp 14 to 15, https://www.landlordlaw.co.uk/content/PRSmediareport.pdf (last visited 11 July 2008).

4.55 A final problem would be that the framework may still drive out those landlords who consider its requirements too onerous. Some of the more conscientious landlords may fear they will not be viewed as a “fit and proper person” by the licensing authority when in fact they would be compliant. By contrast, wilfully non-compliant landlords or agents may remain within the sector because they may view the risks of formal enforcement as being slight. The absence of a formal application process would be unlikely to encourage the ill-intentioned landlord or agent to leave the sector or improve compliance.

4.56 Finally, policing such a scheme would arguably be more difficult than with compulsory licensing, under which landlords would be required to produce a licence on commencement of a letting. If licences were implied, then previously disciplined landlords might find it easier to avoid detection than unlicensed landlords under the mandatory system.

HOME CONDITION CERTIFICATION

4.57 A further idea proposed in the Consultation Paper was that of Home Condition Certification. The idea builds on the current practice that there should be regular inspections of gas appliances, in particular central heating boilers, to ensure they are safe. This seems to be working relatively satisfactorily.

4.58 Part of the problem with the current regulatory framework as it relates to property conditions is that, in dealing with health and safety issues, it is (with the exception of gas inspections) reactive rather than preventive. Standards are enforced, if at all, only after a breach has been uncovered. It is therefore argued that a better way to ensure that rented accommodation meets the basic legal minimum standards for health and safety and property conditions is to devise a means of guaranteeing the condition of a property before it is let.[30]

4.59 One means of doing so would be to require that privately rented accommodation be inspected and certified before it can be rented. Certification would be centred on the main legal obligations relating to health and safety and property condition: the Housing Health and Safety Rating System, the Gas Safety (Installation and Use) Regulations 1998,[31] other safety regulations made under the Consumer Protection Act 1987,[32] and the landlord’s repairing obligations under section 11 of the Landlord and Tenant Act 1985.[33] Certification would be a means of ensuring that these obligations have been complied with before a property is occupied.

[30] This would support the recommendation in para 8.7 of Renting Homes: The Final Report (2006) Law Com No 297, that accommodation should at least be free of ”category 1 hazards” at the time of the letting: see http://www.lawcom.gov.uk/docs/lc297_vol1.pdf.

[31] SI 1998 No 2451.

[32] See Supplementary Paper 1: The law on housing conditions and unlawful eviction, http://www.lawcom.gov.uk/housing_renting.htm.

[33] For a description of the obligations, see paras 3.9 to 3.12 of the Consultation Paper.

4.60 Certification could work as follows. Before a landlord could let a property, it would be inspected to certify that the property complied with the relevant obligations. The inspection would ensure that there were no category 1 hazards on the premises; that the installations, which are the landlord's responsibility under section 11 of the Landlord and Tenant Act 1985, were in repair and proper working order; the gas safety certificate was up to date; and that electrical installations had been tested and were working satisfactorily. If these conditions were met a certificate would be issued that stated that the property was in an appropriate condition for letting and complied with the obligations at the time of the inspection.

4.61 Given the rate of turnover in parts of the private rented sector it would be impractical to require recertification prior to each new letting. A certificate would therefore need to last for a set period of time (say three years).

4.62 If the property could not be certified as safe and in compliance then the landlord would have to bring it up to the required standards before it could be let. Letting without having first obtained a certificate would be an offence. Transitional arrangements would be required for those properties that were occupied when the scheme came into effect, including what would happen to the occupiers of properties that did not meet the required standard and failed to be subject to a certificate.

4.63 The cost of obtaining a certificate would be borne by the landlord. Where market conditions allowed, these could be passed on to the occupier as part of the rent.

CONCLUSION

4.64 In the Consultation Paper, our provisional view was that of the three options for change we had identified, option 2 – enforced self-regulation – was to be preferred to either option 1 – voluntary self-regulation or option 3, licensing. We argued that, in our provisional view, option 1 would not really tackle the underlying problem of non-compliance; option 3 would be over centralised and not meet the basic principles we set out in para 3.27.

4.65 As regards home condition certification, we thought it might be part of a new regulatory structure which could supplement the power of the central regulator. The starting, and ideal, position would be that the regulatory regime would be a system of enforced self-regulation. However, if it became apparent that this approach was not working in some areas or sectors – that the self-regulatory organisations were operating for the benefit of landlords or agents, not occupiers, or, indeed, no self-regulatory organisation was prepared to deal with landlords or agents in a particular area or sector – then the central regulator would have the option of imposing certification on the relevant areas or sectors. If it appeared that self-regulation could again work (for instance, after certification had forced up standards as a one-off effort), then certification could be removed and its place taken by more effective self-regulatory organisations taking matters back into their own hands.

4.66 Part 5 summarises the responses to our ideas. Part 6 sets out our conclusions and recommendations.

PART 5
RESPONSES TO THE CONSULTATION PAPER: A SUMMARY

INTRODUCTION

5.1 The consultation period ran from 13 July to 12 October 2007. We received 110 responses. They came from right across the sector, from landlords (both individual and institutional), agents and tenants, lawyers and advisers, local government and other key stakeholders. Our thinking has been considerably influenced by them. A full list of those responding is given at Appendix A. We are extremely grateful to all those who took the time and trouble to respond.

5.2 In addition, members of the project team spoke at a number of meetings organised by stakeholders. Comments made there have been taken into account in preparing this report. We have also noted comments of key stakeholders that were made on our provisional proposals in the trade press.

5.3 Unlike some Law Commission consultation exercises, because we knew that this report would not have a draft Bill attached to it, we did not set out a detailed list of questions to which we were inviting responses. Rather, we posed more general questions about what we regarded as the key issues we had identified in the Consultation Paper

5.4 As a consequence, while the responses we received were full and thoughtful, they were often quite discursive and in many cases concentrated on one or two matters of particular concern to that respondent. We have not, therefore, been able to provide the detailed statistical analysis of responses that many Law Commission reports contain. We have, however, prepared a detailed summary of the responses, which is set out in Appendix B. From these responses, we have drawn the conclusions about what respondents were telling us that are set out in this Part.

5.5 There are many respects in which the responses and the conclusions we have drawn from them have made us re-think our provisional proposals. We set out our final recommendations and our reasons for them in Part 6.

5.6 To anticipate those recommendations, our view now is that enforced self-regulation may ultimately be the only way to achieve the improvements to the management of the private rented sector which have been called over the years. However, we believe that an immediate resort to enforced self-regulation would entail a rapid and unwelcome sea-change in the ways in which all those who operate in the private rented sector think about regulation and the regulatory process, which would be detrimental to the sector and the contribution it makes to the delivery of housing policy. Before any decision is taken to introduce enforced self-regulation, there should first be a staged programme of reforms (and evaluations of them) which enhance voluntary self-regulation, but which – save in respect of letting agents – fall short of enforced self-regulation.

5.7 As noted at the start of Part 4, the Consultation Paper identified three options for change, together with ideas for home condition certification. The conclusions we

have drawn from the responses made by respondents are set out in the same order as that of the summary of our provisional proposals which we provided in Part 4, namely:

(1) enhancing voluntary self-regulation;

(2) introducing enforced self-regulation;

(3) expanding licensing; and

(4) home condition certification.

Before turning to these conclusions, it is important to set out some general comments on the nature and content of the responses.

GENERAL COMMENTS

The need for regulation

5.8 All our respondents accepted that there had to be regulation of the private rented sector. We have already noted in Part 2 the views of a small number of respondents who thought that there was no case for changing the current regulatory regime, or that this was not the time for proposing further change.

5.9 A clear majority accepted our view, advanced in the Consultation Paper, that the current system of regulation did not work as well as it should. They agreed that there needed to be change. This was so, notwithstanding the estimates we made in the Consultation Paper of the capital costs that might be associated with better enforcement of current statutory standards, particularly relating to housing conditions.[1]

5.10 There were some who took the view that, given the expansion of the private rented sector, competition would in the long run drive standards up, as those landlords who continued to offer poor quality accommodation at high prices would be driven from the market. But, given the wide variations in different local housing markets, there was no suggestion that, taking the country as a whole, this stage in the development of the private rented sector had yet been reached.

A new regulatory approach

5.11 Given the general acceptance of the basic need for regulation, there was widespread support for the basic idea in the Consultation Paper that a new regulatory approach should be developed.

[1] In the Consultation Paper we discussed the cost of raising the condition of property on a number of different bases (see paras 4.5 to 414). These ranged from £1.47 billion to meet the 'unfitness test' in s 604 of the Housing Act 1985, to £7.5 billion to bring all properties up to the modernisation, fitness or disrepair criteria set out in the decent homes standards (the criteria are defined in the *English House Condition Survey Technical Report* (2004 Edition) (2006) at pp 49 to 52).

5.12 Although there was general agreement on the desirability of a new regulatory approach, there were sharp differences of opinion on the question of what the nature of those changes should be. In particular, there was profound disagreement about two central matters: should the new approach be based on self-regulation or on licensing?; and, should the new approach be voluntary or enforced?

Self-regulation or licensing?

5.13 There was a good deal of support for making the principle of self-regulation the central feature of any new regulatory approach, particularly from landlords and letting agents.[2] However, those making submissions in particular from the tenants' perspective were much more sceptical about the power of self-regulation to deliver significant improvement, especially amongst landlords who currently evaded their existing legal responsibilities.[3] They tended to favour more traditional regulatory approaches, with authority to regulate being given to agencies of the state, in particular local government, for example through an expansion of current licensing schemes.[4]

Voluntary or enforced?

5.14 Strongly conflicting views were also expressed on whether the new approach should remain, as now, an essentially voluntary one, or whether it should, as we had provisionally proposed, become an enforced one. There was a great deal of concern that an enforced scheme would come at disproportionate cost.[5]

Other ideas

5.15 In the Consultation Paper we also sought other suggestions from consultees. A number of ideas emerged which are included in our analysis of responses.[6]

COMMENTS ON THE OPTIONS FOR CHANGE

5.16 We now summarise the main conclusions that we have drawn from the responses to the options for change that we identified in the Consultation Paper.

Enhanced voluntary self-regulation

5.17 In relation to option 1:

(1) A clear majority of respondents felt that a voluntary approach was more desirable than an enforced one.[7]

(2) Voluntary approaches must be underpinned by continued (and if possible greater) enforcement activity by local authorities.[8]

2 Appendix B paras B.1 to B.14.

3 See, for example, the views of Shelter, Appendix B para B.17 and B.42, and Citizens' Advice, Appendix B paras B.155 to B.159.

4 Discussion of responses on licensing is at Appendix B paras B.185 to B.201.

5 Appendix B paras B.192 to B.198. See also Appendix B para B.137.

6 Appendix B paras B.152 to B.184.

7 Appendix B paras B.1 to B.14.

(3) Incentives would be needed to increase voluntary participation in accreditation schemes or self-regulatory organisations.[9]

(4) A purely voluntary approach is unlikely to get at the hard core of landlords who wilfully ignore their statutory obligations, particularly those at the bottom end of the market.[10]

(5) At present landlord associations and accreditation schemes do not, in the main, see it as their function to police standards and compliance with codes of practice. They do not necessarily deliver improved housing management standards.[11]

(6) It was acknowledged that a purely voluntary approach, without any form of central standard setting, might encourage a "race to the bottom".[12]

Enforced self-regulation

5.18 In relation to option 2:

(1) Given the admitted limitations of voluntary self-regulation, there was some support for the principle of enforced self-regulation.[13]

(2) However, there were grave concerns about the practicality and the proportionality of the scheme as outlined in the Consultation Paper.[14]

(3) Organisations representing letting agents were more willing to contemplate the prospect of some enforced scheme of regulation.[15]

(4) *If* there were to be a scheme of enforced self regulation, many respondents accepted that there would need to be a central regulator.[16]

(5) Others were unable to support the idea in the absence of further detail about what its powers would be.[17]

[8] Appendix B paras B.11 to B.12; B.25.

[9] Appendix B paras B.4 and B.5; B.7 to B.9.

[10] Appendix B paras B.16 to B.25.

[11] Appendix B paras B.26 to B.29.

[12] Appendix B paras B.30 to B.32.

[13] Appendix B para B.33, B.34, B.36, B.40.

[14] Appendix B para B.35, B.41, B.42, B.53.

[15] Appendix B paras B.37 to B.39.

[16] Appendix B paras B.44 to B.52.

[17] Appendix B paras B.55 to B.58.

(6) There was no agreement on who that body should be, though there was much support for the proposition that it should be a body working at arms length from government. The Law Commission's suggestion that the Office of Fair Trading might take on the task did not command universal support.[18]

(7) Even if the idea of enforced self-regulation was not taken forward, the suggestion was made that there might be scope for promoting the role of a central regulator to oversee a system of enhanced voluntary self-regulation.[19]

(8) If there was to be a scheme of enforced self-regulation, there should be a single code of housing management practice, rather than a variety of codes.[20] This should be negotiated by those representing all sides of the private rented sector.

(9) There might need to be a separate code of practice for letting agents.[21]

(10) Existing landlord associations are not geared up to undertake the monitoring and enforcement of standards that a scheme of enforced self-regulation would imply. Though one or two organisations saw this possibility as an opportunity, the majority thought it would be extremely hard, if not impossible to achieve.[22]

(11) Doubts were expressed as to whether self-regulatory organisations would be able to impose effective sanctions for non-compliance with the scheme.[23]

(12) There were also concerns about the scope of such bodies to run complaints procedures.[24]

(13) Local authorities would need to retain and perhaps expand their powers of enforcement. Self-regulation could enable them to concentrate on effective action in the worst cases.[25]

[18] Appendix B paras B.59 to B.71.

[19] Appendix B para B.50.

[20] Appendix B paras B.72 to B.79.

[21] Appendix B para B.74.

[22] Appendix B paras B.81 to B.85.

[23] Appendix B paras B.86 to B.91; B.99 to B.111.

[24] Appendix B paras B.112 to B.116.

[25] Appendix B paras B.124 to B.127.

(14) There was support for some form of registration scheme,[26] though views differed on whether it should be run centrally or locally, and whether it should be a register of landlords or a register of properties rented. It was argued that the establishment of such a scheme would facilitate the ability of government and other housing agencies to communicate with landlords.[27]

(15) Any scheme that required rented accommodation to be inspected would be very much more expensive to run than schemes that focused on the suitability of a particular person or organisation to be a landlord.[28]

(16) Other mechanisms for ensuring responsible renting should also be considered, for example by limiting payments of housing benefit to those renting from accredited landlords.[29]

Licensing

5.19 In relation to option 3:

(1) A majority of respondents agreed with the Law Commission's provisional view that licensing should not be the preferred option.[30]

(2) Nevertheless, there was some support for the idea of licensing landlords, particularly from those who were not confident that the principle of self-regulation (whether voluntary or enhanced) would operate effectively.[31]

(3) There was also some support for the idea that letting agents should be required to be a licensed member of a professional organisation.[32]

Home condition certificates

5.20 In relation to home condition certificates:

(1) There was some support for the introduction of a system of home condition certification, though the resource implications of taking such a step were thought to be considerable. [33]

(2) There was merit in finding a way to consolidate inspection work currently undertaken by different people for different purposes.[34]

[26] The most developed was that offered by Eastleigh BC, Appendix B para B.179

[27] See the variations offered by Citizens Advice, Brent Private Tenants Group, Shelter and the Residential Landlords' Association, Appendix B paras B.153 to B.177. See also Appendix B para B.183.

[28] Appendix B paras B.128 to B.132

[29] See Appendix B para B.182 and para B.223.

[30] Appendix B paras B.183.

[31] Appendix B paras B.190 to B.198.

[32] Appendix B paras B.117 to B.123; B.201.

[33] Appendix B paras B.204 to B.210 and B.214 to B.224.

[34] Appendix B paras B.228 to B.231.

(3) Any scheme would need to take into account inaction or damage by tenants so that landlords were not unfairly disadvantaged.[35]

COMMENT

5.21 Having set out what we regard as the principal conclusions which arise from the discussion of our provisional proposals, we now turn to our final recommendations.

[35] Appendix B paras B.233 to B.234.

PART 6
ENCOURAGING RESPONSIBLE LETTING: RECOMMENDATIONS

INTRODUCTION

6.1 We embarked upon this project because, in the course of our other work on the reform of housing law, we had become increasingly concerned that traditional approaches to the regulation of the private rented sector of the housing market did not appear to work well. There was a vast amount of legislation. But ordinary landlords and tenants did not or were unable to use the legal process to assert their legal rights.

6.2 A whole variety of reasons have been identified as to why this should be the case. These include:

(1) ignorance;

(2) not wanting the stress and strain of entering the legal process;

(3) fear of costs;

(4) fear of retaliation by those against whom claims were made;

(5) lack of availability of lawyers.[1]

6.3 Traditional legal responses to these issues would have involved arguing, among other things, for more legal aid and advice, and cheaper court or tribunal procedures. Our difficulty was that we did not see the resources needed being made available. Nor were we convinced that, even if they were available, they would deliver the improvements in management standards we think should be made.

6.4 Nevertheless, the failure of current mechanisms to deliver the statutory protections provided by Parliament meant, for example, that many tenants were still living in accommodation that was, by definition, sub-standard; and those landlords who through ignorance or malevolence did not operate to basic statutory standards continued to give private renting as a whole a negative reputation.

6.5 These failures have serious knock-on consequences, not least the reluctance of institutional investors to invest in the provision of residential accommodation for rent.[2]

[1] See for example, P Pleasance et al *Causes of Action*: *Civil Law and Social Justice* (2nd ed 2006).

6.6 We therefore decided it was important to ask a different set of questions. Was the current approach to the regulation of the private rented sector the right one? If not, was there another approach that could be developed that might have a better chance of being more effective? Could lessons about approaches to regulation developed in other contexts be applied to the regulation of the private rented sector?

THE CHANGING CONTEXT

6.7 As it happens, and quite independently of this project, there is currently a great deal of interest in the regulation of the residential property market, including the private rented sector.[3] Four projects relate particularly to the issues discussed here:

(1) The wider review of regulation across the property sector, established following Parliamentary debate on the Consumers, Estate Agents and Redress Bill.

(2) The independent review of the private rented sector being carried out for the Government by Julie Rugg and David Rhodes.

(3) The report of the Communities and Local Government Select Committee into the Supply of Rented Housing.

(4) Sir Bryan Carsberg's review of residential property, whose report was published in June 2008.[4]

6.8 The implication of all this work is that the regulation of the residential sector in general and the rented sector in particular is neither as coherent nor as effective as it could and should be.

UNDERLYING PRINCIPLES

6.9 As noted earlier,[5] we accept that any recommendations we make for reform must be tested against the following principles, which reflect current Government policy:

(1) The private rented sector plays a very significant role in local housing markets.

(2) In many areas, the private rented sector needs to expand.

[2] A point recently re-emphasised in the British Property Federation's submission to the inquiry being undertaken by Julie Rugg and David Rhodes at the University of York: British Property Federation, *The Future of Renting: a response to the CLG review of the private rented sector by Julia Rugg* (2008) http://www.bpf.org.uk/pdf/21114/THE%20FUTURE%20OF%20RENTING.pdf (last visited 14 July 2008)

[3] These are listed above, para 1.11.

[4] See: http://www.rics.org/NR/rdonlyres/C65D9E57-4587-450D-8A3E-99706A2B33DB/0/CarsbergReviewofResidentialProperty.pdf (last visited 14 July 2008). See also below paras 6.25, 6.41 and 6.75 to 6.76.

[5] See above para 3.27.

(3) In general, accommodation currently available in the private rented sector should remain in the market.

(4) Nevertheless, if increased regulatory effort led to the poorest quality accommodation being taken from the market, that could be to the benefit of the market as a whole, not least because it might create some opportunities for first-time buyers.

(5) It is important to enhance the reputation and professionalism of those who provide residential accommodation for rent.

Regulatory impact assessment

6.10 More generally, it is Government policy that recommendations for reform in any policy area must be subject to a regulatory impact assessment. Indeed, as we noted above,[6] undertaking such assessments goes to the heart of better (smarter) regulation.

6.11 It is now the policy of the Law Commission to subject its own reform proposals to such analysis. On this occasion, we have not undertaken such an assessment, for two reasons:

(1) In deciding its policy response to the Communities and Local Government Select Committee report and also to the independent review being undertaken by Julie Rugg and David Rhodes, the Government will need to undertake its own regulatory impact assessment. There seemed little point in the Law Commission attempting to do work that would also be being done within Government.

(2) We thought publication of this report should not be delayed further, which undertaking our own regulatory impact assessment would have meant. We wanted to ensure that the ideas advanced and conclusions reached here should contribute to the shaping of the Government's thinking on the regulation of the private rented sector.

6.12 As indicated above[7] and as is further discussed below, we have moved away from the provisional proposal in the Consultation Paper for the introduction of a system of enforced self-regulation. We accept that were this step to be taken, such a policy initiative would require a detailed regulatory impact assessment to ensure that the benefits of taking such a step clearly outweighed the costs of introduction.

6.13 We think that the staged programme of reform we now recommend, designed to enhance voluntary initiatives already in place, is much more readily justified in cost-benefit terms. Furthermore, it enables the hypothesis, that self-regulation is better regulation, to be tested in practice in the context of the private rented sector.

[6] See para 3.4.

[7] See para 5.6.

FUNDAMENTAL ISSUES

6.14 Before turning to more detailed conclusions, there are two fundamental issues, which underpin the recommendations we make below.

1. Implementing Renting Homes

6.15 As noted earlier, implementation of our recommendations in Renting Homes[8] will make a significant contribution to the understanding by both landlords and occupiers of their mutual legal rights and responsibilities. This would be widely welcomed by those with an interest in the future development of the private rented sector. The Communities and Local Government Select Committee has broadly endorsed the approach we took in our report Renting Homes and called upon the Government to build on our work. We believe that implementation of the recommendations in our report, Renting Homes, would make a significant contribution to encouraging responsible renting.

2. Changing the regulatory approach – smart regulation

6.16 Our consultation has revealed that there is a large measure of agreement that there should be a change to the regulatory approach adopted in relation to the private rented sector. We note the views of those who argue that they are good landlords who have an unequivocally positive relationship with their tenants and who therefore see no need for any new regulatory approach.[9] We accept that there are very many good landlords. However, there are still bad landlords, and the existence of the good landlords does not change that fact. Nor does it change the conditions in which the tenants of bad landlords have to live. Thus, despite the arguments that were made by those respondents to the Consultation Paper who were against change, we conclude that there should be a new approach to the private rented sector, grounded in principles of smart regulation.

6.17 There are two principal reasons why we have reached this conclusion.

6.18 The first, and more general, is that the private rented sector is a very significant player not just in the housing market but also in the wider economy. The capital value of rented accommodation is substantial; there is a great social interest in ensuring that this accommodation is fit for purpose. Large numbers of individual landlords have borrowed significant sums of money to fund the purchase of rented property. While many have made their investments with long term financial aims in mind, there is concern that problems in the financial markets may encourage some to leave the market. Occupiers of rented property spend significantly more on their housing costs than any other item of their regular household expenditure.

[8] Renting: The Final Report (2006) Law Com No 297, http://www.lawcom.gov.uk/docs/lc297_vol1.pdf.

[9] See for example G Webber, *Oh no! Not more regulation* (2007) 11(5) *Landlord and Tenant Review* 139.

6.19 There is increasing recognition that principles of consumer protection, which were at the heart of our Renting Homes report, should apply to the business of renting accommodation as much as to other sectors of the consumer economy. As Government acknowledged by introducing the tenancy deposit scheme, it is right that those paying for and receiving housing services should be able to feel confident that they have appropriate sources of consumer protection available to them, and effective ways to deal with problems when they arise. And it is in landlords' (and their agents') interests to be able to demonstrate that collectively they are determined to provide good housing services to their customers and clients, which are delivered in a professional manner.

6.20 Secondly, there is a great deal of regulatory legislation on the statute book that does not have the impact that Parliament intended. In particular, we know from the available data that the condition of rented residential property in England and Wales fails to meet statutory standards in a significant minority of cases. There are also more incidents of harassment and illegal eviction than there should be. There is good evidence that the current regulatory approach does not work as effectively as it should. We think a new approach to the regulation of the private rented sector will enable the current law to work better.

6.21 We also think, notwithstanding the views of those who are sceptical about the principle of self-regulation,[10] that the direct involvement of landlords and agents in the active regulation of the private rented sector will do much to enhance the professionalism that is said to be lacking at least in some parts of the market.

6.22 We do not think the adoption of this new regulatory approach will drive significant numbers of landlords from the market. Rather, we think it sends the important signal that all landlords and agents can be relied upon to act in a professional manner and to accept their responsibilities to provide housing services within the legal framework prescribed by Parliament.

6.23 We acknowledge that people in business generally dislike being regulated, but we agree with the view, also made in the consultation response, that they dislike uncertainty even more.[11] They need as stable context as possible in which to make their investment decisions. While reputational issues continue to be raised in political circles about the private rented sector,[12] there must be concern that political pressures may build which will result in "something having to be done". This may in turn lead to another short-term legal "fix" that adds to the complexity of the law but has only marginal practical effect. The new regulatory approach which we recommend should significantly reduce these political pressures. Indeed, we have reason to think that a new regulatory approach could actually encourage new institutional investors, in particular build-to-let investors, to enter the market.[13]

[10] See above para 5.13, and below Appendix B paras B.17, B.43, and B.155 to B.159.

[11] See for example the comments by Mostyn Estates, Appendix B para B.193 who observe that of course business grumbles about regulation but accepts its necessity. What is essential is that the cost of regulation is proportionate.

[12] Above para 1.17.

[13] See for example Social Market Foundation, *The Future of Private Renting in the UK* (2004).

INTRODUCING COMPULSION?

6.24 The Consultation Paper argued that a degree of compulsion would be needed to meet the regulatory challenge we identified as lying at the heart of this project.[14] However, we cannot ignore those respondents to our provisional proposal who told us that, even if the arguments in favour were to be accepted in principle, the burden of a compulsory scheme would be disproportionate to the potential gains to be made. We also noted the view of many respondents that a voluntary approach was to be preferred.[15]

6.25 While a compulsory scheme based on the provisional proposals we set out in the Consultation Paper may at some point be needed, we now believe that much more can be done to build on current initiatives. Indeed if the reforms we recommend in this Report are successful, they may result in the case for the introduction of a comprehensive compulsory scheme weakening.[16] This conclusion is subject to what we say below in relation to the position of letting agents.

MORE DETAILED RECOMMENDATIONS

6.26 Although we do not recommend the introduction of a comprehensive scheme of enforced self-regulation at this stage, we think that there is a programme of steps that can be taken that will make a contribution to the more effective regulation of the private rented sector. It is important that each of the initiatives we recommend is evaluated to see whether it is having the desired impact.

6.27 The components of the reform programme we now recommend are:

(1) The national provision of landlord accreditation schemes;

(2) Establishment of a housing standards monitor for the private rented sector (for each of England and Wales);

(3) Appointment of a stakeholder board;

(4) Publication of a single code of good housing management practice;

(5) Setting up a national landlords' register;

(6) Regulation of letting agents;

(7) Development of new channels for dealing with complaints and the redress of grievances;

(8) Piloting home condition certificates.

6.28 Each of these is discussed in more detail below.

[14] See above paras 1.13 to 1.19.

[15] See Part 5 paras 5.14 and 5.17(1) and Appendix B paras B.1 to B.14; B.137; and B.192 to B.198.

[16] We note that Sir Bryan Carsberg's review has called for landlords who do not use agents to be required by legislation to join a private sector regulatory scheme.

The national provision of landlord accreditation schemes

6.29 As responses to the consultation made clear,[17] the development over recent years of a variety of accreditation schemes is one of the principal ways in which local authorities and other bodies – in particular those involved with the provision of student accommodation – have sought to improve the management of rented residential property. We are certain that this work must continue.

6.30 The consequence of this being a voluntary activity, however, is that despite the growth in the number of schemes, there are still areas of the country where no accreditation scheme is in place. We think the time has come when an accreditation scheme for landlords should be available everywhere. We do not think it is necessary for every local authority to run its own scheme. We see considerable force in the idea that local authorities should increasingly work on a regional basis in the provision of such schemes. But we do think the time has come when an accreditation scheme should be available to landlords in every part of the country.

6.31 **We recommend that landlord accreditation schemes should be made available in every local authority area.**

6.32 We envisage that landlord accreditation schemes would continue to be run in the main by local authorities, either on their own, or in consortia with other local authorities. While this could probably be achieved by executive action, we think there would be considerable merit in putting this initiative on a statutory basis, if only to ensure that a scheme was actually available in all parts of the country. We also envisage that not every local or regional scheme would have to be identical but should be shaped, within a common framework, by local housing market conditions.

6.33 For example, we know that a number of local authorities have developed tenants' accreditation schemes alongside their landlord schemes. They can provide incentives for tenants to look after their properties and adhere to their contractual obligations. They emphasise the point that, while landlords must take prime responsibility for the management of the properties they rent, tenants also have their part to play in good housing management. Where appropriate to local housing market conditions, we think that such local initiatives should continue to be encouraged.

Establishment of a housing standards monitor for the private rented sector

6.34 In our provisional proposals for a scheme of enforced self regulation, we discussed the necessity of establishing a central regulator who would, among other activities, set the standards for the work of the self-regulatory organisations, ensure that those organisations had mechanisms in place for the resolution of disputes, and establish procedures for the referral of particularly difficult cases to local authority enforcement agencies. Responses to the consultation indicated that, were there to be enforced self-regulation, there was considerable support for the principle of creating a central regulator.[18]

[17] Appendix B, paras B.2 to B.14.

[18] Above para 5.18(4) and below Appendix B, paras B.44 to B.52.

6.35 We were struck by the comments of one or two respondents, in particular the National Trust,[19] who observed that a central regulator could play a significant role, even if the regulation of the private rented sector continued to be on a voluntary rather than compulsory basis. We found this suggestion to be an interesting one.

6.36 Given the move away from our original ideas on enforced self-regulation, we do not think it is appropriate to retain the concept of a central regulator. But we think that the enhancement of voluntary self-regulation could be promoted by the creation of what we now call a housing standards monitor. We envisage the monitor would have responsibility for monitoring local developments in relation to the management of the private rented sector, spreading information about best practice, criticising poor practice and encouraging innovation.

6.37 In addition to these general functions of data gathering and information provision, the housing standards monitor should have the following more specific functions:

(1) Establishing a private rented sector stakeholder board;

(2) Keeping the regulatory framework under review;

(3) Developing a single code of management practice for landlords;

(4) Exploring the feasibility of establishing a national landlords' register;

(5) Promoting new ways for dealing with complaint and disputes;

(6) Exploring the potential for home condition certification;

(7) Considering the incentives needed to promote enhanced self-regulation;

(8) Overseeing the programme of evaluation that should accompany the implementation of these proposed reforms.

These potential functions of the housing standards monitor are discussed further in context below.

6.38 We think that it would be wise to establish the housing standards monitor on a statutory basis to give it the authority necessary to maximise its influence on the operation of the private rented sector.

6.39 **We recommend the creation of a housing standards monitor for the private rented sector**.

The identity of the housing standards monitor

6.40 In the Consultation Paper, we identified two possible candidates to take on the role of central regulator: the Office of Fair Trading, and the (new) Office for Tenants and Social Landlords.

[19] See above para 5.18(7) and below Appendix B para B.50. See also the view of the British Property Federation who saw value in the central accreditation of accreditation schemes: Appendix B para B.49.

THE OFFICE OF FAIR TRADING

6.41 One suggestion, the Office of Fair Trading, commanded less support than we had anticipated.[20] Indeed, in its own response to the Law Commission, it became clear that it did not see itself as taking a lead role in this context. Nevertheless, it is a body that has some experience of dealing with housing-related consumer issues. It has issued important reports on unfair terms in tenancy agreements.[21] It has been closely involved in all the recent statutory developments relating to the regulation of estate agencies. And more generally it has experience of helping to set up and approve industry codes of practice designed to enhance consumer protection. Sir Bryan Carsberg's Review of Residential Property envisages the OFT playing a central role.[22]

6.42 However, given respondents' views on the matter, including those of the Office of Fair Trading itself, and the fact that we are not now proposing the creation of a central regulator, we have concluded that the OFT is not the appropriate body for the post we now envisage.

THE OFFICE FOR TENANTS AND SOCIAL LANDLORDS

6.43 The second suggestion was that the proposed new Office for Tenants and Social Landlords, being established by the Housing and Regeneration Bill 2007 might also take on work related to the private rented sector. A number of respondents supported this idea, observing that it would help to counter the present fragmentation in regulatory approaches to the social and private rented sectors.[23]

6.44 The obvious difficulty is that the new body is not yet in being and has not started the job Government is establishing it to do. We do not know all the details of the powers it will have. It is very hard to know at this point whether the new Office could be adapted to take on a key role in relation to the private rented sector. However, we think that this idea should continue to be a possibility since the potential activities of the monitor will mirror the focus of the new office on tenant and consumer protection.

6.45 **We recommend that consideration be given to making the Office for Tenants and Social Landlords the housing standards monitor for the private rented sector in England**

6.46 In Wales, the position is different, in that the functions of the Office for Tenants and Social Landlords are carried out directly by the Welsh Assembly Government. We consider the position in relation to Wales below at paragraphs 6.50 to 6.55.

[20] See above para 5.18(6) and below Appendix B paras B.59 to B.71.

[21] See for example OFT, *Guidance on Unfair Terms in Tenancy Agreements* (2005) OFT356, http://www.oft.gov.uk/shared_oft/reports/unfair_contract_terms/oft356.pdf (last visited 14 July 2008).

[22] Recommendation 7.

[23] See for example Appendix B paras B.61 and B.62.

LOCAL GOVERNMENT

6.47 Although the Consultation Paper saw local authorities playing key roles in the proposed regulatory structure, in particular through use of their enforcement powers, and taking other initiatives such as the development of accreditation schemes, the Paper was less enthusiastic about local authorities playing the role of central regulator. Indeed a number of respondents welcomed the idea of the central regulator being a body at arms length from government, both central and local. A degree of independence was seen as important to encourage participation by stakeholders in the regulation of the private rented sector. [24]

6.48 However, we note that the report of the Communities and Local Government Select Committee envisages a rather larger role for local government in the regulation of the private rented sector. Given the fact that the housing market is not a single entity but differs in different areas of the country, We can see that the case for local authority regulatory leadership may seem attractive.

6.49 We remain concerned that, if the setting of regulatory standards and good practice is left to individual local authorities, this may prevent the establishment of the common standards and practices which would benefit the operation of the private rented sector as a whole. Notwithstanding our own reservations about the idea, we accept, given the Select Committee's report, that the possibility of local government taking the regulatory lead in the promotion of housing standards will continue to be considered, perhaps through a central group such as LACORS.

The position in Wales

6.50 The response from Welsh stakeholders to our proposals was limited. In particular, the Deputy Minister of Housing took the view that time should be allowed for the measures in the Housing Act 2004 to show their effectiveness or otherwise.[25] We reject this specific argument, since we regard the measures relating to houses in multiple occupation and selective licensing and the other measures in the 2004 Act as at best a partial response to the regulatory challenge of the private rented sector.

6.51 Nevertheless, we must ensure that any changes we recommend to the regulatory structure properly reflect the devolution settlement.

6.52 Housing as a policy area has been subject to executive devolution since the establishment of the National Assembly of Wales under the Government of Wales Act 1998. It is now one of the "fields" for devolved legislative functions set out in Government of Wales Act 2006, schedule 5, as is local government. There will be areas in which co-operation between the housing standards monitor and those responsible for government policy will be essential.

[24] See above para 5.18(6) and below Appendix B paras B.59 to B.65.

[25] Above para 2.42.

6.53 If there were separate monitors for both England and Wales, there might be some potential difficulties for, particularly, landlords and organisations involved in self-regulation that operated in both England and Wales.[26] These, we consider, are not insurmountable. Indeed, they are problems that could occur *within* either of the countries if the monitor were to accept that on some matters there needed to be regional differences, a possibility that we consider advantageous.

6.54 We think that so long as the broad regulatory approach is the same on both sides of the border, the two housing standards monitors would co-operate to minimise trivial differences and so facilitate the development of the new regulatory approach in both England and Wales. Where they differed, we are confident that those differences could be accommodated.

6.55 **We recommend that there should be a separate housing standards monitor for Wales**.

Appointment of a stakeholder board

6.56 Central to our vision of smart regulation is that the industry itself should take as much responsibility as possible for the regulatory process, both setting standards and seeing that those standards are met. Given the programme of reforms designed to enhance voluntary self-regulation that we recommend here, we think it desirable for all sides of the lettings industry to come together to explore the common ground, to identify good practice and ideas, and to learn from mistakes. This already happens in informal and ad hoc ways and of course, government already engages with stakeholders in the normal course of the development of policy. However, we think it would be sensible to put these informal arrangements on a more regular and public footing.

6.57 If our recommendations for the creation of housing standards monitors for England and Wales are agreed, we think that the promotion of voluntary self-regulation would be further enhanced if, in each case, the monitor worked with and was supported by a stakeholder board drawn from all sides of the private lettings industry.

6.58 Such a board would give the private rented sector a focus for the development of appropriate regulatory practices that are key to successful self-regulation and help address some of the acknowledged difficulties with the voluntary approach.[27]

6.59 Working together, each housing standards monitor and stakeholder board will be best placed to assess the workings of the regulatory regime. They should have responsibility for keeping the regulatory framework under review and making proposals for change. In particular they would consider whether there need to be further moves towards enforced self-regulation.

6.60 **We recommend the establishment of a rented accommodation stakeholder board to which representatives of all sides of the private residential rented property sector are appointed in each of England and Wales.**

[26] All four of the national landlords' associations cover at least England and Wales.

[27] See above para 5.17(4).

Publication of a single code of good housing management practice for landlords

6.61 The prospect of multiple codes of housing management practice, which was one aspect of our original provisional proposals, drew criticism from some respondents, who argued that multiple codes would encourage a "race to the bottom".[28] Others argued that the present multiplicity of codes of practice was confusing to both landlords and tenants.[29]

6.62 We agree that these criticisms are well made. Effective public education and advice on landlords' and tenants' rights could be seriously undermined if there were to be numerous different codes of practice. We think that one of the first tasks for the two proposed housing standards monitors and stakeholder boards should be the preparation of a single code of practice for landlords.[30] This could build on the work already done, for example, by Accreditation Network UK and the Improvement and Development Agency.[31] While the English and Welsh standards monitors and stakeholder boards should each produce their own codes, it would be desirable if the codes were as similar as the differing needs and policy contexts in England and Wales permitted.

6.63 We stress that the existence of national codes of minimum standards would not prevent individual landlord associations or accreditation schemes setting standards above the minima by means of additional or supplementary codes of practice.

6.64 There is no point in undertaking this work, however, if it cannot be brought to the attention of those whom it seeks to influence. The housing standards monitors and stakeholder boards should be asked to consider effective channels of communication for the code of practice.

6.65 We discuss below the issue of a code of practice for letting agents.

6.66 **We recommend the development of a single code of housing management practice for landlords in each of England and Wales**.

[28] See above para 5.18(8) and below Appendix B paras B.72 to B.79.

[29] Appendix B paras B.72 to B.78.

[30] The core issues that would need to be addressed in a Code of Practice are set out above para 2.2.

[31] See their Landlord Accreditation Manual, produced by Accreditation Network UK and the Improvement and Development Agency with Local Authorities Coordinators of Regulatory Services (LACORS) published in April 2007: http://www.lacors.gov.uk/lacors/contentdetails.aspx?id=15349 (last visited 10 July 2008).

Setting up a national landlords' register

6.67 In the responses to the Consultation Paper, there was considerable support for the idea of the creation of some form of national landlords' register.[32] Different respondents offered different reasons for this proposal. For example, Eastleigh Borough Council saw it as a way for local authorities to have a better understanding of what properties in their area were being rented and as a way of enabling local authorities to make contact with private landlords.[33] It would also help tenants to discover basic information about their landlords, for example their business address.

6.68 However, there were concerns that the creation of such a register would be an expensive bureaucratic exercise with only limited practical benefit. In addition, a number of respondents argued that, if there was to be a register, it should be a register of landlords, not of properties. This was so that landlords with more than one property would only have to register once; a property register would require separate applications for each property and be much more costly.[34]

6.69 We have already stated that this report is not recommending the introduction of enforced self-regulation. However, in the absence of compulsion, we think that the value of a register of landlords is likely to be significantly reduced. If the requirement to register is made compulsory, how could this requirement be enforced?[35]

6.70 One issue that would have to be borne firmly in mind is what the costs of establishing such a scheme would be and therefore what the costs to landlords would be. Any such costs would need to be kept at a modest level. We would be very concerned at any proposals that led to the creation of an expensive bureaucracy that had little practical utility.

6.71 However, given the fact that this idea has been advanced by a number of those involved in the private rented sector,[36] we do not think we can omit all reference to the idea. Despite the obvious problems, it is possible that the idea of a landlords' register could be developed which would actually promote the principle of voluntary self-regulation. For example, if the requirement to register did not apply to landlords who were signed up to an accreditation scheme, or who were members of a landlords' association, or who let through an accredited letting agent, this might encourage landlords to consider one of these options more thoroughly.

6.72 In accordance with the principles of smart regulation, we think that this is another issue that should be explored further by the housing standards monitors and the stakeholder boards.

[32] See the variations offered by Citizens Advice, Brent Private Tenants Group, Shelter and the Residential Landlords' Association, Appendix B paras B.153 to B.177. See also Appendix para 1.183

[33] Appendix B para B.179

[34] See above para 5.18(15).

[35] Analogous provisions in the Housing Act 2004 dealing with landlords who take a deposit but who do not hold it in accordance with the requirements of the tenancy deposit scheme might be adapted for this purpose: see the Housing Act 2004, s 215.

6.73 **We recommend that the housing standards monitors and the stakeholder boards should be asked to consider the feasibility of the introduction of a national landlords' registration scheme within their areas**.

Regulation of letting agents

6.74 A rather different set of issues arises in relation to the question of the regulation of letting agents. It is clear that this is an issue that has been exercising both agents' and consumers' organisations for some time. The government has established its own further study into the issue.[37] The agents themselves have also commissioned work on the question.[38]

6.75 Evidence to the Carsberg Review indicated that there was a large measure of agreement that there needed to be further regulation of letting agents. There was however rather less agreement as to the exact form and nature of any new regulatory scheme.[39] This broadly reflects the evidence we received on the question.[40]

6.76 Just before the text of this report was finalised, the report of the Carsberg Review was published. It has recommended, among other things, that there should be a new regulatory body to provide a regulatory regime covering all those who provide agency services in the property sector. More generally, he recommends that landlords, letting and managing agents should be subject to appropriate regulatory requirements in order to achieve consumer protection, efficient markets and cost effectiveness.

6.77 Although we are not recommending the introduction of enforced self-regulation for the whole of the private rented sector, in the light of both the evidence we received and from other work currently being done, we conclude that there is a strong case for the regulation of letting agents.

6.78 **We recommend that all those who provide letting agency services on a commercial basis should be brought within an appropriate regulatory scheme.**

6.79 If this recommendation were to be taken forward, we think that other consequences should follow. In particular, and for similar reasons as those which apply to landlords, **we recommend that there should be a single code of practice for letting agents**.[41] This would be published by whatever body is established to regulate the activities of letting agents.

[36] See above para 5.18(14) and below Appendix B paras B.153 to B.177, B.179 and B.183.

[37] See above para 1.11(1).

[38] See above para 1.11(2).

[39] See RICS, *Summary of Evidence to the Carsberg Review* (April 2008).

[40] See above para 5.18(3) and Appendix B paras B.35, B.41, B.42, B.53.

[41] See above para 5.18(9)

Development of new channels for dealing with complaints and the redress of grievances

6.80 One of the principal arguments used by critics of our proposed scheme for enforced self-regulation was fear of the costs of establishing mechanisms for the handling of complaints and the resolution of disputes.[42]

6.81 We have reviewed generally the issues relating to the proportionate resolution of housing disputes in our report published earlier in 2008.[43] One of the central elements of the recommendations made in that report was that much more emphasis should be placed on the provision of channels for the handling of complaints and disputes.

6.82 In this context, we do not think that, for example, each landlord association would have to have its own dispute resolution procedure. The Housing Ombudsman service, for example, already has the capacity to deal with private sector housing disputes (in addition to its primary service for housing associations) at very modest cost. As a consequence of the introduction of the tenancy deposit scheme, new dispute resolution services have been devised for dealing with issues arising in that context. We see considerable opportunity for the expansion of such services into other categories of private sector housing complaints and disputes.

6.83 While alternative forums for dispute resolution and complaints handling cannot replace the statutory functions performed by the county court and the Residential Property Tribunal Service, we think they have considerable potential for further development and provide a proportionate way – in terms of both cost and procedure – for dealing with many housing issues.

6.84 An important issue to explore is the extent to which effective dispute resolution services can be offered by third party agencies, rather than directly by, for example, landlords' associations themselves.

6.85 If letting agents are made subject to a compulsory registration/accreditation scheme, we assume that, in any event, they will be required to ensure that mechanisms are in place to resolve complaints and disputes made against them either through the Ombudsman for Estate Agents or such other services that may in future be developed.

6.86 In this context, there is a number of more specific matters raised by respondents, with which we agree.

(1) For the most serious cases – for example where premises are in a dangerous state – it is essential that complainants have immediate access to the enforcement authorities within local authorities; the existence of complaints procedures must not become a barrier to effective urgent legal action.

[42] See above para 5.18 (12) and below Appendix B paras B.86 to B.91; B.99 to B.111.

[43] Housing: Proportionate Dispute Resolution (2008) Law Com No 309, http://www.lawcom.gov.uk/docs/lc309.pdf.

(2) While access to the courts cannot be denied, procedural protocols could seek to ensure that, wherever possible, non-formal dispute resolution services are to be used before court proceedings can be contemplated.

(3) While any complaints procedure must be fair, it is important that any procedural safeguards are not so demanding that the costs of dispute resolution become unsustainable.

6.87 **We recommend that the monitors for standards and the stakeholder boards should be asked to develop proposals to encourage the development of alternative methods for dealing with complaints and grievances.**

Piloting home condition certificates

6.88 Our provisional proposals relating to home condition certification received an interesting response. Few were willing to endorse our proposals without reservation. What particularly worried respondents was the potential cost of introducing such a scheme, certainly on a compulsory national basis.[44]

6.89 Nevertheless, there was support for the idea in principle and some willingness to explore the concept further. There was also support for trying to develop ways to consolidate the inspection activity that is currently undertaken, to reduce the need for separate inspections of, for example, gas and electricity installations.[45]

6.90 In the light of this, we now think that the housing standards monitors and stakeholder boards should be asked to explore the home condition certification proposals more fully, to see whether a cost-effective scheme could be devised. It could also be asked to develop proposals for the introduction of the scheme on a pilot basis so that the potential impact of such a scheme on the improvement of housing conditions (including health and safety issues) could be assessed and evaluated. Any such proposals should ensure that the issues highlighted in responses to the Law Commission are addressed.

6.91 **We recommend that the housing standards monitors and stakeholder boards should be asked to develop proposals for piloting a scheme for home condition certification**.

[44] See above para 5.20(1) and Appendix B paras B.204 to B.210 and B.214 to B.224.

[45] See above para 5.20(2) and Appendix B paras B.228 to B.231.

OTHER MATTERS

Enhancing the role of local authorities

6.92 We were surprised that a number of respondents read the Consultation Paper as implying that there should be a downplaying of the role of local authorities. We certainly proposed no reduction in the regulatory duties and enforcement powers available to local authorities. We agree with those respondents who argued that voluntary approaches to regulation must be underpinned by effective local authority enforcement.[46] Indeed, in the light of experience there may need to be some enhancement of those powers, for example, to ensure the national availability of accreditation schemes which we have already recommended. We suspect however that for most practical purposes local authorities already have adequate powers to ensure that they can work effectively within the new regulatory framework.

6.93 In the Consultation Paper, we argued that the introduction of enforced self-regulation would, by encouraging landlords and agents to improve their ways of working, free local authorities to concentrate on the really hard cases that require their enforcement intervention. We think that the same principle applies in the context of the recommendations we make in this report for the enhancement of voluntary self-regulation.

6.94 One of the important outcomes of such enhancement should be the development of new channels of communication between accreditation schemes, landlord associations and letting agents' professional bodies and local authorities.

6.95 It is important, however, that any such channels of communication should be two-way. For example, if the work of environmental health officers in a particular area reveals systemic problems, they should be able to take them to the monitor for standards to seek ways of addressing them in appropriate ways at the local level.

6.96 In addition, local authorities that offer the services of tenancy relations officers (however they may be labelled in the particular local authority) will have practical experience in the management of housing management issues which should be available to the monitor for standards.

6.97 We conclude that both Environmental Health Services and Tenancy Relations Services should be seen as having significant contributions to make to the development of enhanced self-regulation.

Retaliatory eviction

6.98 Although this was not an issue on which we consulted, it is an issue which has attracted a considerable amount of public attention over the last year. The basic idea is that, where a landlord seeks possession against a tenant, but it can be shown that the proceedings were taken against the tenant in retaliation for the tenant making a complaint to or taking some other step against the landlord, for example resulting from poor housing conditions, the landlord would not be entitled to a possession order from a court.

[46] See above para 5.17(2).

6.99 At first sight, this form of legal protection for tenants may seem an attractive idea.[47] We think, however, there are likely to be significant difficulties with it in practice.

(1) Most tenants do not seriously consider taking legal proceedings. The availability of legal provisions to address retaliatory eviction may be of symbolic importance but be of little practical effect.

(2) There would be major evidential problems in establishing that a landlord was bringing possession proceedings solely as retaliation for steps that have been taken against him or her.

(3) Retaliatory eviction does not fit the smart regulation approach we advocate here.

(4) We anticipate that introducing retaliatory eviction could cause considerable disturbance to the private rented sector by introducing a measure whose impact would be unpredictable and uncertain.

6.100 We do not accept any suggestion that the introduction of retaliatory eviction would remove the need for the introduction of the reforms to the regulation of the private rented sector which we recommend in this Report.

Incentives

6.101 The Consultation Paper identified[48] some of the incentives we thought would be necessary to make a scheme of enhanced voluntary self-regulation work. In Appendix B of this report,[49] we summarise the additional points we received in response to the consultation.

6.102 Some of those incentives were about helping landlords and agents gain commercial advantages in the market place. Others, particularly relating to the tax and benefit treatment of landlords involve wider considerations of fiscal and economic policy.

6.103 We do not think that we should make detailed recommendations on what those incentives should be. But it will be necessary for the question of incentives to be kept under consideration.

6.104 **We recommend that the housing standards monitors and stakeholder boards should be asked to consider what appropriate and affordable incentives would be necessary to ensure that the proposed programme for the enhancement of voluntary self-regulation is made attractive to landlords**.

[47] See Appendix B paras B.159 and B.181

[48] Summarised above at para 4.14.

[49] Appendix B paras B.4 to B.9.

EVALUATION

6.105 We have set out above a series of recommendations for reform of the regulation of the private rented sector. If implemented, these recommendations would result in the development of a very different approach to the regulation of the private rented sector. Instead of relying on individuals to enforce statutory standards and contractual terms through the courts, which is clearly not as effective as it should be, our recommendations have adapted ideas of "smart regulation" to the operation of the private rented sector.

6.106 Central to this approach is the proposition that regulation will be more effective if it is lead by those who work within and understand the market to be regulated. They understand how important it is that legal standards are met and consumers of housing services receive good value for money.

6.107 Because this is a new approach, there are those who doubt whether it can work effectively. It is essential in our view that the introduction of our recommendations should be accompanied by a programme of research to evaluate their impact, to see what works and what does not, and to provide the information base for any further steps that need to be taken.

6.108 We think that the programme of evaluation should be overseen by the housing standards monitors and the stakeholder boards, though, of course the research itself should be undertaken by independent researchers.

6.109 **We recommend that, if the reforms we recommend are introduced, they should be the subject of a programme of evaluation by independent researchers, overseen by the housing standards monitors and the stakeholder boards.**

CONCLUDING REMARKS

6.110 We conclude that:

(1) the programme of development outlined above sets out a series of affordable and proportionate measures that, by enhancing self-regulation, will improve the management of the private rented sector;

(2) their adoption by Government would signal a determination to address the reputational issues that continue to bedevil the private rented sector and stimulate further activity by landlords and agents;

(3) they will be of benefit both to tenants and to landlords;

(4) they complement recommendations already made by the Law Commission in its reports Renting Homes, and Housing: Proportionate Dispute resolution;

(5) they can be successfully tested against the principles set out above in para 6.9;

(6) they will enable the private rented sector to play a fuller role in the delivery of housing policy ;

(7) they build on current initiatives whose benefits are already being recognised;

(8) they enable the principles underpinning the smart regulatory approach, in particular self-regulation, to be tested and evaluated;

(9) in general, they give all stakeholders in the private rented sector the encouragement to take increased responsibility for the management of this increasingly important sector of the economy;

(10) they leave open the question whether, in the longer term, there should be more compulsion in this area of regulation.

RECOMMENDATIONS

6.111 Here we bring together the recommendations made in this Part:

(1) **We recommend that landlord accreditation schemes should be made available in every local authority area.**

(2) **We recommend the creation of a housing standards monitor for the private rented sector.**

(3) **We recommend that consideration be given to making the Office for Tenants and Social Landlords the housing standards monitor for the private rented sector in England.**

(4) **We recommend that there should be a separate housing standards monitor for Wales.**

(5) **We recommend the establishment of a rented accommodation stakeholder board to which representatives of all sides of the private residential rented property sector are appointed in each of England and Wales.**

(6) **We recommend the development of a single code of housing management practice for landlords in each of England and Wales.**

(7) **We recommend that the housing standards monitor and the stakeholder board should be asked to consider the feasibility of the introduction of a national landlords' registration scheme within their areas.**

(8) **We recommend that all those who provide letting agency services on a commercial basis should be brought within an appropriate regulatory scheme.**

(9) **We recommend that there should be a single code of practice for letting agents.**

(10) **We recommend that the monitor for standards and the stakeholder board should be asked to develop proposals to encourage the development of alternative methods for dealing with complaints and grievances.**

(11) **We recommend that the housing standards monitor and stakeholder board should be asked to develop proposals for piloting a scheme for home condition certification.**

(12) **We recommend that the housing standards monitor and stakeholder board should be asked to consider what appropriate and affordable incentives would be necessary to ensure that the proposed programme for the enhancement of voluntary self-regulation is made attractive to landlords.**

(13) **We recommend that, if the reforms we recommend are introduced, they should be the subject of a programme of evaluation by independent researchers, overseen by the housing standards monitor and the stakeholder board.**

(*Signed)* TERENCE ETHERTON, *Chairman*
ELIZABETH COOKE
DAVID HERTZELL
JEREMY HORDER
KENNETH PARKER

WILLIAM ARNOLD, *Chief Executive*
15 July 2008

APPENDIX A
RESPONDENTS TO CONSULTATION PAPER

LIST OF RESPONDENTS TO CONSULTATION PAPER

A.1 Responses to the Consultation Paper were provided by:

Landlords

(1) A Graham, A Graham and Associates, Worcester*[1]

(2) Alison Wagstaff, Ipswich*

(3) Alison Wolfe, Merseyside*

(4) Angus Bearn, London*

(5) Anita Harris, Cheshire*

(6) Bill Filmer

(7) Brenda Mellors, Pudsey*

(8) Brian Worrell, Herts*

(9) Chris Duffy, East Yorkshire*

(10) Christine Howarth, Liverpool*

(11) David Button, South Yorkshire*

(12) Derek Briggs, Surrey*

(13) Edward Ramsbottom, Dorset*

(14) Fred Arnold, Brighton*

(15) Graham Seed*

(16) Howard Springett

(17) Jacqueline Jacobs, Essex*

(18) Johann Davies, Cardiff*

(19) John Guest

(20) John Morris, Swindon*

(21) John Selway, West Midlands

[1] * denotes a response received via Tessa Shepperson.

(22) Loisjoy Thurstun*

(23) Malcolm Pollack*

(24) Matt Lardi, London*

(25) May Gane, Hereford*

(26) Mike Bird*

(27) Mrs T Ahmed*

(28) Naama Farjoun*

(29) Paul Cartwright, Hants*

(30) Richard Booth, Abergavenny*

(31) Sue Hill, Co Durham*

(32) S W Morris, Somerset*

(33) Tom Reynolds, Warrington*

(34) Walker, Bromley*

(35) Julie and Richard Hill, Bridgewater

(36) Tony Wilson, Surrey

(37) Howard Jones, Cheshire

(38) Tabitha Aldrich-Smith, Unite Group plc

(39) Tony Burton, The National Trust

(40) Peter Girling, Girlings Retirement Options

Letting agents' associations

(41) Andrew Thomas, Association of Residential Letting Agents Wales (ARLA Wales)

(42) David Hewett, Association of Residential Managing Agents (ARMA)

(43) John Peartree, The UK Association of Letting Agents (UKALA)

(44) Peter Bolton King, Association of Residential Letting Agents (NAEA ARLA)

(45) Patricia Monahan, Royal Institution of Chartered Surveyors (RICS)

Landlords' associations

(46) Adrian Thompson, Guild of Residential Landlords

(47) Beatrice Barleon, British Property Federation (BPF)

(48) Elizabeth Brogan, National Landlords' Association (NLA)

(49) Robert Graver, Eastern Landlords' Association

(50) John O'Donnell, North West Landlords' Association

(51) Mike Stimpson, National Federation of Residential Landlords (NFRL)

(52) Richard Jones, Residential Landlords Association (RLA)

Tenants and tenants' representatives

(53) Carolyn Harms

(54) Liz Phelps, Citizen's Advice Bureaux

(55) Debbie Crew, Citizen's Advice Bureaux (CABx)

(56) Elaine Jones, Shelter

(57) Jacky Peacock, Brent Private Tenants' Rights Group

(58) Simon Kemp, Unipol

(59) Ama Uzowuru, National Union of Students (NUS)

(60) Shelter Cymru

Local Authorities

(61) Dave Hickling, Sheffield City Council

(62) David North, City of Bradford MDC

(63) Peter McDermott, Gateshead Council

(64) Martin Pettitt, Coventry City Council

(65) Gail Webb, Hyndburn Borough Council

(66) Gerry Glyde, Newcastle City Council

(67) Jill Ellenby, Islington Borough Council

(68) Julianne Scarlett, Bolton Council

(69) Neil Sparkes, Manchester City Council

(70) Peter Warneford, Leeds City Council

(71) Roy Dicker, Eastleigh Borough Council

(72) West Midlands Private Sector Housing Forum

(73) Martin Brown, Derby County Council, Private Sector Housing Initiatives

Local Authority groups

(74) Andrea Buse, HMO Network

(75) Andrew Greathead, Association of Tenancy Relations

(76) Caren Green, Authorities and Landlords Improving Standards Together NW (A-LIST)

(77) Ian Cole, West of England Local Authorities Group

(78) Richard Tacagni, The Local Authorities Coordinators of Regulatory Services (LACORS)

(79) Sheila Winterburn, Herts and Beds Environmental Health Group

(80) David Shiner, Urban Renewal Officers Group

(81) Gloria Willis, Metropolitan Housing Partnership

(82) Madeleine Bell, Humber Housing Partnership

(83) Babette Howard, Bury Landlord Accreditation Scheme

(84) Elizabeth Mooney, Sandwell MBC's Landlords' Forum

Other professional organisations

(85) Bob Mayho, Chartered Institute of Environmental Health (CIEH)

(86) Harriet Flanagan and Helen Shipsey, Country Land and Business Association

(87) Sam Lister, Chartered Institute of Housing (CIH)

(88) Peter Morgan, Real Service

Lawyers

(89) Arden Chambers

(90) David Watkinson, Housing Law Practitioners Association (HLPA)

(91) Tessa Shepperson, Solicitor

(92) Law Reform Committee, Bar Council

(93) Law Society, Housing Law Committee

(94) Civil Justice Council, Housing and Land Committee

(95) Aisha Khalaf*

(96) Nicole Longley

Judges

(97) District Judge David Oldham, Association of District Judges

Academics

(98) Prof Susan Bright, New College Oxford

Others

(99) Jocelyn Davies AM, Welsh Assembly Government (WAG)

(100) Alan Williams, Office of Fair Trading (OFT)

(101) Rob Thomas, Council of Mortgage Lenders

(102) Frances Kneller, Digital UK

(103) Julia Sheppard

(104) L P Dillamore (individual), Dorking

(105) Mike Ockendon, Association of Home Information Pack Providers (AHIPP)

(106) Tony Redmond, Local Government Ombudsman (LGO)

(107) David Edwards, Perverel Group Limited

(108) Nigel S Terrington, Paragon Group of Companies plc

(109) Brian Johnson, CityWest Homes

(110) Bob Pulford.

A.2 We are also grateful for the assistance of our Academic Advisory Group, consisting of Professor Julia Black (LSE), Professor David Campbell (Durham University), Professor Frank Stephen (University of Manchester), Professor Martin Cave (Warwick University) and Professor Tony Crook (University of Sheffield).

APPENDIX B
ANALYSIS OF RESPONSES TO THE CONSULTATION PAPER

1: ENHANCING VOLUNTARY SELF- REGULATION

B.1 Turning to the first of the options we identified, there was widespread support for the idea of enhancing voluntary self-regulation. A number of respondents thought this would result in a raising of expectations for both landlords and tenants that would encourage better housing management and improved compliance. Voluntary use of accreditation schemes was particularly stressed.

B.2 For example, Bolton Council stressed that:

> Accreditation is a very positive form of regulation when used to support and supplement other forms of regulation, and it is an important vehicle for facilitating communication and influence in the private rented sector, enabling us to recognise and focus on those reputable landlords who operate more equitably alongside social housing providers.

B.3 Unipol suggested that:

> The majority of landlords who let to students are prepared to join such [accreditation] schemes and to meet the standards which are set so long as their voluntary effort is recognised.

B.4 Where enhanced self-regulation was the favoured option, it was recognised that, as the Consultation Paper suggested, the incentives for joining an accreditation scheme or other self-regulatory organisation would need to be improved to attract a higher proportion of landlords.

B.5 The British Property Federation argued that this was likely to be the most effective of the three options being considered:

(1) Choosing a carrot over stick approach is not only likely to get more support from the property-owner community, as it avoids blaming landlords for all the problems, but will also [avoid] adding another layer of bureaucracy to an already very complicated regulatory system.

(2) Central in our opinion to getting more landlords to join an accreditation system is for accreditation to have real benefits for the landlord. Under the current system being able to display a kite mark should theoretically provide a landlord with a competitive advantage; however, the benefits of accreditation are often undermined by demand for rental housing outstripping supply.

(3) The BPF therefore believes that it is time to offer landlords greater financial benefits for joining an accreditation scheme and to help them finance repairs and better management structures through changes in tax treatment. Adding these benefits to the ones that some accreditation

schemes already offer, we are confident would encourage greater membership of professional associations.

B.6 The Consultation Paper set out a long list of incentives we thought might be needed for landlords in particular to be encouraged to join an accreditation scheme or other self-regulatory organisation.[1] Respondents made other suggestions.

B.7 For example, LACORS thought:

> Accredited properties could be published by local authorities on their websites and promoted through accommodation lists to guide prospective tenants to accredited landlords. Local authorities can offer free or reduced-cost training courses to accredited landlords, or access to an information and advice hotline. At the national level, it may be possible to negotiate reduced insurance premiums for accredited properties due to the lower "risk" associated with well managed properties that are maintained in good repair.

B.8 The Guild of Residential Landlords also commented on the incentives that would entice landlords to join. In addition to tax reform, their suggestions included:

(1) Access to a truly fast tracked court procedure. (They regarded the accelerated possession procedure as misleadingly named).

(2) Improved access to local authority home improvement grants. This would not require additional funds, rather a quicker and easier way to access the funds.

(3) Improved access to Housing Health and Safety Rating Scheme evaluations.

(4) Having access to Security Industry Authority licensed bailiffs to enforce warrants for possession of property rather than having to use county court bailiffs.

The Guild of Residential Landlords concluded that "with these benefits in place, which other than the suggested tax reform will cost nothing additional, we are certain sufficient numbers would join a voluntary scheme".

B.9 Some respondents echoed the position taken in paragraph 7.12 of the Consultation Paper[2] when they suggested that it was possible for voluntary accreditation or membership of a self-regulatory organisation to confer market advantage under certain market conditions, and that this in itself could act as an incentive to membership.

[1] See above 4.14; Housing: Encouraging Responsible Letting (2007) Law Commission Consultation Paper No 181, para 7.31, http://www.lawcom.gov.uk/docs/cp181.pdf

[2] Housing: Encouraging Responsible Letting (2007) Law Commission Consultation Paper No 181, http://www.lawcom.gov.uk/docs/cp181.pdf.

B.10 However, others were more sceptical. For example, the National Landlords Association considered that accreditation or membership may confer advantage

> in certain low-demand areas of the country or for landlords who are prepared to let to tenants who are on the local authority housing list … However, for landlords in high demand areas, and for those operating at the middle to top end of the market, accreditation or membership of a landlords' association confers no particular advantage over neighbouring properties.

B.11 Despite supporting enhanced self-regulation, few respondents took the view that market discipline coupled with self-regulation would on its own result in a robust regulatory structure. Those supporting voluntary self-regulation typically saw it being linked with existing enforcement systems. The National Landlords Association, for example, said:

> We believe that the current system of voluntary self-regulation (via membership of accreditation schemes or landlords' associations) combined with the powers available to local authorities to improve standards in the worst properties is the most viable of the options presented in the Consultation Paper.

B.12 The National Trust favoured voluntary self-regulation, indicating that:

> We are more optimistic than the Commission appears to be that voluntary self-regulation could be made to work. Given that the options of enforcement through local authorities and the civil courts would, under enforced self-regulation, remain in place, we have some concerns about overlaying a further compulsory legislative regime on that.

B.13 LACORS, although "a keen advocate of accreditation which supports and encourages landlords to improve the standard of accommodation they offer to tenants", emphasised the fact that, quite apart from the issue of the benefits associated with accreditation, one of the challenges would be to widen the range of accreditation schemes so that they were (in theory) available to all landlords.

B.14 Accreditation was more typically seen as a mechanism for supporting existing good practice rather than raising compliance levels. It would facilitate further provision of intelligence (education and information) to landlords but it would not address the rogue landlord.

B.15 Notwithstanding support for voluntary self-regulation and accreditation, three key issues emerged from the responses:

(1) Can it reach those landlords whose behaviour is most problematic?

(2) Does membership of a landlord association or accreditation scheme necessarily deliver better landlord behaviour?

(3) Who would regulate the regulators?

Can voluntary self-regulation reach those landlords whose behaviour is most problematic?

B.16 Some respondents, especially those from the statutory sector, were concerned that any system based upon voluntary membership would fail to reach those whose performance is most problematic. Consequently it would make little impact upon the problem. Authorities and Landlords Improving Standards Together (A-LIST), a regional organisation of both local authorities and landlords in the North West, considered that:

> Self regulation does not provide any value or address conditions and ways to make improvements in the poorer properties where landlords are not engaging.

Similarly, LB Islington noted that "in our experience only 'good' landlords desire to come forward for self-regulation and certification. This is our experience also of HMO licensing [licensing of houses in multiple occupation]".

B.17 Shelter took the view that:

> There are many positive aspects to voluntary self-regulation and … good practice tools such as accreditation schemes and codes of practice can be enormously helpful in encouraging responsible letting. However, we do not think that this approach is sufficiently robust to become the main means of regulating the [private rented sector] at a strategic level.

B.18 At a more detailed level, and notwithstanding their support for voluntary accreditation (see above para B.2), Bolton Council also observed that:

> Voluntary accreditation can only produce limited success, while the worst landlords continue to operate covertly; convincing even the best landlords to engage is difficult, not least because most private landlords are reluctant to:
>
> (a) reveal the extent of their investment portfolios
>
> (b) share information with their peers who are also their competitors
>
> (c) allow partners to scrutinise their working practices
>
> (d) inspect property standards
>
> (e) impose sanctions on each other.

B.19 It might be possible to increase the benefits associated with membership in order to attract a larger proportion of landlords. However, as the Consultation Paper itself anticipated, this would run the risk of making such schemes either too expensive to encourage landlords to join or uneconomic for organisations to run. Equally importantly, as suggested by a number of respondents, increasing the incentives substantially to entice new members could fundamentally alter the nature of schemes.

B.20 LACORS summarised the point in this way:

> If a landlord can obtain a generous benefits package simply by paying a small application fee and signing a code of practice, they are likely to be attracted to the scheme for all the wrong reasons and may simply ignore the advice and assistance package on offer.

B.21 The National Federation of Residential Landlords drew on the experiences of its members to highlight the difficulties associated with attracting landlords to associations:

> Many of NFRL's affiliated associations have always found it difficult to recruit landlords and, for that matter, agents into membership. Even with substantial discounted insurance schemes and low membership fees (some as low as £25.00 per year), landlords have still not joined associations in numbers. NFRL has, over many years in consultation with its members, looked at ways of attracting more members into membership but generally landlords who use agents consider it unnecessary to belong to a landlords' association or, for that matter, to become knowledgeable themselves in the letting business, and many other landlords who rent out and manage their own properties believe they are both competent and knowledgeable, to such an extent that they do not consider it necessary to belong to a landlords' association.
>
> …. Historically, landlords have never been keen to pay reasonable subscription fees to belong to an organisation, and when they do their expectations for the money expended are often far greater than what is reasonably achievable.
>
> Although NFRL would wish to favour Option (1) by enhancing voluntary self-regulation with a range of benefits for those landlords who join associations, NFRL is of the opinion that no amount of benefits would encourage the majority of landlords to join landlords' associations.

B.22 Writing from the tenants' perspective Shelter endorsed the Commission's view that "it is difficult to identify sufficiently persuasive levers in a voluntary regulatory environment to encourage landlords to join professional organisations/accreditation schemes".

B.23 Whether a failure by landlord associations to engage problematic landlords was considered a significant problem depended on how respondents viewed self-regulation as interacting with existing statutory enforcement regimes. The Association of Tenancy Relations Officers, for example, considered that "encouraging compliance can only be part of the strategies in the sector …It is naïve to assume that self-regulation would raise standards in itself". Yet they noted that "it could … bring the benefit of allowing regulatory resources to be directed towards the less responsible landlords".

B.24 The point was amplified by the National Housing in Multiple Occupation Network:

> A move to a self-regulated market would …[allow] regulatory resources to be directed towards less responsible landlords if

whichever body(s) set up for self-regulation could be trusted to ensure good property conditions are maintained.

B.25 One respondent, the UK Association of Letting Agents, took the view that if one is seeking a model with a strong self-regulatory component – whether enhanced or enforced – that meant leaving the private sector to identify the appropriate package of measures and regulatory codes, while the local authority focuses efforts upon the problematic cases:

> We suggest that LHA [local housing authority] efforts should be directed wholly at the bottom end of the [private rented sector]. This is where their expertise lies and they can really have an impact on improving standards (or prosecuting and preventing bad landlords from operating). From experience with (well intentioned) LHAs who engage with landlords with higher standard accommodation not much is achieved.
>
> Although the coffee mornings are pleasant and the accreditation schemes superficially praiseworthy we suspect they are a waste of time and money. Better to encourage Local Housing Authorities to root out the rogues at the bottom end and leave the better standard landlords to take care of themselves at their expense. Such landlords can use a letting agent or join the National Association of Landlords.

Does membership of a landlord association or accreditation scheme necessarily deliver better landlord behaviour?

B.26 A second concern was whether membership of some form of self-regulatory body could be equated with satisfactory performance as a landlord. LACORS noted that “most accreditation schemes are designed to support the more responsible landlords who want to ensure their properties are well managed. Many such schemes do not operate an inspection regime and rely on training and development to drive up standards”.

B.27 Several respondents were sceptical that one could take membership as a sufficient indicator of quality:

> It is members’ experience that some landlords who are members of known landlords associations do not act responsibly. Therefore reliance on such membership cannot be used exclusively to promote responsible renting. (Association of Tenancy Relations Officers)
>
> Reliance upon accreditation schemes alone may not achieve the desired results in terms of property standards and tenancy management. Experience from some local authorities who operate accreditation schemes or who are partners to accreditation schemes is that high levels of non-compliance have been identified following sample surveys. (National HMO Network)
>
> Caution is called for with respect to the proposition that individuals and companies who are members of trade associations … are necessarily professional themselves. Our experience is that in most cases this is clearly not the case, and that a better approach may be

> to require landlords to undertake a professional qualification, rather than place the burden on a national body. (National HMO network)
>
> Accreditation schemes in the private rented sector can vary widely … The model example which Accreditation Network UK used to endorse was more along the lines of a “self-certification” scheme where landlords signed an agreement that all their properties met the relevant standards, they then became accredited and were inspected retrospectively by local authority staff. Subsequent inspections … had allegedly found that up to 60% of the properties did not meet the standard as the landlord had previously stated. Although it is possible some deterioration will have taken place since the landlord joined … it is unlikely this would result in such a high failure rate. (Gateshead MBC)
>
> There is no correlation between being a member of a trade association and following legal advice or guidance that a person is given. (Newcastle MBC)
>
> Mere membership of a landlords’ association or accreditation scheme may not itself guarantee a better landlord. (Small landlord)

B.28 This might be taken to indicate that landlord associations and/or accreditation schemes – as currently operated – are not effective in their attempts to raise standards in the sector. It is, however, appropriate to reflect upon the extent to which that is currently one of their objectives:

> The Law Commission understands that landlords’ associations are membership bodies who provide a vital function in providing their members with the information they need in order to manage their properties and tenancies properly. …
>
> The services that we provide are those which we find that our members need most. However, our role is simply to provide those services. It is not our role to require members to take them up, although naturally we encourage them to do so. We will provide them with information on their obligations via our website and magazine and through our advice line but we cannot compel our members to follow the advice that we give them. Because many of our members are more responsible landlords they are already motivated to ensure that they are complying with the law and are fully knowledgeable about their obligations and how to apply them. However, it is impossible to monitor the extent to which all members are actively involved with our services or whether they are following the advice and information they are given… .
>
> We have no powers to force members to apply best practice and those landlords who wish to apply the minimum will continue to do so, regardless of the information they receive. (National Landlords Association)

B.29 In similar vein, ARLA Wales observed:

> It is unclear to what extent the various landlord associations or local authority accreditation schemes currently control their members. Organisations operate principally as a means for landlords to be advised of new legislation and other developments in the lettings market, rather than as regulatory bodies. There is certainly value in distributing important information but there is some doubt as to how proactive the associations may be in ensuring that members comply with codes of practice, where these exist. There is instead perhaps more of a "club" mentality. This model would need to be considerably enhanced if self-regulation is to be usefully applied to the landlord sector. (ARLA Wales)

Who would regulate the regulators?

B.30 One of the questions the Commission raised with respect to a model based upon enhanced voluntary self-regulation was: who would regulate the regulators? Would associations of landlords or managing agents be willing to police their members vigorously when their performance fell short of expectations or requirements?

B.31 This concern was shared by bodies such as the Chartered Institute for Environmental Health and Shelter. The latter considered that:

> There would be a significant conflict of interests between professional organisations' reliance on members' fees and their willingness to police these same members effectively in the event that they contravene standards. We believe that this model may encourage "a race to the bottom" in terms of the standards which each professional organisation would require of its members and consider that the requirement to belong to a professional organisation without centrally agreed and enforced standards is no guarantee of better letting practice.

B.32 In contrast, the Guild of Residential Landlords commented: "we see the paper's point regarding the disadvantage, who would regulate the regulators, however this shows little faith in landlords generally".

2: ENFORCED SELF-REGULATION

B.33 We now turn to the reaction of respondents to the option which we provisionally preferred. While no respondent gave our proposal an unqualified welcome, there was a good deal of support from respondents, drawn from across the range of stakeholder groups, for the basic idea. Many respondents felt unable to go further than this, however, as they pointed out that not enough detail of the proposed scheme had been set out in the Consultation Paper. They were understandably unwilling to commit themselves further given that, as in so many cases, 'the devil is in the detail'. In some cases, respondent organisations offered their own variations, some of which we set out below.[3] We start, however, with some more general comments.

[3] Paras B.52 to B.77

General comments

B.34 Bodies representing lawyer groups could see merit in the Law Commission's preferred option. For example, the Bar Council considered that "…on the whole, enforced self-regulation appears to be the most appropriate option". The Civil Justice Council's Housing and Land Committee stated that the "proposition is well argued and we support the recommendation in principle". Arden Chambers expressed similar views.

B.35 A number of housing professional groups and local authority groups were also generally in favour of the basic idea. For example, the Chartered Institute of Housing was broadly supportive of the Commission's analysis of the issues and its proposed solution. However, it expressed concern about the overall regulatory structure that would result once the Commission's system of enforced self-regulation was set alongside existing provisions:

> We suggest that the overall coherence of the whole regulatory regime is also a factor in its effectiveness. We have some concerns over the number of bodies who will be involved in some way with the regulation and their responsibilities and believe that this produces a risk that:
>
> > Landlords will be confused as to which body to approach to seek advice and their costs are likely to be higher than in a more streamlined framework.
> >
> > Consumers will be confused as to the role and function of each body
> >
> > The regulators will themselves have different views as to their responsibilities with the result that consumers fall between the gap or are referred back and forth between agencies where there is a boundary dispute.
>
> These sorts of problems are apparent in the social sector where the relative roles of the local authority, Audit Commission, the Courts Service, Housing Corporation and the Independent Housing Ombudsman [can be confusing].
>
> For example the following bodies would all have a role in regulating the activities of private landlords:
>
> (a) Local authorities (for enforcement of environmental standards and licensing)
>
> (b) The courts service (for private law rights)
>
> (c) The tenancy deposit scheme
>
> (d) The approved industry self regulatory schemes
>
> (e) The central regulator

> We suggest that the Commission considers whether the roles of these bodies could be merged into a more coherent framework. One option might be to combine the roles of the Tenancy Deposit Scheme providers with the industry scheme providers. At the very least consideration should be given as to how roles of each body could be more clearly defined and made more transparent to consumers. However, despite these concerns we still agree that the Commission's overall position and analysis that enforced self regulation is the right approach.

B.36 Other professional groups indicating a degree of support included the Chartered Institute of Environmental Health, the Urban Renewal Officers' Group, Leeds City Council, Metropolitan Housing Partnership, and the National Housing in Multiple Occupation Network, although for the latter enforced self-regulation appeared to have "significant limitations".

B.37 From the agents' perspective, a leading representative body – NAEA ARLA – offered support for our proposals. It felt that the "arguments and conclusion for enforced self-regulation is well set down". In addition, it felt that:

> For agents, it should be relatively straightforward to extend the existing self-regulation model, with positive benefits for compliance and management standards throughout the [private rented sector]. However, the need for enforcement rather than continuing to rely on voluntary action is evident in the fact that only around half of letting agents belong to a professional body at present, while most new entrants to the industry are untrained and unaffiliated … Enforced self-regulation will certainly lead to a more level playing field. Some will probably leave the sector rather than meet the costs of compliance but there is confidence that any slack could be taken up by new entrants or existing agents who wish to expand their businesses.

B.38 In addition, ARLA Wales observed:

> The recent Consumer Redress and Estate Agents Act excludes letting agents and also the letting activities of estate agents, in common with the Estate Agents Act 1979 on which it builds. This is widely regarded as a missed opportunity. Arguably if letting agents … were required to have membership of an approved Ombudsman Scheme (currently the OEA is the only one) then we would already be well on the road to the Commission's aspiration to enforced self-regulation.

B.39 For landlords, the Residential Landlords Association argued strongly that enforced regulation could only work effectively if the focus was on landlords rather than the properties they own. The National Federation of Residential Landlords, while instinctively favouring voluntary enhanced self-regulation, felt that in the light of its experience of voluntary schemes it was "forced to the conclusion that the most effective option is option (2): enforced self-regulation".

B.40 Others responding from the landlord perspective felt that enforced self-regulation would be a mechanism for mitigating what was seen as unfair competition from

landlords who offer substandard property. One small landlord from the south east drew a parallel with other activities:

> Private landlords should not be allowed to let privately. I can't perform surgery, sell you a pension, MoT your car and a million and one other things. Yet I could meet you at the pub, take rent off you, give you the keys and let you live in a death trap. For this reason I believe that all lettings should be conducted by professionals.

B.41 By contrast, the Guild of Residential Landlords stated bluntly: “we absolutely disagree that this is a viable option. Yet more attempts to crack a nut with a hammer. There are simply too many individual landlords to make this work. The costs would be enormous”.

B.42 From the tenant perspective, Shelter, for example, noted:

> We welcome a number of elements of this approach, specifically the emphasis on the need for regulation from a central body with oversight of the sector as a whole; the requirement that all landlords (or their agents) participate; and the attempt to build on existing schemes thereby taking account of approaches already in operation on the ground … However, … we are unable to endorse it as a whole as there are a number of elements which we regard as inherently problematic.

For Shelter the key problem lay in the major role given to landlord bodies under the proposed regime.

Issues raised by respondents

B.43 Given that the Law Commission’s preferred provisional option was enforced self-regulation, many respondents raised detailed questions about what exactly the Commission had in mind. We consider these in the following paragraphs.

1. The central regulator and its role

THE PRINCIPLE OF A CENTRAL REGULATOR

B.44 The idea of a central regulator met with approval from respondents writing from different perspectives.

B.45 Legal respondents were broadly in favour. The Civil Justice Council Housing and Land Committee not only “accepts the argument” for a central regulator, but also the “advantage that the new regulatory framework might enable Government to reduce legislation”. The Bar Council responded that “the proposal that there should be a central regulator to enforce common codes against their membership is self-evident”. Arden Chambers “agree[d] that there is plainly a need for a central regulator”.

B.46 Of those writing from the agents’ perspective, the Association of Residential Managing Agents found the “account of the role of the central regulator persuasive”. The NAEA ARLA noted that the proposal resonated with those offered elsewhere:

> The concept of an approved self-regulatory body operating under an umbrella of some type of central industry practices board is one which the professional bodies have discussed and proposed for quite some time and so we would support this principle.

B.47 ARLA Wales acknowledged that it was clear that "the approved self-regulatory professional bodies would themselves require a degree of oversight" but went on to add that "hopefully this could be 'light touch' or industry-led".

B.48 With an eye to regulatory effectiveness, a landlord from the Eastern Landlord Association noted that "some kind of overall control of these organisations would be necessary otherwise they may not have the required "clout"." Similarly, A-list took the view that:

> The role of the central regulator of approved schemes is vital and it should ensure that an adequate standard of management is applied uniformly or else there will be a sector of the industry that will be allowed to persist with lower standards and housing conditions.

B.49 The British Property Federation was supportive of the proposal, but framed the issue in terms of broader benefits:

> BPF can see the benefits of requiring accreditation schemes to be accredited by an external body and believes that setting some form of minimum standards for accreditation schemes would be beneficial to both landlords and tenants. Being given this form of approval would help the bodies providing accreditation gain greater credibility, with tenants in return developing greater confidence in their landlords. We can see this adding to the benefits landlords receive from joining such a scheme.

B.50 The National Trust, while not proposing a fully worked out alternative to the Commission's scheme, favoured exploring the possibility of a hybrid between voluntary and enforced self-regulation and in this context "see no reason why there should not be a role for a housing regulator even with a voluntary scheme".

B.51 CityWest Homes "considers that the role of a central housing regulator should cover all tenures, private rented, local authority, ALMO and RSL managed housing. This would relax the unnecessary divides that currently exist in the housing sector".

B.52 The Urban Renewal Officers Group made a similar point:

> There is currently a huge gap between where the regulation of social rented housing (local authority and housing association) is, and where private rented housing is. The recent Cave Review (June 2007) has recommended changes to the way the social rented sector is regulated. As a consequence there is now a debate about whether the Housing Corporation or the Audit Commission should be the regulator. Is it too late to extend the debate to cover the regulation of the private rented sector too through the enforced self-regulatory framework? If so a huge opportunity to close the regulatory gap between the sectors will have been missed.

B.53 However, others were concerned that the creation of the central regulator would have broad negative impacts:

> We also believe that the establishment of a central regulator to oversee the representative bodies would concern many landlords, who would see the risk that its role could be enlarged, potentially deterring investment in the sector. Thus we see the potential for extra cost from enforced self-regulation but little in the way of clear benefits. (Council of Mortgage Lenders)

B.54 Although starting from the very different position that greater regulation was desirable, the Brent Private Tenants' Rights Group nevertheless felt that:

> The role of a Central Regulator as proposed in this model could send out signals of a heavier touch regulation than is perhaps intended, which could deter potential investors.

POWERS AND PRACTICALITIES

B.55 Respondents including LACORS and the Chartered Institute of Environmental Health raised important questions regarding how the central regulator would operate in practice:

(1) How will the central regulator monitor, maintain and enforce standards?

(2) What sanctions will the central regulator apply if an unscrupulous self-regulatory organisation accepts unsuitable landlords or properties for profit?

(3) If a self-regulatory organisation stops trading, how will the members of the scheme, who have paid their fees, be dealt with?

(4) How will the central regulator approach the question of whether the standards in approved codes will deal with property conditions directly, as in some accreditation schemes, or indirectly through management standards, as in most professional associations?

(5) Will any reports produced by the regulator routinely be made available to local authorities or environmental health practitioners in the relevant area?

(6) If the central regulator passes on individual complaints to the relevant self regulatory organisations to deal with, what mechanisms will be in place to ensure that they do actually deal with it and not just ignore it? Perhaps if matters are not dealt with appropriately, or within a specified time, the central regulator could pursue the matter itself.

B.56 Others sympathetic to the central regulator in principle were concerned about practicalities:

> [National Union of Students] is … dubious as to how the central regulator would work in practice. It would be incredibly complex and resource intensive and would have to be made up of people with a great deal of expert knowledge of the sector to effectively oversee,

> and to hold landlords to account. Furthermore, with regards to tenants accessing it to make complaints, NUS would question realistically how often such a service would be used … National standards would appear to be problematic; factors such as demographics, type of tenants (eg a densely populated student area will have different issues from an area with lots of families in social housing), rural or urban settings, geographical location, will all affect the [private rented sector]. For a centralised body to recognise all this would seem incredibly challenging.

B.57 The local nature of the housing market was seen as presenting regulatory problems from a different angle. LACORS reported that:

> Councils say, as the housing market is a local one, based on local stock conditions and economic activity, enforcement should remain at a local level and be carried out by local authorities. They believe a move to a centralised organisation, similar to the Health and Safety Executive, is likely to lead to reduced activity on a local level.

B.58 The National Housing in Multiple Occupation Network argued against the practicality of a central regulator dealing with specific claims effectively:

> Housing is one of the essential elements of life and as such it is a highly emotive issue, often leading to complex and confrontational issues between landlords, tenants, and local authority officers who attempt to enforce standards on the one hand but also act in a mediatory role on the other. It is considered that any centrally appointed regulator such as the Office of Fair Trading, Housing Corporation or Audit Commission (to which occupiers would have recourse to refer complaints about their housing conditions) would quickly become embroiled in complex local issues which they would not necessarily have the resources or flexibility to resolve.

THE IDENTITY OF THE CENTRAL REGULATOR

B.59 The Consultation Paper suggested options as to who might take on the role of the central regulator and invited views on the identity of the central regulator. The Consultation Paper took the position that local authorities were unlikely to be an appropriate body to act as the central regulator. This position was occasionally queried:

> The proposals … appear to dismiss the potential role of local authorities as an appropriate regulator under any adopted self regulation scheme. It is considered that this is potentially a mistake. It should be borne in mind that local authority officers provide a wide range of services in their dealings with the private rented sector, including advice to landlords on appropriate standards, and advice to tenants on their rights and housing options. (National HMO Network)

B.60 If local authorities are not seen as an appropriate candidate for the central regulator then other possibilities were noted.

B.61 Brent Private Tenants' Rights Group suggested that:

> The restructuring of the Housing Corporation/Audit Commission could result in a body which may be appropriate to take responsibility for co-ordination of the [private rented sector] in addition to its social housing responsibilities. This would have the advantage of bringing closer the "level playing field" between the expectations of the social and private rented sectors which many private landlords have long called for.

B.62 The A-LIST said:

> No organisation is at present in a position to be the central regulator, although there are a few candidates that could develop that function as well as new bodies, given sufficient funding … Accreditation Network UK (ANUK) has the knowledge, expertise, skills, experience, partnership structure and administrative support to develop and undertake this role. Any body that is established would have to make use of the expertise that ANUK already utilises.

B.63 Several other respondents also endorsed the Commission's preferred option of an independent central regulator, rather than relying on central or local government:

> We also strongly agree that the regulator cannot be central government and should not be local authorities. Rather, as proposed in the Paper, the central regulator should be an arm's-length agency. (Arden Chambers)

> LACORS agrees that the preferred option would be an arms length agency rather than central or local government. (LACORS)

> We agree that an arms length organisation would be best as the central regulator. (National HMO Network)

B.64 Precisely what the constitution of such an arms-length agency might be was less often considered. However, the British Property Federation identified the need for an organisation that is credible and seeks evolution rather than revolution:

> We would argue that this policeman for accreditation schemes should be a stakeholder organisation rather than a Government body. This would command the respect of all sides of the industry and build upon the ways in which accreditation schemes themselves work.

B.65 A-LIST elaborated its views by offering an account of how such a body might link in to existing government bodies:

> The central regulator should be an arms length agency that reports directly to the Minister, with possibly the Government Office for the Regions overseeing this. The central regulator could develop a supportive and development function to be effective and should form the basis of a National Housing Standards Agency … the central regulator should be CLG and/or appointment of a body such as ANUK (independent third party) to oversee and report back to CLG on all LA schemes in the country. They would develop regional

> networks based on Government Office regions, who would sit on regional network groups and ensure this is fed into and utilised on regional plans and policy.

B.66 One organisation we identified as a candidate for the role of central regulator was the Office of Fair Trading. This option met with only limited support.

B.67 Tessa Shepperson of Landlordlaw noted that:

> A central regulator sounds essential. The Office of Fair Trading appears to be the obvious candidate. However they are very consumer orientated. For example some of their decisions in the area of unfair terms in tenancy agreements appear to favour the tenant more than the landlord. Landlords may feel unhappy about an organisation, which they may see as anti landlord, being given this jurisdiction.

B.68 These concerns were echoed in the views of the Residential Landlords Association when setting out their favoured alternative:

> There would be a central regulator. This would be a new body. The Association does not consider that the Office of Fair Trading as an appropriate regulatory body. It only has limited experience of the sector (in relation to unfair contract terms). It would seem that this reform presents a good opportunity for a purpose designed new body. This body would be made up of representatives of landlords, tenants as consumers, and appropriate independent personnel to form a board of management.

B.69 Others noted that the OFT's current dealings with the sector raise concerns about the practicalities of implementation: "a further issue is the speed with which multiple codes would be approved. To date the OFT has made very slow progress, approving only five codes in five years". (Citizen's Advice)

B.70 Indeed, the Office of Fair Trading itself was not keen on the idea. In its own response to the Consultation Paper, it underlined some of these concerns and identified a number of others:

> We have some concerns over whether the OFT would be well placed to play a role overseeing the Law Commission's proposed regime, in the event that this approach were pursued. At this stage, taking on this role would constitute a departure from our objectives and long term strategic role. The OFT is not primarily a regulator, and acts as such only where we have a statutory obligation to do so.
>
> In addition, it is not clear that the Law Commission's proposals could easily be integrated as part of the current work that we undertake in this sector — such as our Consumer Codes Approval Scheme (CCAS). The CCAS is not designed as a tool to ensure compliance with existing legislation. Instead, it is designed to promote and safeguard consumers' interests by helping consumers identify businesses who have voluntarily committed themselves to providing higher levels of customer service than that required by law.

> Finally, implementing the Law Commission's proposals is likely to incur high resource costs. At the very least, potential costs are likely to include: complaints handling, enforcement, producing guidance, hiring new staff, possibly extra accommodation, involvement with appeals (whichever appellate body may be tasked) and potentially the responsibility for ensuring that landlords join the self-regulatory organisations and monitoring this on an ongoing basis. Given that consumers are not effective in complaining and enforcing their rights, the costs associated with monitoring compliance are likely to be large. The OFT does not currently have sufficient resources to fulfil such a role.

B.71 Another candidate for regulator that emerged in one or two responses was the Ombudsman for Estate Agents. This was not a possibility we had considered. NAEA ARLA did not think it would be an appropriate body to be the central regulator:

> We do not believe that such a board or body needs to be large or indeed needs to be an executive agency of government although it could be overseen or run jointly by such as the OFT or Housing Corporation. There has been some comment that an organization such as the Ombudsman for Estate Agents (OEA) might be seen as performing this function but, as the OFT have previously stated to us, it is not the role of an Ombudsman to act as a regulator, nor is it the role of an Ombudsman scheme to develop its own Code of Practice – both those processes should be the responsibility of the key stakeholders within a sector.

CODES OF PRACTICE

B.72 A key role for the central regulator would be approval of Codes of Practice (CoP) proposed by organisations wishing to operate as self-regulatory bodies. At the heart of this role would be ensuring that adherence to CoP would deliver standards that at least satisfy current legal requirements. There would be nothing to prevent CoP embodying higher standards, if a self-regulatory body saw a market advantage in promoting one. This proposal met with some support.

B.73 The National HMO Network, for example,

> agree that a CoP should ensure at least achievement of legal obligations in all areas of legislation that may be connected to housing/renting, eg house conditions, tenancies, CORGI certification, electrical installation certificates, etc. Adding other issues in would benefit those landlords who want to improve their property and management beyond the basic level.

B.74 There were alternative suggestions for the substance of the Code:

> Training and landlord development must be to a set standard. The ANUK/IDeA Landlord Development Manual is an initial stage in setting an industry standard. The means of delivering this are being developed and this forms the basis of entry level proof of competence for acceptance into an accreditation scheme. (A-LIST)

> Having recently merged, ARLA and the NAEA are currently reviewing their comprehensive Codes of Practice for both sales and lettings. It may be that the organisations take for one reference point the present Ombudsman for Estate Agents' codes of practice. Of these, the OEA Sales code now has OFT approval and the Lettings code is also currently with the OFT awaiting approval. The OEA lettings code could perhaps be usefully and uncontroversially considered for application across the agent sector. (ARLA Wales)

B.75 In contrast, Shelter, for example, felt that the Commission's proposal to allow the central regulator to approve a variety of codes, so long as they met minimum standards, was problematic:

> We believe that the proposal that individual landlord organisations should set standards for their members and enforce first level compliance is problematic as an approach. Whilst we recognise the role of the proposed central regulator in ensuring that the standards set by individual organisations are appropriate, we consider that this approach will be time-consuming and confusing and will ultimately lead to organisations competing with each other to lower standards in order to increase their membership. We believe that there should instead be a single code of practice/standards for the sector as a whole so as to facilitate effective monitoring and compliance.

B.76 Shelter also argued that if there were to be competing codes of practice, this would make the system harder for tenants to use. '[They] would find the system complex and confusing and may find it difficult to raise complaints in a system of multiple and competing professional organisations.' Indeed, competition between organisations for members could result in a "race to the bottom". Those with the least demanding standards would attract the most members.

B.77 Several other respondents made a similar point, and felt that this approach might create confusion for landlords regarding what they should be doing. And it could create confusion for tenants regarding what they should expect from their landlord. They argued that if there were to be multiple organisations, they should nevertheless work to a single standard code of management practice. This would help to bring clarity.

B.78 In contrast, some respondents suggested that a uniform national standard against which to regulate would be difficult to achieve. They thought account needed to be taken of local market conditions and variations in local housing stock which should be embedded into the codes that are approved.

B.79 The existence of different codes of practice might encourage the development of standards which only met a bare minimum and would do little to improve standards in the private rented sector. While we had seen the "race to the bottom" as a particular problem for voluntary self-regulation, some respondents felt that the introduction of enforced self-regulation could actually increase this risk. They argued that requiring membership of organisations that are in competition with each other would give a greater incentive for those organisations to require a minimum of their members and go soft on enforcement.

2. The role of self-regulatory organisations

B.80 The Consultation Paper envisaged that existing (and future) self-regulatory organisations would have to play a key role in the operation of the new regulatory approach. The Law Commission accepted that this would present considerable challenges, in particular relating to capacity, authority and cost. Not surprisingly, these challenges attracted considerable comment.

CAPACITY

B.81 Some respondents felt that the Law Commission had not fully appreciated the gap that existed between the current roles of self-regulatory organisations and what was being proposed for them:

> We believe that the Law Commission has failed to consider adequately the current role of landlords' associations. Without this understanding it is impossible to recognise the problems presented by the … proposals for enforced self-regulation. (National Landlords Association)

B.82 We acknowledge that, at present, the activities of landlords' and agents' associations vary widely. We accept that many landlords' associations in particular largely restrict themselves to the provision of information and assistance, without necessarily seeking to raise standards among members. However, some are trying to get their members to improve their housing management activities, and others would like to do more of this. This is certainly true of agents' organisations.

B.83 Enforced self-regulation would involve those running accreditation schemes and landlord and agent associations in taking a more proactive role in seeking to raise standards of housing management. This would involve two key elements. First, as discussed above, schemes and associations would be expected to agree an appropriate code of practice with the central regulator. Second, mechanisms for dealing with complaints against members who were alleged to be in breach of the code would need to be created. More generally, schemes and associations would also have to account to the central regulator for the effectiveness of their efforts in assuring appropriate standards of housing management were delivered.

B.84 Anticipating that some existing organisations might be unwilling or unable to develop their activities in the ways foreshadowed by the Commission, the proposals in the Consultation Paper were not dependent upon the willingness of existing organisations to take on these tasks. It was anticipated that new organisations, perhaps more attuned to the requirements of a new regime, might also be formed, as happened in response to the Government's decision to introduce a compulsory Tenancy Deposit Scheme.

B.85 Nonetheless, there were concerns expressed about the capacity of existing organisations to deal with the increase in work implied by enforced self-regulation. There was also recognition that moving from existing systems to enforced self-regulation would require a careful implementation strategy to avoid the sort of problems experienced with the introduction of registration in Scotland. In particular it was vital to ensure that landlord activity was not rendered unlawful simply as a result of a lack of capacity on the part of self-regulatory organisations.

AUTHORITY

B.86 Because at present landlord associations do not in the main seek to enforce standards or adherence to codes of practice among their members, some respondents were sceptical that they could ever to do this.

B.87 In addition, as Citizen's Advice among others noted, the model would

> risk confusing their trade association functions (which includes lobbying on behalf of their members) with regulatory functions which would include enforcement and providing access to redress. Crucially these would need to be delivered on a very *pro-active* basis if the objectives were to be achieved.

B.88 Brent Private Tenants' Rights Group, referring to landlord associations, said:

> We do not think that it is reasonable to expect them to undertake a statutorily underpinned policing role with regard to their members. Indeed, we would be surprised if any of them felt comfortable doing so since it would fundamentally change their relationship with their members.

B.89 Landlord associations themselves differed in their enthusiasm for the enforced self-regulation model. Some could see that it would require a scaling up and reorientation of their operation, but they were positive about engaging with this possibility. Others recognised that they were not equipped to provide the sort of services that were likely to be required and did not view the prospect with enthusiasm.

B.90 One of the principal ways in which enforced self-regulation is intended to raise quality is through positive peer group pressure. Through membership of a scheme or an association, landlords would be exposed not only to information and educational activities but also to positive role models. The effectiveness of this mechanism assumes that much poor landlord practice is currently the result of ignorance, rather than deliberate bad management.

B.91 While this was not an aspect of the model that attracted much comment, one landlord association observed:

> To suggest, as the Consultation Paper does, that landlords who were forced to join an association would improve their standards because they would become aware of how well-informed and well-intentioned landlords operate is naïve. Those who are already applying good practice will continue to do so, whether or not they are members of an association. We have no powers to force members to apply best practice and those landlords who wish to apply the minimum will continue to do so, regardless of the information they receive. (National Landlords Association)

COST

B.92 Respondents were asked whether they felt that the costs associated with our proposed scheme were justified. Some felt that any additional costs associated with the scheme were worth incurring to deliver improved standards. In contrast,

some were concerned that enforced self-regulation would require a major infrastructure to be established alongside existing enforcement systems and that the system would primarily impinge upon well-intentioned landlords.

B.93 Humber Housing whilst favouring enforced self-regulation, noted that:

> To be effective the proposal would require the creation of a large, costly and bureaucratic system. This includes the development of self-regulatory accreditation schemes and a body to oversee them.
>
> The proposal would penalise the majority of compliant landlords with the extra burden of joining a scheme.

B.94 Similarly, the British Property Federation believed that:

> Introducing enforced self-regulation for landlords is a huge undertaking that will ultimately not achieve what it set out to do. We feel that its perceived advantages are likely to be undermined by the system's inability to enforce better compliance among those landlords it is most concerned to reach, therefore presenting no improvement on the current system.

B.95 Some felt that that this was a key issue that the Commission had failed to take adequate account of in its discussion of costs:

> The estimated costs also ignore the costs to associations of updating and running their Codes of Practice so that they are satisfactory to the regulator. Reading the criteria which the Office of Fair Trading requires Codes of Practice to meet in order to be approved, there is a significant administrative burden even for associations which already have a sound Code of Practice. For a Code of Practice to be approved the representative body has to follow steps including consultation with consumer bodies, the creation of performance indicators to measure the success of the Code of Practice and other preparatory measures.
>
> This would represent a significant administrative burden on a landlords association and it is not clear at this stage whether the costs of this could be absorbed in the existing membership rate. Even if this were possible, the OFT also demands ongoing monitoring of the Code of Practice once approved (including a written annual report to the regulator and monitoring against performance indicators). These ongoing costs would almost certainly have to be absorbed into an increased membership rate. The proposals in the Consultation Paper also envisage the establishment of an appeals process for landlords who disagree with the handling of a complaint against them. Creating this from scratch and running it would incur further costs, inevitably leading to an increased membership fee. (National Landlords Association)

B.96 Some considered that schemes of enforced self-regulation attracted similar criticisms to mandatory licensing. Indeed, some felt that the difference in practice between the two models was not as great as the Commission might be taken to

have suggested. Others saw the parallel between enforced self-regulation and licensing as a positive.

B.97 Bolton MBC for example considered that the advantages the Commission attributed to enforced self-regulation could equally be delivered by licensing with what, in practice, would be a similar level of resources. Hence, they argued that there would be limited benefit in choosing the structurally more complex enforced self-regulation.

B.98 From a different perspective the OFT (whilst admitting that that the proposal warranted further investigation) suggested that comparisons could be made with existing licensing regimes so as to assess whether the administrative costs associated with licensing would be replicated by a scheme of enforced self-regulation. It set out a detailed agenda of research questions that it felt would be required in order to determine whether the enforced self-regulation model represented a proportionate solution to the problem.

3. Powers and sanctions

B.99 Although the fundamental objective of smart regulation is that the self-regulatory organisations should work with those who are regulated to ensure that they operate according to statutory and other contractually agreed standards, it is necessary that there are powers to impose sanctions on those who, after appropriate warning, fall below those standards. The Consultation Paper identified a number of sanctions which it thought the scheme would need.

B.100 From the responses, four particular issues emerged: dealing with landlords who fail to join the scheme; dealing with breaches of the code of practice; dealing with complaints; and controlling agents.

DEALING WITH LANDLORDS WHO DO NOT JOIN THE SCHEME

B.101 Most respondents felt it implausible to assume that all landlords will join some form of self-regulatory organisation simply because it became a legal requirement to do so. Yet, many felt that it was those who do not join who should be the main concern. How were such landlords to be treated?

B.102 The Consultation Paper suggested that such landlords would be identified by those working or living in local housing markets. This was criticised by some as too haphazard and unreliable. More than one respondent made suggestions for making the process of identifying non-member landlords more systematic.

B.103 One or two respondents suggested that once a landlord was identified as not part of a scheme or association, the credibility and effectiveness of the scheme would depend upon the availability of effective sanctions. While the initial response would be to try to persuade the person to sign up, ultimately, as one respondent put it:

> The penalty for not joining a scheme would have to be harsh, … Without sufficient penalties in place landlords with poor quality property may feel it well worth their while to take a risk of not joining and waiting to be discovered. (Humber Housing Partnership)

DEALING WITH BREACHES OF THE CODE OF PRACTICE

B.104 Respondents also raised questions about the sanctions that would be available to self-regulatory organisations to discipline members who failed to conform to the relevant code of practice.

B.105 The Consultation Paper noted that, as membership of a scheme or association, or letting through an appropriate agent, would be a prerequisite for engaging in the residential letting market, the ultimate sanction would be to eject the landlord from the scheme or association.

B.106 Citizen's Advice suspected that because members "would instantly lose their entitlement to carry out their business … in practice this might mean that this sanction would not be effective as it would not be used".

B.107 Two questions follow from this. First, what lesser sanctions should be available to self-regulatory organisations? Second, what happens to a landlord or agent whose membership of the scheme is withdrawn?

B.108 In relation to the first, the Commission assumed that, initially, warnings would be used. Respondents still wanted to know whether there would be any scope for escalating sanctions before reaching the point where threatening the withdrawal of membership would be appropriate? How would persistent offenders be dealt with? There was a concern that self-regulatory organisations would lack sufficient levers to deliver compliance.

B.109 In relation to the second, the Consultation Paper recognised that there would need to be an appropriate appeal procedure associated with membership withdrawal and that the process would have to function in a way that meant that tenants of such landlords were not disadvantaged. Where views on external appeal mechanisms were expressed, the majority favoured giving the responsibility to the residential property tribunal service rather than to the courts.

B.110 A further point noted by respondents was that the threat of withdrawal of membership could act as an effective incentive for poor landlords to alter their practices:

> Landlords associations would, in the worst cases of complaints, have no option but to bar an existing member from the association because of the scale of the breach of the code of practice. Careful consideration needs to be given to how to ensure that such landlords did not return to letting property (unless they used an agent). This would require constant policing and is not a role that the landlords association could carry out. (National Landlords Association)
>
> Enforced self regulation is the preferred option. However, measures should be put in place to prevent a landlord "expelled" from one association simply joining another in order to continue to let property. I think it would be vitally important that the Landlord Associations are themselves properly regulated and administered. (Morris – Landlord)

B.111 A related question was whether a landlord could be a member of more than once scheme or association. At first sight it might be thought there was no reason why this should not happen. However, one respondent observed there was a sense in

which concurrent membership of different self-regulatory organisations would be undesirable because it could enable a landlord, expelled from one association, to continue in business as the member of another. This raised for consideration whether there should be a means of making the names of expelled landlords available to all self-regulatory organisations.

DEALING WITH COMPLAINTS

B.112 Self-regulatory organisations were envisaged as being the first point of contact for a complaint. Some respondents queried our estimates of the volume of complaints that they were likely to receive. It was suggested that relying on an analogy with the housing ombudsman service would significantly underestimate likely volumes.

B.113 Other respondents queried whether self-regulatory organisations would have the expertise and capacity to handle complaints adequately. If they did not, how would they be dealt with? Would they have to be handed over to local authorities? As LACORS observed:

> The complaints process can involve visiting properties, carrying out detailed inspections, drawing up schedules of work, dealing with complex issues associated with works in the common parts of multiple occupied buildings which themselves are in multiple ownership and maintaining close contact with both parties until the situation has been resolved. … If scheme providers are expected to take on the full complaint handling role from local authorities, they would need to provide significant expertise in-house and have a local presence to enable swift intervention following receipt of serious complaints. Any such approach would have significant cost implications for scheme providers which could only be recovered through the scheme application fee. LACORS believes that the costs estimated in the report represent a significant underestimate of the true cost of operating such schemes.

B.114 In respect of this model, the Bar Council stated that “the main concern is that the self-regulatory organisations develop sufficient expertise to give a fair hearing to any of their members they take action against”. A second concern is to ensure that making the self-regulatory organisation the primary route of complaint should not result in tenants being denied existing legal routes of redress.

B.115 Some respondents expressed concern that it was not clear how emergency work or complaints that involve serious risk or danger to the tenant would be dealt with under the regime. These are instances where rapid recourse to statutory powers would be required.

B.116 The Housing Law Practitioners Association noted that “it is of concern that, without more precision as to how the scheme is to work and what it is to cover, it could introduce a layer of regulation which could delay obtaining a remedy in cases which require speedy action”.

CONTROLLING MANAGING AGENTS

B.117 Managing and letting agents play a central role in the Commission's preferred option. Under our provisional proposals, agents would offer landlords who did not wish to join a self-regulatory landlord association or accreditation scheme an alternative route to participation in the private rental market.

B.118 Many respondents were concerned that the Commission's proposals did not give sufficient prominence to the requirement for all agents to be members of *effective* professional associations. As the respondent from Bolton MBC commented: "managing agents from leading high street names to smaller independents vary in much the same way as private landlords and should not be exempt".

B.119 Citizen's Advice noted that: "CABx regularly report concerns with lettings agents' practices, and given the size of their lettings portfolios, the scale of consumer detriment can be significant".

B.120 Negative comment about the performance of managing agents was one of the most frequent features of the consultation responses. In addition to those who proposed licensing for agents, Andrew Dymond of Arden Chambers advocated accreditation for all managing agents.

B.121 Some of the smaller landlords expressed concern regarding the activities of letting or managing agents. Some of the bigger organisations, such as Unipol, referred to difficulties with intermediaries. Concerns were expressed that membership of existing professional bodies was no guarantee of professionalism.

B.122 One of the responding landlords commented:

> Any scheme that requires a landlord to be with a managing agent to get benefits would be a nightmare as I've not met one who will give the service required to myself or my tenants ie respond to tenant requests for maintenance issues quickly, call us to give us the option to react, check the property before releasing the deposit, who will respond to tenant, collect top-ups from benefit tenants, advertising the properties adequately ... the list of shortfalls is endless ... Please don't make us prove how serious we take our role as private landlords by paying good money to incapable agents.

B.123 Brent Private Tenants Rights Group sought to put the issue in context:

> The need to strengthen regulation of estate agents to protect consumers of properties when they are bought and sold was recognised with the introduction of the recent Consumers, Estate Agents and Redress Act 2007 which we support. Yet the related activities of managing agents are almost wholly unregulated, despite the fact that they have a far more crucial role in the well-being of the consumers of rented housing.

4. The role of local authorities in the proposed scheme

B.124 We received a number of comments that the role we envisaged for local authorities was not clear. For example, Bradford MBC observed:

> Apart from highlighting the important role of LAs in regulating the [private rented sector] the report is worryingly silent on what new role, if any, it envisages the LA should have in any new enforcement regime and how its current enforcement powers and policies will need to change.

B.125 In fact, the Law Commission's model does not propose changes to the current enforcement powers of local authorities. Indeed, current powers may need some enhancing. Rather, one feature of the enforced self-regulation regime is that it would, in the words of the Chartered Institute of Environmental Health, "enable local authorities to concentrate on those who seek to "stay below the radar'".

B.126 Other respondents noted that the Consultation Paper did not consider the processes by which self-regulatory organisations and local authorities would interact, if at all, when it comes to dealing with complaints and problems.

B.127 A different concern, expressed by several local authorities, is that a move to enforced self-regulation – if it results in landlords joining national or regional landlord-led self-regulatory organisations rather than local accreditation schemes – could mean that there would be a loss of local knowledge and relationships that have been built up over a number of years. This in turn could impact negatively on the local authorities' ability to deliver local housing strategy in collaboration with private sector housing providers.

5. The focus of the scheme

B.128 A number of respondents raised questions about the focus of the scheme, in particular about the requirements, if any, that landlords would be expected to satisfy in order join a landlord association.

B.129 LACORS, for example, asked:

(1) Would applications be vetted to ensure they are "fit and proper" (as required in relation to HMO licensing under Part II of the Housing Act 2004) or would their application be approved simply on the basis of paying a fee and signing a code of practice?

(2) Would the cost of any required training scheme be included within the application fee, or charged as a separate expense?

(3) Would there be a requirement for ongoing mandatory training or simply a short introductory course?

(4) Would applicants' properties need to be inspected before joining an association, and if so would it be all properties or on a sample basis? Or would inspection only occur on a rolling basis or once a complaint is received?

B.130 Some existing organisations had a negative view of the prospect of taking on an inspection role:

> There are slight suggestions throughout the Consultation Paper … that under enforced self-regulation landlords associations might take

> on a role of inspecting properties before allowing landlords to join. We have to fundamentally reject this suggestion. We do not have, and could not be expected to gather, the necessary number of staff on the ground across the country that would be required to carry out such inspections on properties – even those belonging to our existing membership and certainly not to an expanded membership. (National Landlords Association)

B.131 Others approached it more positively, and in the light of the existing system:

> Landlords could … be required to have properties accredited by the local landlords association before renting. The extra income in fees to associations could be used to pay inspectors to visit the properties. Local authorities could do random checks … Anything would be more effective and manageable than the present unworkable legal jungle that we are all trying to struggle through (North West Landlords' Association)

B.132 Answering these questions is of considerable practical significance. First, they influence the extent to which the role of the self-regulatory organisations will differ from that currently fulfilled by landlord associations. Second, it will shape the costs associated with membership and hence be likely to affect the rate of compliance. Some considered that minimising entry requirements would minimise the costs associated with the new system and maximise participation. Others felt that this would undermine the goals of the scheme. The Residential Landlords Association, for example, suggested that "unless there is pre-entry vetting … this scheme would not have the necessary degree of public confidence".

6. The scope of the scheme - overlaps and exemptions?

B.133 Respondents raised a number of issues about the scope of the scheme.

B.134 The first related to the question of whether landlords operating in several different local authority areas would be obliged to join several schemes or would joining one regional or national scheme exempt them from any local requirements such as selective area-based licensing.

B.135 It was also suggested that further consideration should be given to whether there should be any exemptions from the regulation requirement, for example for holiday lettings or for lettings where the landlords was resident in the premises. A list of possible exemptions was offered for consideration in the Consultation Paper.[4]

B.136 While not many respondents commented on this, where views were offered they differed significantly. Some took the view that a broad range of exemptions would be appropriate. Others felt that there was little or no justification for placing certain types of lettings or living arrangements outside of the scheme. The view that exemptions should be tightly controlled was encountered somewhat more frequently. Some sought to broaden the scheme and argue that it should apply to social landlords as well as private landlords.

[4] Paras 7.13 to 7.20.

B.137 Perhaps the most extensive list of suggested exemptions came from the Country Land and Business Association. They started from the premise that the Commission's proposals for reform represented "a regulation too far and it is disproportionate". Given this position, it is perhaps not surprising that wide-ranging exemptions were proposed:

> We would agree that resident landlords sharing accommodation with their occupiers need not be included. This raises the issue of the type of occupancy it is envisaged would be covered. Lettings under the Rent Acts with rents subject to the fair rent regime should be excluded on the basis that any further burdens would have to be borne by the landlord where in many cases already he will not be receiving sufficient income to cover repair and maintenance and this may exacerbate the situation. There are also lettings to agricultural workers and other service occupancies where the level of maintenance required may be different and they should be kept out of any such regime. There would need to be thought given to the various types of occupancies that do exist with differing obligations on the parties that would not fall neatly into the requirements of this regulation. Certainly family lettings and those for no monetary consideration should be excluded. Fixed term tenancies for seven years or more should be excluded as again different standards apply.

B.138 In contrast, the National Federation of Residential Landlords was more circumscribed its proposed exemptions:

> Landlords who let a room under the room-to-rent scheme and resident landlords occupying and sharing facilities with their tenants should be excluded from enforced self-regulation. NFRL does not, on the face of it, consider that there should be any other exclusions but if it be deemed that there should be, they should be few indeed.

The Bar Council similarly considered it appropriate for this group to be exempt.

B.139 Respondents such as the National Housing in Multiple Occupation Network and Newcastle City Council considered that resident landlords should not be excluded from the regime. As the former commented: "they may maintain the parts of the property used only by them, but not necessarily parts used only by the occupants".

B.140 Smaller landlords tended to favour no exclusions. Indeed one suggested that holiday lets should be included in the regime. Those from this group that did advocate exceptions sought to exclude either all landlords with less than five properties or tenants residing with the landlord or family arrangements.

B.141 The Residential Landlords Association similarly felt that:

> There is merit in exempting lettings by individuals of [the] home [in which] they have resided. Often these are effected informally and resident owners might not be aware of the requirement to register. It may be too onerous for them particularly if they are only letting their properties for a relatively short period of time eg because they are moving away to work. Perhaps an exemption for up to three years

> could be considered for them. Holiday lets should be excluded. Lettings as part of ones contract of employment should also be excluded. Likewise letting for family members and for no consideration should be exempted.

B.142 The Guild of Residential Landlords also supported the exemption of resident landlords. In addition, it suggested excluding long leases (of more than seven years); very short term lets; and, possibly, leases of more than £25,000 per annum. The Guild advocated the inclusion of the whole of the social rented sector.

B.143 Shelter did not consider that certain categories of landlord should be excluded from any revised regime. This was

> not least because of the difficult issues this raises regarding where and how the "dividing line" between types of tenant should be drawn. We believe that all tenants should be offered regulatory protection and recourse to the law in the event that these rights are not met.

B.144 Similar sentiments were expressed by A-LIST who considered that people are entitled to the same standard of living regardless of contractual situation. This led them to the view that resident landlords, family and non-monetary lets should all be included. Unipol and the Housing Law Practitioners Association also suggested universal application and no exclusions.

B.145 One matter on which several respondents commented was the proposed exemption of various types of temporary accommodation. Shelter, for example, stated:

> Shelter has particular concerns about the Commission's analysis of the application of the regulation to those in temporary accommodation. We do not believe that the brevity of the relationship involved in temporary accommodation "brings them outside the property management and property condition issues". Whilst we acknowledge that individual renting relationships may sometimes (though not always) be short, renting itself represents a continuous function for a provider of temporary accommodation and we do not therefore believe that they should be excluded from any regulatory efforts.

B.146 The West Midlands Private Sector Housing Forum queried the exemption of hostels and bed and breakfast accommodation.

B.147 LACORS stated:

> LACORS would refer the Law Commission to Canterbury City Council, who have serious concerns about the proposed exemption for short-term occupation such as staying in a hotel, B&B or holiday letting. Whilst they understand the spirit in which the proposed exemption is suggested, there is evidence that some of the worst conditions exist in premises of this type. Certain unscrupulous landlords use the terms "bed and breakfast" or "holiday letting" as an

> excuse for letting sub-standard accommodation on a permanent or semi-permanent basis to vulnerable occupiers.

B.148 Similarly, the Residential Landlords Association "consider that lettings even temporary where it is a persons only residence (eg hostels) should be included in the scheme".

B.149 Finally, LACORS echoed this focus upon primary residence as the key basis for framing exemptions:

> It must be recognised that the need for regulation arises when accommodation is occupied by people as their only or main residence, regardless of the label attached to it by the landlord. Exemptions must, therefore, be very carefully and precisely defined to reduce the capacity for exploitation of loopholes.

7. Would adoption of enforced self-regulation lead to a reduction in other forms of regulation?

B.150 The Consultation Paper raised as a possibility that adoption of a new regulatory framework might be accompanied by a reduction in other forms of regulation. Although we did not pursue this issue in any detail it was taken up by one or two respondents. They indicated that our proposals for enforced self-regulation might be a more attractive proposal if it could be linked to other changes in the law.

B.151 For example, from the perspective of some landlords enforced self-regulation would be an attractive alternative to mandatory HMO or selective licensing. Similarly, the Residential Landlords Association suggested that the new regime should be accompanied by member landlords being "taken out of local authority enforcement regimes … and the tenant deposit scheme should be scrapped and replaced by appropriate provisions in the code of practice with financial bonding".

8. Alternative schemes

B.152 The following organisations set out, in more or less detail, alternatives to the Law Commission's proposal for enforced self-regulation:

(1) Citizen's Advice

(2) Brent Private Tenants' Rights Group

(3) Shelter

(4) The Residential Landlords Association

B.153 It is clear that alternatives (1) to (3) have a strong family resemblance. The key departures from the Commission's proposal are a preference for a standard code of management and the role ascribed to the central regulator, including how it relates to local enforcement bodies. All see central registration as important, suggesting the need for a national registration scheme. They also appear to give the central regulator a more direct role in dealing with infringements of the code of management than envisaged by the Commission. All highlight the advantage that simply requiring landlords to supply or display their registration number would encourage participation.

B.154 The Residential Landlords Association scheme also gives the idea of landlord reference numbers a prominent role, although in this case the scheme retains the idea of a system of approved bodies for landlords to belong to, rather than a single central regulator.

CITIZEN'S ADVICE

B.155 Central to their scheme is a single independent regulator. The regulator would draw up a common code of standards, in consultation with key stakeholders, and enforce it across the private rented sector. The code would require all landlords to have a complaints procedure and to be a member of the Housing Ombudsman scheme. Tenants would therefore have access to mechanisms to obtain redress without resorting to the courts. The need for landlords to have an internal complaints procedure could be achieved by their becoming a member of a professional body or accreditation scheme which has one, therefore providing a further incentive for joining.

B.156 The regulator should have the power to:

(1) Take a pro-active approach towards enforcement by carrying out inspections of properties targeted on the basis of a risk assessment analysis from intelligence sources including the Housing Ombudsman, local authorities or advice agencies. To do this effectively inspectors would need to be locally based.

(2) Provide guidance and practical assistance to non-compliant landlords, and undertake monitoring visits.

(3) Where necessary undertake enforcement action, which would include the requirement to employ a managing agent until compliance could be achieved.

B.157 All landlords intending to manage a property would be required to register with the regulator. This would give the regulator access to a comprehensive list of the regulated population. The requirement to provide proof of registration should be embedded in landlord procedures such as taking court action, claiming tax allowances or using the deposit protection scheme. Landlords would not be able to conduct their business without proof of registration. Registration could be automatically linked to membership of the housing ombudsman.

B.158 Under this model, professional bodies and accreditation schemes would have a key role to play. This role builds on their existing functions by supporting members to ensure they are able to comply with the regulator's requirements. They could also provide a first tier complaints system to reduce the need for complaints to be dealt with by the ombudsman (which would be likely to generate additional costs to the landlord). Depending on the evidence of the effectiveness of their self regulating procedures, membership might be treated by the regulator as an indicator of a lower level of priority for inspection action. There would therefore be positive incentives for membership but not compulsion.

B.159 In addition Citizen's Advice believed the following measures were necessary:

(1) Statutory regulation of all lettings agencies. These would provide the alternative for landlords not wishing to register with the regulator.

(2) An effective and pro-active single regulator should help drive up standards and reduce the need for individual tenants to initiate enforcement action or make complaints. However the need for an individual remedy will remain. Measures must therefore be put in place to protect tenants from retaliatory eviction if they seek redress.

BRENT PRIVATE TENANTS' RIGHTS GROUP

B.160 All landlords should be required to be "fit and proper" persons, unless they have appointed a licensed agent with full property and tenancy management responsibilities. The definition of "fit and proper" would entail adherence to a statutory Management Code. The Management Code would comprise the minimum standards required, and should be aligned with current legal requirements. The Code could replace some existing legislation. All those acting as professional agents would be required to be licensed.

B.161 There would be a central co-ordinating body. It could be a new agency, or preferably an extension of one that already exists. The co-ordinating body would not, directly, have a regulatory role, although they would be expected to refer any alleged breaches of the Code that are brought to their attention to the relevant local authority or other regulatory body. The co-ordinating body would monitor and record the action taken by the relevant regulatory authorities as a result of such referrals, and satisfy themselves that the action is adequate and proportionate.

B.162 Landlords would be encouraged but not compelled to join a Landlords Association or similar body. They would register themselves as landlords with the central co-ordinating body, paying a small administrative charge, plus a minimum fee to cover automatic membership of the Housing Ombudsman Service. Upon registration, landlords would be deemed to be "fit and proper" unless or until proven otherwise.

B.163 Once registered each landlord would receive a Registration ID number, along with the statutory Code, plus information about local support agencies, such as landlords associations, training courses, advice agencies, relevant local authority services and accreditation schemes. It would be a requirement to quote the ID number on Tenancy Agreements, and on all official documents relating to the tenancies or properties let, such as applications to court, tax documents, tenancy deposit protection schemes and grant applications. Landlords would also be expected to quote the ID when advertising tenancies or joining landlords associations. The Group believed that, with these measures, sanctions against a failure to register per se would not be necessary.

B.164 Any alleged non-compliance with the Code could be brought to the attention of the co-ordinating body. This might be in the form of reports from a local authority; complaints from tenants (to the co-ordinating body directly or via the Housing Ombudsman Service); reports from third parties; and anonymous reports (to allow tenants in fear of eviction to complain); plus occasional spot checks or audits by the co-ordinating body. The co-ordinating body might inform the landlord directly about the allegations, or the matter might be referred to the

relevant enforcement body to notify the landlord. Where a landlord is notified of an alleged breach of the Code which he disputes, the matter should then be investigated by the relevant enforcement authority. If the landlord continues to dispute any breach of the Code following an investigation and confirmation of the breach by the relevant enforcement agency, there should be an appeal process to the Residential Property Tribunal.

B.165 The Group expected that undisputed breaches of the Code, or those confirmed on investigation, (or following appeal), would initially be dealt with by raising awareness of the breach and the need to remedy it within a set time appropriate to its seriousness, and in line with existing enforcement legislation, protocols or concordats. Where appropriate, there could be a requirement that training be undertaken. Cases of serious breach, or a failure to remedy a breach without good reason, would result in enforcement action by the relevant enforcement agency, including work in default. As now, the landlord could also be prosecuted. Provision should be made for the extension of the use of Interim or Final Management Orders where there are serious and/or repeated breaches of the Code, and a refusal to appoint a licensed agent.

B.166 Ultimately, the co-ordinating body would have the right to revoke registration, with a right of appeal to the Residential Property Tribunal against this decision. In such circumstances the local authority would have a duty to serve a Management Order on any property owned by that landlord which is used for residential letting. In the case of an appeal, the tenants of all properties let by the landlord in question should be informed of the appeal and have a right to submit witness statements.

SHELTER

B.167 At the core Shelter's approach would be key elements of the enforced self-regulation model: the use of a central regulator, and the requirement that all landlords (or their agents) participate. It would differ from the Commission's proposal in two fundamental ways: first, it would establish a universal code of standards for all private landlords; and, second, it would require national registration for all landlords.

B.168 Shelter believed a common code was vital to a successful approach to regulating the private rented sector. It would be drawn up with input from landlords, tenants, government, local authorities and professional organisations. Such a code would avoid the proliferation of varying standards and approaches, facilitate monitoring and enforcement and enable both tenants and landlords to be aware of their rights and responsibilities with regards to renting property.

B.169 In tandem with this universal code, Shelter believed that national registration of landlords should be the basic means by which enforcement of the code is made possible. They suggested that registration should be simple and either free of charge or perhaps with a small administration fee payable. Registration would confer a professional identification number on the participating landlord, and this ID number would subsequently be used in transactions related to the rental of their property including advertising tenancies, using the tenancy deposit scheme, claiming tax allowances, taking court action and carrying out possession orders.

B.170 The central regulator would oversee compliance with the code and monitor any alleged non-compliance which is brought to its attention. This might take the form of complaints from tenants, from third parties such as advice agencies or non-compliance reports from local authorities. Non-compliance could be dealt with by the central regulator through a range of methods starting with drawing the problem to the landlord's attention, through to sanctions such as the withdrawal of the right to registration and/or the imposition of a fine.

RESIDENTIAL LANDLORDS ASSOCIATION

B.171 The RLA scheme would include a system of recognised bodies, which could comprise landlord associations and accreditation schemes. These are termed "approved schemes".

B.172 There would be a central regulator. This would be a new body comprising representatives of landlords, tenants as consumers, and appropriate independent personnel to form a board of management. The regulator would approve landlord association or accreditation schemes which complied with certain minimum requirements: that they are able to vet prospective members, to provide training, to deal with complaints and have a robust disciplinary system.

B.173 There would also be an appropriate scheme for the vetting and registration of agents. Whether they would need to apply to a letting agent who simply arranges a letting and no more is something which would need further consideration.

B.174 Lettings would be prohibited unless effected by a landlord who was a member of an approved scheme or there was a managing agent responsible for the property who was himself a member of an approved scheme. For these purposes lettings include granting a licence to occupy.

B.175 All landlords or agents who are members of an approved scheme would be given a unique reference number. Part of this reference number would have to identify the scheme in question. There would be a website enabling tenants and others to check that the registration was still valid. The registration number would have to appear with contact details on the tenancy agreement and paperwork issued by the landlord/agent. There could be a legal requirement for this number to appear on tenancy agreements. This could assist in spreading knowledge of the requirement to be registered with an approved scheme.

B.176 The RLA envisaged that it would be unlawful to receive rent unless one was registered. Any rent paid in breach could be recoverable, subject to a time limitation. Any landlord seeking possession on whatever ground, including section 21, would need to demonstrate to the Court that he was registered or the letting was managed by a registered agent. Local authorities would check before paying local housing allowance or housing benefits to any tenant that the tenancy was being conduction by a registered landlord or agent.

B.177 The RLA envisages a high take up rate as a result of these measures. The RLA envisages that the system would need to be supported by financial incentives to members available only to registered landlords. This would further encourage take up. Non-registered landlords would operate via agents. They would not be eligible for tax incentives.

Alternative approaches and suggestions

B.178 The Consultation Paper also invited respondents to make suggestions for alternative approaches including any proposals for improving the current system and identifying any additional topics that the Commission might wish to consider further.

The Eastleigh alternative

B.179 The most developed alternative idea came from Eastleigh Borough Council who proposed that landlords should register their properties with their local housing authority (LHA). This approach was argued as having the following advantages:

(1) Management of the register would involve little cost and therefore demand only a small registration fee that landlords would find more palatable.

(2) The register details would be simple and represent a limited imposition on the landlord.

(3) The register details would however enable the LHA to undertake a desktop risk assessment and implement a pro-active but proportionate programme of action, the compliance code and any regulatory instrument on standards. The risk assessment could take into consideration membership of any landlord's association or any accreditation achieved.

(4) The register would provide the LHA with the means to communicate more effectively with the private rented sector, to educate and disseminate information and advice, consult and collaborate and build co-operation that would facilitate responsible letting.

(5) A LHA registration scheme would give tenants a clear, impartial single source to which they can make representation in confidence.

(6) Existing cross border liaison between LHAs would facilitate consistency and standardisation of the individual schemes but allow for local differences.

(7) There would be no need for a central register or an additional central regulatory body thus avoiding the additional bureaucracy and cost that would otherwise result.

B.180 The registration scheme could incorporate the enforcement options and sanctions detailed in section 7.25 of the Consultation Paper.[5] If not applied across the whole sector, registration could be made compulsory in designated areas or for particular types of accommodation such as houses in multiple occupation that fall outside licensing requirements.

[5] These include, requiring landlords or agents to attend training courses; awarding compensation to the aggrieved party; requiring the use of a managing agent; or imposing an administrative fine. It was suggested that these sanctions could be reinforced with the possibility of expulsion from or revocation of membership (or a license under the licensing option), and criminal prosecution.

Selected modifications to the existing system

B.181 A number of modifications to the existing regulatory framework were also suggested, the first three of which had been recommended in our earlier report, Renting Homes[6]:

(1) Amend the mandatory grounds for possession, for example reduce rent arrears from three to two months, and make anti-social behaviour and property damage mandatory grounds rather than discretionary ones. This would provide landlords with a quicker means to bring tenancies to an end in such circumstances, being ones our experience has shown to be a common cause of concern to landlords. (West of England Local Authorities Group)

(2) The implied landlord covenant/repairing obligation under section 11 of the Landlord and Tenant Act should be based upon the freedom from category 1 hazards alone. This would simplify matters to one "standard", ease [the] regulatory burden by shifting [the] basic requirement to one of safety rather than any other implied, higher "repair" standard and also ensure that design defects would come under the obligation which they currently aren't. (West of England Local Authorities Group)

(3) Many of our members would also welcome any attempt to simplify the law in relation to private-rented sector housing and to make it more accessible to the lay person. As it currently stands landlords have to be familiar with 58 Acts of Parliament to fulfil their duties making compliance difficult. The BPF would therefore be in favour of rekindling the debate around tenancy agreements, first discussed in the Law Commission's paper "Rented Homes", in the hope that these could be modified and a model tenancy agreement developed to make both landlords' and tenants' rights and obligations clearer. (British Property Federation)

(4) Legislation to safeguard tenants from retaliatory eviction where they report their landlords for non-compliance with a Code or any other legislation governing their tenancy or the property in which they live, or where they co-operate with enforcement agencies in providing information. (Brent Private Tenants Rights Group and Debbie Crew)

Additional topics

B.182 The following topics were suggested by respondents as worthy of further consideration:

(1) The notion of linking the payment of Housing Benefit to property condition and standards of management, either as an incentive within the enforced self-regulatory framework or as a potential alternative to it. (Urban Renewal Officers Group)

(2) Compulsory registration of the private rented sector, with every new tenancy being notified to the registrar, accompanied by a small

[6] Renting Homes: The Final Report (2006) Law Com No 297, http://www.lawcom.gov.uk/docs/lc297_vol1.pdf.

administrative fee. High risk premises which are presently unknown to the local authority would no longer be unknown to the authority so local enforcement policies and strategies can be effectively introduced. (A-LIST)

(3) All landlords to have Client Money Protection insurance. This should be a pre-condition of membership of a landlord association. Letting agents should have Client Money Protection insurance alongside Professional Indemnity Insurance. Tenants' and landlords' money would be covered if the agent goes out of business. (UKALA)

(4) Land Registration Act 2002. While the vast majority of let properties are likely to be registered with the Land Registry, there may be a case for making the letting of properties on short lets a trigger for registration, as is the case now with leases of seven or more years. While we do not, for one moment, suggest that every shorthold is separately registered, we believe that it would be helpful if the title of all properties subject to residential lets were registered as such. Regulatory bodies could then be granted access to the Land Registry's Index of Proprietors' Names. This would aid the process of identifying all properties let by a particular landlord. (Brent Private Tenants Rights Group)[7]

Other variations

B.183 Other alternatives were offered more briefly. In particular, the Chartered Institute of Housing commented:

> One variation of an enforced self-regulation regime that the Commission may wish to consider is "default" registration. In this approach landlords that fail to join an industry scheme will, in the event of a complaint by a tenant in a dispute be bound by the decision of an adjudicator of the scheme designated by the regulator to be the default scheme of which the landlord would be deemed to be a member (for example, the Independent Housing Ombudsman). The landlord would be bound to be a member of the default scheme until they paid up the subscription fee that they would otherwise have paid if they had joined that scheme voluntarily (perhaps with an appropriate penalty charge). This would help remove any incentive that the landlord might have to take the risk and not join a scheme. It would also provide tenants (and their advisers) who did have a complaint with a clear mechanism for resolving disputes without first seeking the involvement of the central regulator.

B.184 Another alternative, proposed by L P Dillamore, argued for a scheme built upon the Tenancy Deposit Scheme introduced by the Housing Act 2004:

[7] This proposal was made by the Group in the context of their alternative model of enforced self-regulation. In this instance the regulatory body with access to Land Registry information would be their proposed central co-ordinating body. However, the proposal would seem to have a broader relevance, and hence is listed here. It is intended that tenancies for periods greater than three years should be brought within the Land Registration scheme in the near future.

> As a result of the TDP initiative, for the first time ever, government has the practical capability of engaging directly with the letting community … If awareness, compliance and enforcement are the central issues to this initiative, … most, if not all the Law Commissions desires can be achieved in a far simpler and significantly less costly way …
>
> The TDP legislation … intentionally or not, has provided an ideal central data base (particularly the "custodial" scheme) which, if used appropriately, would enable Government to address the awareness issue, as the data bases created are, de facto, a "register" by default … the holding of tenant's deposits does not apply to the entire [private rented sector], nevertheless … by the time any legislation that may be enacted, following the submission of the Law Commission's report to Government, a very significant proportion of the PRS will be enrolled within the data bases.
>
> From a functionality perspective, all landlords and / or their agents are compelled to proactively engage with TDP provisions when accepting or lodging a deposit … the Law Commission should consider the possibility of obliging the landlord to make a simple Statutory Declaration at the point of lodgement confirming that, after due consideration / enquiry, … their property complies with the law as it applies. Thereby making it an express condition of the tenancy rather than an implied one as it is currently.

3: EXPANDING LICENSING

B.185 The third option suggested by the Law Commission was an expansion of current licensing activity.

The response

B.186 The majority of respondents did not consider that expansion of the existing HMO licensing scheme across the whole of the private rented sector was a practical option, primarily for the reasons set out in the Consultation Paper.

B.187 It was strongly rejected by the major landlord associations. The Bar Council considered that "the proposal for licensing appears to bring nothing new to the regulatory regime that deals with the problems of the cost of enforcement and the sheer scale of the problem. It also does not have the positive effect of encouraging best practice that may be achieved through enforced self-regulation". LACORS agreed that "a national mandatory licensing system … would be neither desirable nor effective". Some suggested that licensing was a good idea in theory but that the resource implications of delivering an effective system are such as to make it impractical.

B.188 The Council of Mortgage Lenders set the proposal in a wider context, arguing that it could be positively harmful:

> The cost of a compulsory licensing scheme would be considerable against which the scheme addresses no obvious consumer detriment. Compulsory licensing would also risk deterring homeowners with

> properties empty for shorter periods (such as those working away from home for a year or two) from renting out their homes. While some have argued that the sector does not benefit from these "amateur" landlords, the reality is that they often provide high quality accommodation at reasonable rents. Measures that would discourage such letting, such as compulsory licensing, would result in more houses left empty needlessly.

B.189 Some respondents pointed to the recent experience of introducing mandatory HMO licensing in England and licensing in Scotland as indicative of the practical problems of running such a scheme with inadequate resources.

B.190 However a number of respondents argued the other way. Licensing was most likely to find favour amongst local authorities and advocacy groups. For example, the Chartered Institute for Environmental Health wrote:

> There is an argument to be made for all private sector rented housing to be licensed, but experience of the HMO licensing so far would indicate the need for caution – but should not be taken as the reason why licensing is not a good option. Licensing should be a lot simpler than it is and less bureaucratic (and cheaper). Furthermore there would be no reason why a third party, could not certify compliance with physical and management standards, and the local authority issue the licence.

B.191 Shelter argued that:

> Licensing can provide a tool for ensuring that all those providing one of our most important service industries – ie a home – are registered and therefore accountable. It also provides more certainty for tenants with regards to being sure that their landlords are working in accordance with standards and are "fit and proper" persons to provide this accommodation.

They concluded that we had been "unduly negative about this approach."

B.192 The Law Society's Housing Law Committee preferred the licensing option. The Association of Residential Managing Agents maintained that:

> We still believe licensing is the best way to reassure the public and to prevent those who are unsuitable for setting up in business or indeed staying in or re-entering.

B.193 Some landlords took the view that regulation external to the sector was necessary:

> Associations and professional bodies should not be given any role at all in regulation, as they will not do it. Irresponsible landlords and criminals are present in large numbers in the private rented sector and simply take advantage of the effective "free for all". Even if membership of an organisation was made compulsory, we would soon see the establishment of the "Recalcitrant Landlord's Association"… Voluntary regulation will not work, as the worst

> landlords will not take part. “Enforced self regulation” will not work, as landlords’ associations/institutions will not be able to enforce standards against their own members, even if there are sanctions, as loopholes will be found or means of watering-down regulation will emerge … Responsible landlords are not put off by regulation, such as licencing [sic], so long as it is comprehensible, but by excessive fees, so these need to be set at a realistic level … (we all grumble, about everything, all the time, but that is not a revolt!) (Mostyn Estates)

B.194 One difference between enforced self-regulation and licensing is the additional leverage given to a licensing authority by the statutory basis of the scheme. The Association of Tenancy Relations Officers argued that there is evidence that this opens up the potential to effect changes in well-established but undesirable practices:

> It is suggested [by the Commission] that amateurism or inadvertence would … be replaced by membership of organisations. There is no available evidence to suggest that there is any lack of either existing information services … or that individual landlords are necessarily amateur … both large and top end of the market providers have been shown to be unwilling to change practice or procedure by Local Authority encouragement. The limited scope of the mandatory licensing system has enabled the Authority to monitor landlords’ or agents’ practices. As an example, in Newcastle a major participant agent has been successfully persuaded to alter their practice of gaining access to tenants’ homes without notice by using their own keys as a part of the review of their procedures. The particular agent, whose principal officer holds a Law degree, had been advised many times in previous years that their practices were in breach of the covenant of quiet enjoyment. However, the act on its own did not enable tenants to enforce their rights. The new licensing regulations have now made that possible to do. The particular agents describe themselves as being a professional body that are members of various national organisations concerned with lettings.

B.195 Taking licensing a step further would remove one of the disadvantages associated with the existing system:

> Another reason for opting for licensing is that selective licensing, and the difficulties associated with it could be abandoned. When “bad” landlords become aware that selective licensing is to be introduced in an area, it gives them the opportunity to sell up and move to another part of town resulting in the decline of another area (Hyndburn DC)

B.196 The same respondent went on to argue that:

> Other professions need a licence to operate and need to abide by the conditions attached or lose the licence and be unable to operate their business. This is for the safety or well being of the public and we can see no difference in the case of private landlords if the aim is to improve conditions in the private rented sector.

B.197 Other respondents pointed to the example of alcohol and taxi licensing as policy areas in which local authority-led licensing regimes can operate productively and positively. These are areas in which local authorities can claim some success in working with businesses to operate successfully while at the same time meeting relevant legal obligations.

B.198 Some respondents focused critical attention upon the contrast the Commission drew between its favoured option of enforced self-regulation and the licensing option:

> Given the bureaucracy, which the [enforced self-regulation] proposal envisages, there seems little advantage over a mandatory licensing scheme operated by local authorities. It would be possible to include a requirement to consult with local landlords and their organisations prior to introducing such a scheme. In this way the degree of "ownership" by landlords seen as a major advantage could be achieved. Many of the disadvantages attributed to mandatory licensing, particularly the cost are multiplied in the proposed scheme. The least that can be said of mandatory licensing is that local authorities have an established structure so there would be no need to create one or the overseeing regulator as envisaged in the enforced self-regulation proposal. We do not propose a licensing scheme only point out that there are other methods of producing the same outcomes without the massive bureaucracy and difficulties envisaged in the proposals. (Humber Housing Partnership)

> We find it strange that the paper sees a major argument against licensing, the question as to whether local authorities would have the resources to regulate the estimated 700,000 landlords, whilst similar concerns were not considered compelling under the Option 2 proposal which would have placed similar duties on associations and a central regulator … In both options there will obviously be a significantly increased regulatory burden which will require commensurate resources to be delivered. (Citizen's Advice)

B.199 The Consultation Paper floated the idea of implied and negative licensing, which broadly works on the principle that a landlord is innocent until proven guilty: there are no conditions attached to the initial application for a licence, but it can be removed if a landlord is subject to a successful complaint.

B.200 A small number of respondents commented on this proposal and were generally negative. If a key purpose of licensing is to give the tenant assurance then this system could not deliver that. Given one of the acknowledged problems of the current system is its reliance on complaints, the chances of a landlord ever being deprived of a licence are likely to be relatively limited.

B.201 One possibility not discussed in the Consultation Paper was a regime that differentiated between landlords and managing agents, with managing agents but not landlords being subject to licensing. This model was proposed by Brent Private Tenants' Rights Group. Under this system if a landlord did not join a self-regulatory body then they would put their property in the hands of a managing agent who would be licensed. One could argue that this overcomes some of the

concerns that respondents had about licensing private landlordism in the same way as any other profession. While the individual private landlord might have a case for not being treated as a professional, it is harder to say the same about managing agents.

4. HOME CONDITION CERTIFICATION

B.202 The final proposal offered in the Consultation Paper was that consideration might be given to introducing a system of home condition certification. The Consultation Paper suggested that this might be a stand alone scheme, but more likely would be a power which the central regulator could use if it was felt that it was necessary in relation to a particular area or particular class of properties.

B.203 Many respondents supported the idea of certification in principle but feared that the difficulties anticipated in implementing an effective scheme might mean that it was not feasible in practice. Others felt that while the initial proposal lacked detail, it merited further development. A small minority supported the principle of home condition certification without significant qualification.

Support for the principle of home condition certification

B.204 One of the key positive characteristics of the proposed system was thought to be its potential to encourage landlords to manage their properties more proactively. Arden Chambers noted that:

> The certification scheme would encourage landlords to move away from a purely "reactive" attitude towards disrepair and would force them to embark on programmes of planned maintenance. We think that this could cause a significant improvement in the standard of maintenance in the private sector. Currently, most landlords do not carry out programmes of maintenance for rented properties and only carry out repairs when notified by tenants. In many cases, however, tenants do not complain, or do not complain promptly, with the result that a defect can exist for many years without being addressed. This can lead to significant damage to the fabric of a building requiring costly remedial work when prompt action to address the initial defect could have been inexpensive.

B.205 The Association of Home Information Pack Providers also felt that a certification system would add a "much needed preventative element", adding that it would build on existing good practice (for example, regarding inspection of gas appliances) and, if the benefits were maximised, could:

(1) Ensure compliance with safety obligations at the point of letting;

(2) Significantly enhance tenant protection;

(3) Help tenants make informed choices between available properties;

(4) Identify areas where the property would benefit from cost effective improvement;

(5) Help safeguard the landlord's investment in the property;

(6) Help the landlord reach decisions on planned maintenance;

(7) Deliver an efficient holistic mechanism for preventing breaches of the legal obligations relating to health and safety and property condition.

B.206 The Chartered Institute of Housing sought to frame the debate more broadly and argued for certification on grounds of a consistent approach to consumer protection:

> We would like the option to be explored as to whether Certification could be combined into a single process for Home Condition Reports for private sector housing ... CIH strongly supports the introduction of Home Information Packs which are being introduced as a justifiable measure of consumer protection. We see no reason why consumers of rented housing should not also benefit from the same degree of protection (although many of the issues that tenants need to be aware of are different). Treating tenants as consumers is consistent with the Commission's approach in Renting Homes.

B.207 There was concern that the standards to be expected should be realistic. Arden Chambers considered "the idea … to be most attractive" but only on condition that "the standard expected is not set too high". In this respect, the position adopted in the Consultation Paper was seen as plausible. Similarly, the Chartered Institute of Housing stated that it "would not favour this approach if it was to be imposed as an addition to the existing burden of regulation".

B.208 This sentiment was echoed, and elaborated upon, by the British Property Federation:

> We would only be supportive of certification if the aim of such a certificate was to consolidate all existing obligations, such as those required under HHSRS and HMO licensing, gas and electrical safety certification, etc, potentially reducing the time and effort it takes to carry out all the necessary checks and maintenance work. What the BPF would not want to see is an additional bureaucratic layer adding cost and complication to the system.

B.209 In contrast, the Association of Home Information Pack Providers felt that to deliver the benefits they identified for the scheme,

> The certification arrangements need to go further than simply ensuring that the main legal obligations relating to health and safety and property condition have been complied with. The certification arrangements should encompass also a report on the physical condition of the property and its energy efficiency.

B.210 A number of respondents drew on the experience of introducing home information packs in the owner occupied sector, if only to strike a note of caution. The NAEA ALRA warned that:

> Any type of house condition certification needs to be simple, cost effective and easily performed. We have recently seen issues around the difficulties with implementing the Home Condition Report within

> the Home Information Pack and the eventual realisation by the government of the impracticalities and likely negative impact upon the sales market. When one considers how much more flexible and fast moving the rental market is and needs to be, the implications and practicalities of a similar proposal has to be considered very carefully.

Relationship with a system of enforced self-regulation

B.211 A few respondents made the connection between certification and the broader system of enforced self-regulation. A-LIST suggested that the

> home condition certificate … could in the future form part of enforced regulation; this …can be attached to tiered membership levels of that of highest standard. This would provide useful information and the monitoring of things such as thermal efficiency of properties and levels of decency.

B.212 The Urban Renewal Officers Group envisaged a more limited role for certification, suggesting that it was best limited to

> a rolling programme of sample surveys commissioned by the central regulator as a part of their monitoring of landlord associations and accreditation schemes under enforced self-regulation. Referrals could then be made by the regulator to local authorities for enforcement action against landlords where necessary.

B.213 In contrast, a respondent from Derby City Council offered support for the concept of a system of certification not just as part of enforced self-regulation but as “the hub around which option 2 [enforced self-regulation] is built”. The thinking was that “self-regulatory schemes would have no credibility unless they are able to ensure the quality of their ‘product’ – that is the quality of accommodation in their scheme and the quality of management by their landlords”, and that self regulatory organisation would not have the resources to deliver the necessary credibility through inspection regimes.

Less positive responses

B.214 To some extent, those taking a more negative stance towards our proposal covered similar concerns to those raised by respondents who were, on balance, positive. They simply weighed their concerns and the anticipated costs more heavily against the benefits.

B.215 A major concern was the impact of certification on incentives and disincentives. For example, the National Landlords Association considered that:

> Requiring every property to be certified before letting could result in a rise in empty homes as it would deter people from letting properties which they acquire, for example by inheritance or where they are moving elsewhere for the medium-term and letting their home … The property could very well meet the standards required for a certificate. However, the administrative burden would remove the flexibility of private renting as an option for empty property and this burden, together with cost of making good any defects (which the owner-

> occupier will have accepted and lived with) will deter the owner from letting.

B.216 A number of respondents simply considered certification to be unnecessary. According to the Eastern Landlords Association "the existing laws fairly applied should be adequate".

B.217 Unipol thought that the proposal

> ignores the fact that landlords already need to possess some of the certification identified to abide by existing laws – certainly in respect of gas safety, and most accreditation schemes require other certificates in relation to electrical safety and HMO licensing.

B.218 Others felt that while certification might address aspects of the problem that the Law Commission was seeking to tackle, it would only be a partial solution. Moreover, structurally, periodic certification may not be effective in promoting a compliance culture. This was the view of the National Landlords Association:

> We do not believe that certificates of home condition are a suitable way forward for ensuring better standards in the sector. They may improve housing conditions but would do nothing to address the problems of harassment and illegal eviction which the Consultation Paper has set out to address. Nor would a certificate lasting for three years (as proposed in the consultation document) address the problem of ensuring that landlords met their repairing obligations during that period.

B.219 ARLA Wales made the link back to regulatory theory and noted that while the Commission's main regulatory proposals represented an attempt to engage with advances in thinking about regulation, certification emanates from a different perspective:

> There will already be a significant amount of work to do to ensure every agent and in particular every landlord is a member of an approved regulatory body. Nevertheless this primary and preferred proposal should prove an effective tool in improving management standards and property condition, with perhaps a modest level of statutory oversight after the initial implementation phase. Imposing strict property certification standards will, in contrast, require a 'command and control' structure of a significant size in order to monitor compliance. This would entail expanding what has already been described in this response (and implied in the original document) as a failing strategy.

Practical issues

B.220 A number of respondents felt that the practical problems that would be associated with a certification scheme, many of which were highlighted in the Consultation Paper, were sufficient to render it unworkable.

Cost

B.221 A major concern was the cost of operating certification, and the question of who would bear that cost. Some respondents were particularly concerned that additional costs would be passed onto tenants. Shelter therefore welcomed

> The Law Commission's suggestion that there might be scope for the public purse to meet the cost of these certificates for landlords housing those in receipt of housing benefit.

B.222 In contrast, LACORS did "not think central government should subsidise or meet the full cost of home condition certificates for properties housing tenants on benefit. Private landlords need to retain responsibility for ensuring their properties are properly maintained".

B.223 The National HMO Network took that argument to the opposite extreme and suggested linking the payment of benefit to the condition of the property more directly:

> In this way, unless a property met a certain standard (freedom from category 1 hazards or meeting the decent home standard), housing benefit would not be paid. This would be a major financial incentive for the less responsible landlords where problems often occur and help to improve standards at this end of the market.

B.224 ARLA Wales set the cost of a new system in the context of the costs that have already been incurred as a result of recent policy change:

> A final concern would be the cost of certification given that landlords are still absorbing the increased costs of Tenancy Deposit Protection (insurance fees and inventory charges) together with, in many cases, HMO licensing fees. Landlords also face the implementation of EU requirements for Energy Performance Certificates, to be rolled out to rental properties later in 2008.

Coverage

B.225 The Consultation Paper suggested that there might be grounds for exempting certain types of property or landlord from a certification regime. A number of respondents expressed concern about the possibility that landlords and agents who are part of a self-regulatory scheme might be exempt from the need for certification.

B.226 There was also concern about the suggestion that new build properties should be exempted from certification for an initial period. In particular, some respondents felt that certification should cover management and harassment issues as well as condition: ie the scope of certification should be drawn more widely than we were proposing. Others thought that exempting new build properties might be appropriate but that it needed a more nuanced approach. For example, the Association for Home Information Pack Providers recommended that "the certificate scheme should apply to homes more than three years old" rather than the ten years suggested in the Consultation Paper.

B.227 There was also some discussion about the circumstances in which a certificate should be granted. Arden Chambers, for example, took the view that a property should be able to "obtain a certificate notwithstanding the presence of a Category 1 hazard if the hazard is only relevant to a vulnerable occupier and the intended occupiers do not include such an occupier".

Process

B.228 At present private rented properties are subject to inspection by a number of specialist inspectors. The Consultation Paper suggested that it might be possible for those with specialist expertise to acquire the relevant skills needed to complete a whole certification process.

B.229 There was some recognition of the benefits of a single inspection service. For example, the Association of Home Information Pack Providers noted that:

> The present regulatory arrangements involve a number of different people with different expertise carrying out inspections at different times. It is inefficient and unnecessarily costly for environmental health officers, gas fitters and electricians to make separate visits. The proposed certification arrangements offer a genuine opportunity for the market to streamline this process, inject increased competition and drive down costs.

B.230 While concern was expressed about the feasibility and cost of training "generic inspectors", particularly in view of the diverse skill bases involved, the Association of Home Information Pack Providers was in

> no doubt that the market would respond and provide training and employment opportunities for people with relevant specialist expertise willing to acquire the additional skills and qualifications needed to enable them to undertake the full certification inspection in a single visit.

B.231 The London Borough of Islington suggested an alternative to a "cadre of specially trained inspectors operating privately":

> Another option…would be to fund Local Authorities to employ staff to carry out this function. Local Authorities now have expertise at administering HMO Licensing Schemes and could transfer these skills to Certification. Local Authorities would be able to examine management of properties and have information about landlords' records in relation to harassment.

Frequency

B.232 Respondents generally agreed that it would be impractical to require re-certification prior to each new letting. However opinions differed about the appropriate duration of a certificate, with suggestions ranging from one year to five years.

B.233 It was also pointed out that it is not simply an issue of landlords needing to be proactive in dealing with the consequences of the passing of time and the force of

the elements. The (in)actions of the tenant also play a role in whether a property is compliant.

B.234 Thus the Association of District Judges considered that:

> A certificate for a fixed period may be inappropriate if a tenant does not comply with their obligation to look after the property. This may then leave a subsequent tenant at a disadvantage. However, having to obtain a new certificate before each tenancy may involve too much bureaucracy and cost.

Implementation

WHO WOULD RUN THE SYSTEM?

B.235 The Consultation Paper made limited reference to the organisations and institutions that would be responsible for running any system of certification. This provoked comment from respondents.

B.236 The Office of Fair Trading considered that:

> It is not clear … whether it is envisaged that Local Authority Trading Standards Services (TSS) would be involved in the inspection process in relation to home condition certification or whether the work may be more suitable to Local Authority Environmental Health Departments (EHDs). If so, we would urge that Local Authorities are fully consulted on the detail of such proposals and the implications on TSS or EHD resources.

B.237 The National HMO Network suggested that the system "would need to be regulated by an organisation with knowledge and responsibility for the area of private renting and housing conditions".

PHASING

B.238 Several respondents highlighted the need to consider carefully the details of implementing a certification system particularly in the light of the difficulties that have arguably resulted from a lack of attention to the demands of implementation in recent regulatory change (registration in Scotland, HMO licensing in England).

B.239 Respondents warned that it would take time for properties to be brought up to the requisite standard; landlords would not be able to improve housing stock immediately. The National Trust identified a number of obstacles to immediate action:

(1) Shortage of funds

(2) Shortage of staff and contractors to carry out and supervise any necessary work

(3) The need for education as to what work needs to be done, and the most suitable method of carrying it out

(4) Difficulties in securing vacant possession (whether on a short or long term basis) in order to carry out more significant work

(5) Resistance from tenants to the carrying out of work, even if properties fall below minimum standards

It noted that "many of these difficulties are acknowledged in the Commission's paper".

B.240 For reasons such as these several respondents argued that an incremental or phased approach to the implementation of any new system is vital. The precise nature of the phasing favoured could, however, differ.

B.241 Shelter, for example, recommended an approach which "would concentrate initially on those sectors of the [private rented sector] in which disrepair is a particular problem". The National Trust suggested a transitional period of at least five years, with possibly an additional period "for charities or other bodies with public interest objectives for whom the opportunity cost in terms of funding priorities would have an impact on the public and not private interest".

ENFORCEMENT

B.242 Respondents highlighted a number of challenges in seeking to make the system an effective means of improving the quality of property in the private rented sector – for example, the potential numbers involved and the issue of resources.

B.243 The point was made that enforcement would still largely be reliant on the occupiers, a problem that the Consultation Paper identified as at heart of existing problems in the sector. The National HMO Network suggested that:

> Occupiers would need significant education and information provided if they are to be expected to report non-compliance with the scheme. There is also a potential problem if occupiers are afraid to report such matters due to fear of retribution.

B.244 Yet, other respondents examined the proposals and came to a different conclusion:

> As the paper recognises, there is considerable concern that assured shorthold tenants do not take action against their landlords for fear of eviction. By ensuring that there are regular checks of a building, the certification scheme is likely to ensure that the housing conditions for many assured shorthold tenants are significantly improved. (Arden Chambers)

SANCTIONS

B.245 Few respondents considered the question of the appropriate sanctions for non-compliance in any detail. The Guild of Residential Landlords did offer the following:

> It could be that sanctions are imposed as is the current system…like limits on the serving of a section 21 notice as is the case for not having a licence or a failure to protect the deposit.

B.246 The same respondent suggested that a focus upon incentives as well as sanctions might be productive:

> We feel some rewards for a successful certificate should be provided for landlords with good quality properties like those suggested above under option 1, in particular a quicker procedure for rent arrears. This would show that good landlords are rewarded with greater powers against bad tenants.

B.247 Finally, although it would require further consideration, there was also the suggestion that a certification system could move beyond a standardised approach and, in line with contemporary regulatory thinking, become rather more risk-based. The Chartered Institute of Housing thought that:

> One approach might be to vary the lifetime of a certificate according to the standard of accommodation and the landlords' conduct during the previous period. This would provide a clear incentive for landlords to comply and would also help to ensure that the greatest proportion of the costs would fall on those landlords that had the worst record. We accept that there are difficult issues to be resolved but think this is worth further consideration.

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