



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

REPORT

THE LAW OF LANDLORD AND TENANT

(LRC 85-2007)

IRELAND

**Law Reform Commission
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LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act, 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published 83 Reports containing proposals for reform of the law; eleven Working Papers; 46 Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and 27 Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained on the Commission's website at www.lawreform.ie.

The *Statute Law Restatement Act 2002* provides for the administrative consolidation of legislation, certified by the Attorney General. At the Attorney's request, and following a Government decision in May 2006, the Commission agreed to take over responsibility for this function from the Office of the Attorney General.

Subsequently, in December 2006 the Commission agreed to the Attorney General's additional request for the Commission to assume responsibility in 2007 for the maintenance of the Chronological Tables of the Statutes.

Membership

The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners.

The Commissioners at present are:

<i>President:</i>	The Hon Mrs Justice Catherine McGuinness, former Judge of the Supreme Court
<i>Full-time Commissioner:</i>	Patricia T. Rickard-Clarke, Solicitor
<i>Part-time Commissioner:</i>	Professor Finbarr McAuley
<i>Part-time Commissioner</i>	Marian Shanley, Solicitor
<i>Part-time Commissioner:</i>	Donal O'Donnell, Senior Counsel
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Landlord and Tenant Law Working Group

In July 2001, the Law Reform Commission established the Landlord and Tenant Project aimed at reform and consolidation of Landlord and Tenant Law. It engaged the services of Professor JCW Wylie as expert consultant and leader of a Working Group comprising legal practitioners with knowledge and experience of this area of the law and representatives of the Department of Justice, Equality and Law Reform and the Department of the Environment, Heritage and Local Government. Professor Wylie is the author of several standard texts on Irish property law, including *Irish Landlord and Tenant Law* (2nd ed Butterworths 1998). The other members of the Working Group who assisted in the preparation of the draft Bill appended to this Report were:

The Hon Mrs Justice Catherine McGuinness, President of the Law Reform Commission

Commissioner Patricia T Rickard-Clarke (Convenor)

John F Buckley, Solicitor (former judge of the Circuit Court)

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Áine Clancy was Secretary and Legal Researcher to the Group for the period during which the subject matter of this Report was under consideration.

The Law Reform Commission wishes to record its appreciation of the indispensable contribution which the members of this Working Group have made and continue to make, on a voluntary basis, to the Commission's examination of this area of the law.

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INTRODUCTION

1. This Report forms part of the Commission’s *Second Programme of Law Reform 2000-2007* which includes the examination of land law and conveyancing law.¹ The Report builds upon two Consultation Papers published by the Commission in 2003 on landlord and tenant law, a *Consultation Paper on Business Tenancies*² and a *Consultation Paper on the General Law of Landlord and Tenant*.³ The Report contains the Commission’s final recommendations concerning these aspects of landlord and tenant law,⁴ which are encapsulated in the draft *Landlord and Tenant Bill* set out in Appendix B. Detailed explanatory notes are attached to each of the Bill’s sections.

A GUIDING PRINCIPLES

2. In approaching the task of preparing the draft *Landlord and Tenant Bill* set out in Appendix B, the Commission took full account of the guiding principles set out in the Consultation Papers. It may be useful to reiterate them here:⁵

¹ Item 23 of the *Second Programme of Law Reform 2000-2007* commits the Commission to a general review of land and conveyancing law. The Commission has previously published a *Report on the Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74 – 2005). Following this Report, the Commission agreed to work with the Minister for Justice, Equality and Law Reform on the drafting of the Government’s *Land and Conveyancing Law Reform Bill 2006*, which is currently (November 2007) before the Oireachtas. The substantive reforms being made in the 2006 Bill form part of the Commission’s wider eConveyancing project. In this context, the Commission has also published a *Report on eConveyancing: Modelling of the Irish Conveyancing System* (LRC 79-2006), and is engaged in the next stage of this project – the development of a road map for eConveyancing in Ireland – in conjunction with the Department of Justice, Equality and Law Reform. This has been incorporated into the Commission’s *Third Programme of Law Reform 2008-2014*.

² LRC CP 21-2003. In the draft Bill in Appendix B, referred to as “BTCP”.

³ LRC CP 28-2003. In the draft Bill in Appendix B, referred to as “GLCP”.

⁴ As to other aspects of landlord and tenant law, see paragraph 9ff, below.

⁵ See *Consultation Paper on Business Tenancies* (LRC CP 21-2003), Introduction, para 5. Similar principles formed the background to the Commission’s *Report on the Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74 – 2005).

- (a) Removal of obsolete provisions, including ancient legislation;
- (b) Removal of legislative provisions which militate against commercial practice and operation of free market choice, so as to facilitate creation of agreements free of unintended and unforeseen consequences;
- (c) Recasting legislative provisions which create uncertainties or have proved to be ambiguous;
- (d) Introducing new provisions to meet what are perceived to be gaps in existing law;
- (e) Consolidating existing legislation (together with any new provisions to be introduced) in order to make the law much more accessible and easily understood.

B SCOPE OF REPORT AND DRAFT BILL

3. Reflecting the scope of the Commission's two Consultation Papers, the draft *Landlord and Tenant Bill* in Appendix B deals with the general law of landlord and tenant and also the specific subject of statutory rights relating to business tenancies.

C GENERAL LAW OF LANDLORD AND TENANT

4. The general law of landlord and tenant describes the key legal features of the relationship between landlord and tenant. One of the unique features of existing Irish law was the legislative attempt to revolutionise this concept some 150 years ago in the *Landlord and Tenant Law Amendment Act Ireland 1860*, commonly known as "Deasy's Act." The essence of the 1860 Act was that the relationship was no longer to be based upon the ancient feudal notion of tenure, but rather on the contract or agreement entered into by the parties.

5. In terms of the general law of landlord and tenant, the main elements of the draft Bill deal with:

- the formalities for creation of the relationship and subsequent dealings by the parties with their interests, such as assignments and surrenders;
- the position of successors in title to the original landlord and tenant, following such dealings;
- fixtures, which although a discrete topic is nonetheless very important in practice;

- obligations in general, in particular to what extent legislation should impose some obligations on the parties or provide “default” provisions to operate where the parties fail to make express provision in the lease or tenancy agreement;
- the landlord’s obligations;
- the tenant’s obligations, including rent, service charges, repairs and insurance, and enforcement of obligations;
- termination of the relationship,
- remedies for enforcement of obligations.

6. Enactment of this element of the draft Bill would result in the repeal and replacement of numerous pre-1922 statutes relating to landlord and tenant law. An obvious example would be “Deasy’s Act” – the *Landlord and Tenant Law Amendment Act Ireland 1860*, which would be repealed if the draft Bill became law. The Commission is conscious that further work in this respect will be required to complete the task of assessing, in particular, what pre-1922 Acts remain of relevance today.⁶

D BUSINESS TENANCIES

7. In terms of the discrete aspect of landlord and tenant law concerning business tenancies, the draft Bill in Appendix B seeks to replace, with reform, the current legislative scheme comprising the *Landlord and Tenant (Amendment) Acts 1980, 1984, 1989 and 1994*. In this respect, the draft Bill deals with: the consolidation of the current legislative scheme; entitlement to statutory rights; the position of the State; and restrictions on statutory rights and compensation provisions.

E OTHER ASPECTS OF LANDLORD AND TENANT LAW

8. As the Commission pointed out in the two Consultative Papers published in 2003, the law of landlord and tenant is a vast area, which can be

⁶ A similar task was undertaken by the Commission in the context of preparing the *Land and Conveyancing Law Reform Bill 2006*: see fn 1, above. In that respect, the Commission was greatly assisted by the pre-1922 Statute Law Revision project team in the Office of the Attorney General, whose general work led to the enactment of the *Statute Law Revision Act 2007*, which contains the first definitive list of pre-1922 Acts remaining on the statute book. In the context of landlord and tenant law, many of the pre-1922 statutes concern various aspects of the old land purchase scheme introduced during the 19th century for agricultural tenants. One task is to identify to what extent any of the provisions in this legislation (which includes numerous Land Acts enacted since 1922) remain of relevance today.

categorised in a number of ways.⁷ One method of categorisation is by reference to the nature of the property involved, for example, agricultural tenancies, residential tenancies and business tenancies. Another method refers to the scope of the relevant law, such as “Deasy’s Act” which describes the essential elements of the relationship regardless of whether it is business or residential in nature, or private rented dwellings legislation which deals with the arrangements in certain (formerly rent controlled) residential tenancies. The two Consultation Papers published in 2003, and this Report, deal with significant elements of both these categories of the law of landlord and tenant law. Nonetheless, the Commission recognises that the draft *Landlord and Tenant Bill* in Appendix B does not involve a complete consolidation of the entire law in this area. For a number of reasons, therefore, it is important to note briefly here some other aspects of the law of landlord and tenant which are not encompassed in this Report or the draft Bill. There are three such aspects.

9. The first is the general area of residential tenancies. This was the subject of a comprehensive Report of the Commission on the Private Rented Residential Sector,⁸ which was implemented by the *Residential Tenancies Act 2004*. Although the draft Bill in Appendix B is careful not to trespass upon ground covered by the 2004 Act, it does, of course, have an impact on residential tenancies. The draft Bill deals with much general law that applies to tenancies of all kinds of property and which the 2004 Act does not touch.

10. Second, the draft Bill does not deal specifically with agricultural tenancies as a discrete subject. Such tenancies, which were once very common in Ireland, are very rare nowadays. The Commission has taken the view that formulation of special provisions for such tenancies was not justified. Rather insofar as an agricultural tenancy would involve a business (which most farming would nowadays) it should be covered by the provisions in the Bill relating to business tenancies, which drop the requirement that the premises the subject-matter of the tenancy should comprise mostly buildings and limited unbuilt-on land. This view was taken on the basis that there would, in future, be a right to contract out of such provisions in the case of all business tenancies. A provision to this effect is contained in sections 57 and 58 of the *Civil Law (Miscellaneous Provisions) Bill 2006*, which is currently (November 2007) before the Oireachtas. This provision could be consolidated into the draft Bill if and when it was to be enacted by the Oireachtas.

⁷ See *Consultation Paper on Business Tenancies* (LRC CP 21-2003), Introduction, para 1.

⁸ *Report of the Commission on the Private Rented Residential Sector* (Department of the Environment and Local Government, July 2000).

11. A third area of the law not dealt with in the draft Bill concerns the ground rents legislation – the provisions giving certain tenants the right to acquire the fee simple and the related subject of reversionary leases. This is itself a complex area of the law in its own right and deserves a separate study. The Commission notes, for example, that the High Court has recently dealt with a constitutional challenge to the existing legislative provisions on ground rents⁹ and that the unsuccessful plaintiff in that case has appealed to the Supreme Court which, at the time of writing (November 2007), has yet to hear that appeal.

F RESPONSE TO CONSULTATION PAPERS

12. Finally, the Commission is most grateful to the bodies and individuals who responded to the provisional recommendations contained in the Consultation Papers. They are listed in Appendix A. This response has greatly assisted the Commission in coming to a final view on what to recommend with respect to a highly complex and technical area of the law. Notwithstanding its technical nature it is an area of the law which impacts substantially on the private and commercial world.

⁹ *Shirley v A. O’Gorman & Co Ltd* [2006] IEHC 27, High Court, 31 January 2006.

**APPENDIX A LIST OF RESPONDENTS TO THE
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Irish Auctioneers and Valuers Institute

Dr Rory O'Hanlon TD

Dr Áine Ryall, Faculty of Law, University College Cork

The Society of Chartered Surveyors

Treasury Holdings Limited

LANDLORD AND TENANT BILL 200-

ARRANGEMENT OF SECTIONS

PART 1

PRELIMINARY AND GENERAL

**SHORT TITLE
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INTERPRETATION GENERALLY
SERVICE OF NOTICES
REGULATIONS
RULES OF COURT
OFFENCES
EXPENSES
AMENDMENTS AND REPEALS**

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RELATIONSHIP OF LANDLORD AND TENANT

**CONTRACTUAL BASIS OF RELATIONSHIP
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PART 3

FORMALITIES

**TENANCIES TO BE IN WRITING
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POSITION OF SUCCESSORS
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OBLIGATIONS

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**SCOPE OF PART 6
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RESIDUAL OBLIGATION TO REPAIR
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Chapter 4

Tenant's obligations

**RENT
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RENT REVIEW
RECOVERY OF RENT
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**SCOPE OF CHAPTER 5
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PARTIES TO GRANT
TERMINATION OF A HEADTENANCY
EXTENSION OF TIME LIMITS**

LANDLORD AND TENANT BILL 200-

ENTITLED

AN ACT TO PROVIDE FOR REFORM AND MODERNISATION OF
LANDLORD AND TENANT LAW.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Explanatory Note

This explains the main purposes of the Bill

PART 1

PRELIMINARY AND GENERAL

Short Title

1.— This Act may be cited as the Landlord and Tenant Act 200-

Explanatory Note

The Short Title has been kept simple and straightforward.

Commencement

2.— This Act shall come into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes and different provisions

Explanatory Note

This enables the Minister (for Justice, Equality and Law Reform – see section 3) to bring different parts of the Bill into force at different times, if this becomes appropriate.

Interpretation generally

3.— In this Act, unless the context otherwise requires, -

“Act of 2000” means the Planning and Development Act 2000;

“Act of 2004” means the Residential Tenancies Act 2004;

“Act of 2007” means the Land and Conveyancing Law Reform Act 2007;

“consent” includes agreement, licence and permission;

“consideration” includes marriage, natural love and affection and nominal consideration in money;

“the court” means the High Court or, subject to its jurisdictional limits in respect of land, the Circuit Court;

“covenant” includes an agreement, a condition, reservation, stipulation or other similar provision of a tenancy;

“deed” has the meaning given to it by section 62(2) of the Act of 2007;

“development” has the meaning given to it by section 3 of the Act of 2000;

“development plan” has the meaning given to it by section 2(1) of the Act of 2000;

“incumbrance” includes an annuity, charge, lien, mortgage, portion and trust for securing an annual or capital sum; and “incumbrancer” shall be read

accordingly and includes every person entitled to the benefit of an incumbrance or to require its payment or discharge;

“instrument” includes a deed, will or other document in writing and information in electronic or other non-legible form which is capable of being converted into such a document, but not a statutory provision;

“judgment mortgage” has the meaning given to it by section 3 of the Act of 2007”

“land” includes –

- (a) any estate or interest in or over land, whether corporeal or incorporeal,
- (b) mines, minerals and other substances in the substratum below the surface, whether or not owned in horizontal, vertical or other layers apart from the surface of the land,
- (c) land covered by water,
- (d) buildings or structures of any kind on land and any part of them, whether the division is made horizontally, vertically or in any other way,
- (e) the airspace above the surface of land or above any building or structure on land which is capable of being or was previously occupied by a building or structure and any part of such airspace, whether the division is made horizontally, vertically or in any other way,
- (f) any part of land;

“landlord” means the person, including a sublandlord, entitled to the legal estate immediately superior to a tenancy;

“lease” as a noun means the instrument creating a tenancy and includes any collateral or other agreement relating to a tenancy; and as a verb means the granting of a tenancy by an instrument;

“lessee” means the person, including a sublessee, in whom a tenancy created by a lease is vested;

“lessor” means the person, including a sublessor, entitled to the legal estate immediately superior to a tenancy created by a lease;

“Minister” means the Minister for Justice, Equality and Law Reform;

“mortgage”, “mortgagee” “mortgagor” have the meanings given to them by section 3 of the Act of 2007;

“obligation” in relation to a tenancy includes an obligation arising under a collateral or other agreement relating to that tenancy;

“planning authority” and “planning permission” have the meanings given to them by the Act of 2000;

“possession” includes the receipt of, or the right to receive, rents and profits, if any;

“premises” means the land which is the subject-matter of a tenancy;

“prescribed” means prescribed by regulations made under *section 5*;

“property” includes all property both real and personal and any part of such property;

“provision” in relation to a tenancy includes a provision in a collateral or other agreement relating to that tenancy;

“rent” includes –

- (i) any sum or other payment in money or money’s worth or any other consideration,
- (ii) any payment specified as rent under the terms of the tenancy,
- (iii) any sum payable or refundable to the landlord on a recurring or regular basis under the terms of the tenancy;

“State authority” means a Minister of the Government or the Commissioners of Public Works;

“sublease” includes a sub-sublease; and “sublessee” shall be read accordingly;

“subtenancy” includes a sub-subtenancy; and “subtenant” shall be read accordingly;

“tenancy” means the estate or interest which arises from the relationship of landlord and tenant however it is created but does not include a tenancy at will or a tenancy at sufferance;

“tenant” means the person, including a subtenant, in whom a tenancy is vested.

Explanatory Note

This has been drafted taking into account the definitions in the Interpretation Act 2005 – this includes things like the singular including the plural. It adopts and adapts definitions which appear in legislation being replaced (eg, Deasy’s Act 1860, the Conveyancing Act 1881 and Landlord and Tenant (Amendment) Act 1980). As regards the 1980 Act it implements the recommendations in the BTCP paras 4.03-4.05. It also adopts some of the definitions in the Land and Conveyancing Law Reform Bill 2006, which was passed by the Seanad on in December 2006.

Service of notices

4.— (1) A notice authorised or required to be given or served by or under this Act shall, subject to *subsection (2)*, be addressed to the person concerned by name and may be given to or served on the person in one of the following ways:

- (a) by delivering it to the person; or
- (b) by leaving it at the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, at that address; or
- (c) by sending it by post in a prepaid letter to the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, to that address; or
- (d) where the notice relates to a building with which the person is associated, and it appears that no person is in actual occupation of the building, by affixing it in a conspicuous position on the outside of the building or the property containing the building; or
- (e) if the person concerned has agreed to service of notices by means of an electronic communication (within the meaning assigned by section 2 of the Electronic Commerce Act 2000) to that person (being an addressee within the meaning assigned by that section) and provided that there is a facility to confirm receipt of electronic mail and that such receipt has been confirmed, then by that means; or
- (f) by sending it by means of a facsimile machine to a device or facility for the reception of facsimiles located at the address at which the person ordinarily resides or carries on business or, if an address for the service of notices has been furnished by the person, that address, provided that the sender's facsimile machine generates a message confirming successful transmission of the total number of pages of the notice; or
- (g) by any other means that may be prescribed.

(2) Where the notice concerned is to be served on or given to a person who is the owner, landlord, tenant or occupier of a building and the name of the person cannot be ascertained by reasonable inquiry it may be addressed to the person at that building by using the words "the owner", "the landlord",

“the tenant” or “the occupier” or other like description, as the case may require.

(3) For the purposes of this section, a company shall be deemed to be ordinarily resident at its registered office, and every other body corporate and every unincorporated body shall be deemed to be ordinarily resident at its principal office or place of business.

(4) Where a notice required or authorised to be served or given by or under this Act is served or given on behalf of a person, the notice shall be deemed to be served or given by that person.

(5) A notice served or given to the landlord’s authorised agent within *section 27* or any person collecting the rent on behalf of the landlord shall be deemed to be served on or given to the landlord.

(6) Any notice served or given under an enactment repealed by this Act shall, for the purpose of making a claim under this Act, be treated as a notice under the corresponding provision of this Act as if that provision were in force when the notice was served or given.

(7) A person shall not, at any time during the period of 3 months after the notice is affixed under *subsection (1)(d)*, remove, damage or deface the notice without lawful authority.

(8) A person who knowingly contravenes *subsection (7)* is guilty of an offence.

(9) Where a notice is to be served or given under this Act within a specified period and the last day of that period is a Saturday, Sunday or public holiday (within the meaning of the Holidays (Employees) Act 1973) it is validly served or given if received on the next following Monday or day which is not a public holiday after that last day.

Explanatory Note

This is a standard provision, except for subsections (5), (6) and (9) which have been added to clarify the position in the context of landlord and tenant law. Subsection (9) adapts provisions in section 141 of the Planning and Development Act 2000. It should be noted that Section 82 of the Land and Conveyancing Law Reform Bill 2006 applies these provisions to private documents, subject to any contrary provision in the document in question.

Regulations

5.— (1) The Minister may make regulations-

- (a) for any purpose in relation to which regulations are provided for by any of the provisions of this Act,
- (b) for prescribing any matter or thing referred to in this Act as prescribed or to be prescribed,
- (c) generally for the purpose of giving effect to this Act.

(2) If in any respect any difficulty arises during the period of 2 years from the commencement of a provision of this Act or an amendment of another Act affected by this Act in bringing the provision or amendment into operation, the Minister may by regulations do anything which appears to be necessary or expedient for bringing the provision or amendment into operation and regulations under this section may, in so far only as may appear necessary for carrying the regulations into effect, modify a provision of this Act or such an amendment as if the modification is in conformity with the purposes, principles and spirit of this Act.

(3) A regulation under this section may contain such consequential, supplementary and ancillary provisions as the Minister considers necessary or expedient.

(4) A regulation under this section shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either such House within the next 21 days on which that House has sat after the regulation is laid before it, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done under it.

Explanatory Note

This is also a standard provision.

Rules of court

6.— The rules of court for the purposes of any enactment repealed by this Act shall, pending the making of rules of court for the purposes of this Act, apply for such purposes with such adaptations as may be necessary.

Explanatory Note

This adapts a provision in section 12 of the Landlord and Tenant (Amendment) Act 1980. It is particularly relevant to Part 8 of the Bill.

Offences

7.— (1) A person convicted of an offence under this Act is liable on summary conviction to a fine not exceeding €3,000 or imprisonment for a term not exceeding 6 months or both.

(2) Proceedings for an offence under this Act may be instituted at any time within one year after the date of the offence.

(3) Where a person is convicted of an offence under this Act the District Court shall, unless it is satisfied that there are special and substantial reasons for not so doing, order the person to pay the costs and expenses, measured by the Court, incurred in relation to the investigation, detection and prosecution of the offence.

Explanatory Note

This is also a standard provision. An offence is created by section 4(6), for example.

Expenses

8.— The expenses incurred by the Minister in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas.

Explanatory Note

This is also a standard provision.

Amendments and repeals

9.— (1) Each provision specified in *column (2)* of *Schedule 1* opposite the mention in *column (1)* of that Schedule of an enactment is amended in the manner specified in *column (3)*.

(2) Each enactment specified in *column (2)* of *Schedule 2* is repealed to the extent specified in *column (3)* of that Schedule.

Explanatory Note

This is also a standard provision.

PART 2

RELATIONSHIP OF LANDLORD AND TENANT

This Part contains some of the most important provisions in the entire Bill. They deal with the fundamental issue of when the relationship of landlord and tenant, as opposed to some other relationship (eg that of licensor and licensee), exists. They would replace the provisions of section 3 of Deasy's Act 1860. In so doing they would implement the recommendations in Chapter 1 of the GLCP.

PART 2

RELATIONSHIP OF LANDLORD AND TENANT

DA 1860, s.3

Contractual basis of relationship

10.— (1) The relationship of landlord and tenant continues in all cases to be based on the express or implied agreement of the parties, and not upon tenure or service.

(2) A reversion is not necessary to the relationship.

(3) An obligation to pay rent is necessary in all cases to the creation of the relationship.

Explanatory Note

This section would largely re-enact the provisions of section 3 of Deasy’s Act 1860, but would recast them, with modifications, as recommended by the GLCP.

Subsection (1)

Subsection (1) retains the fundamental principle enshrined in Deasy’s Act, that the relationship of landlord and tenant in Ireland has been based since 1860 on the parties’ agreement. The word “continues” has been used to confirm that the subsection is continuing the existing position. The words “in all cases” have been inserted to clarify that this is a universal principle, as recommended in para 1.17 of the GLCP. Also used is the word “agreement” rather than “contract” – section 3 of DA uses both. The latter

may be confusing in that it raises the contract/grant distinction referred to in Chapter 2 of the GLCP (see especially paras. 2.02 – 2.05).

It should be noted that section 11(3) of the Land and Conveyancing Law Reform Bill 2006 makes it clear that a “leasehold estate” arises whenever a tenancy is created at law. Section 3 of this Bill also adopts the definition of “tenancy” contained in section 3 of the 2006 Bill, which refers to the “estate or interest” which arises from the relationship of landlord and tenant. This implements the recommendation in para 1.18 of the GLCP that a tenancy creates an estate in the land (or an equitable interest in the case of an equitable tenancy). The definition of a “tenancy” in section 3 of the Bill also implements the recommendations in paras 1.24 – 1.25 of the GLCP that tenancies at will and at sufferance should be excluded.

Subsection (2)

Subsection (2) re-enacts another fundamental principle enshrined in section 3 of Deasy’s Act.

Subsection (3)

Subsection (3) implements the recommendations in para 1.23 of the GLCP that it should be made clear that there is a universal rule that reservation of

rent or other consideration is necessary to creation of the relationship.

There is a definition of “rent” in section 3 of the Bill, which also contains a wide definition of “consideration”. This is much wider than the definition of “valuable consideration” in the 2006 Bill, which excludes marriage and a nominal consideration in money.

Identification of a tenancy

11.— (1) Subject to *section 10*, in determining whether a tenancy has been created the court shall –

- (a) give effect to any express provision relating to the matter;
- (b) presume that each of the parties had received independent legal advice by the time of the creation of the tenancy.

(2) Where it is established that any of the parties had not received such advice, it is open to the court to disregard any such express provision where it is satisfied, on all the evidence, that to give effect to it would not reflect the true intention of that party and would prejudice that party.

Explanatory Note

This section implements the recommendation in para 1.31 of the GLCP.

Subsection (1)

Subsection (1), as recommended in order to clarify the position which has become extremely confused in recent years, requires the courts in future to give effect to the parties' express agreement, provided they have each had the benefit of independent legal advice. This is made expressly subject to section 10, to make it clear that the parties in order to create a tenancy must still comply with that section, eg, create the relationship of landlord and tenant and reserve a rent or other consideration.

Subsection (2)

Subsection (2) confirms that where it is established that no advice had been received, it would be open to the court to disregard an express provision, but only if satisfied that it does not reflect the party in question's true intention and that its enforcement would prejudice that party.

PART 3

FORMALITIES

This Part would implement recommendations in Chapter 2 of the GLCP. It deals, in particular, with the formalities governing the creation (grant) of a tenancy and its subsequent disposal (assignment). It would, therefore, replace sections 4 and 9 of Deasy's Act 1860. It does not deal with the surrender of tenancies because this is one method of determination of tenancies and is included in Part 7 of the Bill (the formalities for surrender and its consequences are dealt with in sections 53-57, which replace sections 7, 8, 40 and 44 of Deasy's Act) (See GLCP paras 2.21–2.27). The same applies to the subject of determination of periodic tenancies by notice (see GLCP paras 2.18-2.20 and sections 62-66 of the Bill). For this reason Part 3 does not contain any equivalent of sections 5 and 6 of Deasy's Act. The GLCP also recommended that the obscure and uncertain provisions of the Leases Acts 1849 and 1850 (which purport to save leases which do not meet statutory requirements) should be repealed without replacement (see para 4.17). The Bill implements this (see section 9(1) and Schedule 1).

Part 3 is not concerned with contracts for the grant of a tenancy, but only with the actual grant itself. GLCP drew attention to the fundamental distinction between a contract and a grant, which section 3 of Deasy's Act did not abolish (see paras 2.02-2.09). A contract for the grant of a tenancy,

like other contracts for the grant of an interest in land, creates an equitable interest only and is not governed by section 4 of Deasy's Act. Rather such contracts are governed by section 2 of the Statute of Frauds (Ireland) 1695. Section 2 of that Statute would be replaced by section 49 of the Land and Conveyancing Law Reform Bill 2006.

FORMALITIES

DA 1860, s.4

Tenancies to be in writing

12.— (1) Subject to *subsections* (2) and (3), a tenancy shall be created at law only in writing signed by the landlord or the landlord's agent authorised in writing.

(2) *Subsection (1)* does not apply to -

- (a) a tenancy for a recurring period not exceeding one year,
- (b) a tenancy for a fixed period not exceeding one year, unless the grant includes an agreement or provision for renewal or extension of that tenancy which, if exercised, would result in the period, as renewed or extended, exceeding one year.

(3) *Subsection (1)* does not affect a tenancy by estoppel or the operation of equitable principles.

Explanatory Note

This section would replace the somewhat convoluted and uncertain provisions of section 4 of Deasy's Act 1860, as recommended in GLCP paras 2.10-2.15. It also takes into account the provisions relating to leasehold estates contained in Part 2 of the Land and Conveyancing Law Reform Bill 2006.

Subsection (1)

Subsection (1) retains the rule enshrined in section 4 of Deasy's Act, that writing is needed for the creation of a tenancy, subject to exceptions. The definition of "leasehold estate" in section 11(2) of the Land and Conveyancing Law Reform Bill 2006 is subject to two important qualifications. One is that it does not include grants of leasehold estates prohibited by that Bill, i.e., fee farm grants and various categories of leases for lives (see sections 12 and 14 of that Bill). The definition of "tenancy" in section 3 of this Bill also excludes a tenancy of will and tenancy at sufferance. The Commission recommended that neither of these should in future be regarded as creating the relationship of landlord and tenant (see GLCP paras 1.24-1.25).

Subsection (1) is concerned with the express creation of legal rights to a tenancy, as opposed to rights which may arise from the actions of the parties

or rights which fall short of legal rights and may be equitable only. Such equitable rights are not registrable in the Land Registry and must be protected by registration of a notice or caution if they are to be enforceable against a purchaser for valuable consideration. Similarly such equitable rights in unregistered land are not enforceable against a bona fide purchaser of a legal interest in the same land without notice of them. They may be protected by registering a memorial of any document relating to them in the Registry of Deeds.

Subsection (1) does not refer to a “deed” on the basis that “writing” can take any form, including engrossment in a document intended to operate as a deed (see Part 1 of the Schedule to the Interpretation Act 2005). It should also be noted that the need for a seal in the case of execution of a deed by an individual would be abolished by section 62 of the Land and Conveyancing Law Reform Bill 2006.

In relation to authorisation of an agent, the superfluous “lawfully” in section 4 of Deasy’s Act has been dropped in subsection (1).

Subsection (2)

Subsection (2) provides for exceptions to the need for writing and clarifies section 4 of Deasy’s Act, as recommended by GLCP (see paras 2.13-2.15).

Paragraph (a) provides, as is the current law, that any periodic tenancy can be created orally, provided the recurring period does not exceed one year. Periodic tenancies often arise by implication, eg, where a fixed-term tenant overholds, continues to pay rent and is accepted as a tenant by the landlord.

Paragraph (b) provides that any tenancy for a fixed period not exceeding one year can also be created orally. This makes it clear that a tenancy for one year can be created orally, thereby resolving judicial uncertainty as to the effect of section 4 of Deasy’s Act (see GLCP para 2.15). This does not apply, however, where exercise of an option to renew or other provision results in the combined period exceeding one year.

Paragraph (b) does not refer simply to an “option to renew” as this might be interpreted too narrowly. The intention is to capture any provision which enables the initial term to be renewed or extended, so that the combined terms exceed one year. A “renewal” might be interpreted as confined to repetition of the same initial term, e.g., an initial grant of a term of 9 months, renewed for another 9 months. An “extension”, on the other hand, can be for any term, e.g., an initial grant for 9 months, extended for another 6 months.

Subsection (3)

Subsection (3) makes it clear that, while non-compliance with subsection (1) will mean that no legal tenancy will be created as intended by the purported grant, some sort of tenancy may arise between the parties in accordance with well-established principles. Quite apart from a periodic tenancy arising by implication under the exceptions in subsection (2), a tenancy by estoppel may arise between the parties if the purported tenant goes into possession and pays rent which is accepted by the purported landlord. In this context “estoppel” is not used in the sense of the equitable doctrine of estoppel, but rather is a principle of the law of evidence: see Wylie, Irish Landlord and Tenant Law (2nd ed), para 4.48. Apart from that, the failed attempt to create a legal tenancy may result in the court construing the parties’ actions as a contract for a tenancy which, despite the absence of written evidence, has been rendered enforceable by acts of part performance. Such a contract for a lease, under the rule in Walsh v Lonsdale, is almost “as good as a lease”, but it falls short of a legal lease because the interest created is an equitable one only.

Evidence in proceedings.

13.— (1) In all court proceedings –

- (a) proof by or on behalf of any lessor of execution by the lessee of the counterpart of any lease is the equivalent of proof of execution of the original lease,
- (b) where it appears that no counterpart existed or that the counterpart has been destroyed, lost or mislaid, a copy of the original lease or counterpart, as the case may be, is sufficient evidence of the contents of the lease,

as against the lessee or any person claiming from or under the lessee.

(2) In all court proceedings by or on behalf of or against any person claiming to be a successor in title to the original landlord, after proof of the original lease or tenancy it is sufficient evidence of the successor’s title, as against all parties to the proceedings, to prove that –

- (a) the successor has for one year at least, or
- (b) the person from whom the successor immediately derives title has for one year at least and within three years before the passing of the title,

received from the person in possession the rent of the land in respect of which the proceedings have been brought.

Explanatory Note

Section 13 re-enacts the substance of sections 23 and 24 of Deasy’s Act, which the Commission considered were provisions worth preserving (see GLCP, para 2.16). It was considered whether these provisions would not be more appropriate for Rules of Court, but the view has been taken that they are more appropriately retained in this statutory form.

Subsection (1)

Subsection (1) recasts the substance of section 23 of Deasy’s Act. The word “execution” is substituted for the somewhat archaic “perfection”.

Subsection (2)

Subsection (2) recasts the substance of section 24 of Deasy's Act. It drops the "prima facie" in section 24 which seems to be superfluous – see GLCP para 2.16, fn 49.

Assignments.

14.— (1) Subject to *subsection (2)*, a tenancy is assignable only in writing signed by the assignor or the assignor’s agent authorised in writing.

(2) *Subsection (1)* does not affect –

- (a) devolution of a tenancy on the death of the tenant, or
- (b) transmission of a tenancy by act and operation of law, or
- (c) the operation of the doctrine of estoppel or other equitable principles.

Explanatory Note

Section 14 re-enacts the substance of section 9 of Deasy’s Act (as amended by section 8 and the Second Schedule of the Succession Act 1965).

Subsection (1)

Subsection (1) recasts section 9 of Deasy’s Act. The definition of “tenancy” in section 3 of the Bill, when read with section 12, makes it clear that subsection (1) covers both tenancies created in writing and oral tenancies (as recommended should continue to be the position in GLCP para 2.28). Subsection (1) follows closely the formulation of section 12(1), so that it omits a reference to a “deed” and the word “lawfully” in connection with authorisation of the assignor’s agent. Also dropped is the somewhat misleading “granted” in section 9 of Deasy’s Act – the section is clearly

dealing only with assignments of an existing lease, not the grant of a new lease or sublease.

Subsection (2)

Subsection (2) provides for various exceptional cases, as did section 9 of Deasy's Act.

Paragraph (a) refers to devolution of a tenancy on the death of the tenant.

This is now governed by the Succession Act 1965. On this basis there is no need to refer, as section 9 does, to "devise, bequest". Under Part II of the 1965 Act the deceased's estate devolves on the personal representatives and is in due course vested in the deceased tenant's successor (by will or on intestacy).

Paragraph (b) refers to transmission by "act and operation of law", which includes processes such as vesting (subject to the power to disclaim onerous property) in the Official Assignee on the bankruptcy of the tenant and in a creditor on registration of a judgment mortgage against the tenant's leasehold estate (note, however, that under section 114 of the Land and Conveyancing Law Reform Bill 2006 such a mortgage will operate only to entitle the judgment mortgagee to apply to the court for an order of sale of

the leasehold estate or interest. It also includes the process whereby the sheriff can seize a leasehold estate under a writ of fieri facias and sell it in execution of a judgment against the tenant, but that process would be abolished by section 122 of the Land and Conveyancing Law Reform Bill 2006 (as regards premises not used wholly or partly for the purpose of carrying on a business).

Paragraph (c) preserves the operation of equitable principles, such as the doctrine of estoppel, as recommended by GLCP para 2.28

PART 4

SUCCESSORS IN TITLE

This Part would implement the recommendations in Chapter 3 of the GLCP. It deals with the position of successors in title to both the landlord and the tenant following disposal, including part disposal, of their respective interests. It also deals with the position of the landlord or tenant following such a disposal. Part disposal in this context usually means severance of the landlord's or tenant's interest with respect to the land, eg, where the tenant assigns part of the premises to another person, retaining the tenancy of the other part. There can, however, be another kind of severance such as arises where the landlord grants a concurrent lease to a new tenant. The position of such a tenant is also dealt with.

This Part replaces sections 11 – 16 of Deasy's Act and the duplicate provisions in sections 10 and 11 of the Conveyancing Act 1881 (see GLCP para 3.01). In doing so it is concerned with whole or part assignments of the landlord's or tenant's interest, including involuntary assignments (such as on bankruptcy) and devolution on death of a landlord or tenant. It is not concerned with disposal of the tenant's interest by way of a subletting. Sections 19 – 21 of Deasy's Act contain provisions on this subject which the GLCP described as uncertain and, in so far as their effect could be ascertained, inappropriate (see paras 3.22 – 3.26). It recommended that

those sections should be repealed without replacement and that the general law relating to the position of sub-tenants should continue to operate. In particular the position of a sub-tenant when the head-landlord purports to forfeit the head-tenancy should remain unaffected by uncertain provisions such as those contained in sections 19 – 21. Relief against forfeiture available to sub-tenants is dealt with in Part 7 of this Bill (see section 74).

SUCCESSORS IN TITLE

Application of Part 4

15.— For the purposes of this Part “obligations” and “provisions” are those attaching expressly or by implication, as the case may be, to the landlord’s or tenant’s interest under a tenancy.

Explanatory Note

This section contains provisions defining the scope of Part 4. It explains that key expressions used in the subsequent sections, namely, “obligations” and “provisions”, are those which attach to the landlord’s and tenant’s interests under the tenancy. The definitions of “obligation” and “provision” in section 3 of the Bill make it clear that these expressions include obligations and provisions in a collateral or other agreement relating to the tenancy.

DA1860, ss.12
and 13

Position of Successors

16.— (1) Subject to *subsection (2)*, the holder for the time being of the landlord's or the tenant's interest under a tenancy is -

- (a) entitled to enforce the benefit of all provisions,
- (b) bound by all obligations.

(2) *Subsection (1)* does not apply to –

- (a) a successor in title to the landlord or tenant in respect of the benefit of any provision or an obligation expressed to be personal to the original or another holder of the landlord's or tenant's interest, or
- (b) any obligation contained in a collateral or other agreement separate from the lease or tenancy agreement unless the holder of the interest in question had actual knowledge of the obligation at the time the interest was acquired.

Explanatory Note

Section 16 would replace the duplicate provisions in sections 12 and 13 of Deasy's Act and sections 10 and 11 of the Conveyancing Act 1881. It seeks to clarify the law as recommended by the GLCP (paras 3.03 – 3.06). In particular it assimilates the position of landlord and tenant, so that essentially successors of either party are in the same position, ie, they step fully into the position of their predecessors in title.

Subsection (1)

Subsection (1) states the basic principle that a successor in title to either the landlord or the tenant is entitled to enforce all provisions benefiting the

landlord or tenant and is bound by all obligations attaching to the landlord's or tenant's interest. Section 15 makes it clear that this applies to all provisions and obligations, whether implied under the general law (note the provisions in Part 6 of the Bill) or contained expressly in a lease or other document relating to the tenancy (such as a collateral agreement or "side letter" : see GLCP para 3.05). This is, however, subject to limitations set out in subsection (2) of section 16.

Subsection (2)

Subsection (2) limits the general principle enshrined in subsection (1), that a successor to the landlord or tenant steps completely into the predecessor's shoes.

Paragraph (a) preserves the power of landlords and tenants to include in their agreements provisions or obligations which are intended to be personal to the original parties or specified successors and are not intended to benefit or bind other successors.

Subsection (1) recognises what would appear to be the current law, that provisions or obligations not contained in the main lease, but rather put in a collateral agreement or "side letter", may also benefit or bind successors in

title. Paragraph (b) of subsection (2) implements the recommendation in the GLCP that this should apply only where the successor had notice of the collateral agreement or side letter at the time that successor acquired the landlord's or tenant's interest.

Positions of previous landlord or tenant

17.— (1) Subject to *subsections (2) to (4)*, on the passing, whether by assignment or otherwise, of the landlord's or the tenant's interest under a tenancy, the assignor or previous holder of that interest -

- (a) ceases to be entitled to enforce the benefit of provisions,
 - (b) is not liable for any breach of obligation which occurs after the date of such passing of the interest.
- (2) *Subsection (1)(b)* does not apply –
 - (a) in the case of assignment of the tenant's interest unless, whether required or not by the terms of the tenancy, the consent of the landlord to the assignment has been given in writing,
 - (b) in all cases until notice in writing of the passing of the interest is given to the landlord or tenant, as appropriate.
- (3) *Subsection (1)* does not affect –
 - (a) the right of an assignee or other successor in title to enforce a breach of obligation which occurred before the passing of the interest and remained unremedied at the date of such passing, or
 - (b) the liability of an assignee or other successor in title for the continuing breach of an obligation where the breach commenced before and continued after such passing of the interest.
- (4) This section does not affect the operation of the doctrine of estoppel or other equitable principles.
- (5) For the purposes of *subsection (2)(b)*, a “notice in writing” shall specify –
 - (a) in the case of an assignment, the instrument giving effect to it, the parties to the instrument and its date, or
 - (b) in any other case, the circumstances giving rise to the passing of the interest.
- (6) In this section “passing” includes –
 - (a) devolution on death,

(b) transmission by act and operation of law.

Explanatory Note

This section would replace sections 14- 16 of Deasy's Act and both simplifies and clarifies their operation, as recommended by the GLCP, paras 3.08-3.17. It goes further than the recommendations, in that it drops the distinction drawn in Deasy's Act between the original tenant and subsequent assignees of the tenant's interest. This distinction was probably significant in an age when the rent was usually payable in arrears, whereas in modern times it is invariably payable in advance.

Subsection (1)

Subsection (1) would retain the essential principle that upon an assignment, the original tenant ceases to be liable for future breaches of obligation. This was enshrined in section 16 of Deasy's Act, but as recommended by the GLCP it is now extended to landlords (see para 3.17). It also extends to subsequent holders of the landlord's and tenant's interests and replaces sections 14 and 15 of Deasy's Act.

The subsection contains a number of important clarifications of existing law. One is that it makes it clear that not only is the landlord or tenant relieved of

liability for breach of obligation, the right to enforce provisions of the tenancy is also lost. Another is that the provisions apply to all tenancies, as recommended by the GLCP (para 3.13). Another is that the provisions not only apply to assignments but to all other cases where the landlord's or tenant's interest passes, eg, on bankruptcy or death (see section 14(2) of the Bill). Another is that relief from liability for breach of obligation applies to future breaches only – a landlord or tenant is not relieved of liability for breaches he or she caused before the assignment or other passing of their interests.

Subsection (2)

Subsection (2) clarifies the operation of subsection (1). Paragraph (a) retains the provision in section 16 of Deasy's Act that a tenant is discharged from liability only where the landlord has consented to the assignment. As recommended by the GLCP it replaces the convoluted requirements in section 16 relating to such consent (see para 3.14). It simply needs to be given in writing, which may be incorporated in the instrument of assignment itself or given separately. Paragraph (a) makes it clear that such consent must be given in order to relieve the tenant, whether or not such consent is required under the terms of the tenancy. This was also recommended by the GLCP (para 3.16). Paragraph (b) requires notice of the assignment or other

passing of the interest in question to be given to the other party in all cases if a discharge from liability for breach of obligation is to be obtained. This applies, therefore, not only in cases of an express assignment by the tenant coming within paragraph (a) (under which the landlord's consent is also needed), but to all other passings of the tenant's interest and to all express assignments and other passings of the landlord's interest.

Subsection (3)

*Subsection (3) provides further clarification of subsection (1). Paragraph (a) makes it clear that a successor in title to the landlord or tenant can enforce a breach of obligation which occurred before the assignment or other passing of the interest to him or her, if it remained unremedied on the assignment or other passing. There is authority that this is the position under section 10 of the Conveyancing Act 1881, but it is difficult to reconcile with section 14 of Deasy's Act. Paragraph (b) makes it clear that a successor in title would remain liable for continuing breaches of obligation which occur while he or she holds the interest in question. This reflects current law: *Doyle v. Hort* (1880) 4 LR Ir 455 at 467 (per Palles CB).*

Subsection (4)

Subsection (4) preserves the operation of equitable principles like the doctrine of estoppel. Under this a court may take the view that, notwithstanding the failure to comply with legal requirements (such as the need for consent or the giving of notice under subsection (2)), the circumstances of the case render it unconscionable for a party to rely upon that failure. This ties in with section 14(2)(c) of the Bill.

Subsection (5)

Subsection (5) specifies what information must be given in a notice of the assignment or other passing of the interest in question required by subsection (2)(b). Paragraph (a) deals with the case of an express assignment, where under section 14(1) an instrument in writing must be used. Paragraph (b) deals with cases coming within section 14(2) where no such instrument is required. In such cases the notice must specify the circumstances giving rise to the passing of the interest, eg, death or bankruptcy.

Subsection (6)

Subsection (6) provides a definition of “passing” for the purposes of section 17. The point is that the section is concerned not only with express

assignments of the landlord's or tenant's interest, but also with indirect "passing" of the interest to another person, such as occurs on the death or bankruptcy of the landlord or tenant.

Apportionment on severance

18.— (1) Subject to *subsection (2)*, upon the landlord's or tenant's interest under a tenancy being severed, whether by assignment or otherwise, as to the premises, the rent and other payments under the tenancy and all other obligations and provisions relating to that interest are -

- (a) apportioned, as appropriate to the severed parts of the premises, between those parts,
- (b) enforceable accordingly by or against the parties in whom the severed interests or parts are vested,

as if the apportioned rents, other payments and other obligations and provisions had originally been entered into separately in respect only of each severed interest or part.

(2) Any dispute as to the application of *subsection (1)* to a particular case may be referred to the court for determination and, on such application, the court may order such apportionment as it thinks fit.

(3) This section applies –

- (a) to tenancies whenever created,
- (b) subject to –
 - (i) any agreement to the contrary between the parties to the severance or other interested parties,
 - (ii) in the case of a severance by the tenant, any covenant relating to a necessary consent to be granted by the landlord.

Explanatory Note

This section would implement the recommendations in the GLCP, paras 3.18-3.21. It is designed to clarify the law and to replace the confusing and uncertain provisions currently scattered in several statutes, ie –

Law of Property Amendment Act 1859, section 3

Deasy's Act 1860, sections 11 (and 12-13 in so far as they may be taken to apply to the issue of severance) and 44.

Conveyancing Act 1881, section 12

It aims to provide a clear set of "default" provisions to operate, in the absence of provisions otherwise agreed by the parties, where the landlord or tenant assigns part only of his or her interest or otherwise severs it, e.g. the tenant surrendering part of the land to the landlord. The statutory provisions being replaced are concerned primarily with severance by the landlord, but section 18 governs also severance by the tenant, as recommended by the GLCP (see para 3.21).

Subsection (1)

Subsection (1) provides that upon severance of either the landlord's or tenant's interest the rent and other payments under the tenancy and all other provisions and obligations will become severed as between the severed parts of the premises and enforceable accordingly. This is, however, subject to the qualifications in subsection (2).

Paragraph (a) makes it clear that the apportionment is that appropriate to the severed parts. Thus if the landlord (X) assigns a 40% share of the reversionary interest to Y, Y becomes entitled to 40% of the rent and X remains entitled to 60% only. They can recover those respective proportions from the tenant, who becomes liable to pay those proportions only to X and Y respectively. If the tenant (A) assigns to B a part of the land comprising 30% of the total area originally let to A, B becomes liable to pay only 30% of the rent and to perform all other covenants in so far as they can apply to the 30% of the land assigned. A remains liable to pay 70% only of the rent and to perform all other covenants, again in so far as they can relate to the land A has retained. The point is that certain covenants may not relate to part only of the land, eg, a covenant to keep a building on the land in repair would not apply to a part of the land which is unbuilt-on and is assigned by the tenant to another person.

Paragraph (b) makes it clear that the consequence of apportionment upon severance is that the various provisions and obligations become severed and enforceable only on that basis. Thus, taking the example above of the tenant (A) assigning 30% of the land to B, upon severance the landlord will be able to recover only 70% of the rent from A and 30% from B. It is important to reiterate, however, that this is subject to the parties' agreement or the landlord's consent in the case of severance by the tenant.

Subsection (2)

Subsection (2) gives the court jurisdiction to resolve disputes as to severance and, in particular, to determine the appropriate apportionment of rent and covenants between the severed parts.

Subsection (3)

Subsection (3) clarifies the scope and operation of subsection (1). Since subsection (1) to a large extent reproduces the effect, or probable combined effect, of the various statutory provisions being replaced, it is appropriate to make it apply, as paragraph (a) does, to existing tenancies. This is certainly the case with respect to severance by the landlord, to which those statutory provisions relate primarily. As regards severance by the tenant, arguably sufficient safeguards for the position of existing parties exist in the provisions of paragraph (b).

Paragraph (b)(i) preserves the right of the parties to the severance or other interested parties (eg, the landlord in the case of a severance by the tenant or vice versa) to come to some other agreement. Sub-paragraph (ii) preserves the right of a landlord whose consent is needed for any assignment, or other severance by the tenant, to impose conditions on the grant of such consent. For example, the landlord may wish to avoid the additional expense of collecting rent and other payments (such as service charges) from more than one tenant. So a condition of consenting to an assignment of part of the land to another tenant may be that the original tenant continues to pay the whole rent to the landlord and recovers the appropriate proportion from the other tenant.

Concurrent tenancy

19.— (1) Upon the grant of a concurrent tenancy by the landlord of premises subject to a pre-existing tenancy the concurrent tenant becomes in relation to those premises the successor in title to that landlord during the concurrent tenancy and sections 16 and 17 apply to the landlord, the concurrent tenant and the pre-existing tenant accordingly.

(2) Where the concurrent tenancy relates to part only of the landlord's interest in the premises, the rent and other payments under the pre-existing tenancy and all other obligations and provisions relating to that interest are apportioned and enforceable in accordance with section 18.

(3) In this section –

“concurrent tenancy” means a tenancy of premises granted to a person, other than the tenant of a pre-existing tenancy of the same premises, to run concurrently with and subject to that pre-existing tenancy; and “concurrent tenant” shall be read accordingly;

“pre-existing tenancy” means a tenancy of premises to which a concurrent tenancy of the same premises is subject; and “pre-existing tenant” shall be read accordingly.

Explanatory Note

Section 19 is designed to clarify the law relating to concurrent tenancies.

These are commonly created in favour of investors. For example, the landlord of a major development like a shopping centre, where the various units are already subject to occupational leases, may create an interest in favour of investors by granting them a “concurrent lease”. This is a lease of the landlord's reversionary interest in the occupational leases, which runs

concurrently with those leases. It is to be distinguished from a “reversionary” lease, which is a lease which, although granted during the currency of an existing lease, is not to commence until the existing lease expires.

The case-law on concurrent tenancies is scarce and not as clear as it might be. It would appear that such a concurrent tenancy operates, in effect, as an assignment of the landlord’s reversion in the occupational leases, so that the concurrent tenant steps into the landlord’s shoes and becomes landlord to the occupational lessees. It is, however, not clear how far the provisions in Deasy’s Act and the Conveyancing Act 1881 apply. Under section 9 of the Administration of Justice Act (Ireland) 1707, the need for the occupational lessees to “affirm” or acknowledge that they had become tenants of the concurrent tenant was removed. However section 10 of the 1707 Act provides that an occupational lessee may continue to pay rent to the original landlord until given notice of the grant of the concurrent tenancy. That would remain the case under section 17 of this Bill.

Subsection (1)

Subsection (1) declares what the authorities seem to establish, namely that the concurrent tenant becomes the landlord of the pre-existing

(occupational) tenant or tenants. There is no need to spell this out further, since sections 16 and 17 of the Bill do this.

Subsection (2)

Subsection (2) deals with what is probably a rare situation, but nevertheless a theoretical possibility, ie, where the landlord severs the reversionary interest and grants a concurrent lease of part only. Again section 18 spells out what happens in such a case.

Subsection (3)

*Subsection (3) provides definitions to clarify the scope of section 19. It is important to note that it is confined to a concurrent (as opposed to a reversionary) tenancy granted to a third party. If the concurrent tenancy is granted to the same tenant as holds the pre-existing tenancy, this operates as a surrender of the pre-existing tenancy and substitution of the concurrent tenancy for it: see *Butler v O'Mahoney* (1898) 32 ILTR 93.*

PART 5

TENANT'S PROPERTY

This Part would implement the recommendations in Chapter 4 of the GLCP. That Chapter concerned the law of “fixtures”, but one of the recommendations was that the new statutory provisions should apply to any property brought into the demised premises by the tenant (see paras 4.12 and 4.19). This avoids difficult questions, which often arise in practice, as to whether or not an item installed by the tenant constitutes a “fixture” and, if it does, whether it comes within the category of a “tenant’s fixture”.

The provisions of this Part would replace both the common law of fixtures (as it applies as between landlords and tenants) and existing statutory provisions, ie, the Landlord and Tenant Act 1851 and section 17 of Deasy’s Act (as recommended by the GLCP, para 4.19).

PART 2

TENANT'S PROPERTY

Application of Part 5

20.— (1) This Part applies to any property, whether affixed or not,-

- (a) brought onto, or
- (b) erected upon, or
- (c) installed in, on or under,

the premises by the tenant or the tenant's predecessor in title.

- (2) In this Part such property is referred to as “ the tenant’s property”.
- (3) Subject to this Part, ownership of the tenant’s property remains vested in the tenant, but without prejudice to any hiring or leasing agreement or other agreement entered into by the tenant with the landlord or a third party with respect to such property.
- (4) The provisions of this Part replace entirely the common law relating to fixtures as between landlords and tenants.

Explanatory Note

This section sets out the scope of Part 5 and implements several of the recommendations in Chapter 4 of the GLCP.

Subsection (1)

Subsection (1) makes it clear that the new provisions apply to any property brought onto or installed on the premises by the tenant and for whatever purpose (see paras 4.12 and 4.19 of the GLCP).

Subsection (2)

Subsection (2) specifies the shorthand expression to be used, with a broader meaning, instead of “fixtures”.

Subsection (3)

Subsection (3) reverses the common law rule so far as fixtures are concerned, that even tenant’s fixtures belong to the landlord, so long as affixed to the demised premises and until the tenant exercises the right of removal (severance from the land). It is not clear whether Deasy’s Act enables the parties to contract out of this (see GLCP para 4.04). It is now made clear that fixtures and any other property brought onto or erected upon the demised premises by the tenant remain in the ownership of the tenant (see paras 4.05-4.07). This is, however, subject to any hiring or leasing agreement whereby the tenant acquired the property. Under such agreements the property usually remains in the ownership of the hiring or leasing company. It is also subject to any other agreements to the contrary, including an agreement made with the landlord. This implements the recommendations in the GLCP that the new statutory provisions should operate as “default” provisions only, ie, subject to any agreement to the

contrary, including a provision in the lease or tenancy agreement (see para 4.11).

Subsection (4)

Subsection (4) implements the recommendation that the new statutory provisions should replace the common law (see paras 4.11 and 4.19). They also replace existing statutory provisions, such as section 17 of Deasy's Act, but there is no need to state this, as this is implemented by the repeal of that Act and other Acts like the Landlord and Tenant Act 1851.

Tenant's right of removal

21.— (1) Subject to the provisions of this section, the tenant may remove the tenant's property from the premises (in this Part referred to as the "right of removal") -

(a) at any time during the continuance of the tenancy, or

(b) at the latest upon vacation of the premises.

(2) Where the tenancy is, without act or default by the tenant, terminated upon the happening of an uncertain event, the right of removal may be exercised –

(a) within two months after the date of such termination, or

(b) at the latest upon vacation of the premises before expiry of that period.

(3) The right of removal is subject to the tenant making good, or compensating the landlord for, any damage to the premises caused by its exercise.

(4) For the purposes of *subsection (1)(a)*, "continuance of the tenancy" includes any period –

(a) for which a tenancy has been extended or renewed,

(b) during which a tenancy continues subject to any variation of its terms.

(5) This section takes effect subject to the terms of the tenancy.

Explanatory Note

This section provides for the general right of removal recommended as a "default" provision by the GLCP to replace the common law and existing statutory provisions.

Subsection (1)

Subsection (1) provides for the general right of removal, which may be exercised at any time during the tenancy or upon vacation of the premises. Subsection (2) makes provision for an exception to this rule, where the tenancy ends suddenly on the happening of an uncertain event. The GLCP

did not see the need for any other exception to the rule that, upon vacation, the tenant should take away his or her property (see para 4.15). This is, however, subject to any agreement to the contrary : see subsection (5).

Subsection (2)

Subsection (2) deals with the case where a tenancy ends suddenly upon the happening of an uncertain event and the tenant may not have anticipated the precise timing of this. Paragraph (a) gives the tenant a further 2 months in which to exercise the right of removal (thereby re-enacting a provision in section 17 of Deasy's Act), but paragraph (b) makes it clear that if the tenant vacates the premises before that 2-month period expires, he must remove the property at the time of that vacation (as recommended by the GLCP para 4.16).

Subsection (3)

Subsection (3) requires the tenant to make good any damage caused by the removal or to pay compensation for such damage. It does not, however, include another condition suggested in the GLCP (see paras 4.14 and 4.15), that the tenant should be in compliance with tenant's obligations. The view has been taken that this might work unfairly against tenants, by enabling landlords to block removal where trivial breaches have occurred.

Subsection (4)

Subsection (4) implements the recommendations in the GLCP that the right of removal should be carried forward to any extension or renewal of a tenancy and should continue to apply after the terms of a tenancy have been varied (see para 4.17).

Subsection (5)

Subsection (5), as recommended by the GLCP, makes it clear that the new statutory provisions are "default" ones only, ie, they operate subject to the terms agreed by the parties (see paras 4.11, 4.15, 4.17 and 4.18). Thus a landlord may wish to exclude the right of removal where the tenant installs fixtures or fittings, or otherwise makes improvements, which the landlord wishes to keep. The BTCP recommended that improvements should become a matter for commercial negotiation and judgment by the parties, without statutory interference (see paras 3.38 – 3.40).

Landlord's rights

22.— (1) Where a tenant fails to exercise the right of removal within the time specified in *section 21*, the landlord may, without any liability to the tenant, -

- (a) remove the tenant's property from the premises and store it in a safe place pending collection by the tenant, or
- (b) take such other reasonable steps to safeguard the property as the landlord thinks appropriate,

and shall, in either case, serve notice on the tenant of the removal or other steps taken and arrangements for collection.

(2) The tenant may collect such property within 14 days of service of such notice, but subject to -

- (a) payment by the tenant of any outstanding rent or other money due under the tenancy,
- (b) reimbursement of all reasonable costs and expenses incurred by the landlord in making good any damage to the premises caused by the removal or in connection with such removal, storage or other steps taken.

(3) If the tenant does not so collect the property, the landlord -

- (a) may sell it or otherwise dispose of it,
- (b) shall, where, subject to *subsection (4)*, such disposal results in the receipt of surplus proceeds, serve, within 21 days of that receipt, a notice on the tenant containing a statement of accounts relating to the disposal.

(4) The landlord may deduct from such proceeds any outstanding rent or other money due under the tenancy and costs and expenses to be reimbursed under *subsection (2)*.

(5) Surplus proceeds which the tenant does not claim within 6 months from the date of service of notice under *subsection (3)(b)* become the landlord's property.

Explanatory Note

Section 22 implements the recommendations in the GLCP as to the landlord's rights where the tenant does not exercise the right of removal in time (in essence by the date of vacation of the premises) (see para 4.16).

Subsection (1)

Subsection (1) entitles the landlord to remove the tenant's property and put it in storage or otherwise take steps to safeguard it, but otherwise without liability to the tenant. It also requires the landlord in such cases to notify the tenant of the steps taken.

Subsection (2)

Subsection (2) then gives the tenant 14 days in which to collect the property, but subject to paying outstanding rent or other money due under the tenancy and meeting the landlord's reasonable costs of removal, storage or other safeguarding steps and making good damage to the property caused by the removal.

Subsection (3)

Subsection (3) entitles the landlord to sell or otherwise dispose of the property where the tenant fails to collect within the 14-day period. There is no obligation on the landlord to sell the property, but if there is a sale or other disposal which results in surplus proceeds (ie, after making deductions authorised by subsection (4)), the landlord must account for these by serving notice on the tenant.

Subsection (4)

Subsection (4) authorises the landlord to deduct outstanding rent or other money due under the tenancy and all reasonable costs and expenses which the tenant would have to pay or reimburse on collection of the property under subsection (2).

Subsection (5)

Subsection (5) imposes a six month time-limit on a tenant coming forward to claim the surplus proceeds of sale or other disposal of the property. A failure to meet this entitles the landlord to keep them.

PART 6
OBLIGATIONS

This Part implements the recommendations contained in Chapters 5 – 11 of the GLCP. It deals with obligations of both the landlord and tenant. As the GLCP recommended, it introduces the concepts of “overriding” obligations imposed by statute, which the parties cannot contract-out of, and “default” obligations which would operate in the absence of an express provision or agreement to the contrary or as a variation of the statutory provisions.

PART 3
OBLIGATIONS
Chapter 1

Overriding and default obligations

Scope of Part 6

- 23.—** (1) An obligation arising under this Part -
- (a) applies only to a tenancy created after the commencement of this Part,
 - (b) replaces any obligation of the same nature which would otherwise arise by implication.
- (2) Subject to the provisions of this Part, an obligation arising under this Part –
- (a) applies to any tenancy,
 - (b) has the same force and effect as if it were imposed as an express covenant.

Explanatory Note

This section clarifies the scope of Part 6.

Subsection (1)

Subsection (1) makes it clear that the new statutory scheme of obligations applies only to future tenancies. It also makes it clear that a new statutory obligation displaces any equivalent that might otherwise arise by implication, eg, under the common law. Examples would be the landlord's

obligation as regards the tenant's quiet enjoyment (see section 26 of the Bill) and the tenant's right of set-off (see section 47 of the Bill).

Subsection (2)

Subsection (2) makes it clear that, unless indicated otherwise, an obligation arising under Part 6 applies to any tenancy. In respect of several of the obligations there is a qualification, eg, where an equivalent obligation is created for residential tenancies by the Residential Tenancies Act 2004. It is also made clear that any statutory obligation created by Part 6 operates as if it were an express covenant. Under section 3 of the Bill "covenant" has a wide definition, which includes any stipulation or provision in a lease or part of an oral tenancy agreement.

Overriding and default obligations

24.— (1) An obligation referred to in this Part as -

- (a) an “overriding obligation” applies to a tenancy notwithstanding any provision relating to the tenancy,
- (b) a “default obligation” applies to a tenancy save to the extent that it is excluded or modified by any provision relating to the tenancy.

(2) In relation to any overriding obligation, any provision is void to the extent that it purports to –

- (a) exclude or limit the obligation either expressly or by implication (whether by imposing a more limited obligation on the same party or by imposing an obligation on another party or otherwise), or
- (b) impose on any party –
 - (i) any disability or penalty for enforcing or relying on the obligation, or
 - (ii) a liability to reimburse all or any part of the cost of performing the obligation.

Explanatory Note *Section 23*

Section 23 explains what is meant by the new concepts of “overriding” and “default” obligations introduced by the Bill.

Subsection (1)

Subsection (1) makes it clear that an “overriding” obligation cannot be contracted-out-of. This is further explained by subsection (2). It also makes it clear that a “default” obligation is one which will apply to a tenancy, unless it is excluded altogether or modified to some extent by the terms of the lease or oral tenancy, or some collateral or other agreement (such as a “side letter”).(see the definition of “provision” in section 3 of the Bill).

Subsection (2)

Subsection (2) amplifies the status of an overriding obligation by rendering void any provision purporting to exclude it or limit its operation. It also renders void provisions designed to nullify or limit such an obligation’s operation by a more indirect method, eg, by penalising a party who enforces or relies upon the obligation.

Chapter 2

Landlord's obligations

DA 1860, s. 41

Good title

25.— (1) Subject to *subsection (2)* the landlord has an overriding obligation to give, at or before the grant of the tenancy, good title to the tenant sufficient to support the grant of the tenancy.

(2) *Subsection (1)* does not prevent –

- (a) the parties agreeing to proceed with the grant of a tenancy notwithstanding a defect in title which has been fully disclosed prior to the grant,
- (b) a tenancy by estoppel from arising where a defect in title (whether or not disclosed) exists at the date of the grant.

(3) For the purposes of *subsection (2)(a)*, a defect in title is fully disclosed if all information relating to the title in the possession of the landlord is fully disclosed.

Explanatory Note

This section modifies the recommendation in para 6.03 of the GLCP and replaces the obligation contained in section 41 of Deasy's Act. Para 6.03 recommended that the replacement of section 41 should be a "default" obligation only, but the Commission now takes the view that it should be an overriding obligation because it is confined to giving sufficient title to support the grant of tenancy. As expressed in subsection (1) the obligation would be fulfilled according to usual conveyancing practice relating to "good" title, so that, eg, if the landlord has no documents of title to be furnished, if required, a good "holding" title may be based on long possession of the land being let.

Unlike section 41 of DA, section 25 applies to all tenancies and is not confined to leases.

Subsection (2) qualifies the overriding obligation which would otherwise apply. Paragraph (a) preserves the right of the parties to proceed despite a defect in the landlord's title, but only if it had been fully disclosed prior to the purported grant of the tenancy. Paragraph (b) preserves the doctrine of a tenancy by estoppel, whereby as between the landlord and tenant and

persons claiming by or through them, a tenancy will be deemed to exist according to a purported grant, even though the landlord has no title at all. Subsection (3) clarifies what is meant by full disclosure.

DA 1860,
S.41

Possession and quiet enjoyment

26.— (1) Subject to *subsections (2) to (4)*, the landlord has an overriding obligation to -

- (a) give the tenant possession of the premises on the day the tenancy begins or other such other day as may be agreed,
- (b) ensure that the tenant enjoys quiet possession of the premises throughout the tenancy without interruption by the landlord or any person lawfully claiming through, under or in trust for the landlord.

(2) *Subsection (1)(b)* does not apply to interruption by the landlord or any other person in the exercise of any right or the performance of any obligation conferred or imposed expressly or impliedly by the terms of the tenancy or any statutory provision.

(3) For the purposes of *subsection (1)(a)*, where a lease expresses the tenancy to begin on a day before the date of the lease, the tenancy is deemed to begin on the date of the lease.

(4) This section does not apply to any tenancy to which the obligation arising under section 12(1)(a) of the Act of 2004 applies.

Explanatory Note

This section incorporates the common law implied obligation by the landlord to give the tenant possession of the premises. The GLCP did not touch on this point, but it has been included on the basis that it goes with the quiet enjoyment obligation. It also replaces, in a more limited form, the obligation to ensure that the tenant has “quiet and peaceable enjoyment” throughout the tenancy contained again in section 41 of Deasy’s Act.

Subsection (1)

Subsection (1) specifies the two obligations, both overriding ones.

Paragraph (a) refers to the obligation initially to put the tenant into possession of the premises. The date this has to be done varies. Generally, it will be the date the tenancy begins, but, if the parties have agreed a different date, then it is that date. Subsection (3) deals with the not uncommon situation where no specific date for possession has been agreed and the date specified in the lease for commencement of the tenancy is earlier than the date of the lease. In such cases, the obligation to give possession arises on the date of the lease. In practice, in such cases the tenant will usually have already gone into possession (eg, under an agreement for lease).

Paragraph (b) replaces the implied obligation relating to quiet enjoyment in section 41 of Deasy's Act. As recommended by the GLCP (see para 6.05), the obligation is now confined to the landlord and persons lawfully claiming through, under, or in trust for the landlord. The wording has dropped the archaic "quiet and peaceable" used in section 41 of DA and used simply "peaceful" as section 12(1)(a) of the RTA 2004 does. It has not, however, added "and exclusive" as the 2004 Act does – as this does not seem necessary. It has also stuck to the traditional "possession" rather than "occupation" which the 2004 Act uses.

Subsection (2)

Subsection (2) qualifies subsection (1)(b) to make it clear that a landlord is not in breach of the quiet enjoyment obligation where the “interruption” is a consequence of, eg, the exercise of a right conferred by the tenancy, such as the right of re-entry for breach of covenant by the tenant or right to inspect for damage. The same applies to interruption caused by performance of an obligation, eg, entry in order to carry out maintenance or repairs for which the landlord is responsible. Also excluded is interruption by the landlord or other persons caused by action under statutory provisions, eg, works carried out in order to correct an environmental or public health hazard or nuisance.

Subsection (3)

This subsection, as explained above, deals with the obligation to give possession where the tenancy commences before the date of the lease purporting to grant it.

Subsection (4)

Subsection (4) makes it clear that section 25 does not apply to any residential tenancy already governed by section 12(1)(a) of the 2004 Act (as recommended by paras 5.04, 5.11 and 6.01 of the GLCP).

Landlord's agent and contact

27.— (1) The landlord has an overriding obligation to –

- (a) notify the tenant of the name of the person, if any, (the “authorised agent”) who is authorised by the landlord to act on the landlord’s behalf in relation to the tenancy for the time being,
- (b) provide to the tenant particulars of the means by which the tenant may, at all reasonable times, contact the landlord or the authorised agent.

(2) Nothing in *subsection (1)* affects the obligations in section 12(1) (e) and (f) of the Act of 2004.

Explanatory Note *Section 26*

This section extends the obligations of landlords of dwellings under section 12(1)(e) and (f) of the RTA 2004 to all other kinds of tenancy, as recommended by the GLCP, para 6.22. These are the obligations to notify the tenant of the landlord’s authorised agent and to provide particulars of the means of contacting the landlord or his agent. These would be overriding obligations, as under the 2004 Act (see section 18 of that Act).

Residual obligation to repair

28.— Where in relation to any tenancy -

(a) there is no obligation imposed on any party to repair any part of the premises, or

(b) it is unclear whether such an obligation is imposed on any party,

the landlord has a default obligation to repair.

Explanatory Note

This section implements the recommendations in para 6.18 of the GLCP.

The GLCP took the view that it was not appropriate to extend the landlord obligations for repair contained in the RTA 2004 (see para 6.16). However, it did recommend that there should be a statutory provision to deal with cases where there is a “gap”, ie, where the lease or tenancy agreement fails to deal exhaustively with repairs, or to deal with the subject at all (and there is no common law or other statutory provision to fill the gap). Paragraph (a) deals with case where it is clear that there is a gap in provision and paragraph (b) covers cases where the position is simply unclear. In both cases, the residual obligation will rest with the landlord, as a default obligation.

It is important to note that this default obligation will apply only where the conditions set out in paragraphs (a) or (b) exist. If there are express

provisions in the lease or tenancy agreement, or repairing obligations arising under the common law or other statutory provisions (such as those in the RTA 2004 or Chapter 3 of Part 6 of this Bill), which clearly cover the repairing obligation in respect of any particular part of the premises, section 28 cannot apply.

Defective premises

29.— (1) Subject to *subsections* (2) to (4), the landlord has an overriding obligation on the grant of a tenancy of premises for immediate occupation or use in their existing state to take reasonable care to see that all persons who might reasonably be expected to be affected by defects in the state of the premises at the date of the grant (whether or not those defects have been created by the landlord) are reasonably safe from personal injuries or from damage to their property caused by such defects.

(2) In determining whether a landlord has complied with the obligation under *subsection* (1) regard shall be had to –

- (a) any obligations on the landlord to repair the premises,
- (b) any warning as to defects given by the landlord before the grant of the tenancy, but such a warning shall not relieve the landlord of liability unless it was sufficient to draw to the attention of the person to whom it was given the potential risk of personal injuries or damage to property caused by the defects.

(3) *Subsection* (1) does not apply to defects which –

- (a) on the date of the grant were not, and ought not reasonably to have been, known to the landlord, or
- (b) where the tenancy is a regrant or renewal of a tenancy, arise from the act or omission (including breach of a repairing obligation) of the tenant.

(4) *Subsection* (1) does not prevent a landlord from granting a tenancy of defective premises subject to a written undertaking by the tenant to render them safe, or to carry out works so as to render them safe, as soon as is reasonably practicable after the date of the grant, provided the tenant is, before that date, made fully aware of the defects in so far as known to the landlord and signs, no later than that date, a written acknowledgment of such awareness.

Explanatory Note

This section implements to some extent the recommendation in the GLCP

that the Commission's recommendations in its Report on Defective Premises

(LRC 3-1982) relating to landlords should be implemented. It covers “physical” unfitness, but does not extend to “legal” unfitness, as recommended by the GLCP (see para 6.19).

Subsection (1)

Subsection (1) imposes an overriding obligation, but this is subject to the qualifications set out in subsections (2) – (4). These provisions reproduce the substance of those in LRC 3 – 1982, but with an important exception. The 1982 proposals applied to “disponers” of property, which included not just a landlord, but also an assignor or lessee surrendering a tenancy. The Commission subsequently took the view that the extension to the latter is going too far. It deals with “physical” unfitness and covers both personal injuries and damage to property.

It should be noted that there are important limitations to the landlord’s obligation. One is that it applies only to a tenancy of premises for immediate occupation. It would not apply where the premises are to be demolished or subject to other works rendering occupation impossible. Another is that it applies only at the date of the grant and to defects existing at that date. Thus it does not apply to defects arising later, whatever their cause, eg, the actions or omissions of the tenant. Another is that it is only an obligation to

take reasonable care and subsection (2) gives further guidance on this. Further limitations are spelt out in subsections (3) and (4).

Subsection (2)

Subsection (2) lists matters to be taken into consideration in deciding whether there has been a breach of the obligation.

Subsection (3)

Subsection (3) excludes liability in two situations. One is where the defect was not, and ought not reasonably to have been, known to the landlord at the date of the grant. The other is where the defect has been caused by the tenant. This would arise in cases where the tenancy is a regrant or renewal to the previous tenant who was in occupation of the premises. In such a case the defect might be a consequence of work carried out by the tenant or of a breach of repairing obligation.

Subsection (4)

Subsection (4) provides a saving for the not uncommon situation where the owner of defective premises grants a tenancy to a tenant who is undertaking to repair them or carry out other works which will cure any existing defects.

Buildings' Insurance

30.— (1) From the date of the grant where the premises include buildings, the landlord has default obligations to –

- (a) insure against the insured risks the buildings and landlord's property in or on the premises,
- (b) insure the buildings –
 - (i) in the joint names of the landlord and the tenant or with the tenant's interest noted on the insurance policy, unless the insurer waives subrogation rights,
 - (ii) for the full cost of rebuilding together with incidental costs, expenses and fees, including loss of rent,
- (c) increase the buildings' insurance cover where any review of cover reveals the necessity for such increase or at the request of the tenant where the tenant is liable to pay the premiums or to reimburse the cost of the insurance,
- (d) notify the tenant in writing of the particulars of the building's insurance, including any increases of cover,
- (e) use the proceeds of the buildings' insurance to reinstate the buildings or build equivalent alternative buildings, subject to any necessary planning permission or building consent being available.

(2) In *subsection (1)*, subject to such insurance being ordinarily and reasonably available to the landlord and to such excesses, exclusions and limitations which may be imposed by the insurer, "insured risks" includes –

- (a) earthquakes, fire (including subterranean fire), flood, lightning, storm and tempest,

- (b) explosion,
- (c) impact by any aircraft, other aerial device or articles dropped from the air, and any road or other vehicle,
- (d) civil commotion, malicious damage and riot,
- (e) bursting or overflowing apparatus, pipes, radiators and water or other tanks.

(3) This section does not apply to any landlord to which section 12 of the Act of 2004 applies.

Explanatory Note

This section implements various recommendations in Chapter 11 of the GLCP. It deals with the landlord's obligations with respect to insurance and should be read with section 44 which deals with the tenant's insurance obligations.

Subsection (1)

This lists a series of default obligations, as suggested by paragraph 11.09 of the GLCP.

Paragraph (a) refers to buildings' insurance and landlord's "property" in or on the premises (rather than "fixtures", thereby following the approach in Part 5 of the Bill). This is a default obligation (which arises only where the premises include buildings) and paragraph (d) recognises that the tenancy may provide that the tenant has to pay for the insurance. Subsection (2) defines what is meant by "insured risks".

Paragraph (b) requires (on the basis that this is a default obligation only) two things. One is that the buildings' insurance should be in joint names, unless the insurer waives subrogation rights. This resolves the doubt whether the Irish courts would regard insurance arranged by the landlord as being also for the benefit of the tenant: see GLCP paragraph 11.09 (g) (fn 26). The other is to require the buildings insurance to be for the full reinstatement cost: see GLCP paragraph 11.09 (c).

Paragraph (c) requires an increase in cover in two circumstances. One is where an annual review requires an inflationary increase; the other is where the tenant is paying for the insurance directly or indirectly and requests an increase: see again GLCP paragraph 11.09 (c).

Paragraph (d) requires the landlord to notify the tenant of the particulars of the buildings' insurance, including increases of cover under paragraph (c).

Paragraph (e) requires the landlord to use the proceeds to reinstate the premises. This again resolves a doubt as to the position in Ireland on this point: see GLCP paragraphs 11.05-11.06. There are specified exceptions to this, ie where planning permission or building consent for reinstatement work is not available..

Subsection (2)

This provides a definition of "insured risks" along the lines commonly adopted in the leases.

Subsection (3)

This contains a saving for the provisions in the RTA 2004 imposing an insurance obligation on the landlord: see section 12 (1) (c).

Chapter 3

Landlord's consent

Scope of Chapter 3

31.— (1) Subject to *subsection (3)*, this Chapter applies to any provision of a tenancy which prohibits or restricts the doing of any thing in relation to the premises by the tenant without the consent of the landlord.

(2) For the purposes of *subsection (1)* a provision which absolutely prohibits or restricts the doing of a thing by the tenant shall be treated as if it were a provision prohibiting or restricting that thing without the consent of the landlord.

(3) This Chapter does not apply to a provision –

- (a) requiring compliance with any statutory provision or court order,
- (b) prohibiting or restricting the tenant from carrying out works on or to the premises more substantial than an improvement.

(4) In this Chapter “improvement” means any addition to or alteration of an existing building or structure and includes any structure ancillary or subsidiary to such a building, but does not include any alteration or reconstruction of a building or structure so that it loses its original identity.

Explanatory Note

Section 31 defines the scope of Chapter 3. This chapter replaces Part V of the Landlord and Tenant (Amendment) Act 1980. It implements the recommendations in paras 3.41 – 3.46 and 4.44 – 4.49 of the BTCP, with one exception. This Chapter does not deal with the provisions in section 65 of the 1980 Act relating to damages for breaches of covenants to repair (see BTCP, para. 4.46). This matter is dealt with later in this Bill in the context of repairing obligations (see section 50). Chapter 3 attempts to consolidate in a more simple form the provisions scattered in Part V of the 1980 Act. It

also supplements those provisions by incorporating provisions designed to prevent landlords delaying unduly in dealing with requests for consent. Such provisions were introduced in England by the Landlord and Tenant Act 1988 (see BTCP para 3.46).

Subsection (1)

Subsection (1) makes it clear that Chapter 3 is dealing with the situation where the landlord's consent to do something in relation to the tenancy is sought by the tenant. The substantial difference from Part V of the 1980 Act is that these provisions, which are designed to prevent the landlord from acting unreasonably, would apply to any thing which the tenant wants to do in relation to the premises. Part V is confined to alienation, change of user and making improvements. There are, however, some important exclusions in subsection (3).

It should also be noted that, as recommended by the BTCP (see para 3.42), these provisions are not confined to "leases" (see section 64 of the 1980 Act) (although in most cases they will only operate where there is a written document). Nor are they confined to "tenements" (see BTCP para 3.43).

Subsection (2)

Subsection (2) retains the important provision in Part V of the 1980 Act (see sections 66(1), 67(1) and 68(1) of the 1980 Act) that the provisions requiring the landlord to act reasonably apply also to absolute prohibitions or restrictions (this is not the position in England).

Subsection (3)

Subsection (3) excludes the application of Chapter 3 to certain cases (where the landlord can, therefore, simply refuse to give consent without question and can enforce any covenant strictly against the tenant). Paragraph (a) covers a provision requiring compliance with any statutory provision – this would cover both the landlord and tenant. The wording would cover situations where a public body takes action under statutory powers, eg, enforcement action under planning and environmental legislation. Paragraph (b), when read with the definition of “improvement” in subsection (4), incorporates the substance of sections 67(2)(b) and (3) and 68(1) and (2) of the 1980 Act.

A provision in section 66(2)(b) of the 1980 Act excludes the need to get consent to an alienation in the case of a building lease for a term exceeding

40 years, provided the alienation is made more than 7 years before the end of the term and notice of it is given to the landlord within a month of the alienation. The view has been taken that there is no longer any need for this provision.

Subsection (4)

Subsection (4) provides a definition of “improvement”. In addition, the definition of “consent” in section 3 makes it clear that Chapter 3 applies to a landlord whether the “consent” provision uses that word or some similar word such as “agreement” or “licence” or “permission”. The definition of “provision” in section 3 makes it clear that Chapter 3 applies also where the prohibition or restriction is not contained in the lease itself, but rather in a separate agreement, such as a “side” letter. The definition of “improvement” follows closely the wording in the 1980 Act – the point about this definition is that it entitles the landlord to refuse consent without question in cases where the works proposed by the tenant are so substantial that there is a risk that they might qualify the tenant to acquire the fee simple under the Ground Rent Acts.

Unreasonable withholding of consent

32.— (1) The landlord has an overriding obligation not to -

- (a) unreasonably withhold or delay giving consent, or
 - (b) subject to *subsection (3)*, impose –
 - (i) a fine or sum of money in the nature of a fine, or
 - (ii) any increase of rent,
- for or in respect of the giving of consent, or

impose any other unreasonable condition to the giving of consent.

(2) In any proceedings raising the issue of whether the landlord has complied with *subsection (1)* the onus is on the landlord to prove compliance.

(3) It is not unreasonable of the landlord to require –

- (a) payment by the tenant of a reasonable sum in respect of legal or other expenses incurred by the landlord in connection with the consent, or
- (b) reimbursement by the tenant, recoverable as rent under the tenancy, of all expenditure incurred by the landlord by reason of the transfer or increase of any rates, taxes or other burdens to or of the landlord caused by a change of user or works more substantial than an improvement to the premises made by the tenant.

Explanatory Note

Section 32 incorporates in a more straightforward provision the basic principle that the landlord cannot unreasonably withhold or delay giving consent to things which the tenant may wish to do to the premises. It

replaces the substance of sections 66 - 68 of the 1980 Act and removes the repetition of provisions to be found in them.

Subsection (1)

Subsection (1) encapsulates the basic principle of unreasonableness and incorporates the substance of sections 66(2), 67(2) and 68(2) of the 1980 Act. Since the landlord's obligation is an overriding one it cannot be contracted-out-of: see section 24(1)(a) of the Bill. This accords with the provisions in sections 66 – 68 and with the more general one in section 85 of the 1980 Act. Furthermore, under section 23(2)(b) of the Bill such an obligation has the same force and effect as if it were imposed as an express covenant. This means that the tenant has the usual remedies for breach of covenant by the landlord. In the present context this includes a claim for damages for any loss caused by the landlord's breach, eg, where a prospective assignment is lost because of the landlord's action or inaction. This implements the recommendation in the BTCP (see paras 3.46 and 4.47).

It is important to note the qualifications to subsection (1) set out in subsection (3).

Subsection (2)

Subsection (2) is a new provision reversing the onus of proof re unreasonableness. It imposes on the landlord the burden of proving that he or she has acted reasonably, as recommended by the BTCP (see para 3.46).

Subsection (3)

Subsection (3) incorporates provisions in the 1980 Act (again in sections 66 – 68) which make it clear that certain matters do not involve unreasonableness on the part of the landlord.

Paragraph (a) entitles the landlord to claim reasonable expenses – see sections 66(2)(a), 67(2)(a) and 68(2)(b) of the 1980 Act.

Paragraph (b) entitles the landlord to reimbursement (as rent) of additional burdens caused by a change of user or substantial works which the landlord has agreed to – see sections 66(2)(c) and 67(2)(c) (there is no equivalent in section 68 probably because it is confined to minor improvements which would be unlikely to create additional burdens on the landlord). The definition of “improvement” in section 31(4) of the Bill is important in this context.

Application for consent

33.— (1) A tenant seeking consent of the landlord shall serve notice in writing on the landlord -

- (a) specifying the thing for which consent is sought,
- (b) in the case of a proposed assignment, subletting or other alienation, giving details of the proposed assignee, subtenant or other person to be allowed into occupation, possession or use of the premises,
- (c) in the case of proposed works, providing detailed specifications of any works which the tenant wishes to carry out,
- (d) in the case of a change of user, providing details of the proposed new user of the premises,
- (e) providing any other information which is reasonably necessary to enable the landlord to decide whether or not to give consent.

(2) A landlord served with a notice under *subsection (1)* may, within 21 days of its receipt, request the tenant to furnish such further information as is reasonably necessary to enable the landlord to make a decision concerning the consent sought.

(3) The tenant shall respond in writing to such a request within 21 days of its receipt or within such other time as the parties agree.

(4) A failure by a tenant to comply with this section relieves the landlord of any obligation under *section 32*, but without prejudice to the tenant's right to make further applications for consent.

Explanatory Note

Section 33 introduces new provisions to impose some procedural requirements on the parties, as recommended by the BTCP (see para 4.47(ii)).

Subsection (1)

Subsection (1) requires a tenant seeking consent to serve a notice in writing giving details. Under subsection (4) a failure to do so relieves the landlord of the obligation to act reasonably.

Paragraph (a) requires the tenant to specify what it is that consent is sought for. Paragraph (b) requires details of the person to whom consent to any form of alienation is sought. Paragraph (c) requires detailed specifications where works are proposed by the tenant. Paragraph (d) requires details where a change of user is proposed. Paragraph (e) requires any other information necessary to enable the landlord to make a decision.

Subsection (2)

Subsection (2) entitles, but does not require, the landlord to request further information. The 21-day deadline appropriate may be extended by the parties by agreement or by the court under section 35.

Subsection (3)

Subsection (3) requires the tenant to respond to the landlord's request, again within 21 days.

Subsection (4)

Subsection (4) imposes the sanction for a tenant's failure to comply with the section (this covers both subsection (1) and subsection (3) requirements).

The landlord is relieved of the section 32 obligations and so can refuse consent without question.

Decision on application

34.— (1) Subject to *section 35*, within 21 days (or such longer period as the parties may agree) of (whichever is the later) -

- (a) receipt of a notice under *section 33(1)*, or
- (b) receipt of a tenant's response under *section 33(3)*,

the landlord shall serve a notice in writing on the tenant –

- (i) granting the consent, or
- (ii) granting consent subject to specified conditions, or
- (iii) refusing consent and giving the reason.

(2) A landlord who fails to comply with *subsection (1)* is deemed to have granted the consent, provided the tenant is not in arrears with respect to rent or in breach of any other money obligation.

Explanatory Note

Section 34 contains further procedural provisions requiring the landlord to make a decision quickly and to notify the tenant accordingly.

Subsection (1)

Subsection (1) imposes a time-limit of 21 days, but note that it may be extended under section 35. This runs from the date of service of the tenant's application for consent or, if the landlord requests further information, from the date of receipt of this. Paras (i) – (iii) spell out the alternative decisions which the landlord can make. As regards (ii) any conditions must comply

with section 32(1)(c), ie, they must not be unreasonable. As regards (iii) this makes it clear that the landlord must specify the reason for the refusal, which again must be reasonable under section 32(1)(a).

Subsection (2)

Subsection (2) imposes the sanction that, if the landlord fails to comply with subsection (1), he or she will be deemed to have given the consent sought.

This will not apply where the tenant is in arrears with respect to rent or is in breach of any money obligation (e.g. service charges). The tenant may seek a court declaration to this effect under section 36.

Extension of time limits

35.— Where a person fails to do any act or thing within the time provided for under *sections 33 and 34*, the court may, on such terms as it thinks proper, and shall, unless satisfied that injustice would be caused, extend the time where it is shown that the failure was occasioned by —

- (a) absence from the State, or
- (b) disability, or
- (c) inability, despite reasonable attempt to do so, to obtain requisite information, or
- (d) any other reasonable cause.

Explanatory Note

Section 35 reproduces the substance of section 83 of the 1980 Act – the one change is the addition of “despite reasonable attempt to do” in paragraph (c).

Summary court orders

36.— (1) A landlord or tenant may apply in a summary manner to the court for a declaration or such other order as the court thinks fit to determine whether or not the landlord or tenant has complied with any obligation created by this Chapter.

(2) An application under *subsection (1)* to the Circuit Court may be made by Motion on Notice.

Explanatory Note

Section 36 gives statutory form to the common practice under the 1980 Act to seek a declaration as to whether a landlord is unreasonably withholding consent, but makes it clear that it extends to determination of any issue concerning compliance with any of the obligations created by this Chapter (eg, whether the tenant has complied with section 33). It also makes it clear that the court is not limited to granting a declaration and may make any other order it thinks fit (eg an order requiring the landlord to give consent or an injunction prohibiting the tenant from proceeding with an assignment). Subsection (1) expressly provides for such matters to be dealt with in a summary manner. Subsection (2) makes provision for this to be done in the Circuit Court on the basis of an application by Motion on notice: see Circuit Court Rules 2001, Order 28 and Form 11 of the Schedule of Forms.

Landlord not known or found

37.— (1) Where the tenant is prevented from serving a notice under *section 33(1)* because the landlord is unknown or cannot be found, the court may, on the application of the tenant and after the publication of such (if any) advertisements as it directs, make an order authorising the tenant to do the particular thing to which such notice would relate.

(2) An order made by the court under *subsection (1)* –

- (a) may be subject to such (if any) conditions as the court thinks fit to impose,
- (b) renders it lawful for the tenant to do the thing authorised without the consent of the landlord.

Explanatory Note

Section 37 reproduces part of section 69 of the 1980 Act.

Subsection (1)

Subsection (1) alters section 69 by substituting “or” for “and” between “unknown” and “cannot be found” as recommended by the BTCP (see para 4.49), ie, it should cover both the landlord being not known (unidentified) and the landlord being known (identified) but whose whereabouts are unknown.

Subsection (2)

Subsection (2) repeats further provisions in section 69 of the 1980 Act.

Chapter 4

Tenant's obligations

Rent

DA 1860,
S. 42

38.— (1) The tenant has an overriding obligation to pay the rent provided for under the tenancy on the date when it falls due for payment.

(2) The tenant has a default obligation to make such payment in advance.

Explanatory Note

Section 38 and the immediately following sections (39 to 46) implement Chapter 8 of the GLCP.

Subsection (1)

Subsection (1) implements the recommendation in para. 8.03 that the implied obligation to pay rent in section 42 of Deasy's Act should be replaced by an overriding obligation. It should be noted that subsection (1) does not make a reference to rent "reserved" nor is it confined to leases, both of which apply to section 42. This resolves doubts as to the position where a lease may not contain a reservation as such or a covenant to pay (see again para 8.03). The definition of "rent" in section 3 of the Bill should be noted. This includes payments specified as rent under the terms of the tenancy and other recurring or regular payments payable or refundable to the landlord, such as service charges and insurance premiums.

Subsection (2)

Subsection (2) implements the recommendation in para 8.04 that there should be a variable obligation of limited scope relating to how the rent should be paid. Since this is a variable obligation only, it can be modified by an express provision – in essence it is a "default" provision.

Apportionment of rent

39.— (1) The tenant has a default obligation to pay an apportioned rent in accordance with this section.

(2) Rent accrues from day to day and is apportionable accordingly.

(3) Subject to *subsections (4) and (5)*, where between the dates when rent is payable -

(a) the tenancy is assigned, the landlord is entitled to apportioned parts of the rent from the assignor and assignee respectively,

(b) the landlord's interest is assigned, the tenant remains liable to pay the entire rent only when it is due, but that rent is apportionable as between the landlord at that date and the previous landlord,

(c) the tenancy is lawfully terminated in any way by either the landlord or the tenant, the tenant is liable for an apportioned rent accruing to the date of termination.

(4) In each of the events specified in *subsection (3)* the tenant's liability to pay the apportioned or entire rent arises only on the date when the entire rent would otherwise be payable under the tenancy.

(5) *Subsection (3)* does not apply where rent is payable in advance and is already due when the event in question occurs.

Explanatory Note

Section 39 implements paragraph 8.08 of the GLCP and attempts to consolidate and simplify various provisions relating to apportionment of rent to be found in the Apportionment Act 1870 and Deasy's Act 1860. Since the 1870 Act is not confined to rents, but applies to periodical payments generally (including, eg, annuities, interest and rentcharges), its provisions would be repealed by this Bill only in so far as they apply to rent. Section 39 does not consolidate all the relevant provisions in Deasy's Act. There is no equivalent of section 15, which apparently imposes on a tenant who assigns between gale days continuing liability for rent (and other covenants) to the next gale day. The GLCP queried the imperative nature of this provision and recommended that it should be capable of being contracted out of (see paragraph 3.11). However, in the light of its inconsistency with other

statutory provisions, the view has now been taken to introduce a general “default” provision for apportionment in all cases. As a default provision, it would be open to the parties to agree a different provision, including one like that contained in section 15. The assignor and assignee may agree that the assignee will pay the entire rent due at the date of the assignment or becoming payable after the assignment and that this will be taken into account in fixing the terms of the assignment. On the same reasoning, section 39 does not contain an equivalent of section 34 of Deasy’s Act, which allows a tenant of agricultural land to hold over in lieu of “emblems” in certain cases. Such tenants are comparatively rare nowadays and the view has been taken that arrangements with respect to harvesting crops are best left to be dealt with by express agreement.

Subsection (1)

This confirms that the provisions of section 39 are “default” ones only, which may be varied by the parties’ agreement.

Subsection (2)

This repeats the general rule for apportionment contained in section 2 of the Apportionment Act 1870, so far as it applies to rent.

Subsection (3)

This provides for apportionment of rent in the various circumstances where, as a result of some event occurring between the dates when rent is payable, different people become interested in the landlord’s or tenant’s interest if the tenancy is terminated. These provisions are concerned only with apportionment as to “time”. They are not concerned with apportionments as to the parties’ “estate”, ie, where the landlord or tenant “severs” (splits-up) his or her interest. That subject is dealt with by section 18 of the Bill. Subsection (3) drops the traditional, but somewhat archaic, expression “gale days”.

It is important to note the further provisions in subsections (4) and (5) which qualify the operation of subsection (3).

Paragraph (a) deals with the situation where the tenancy is assigned between the dates when rent is payable. The rent is apportioned (on a day-to-day basis in accordance with subsection (2)) as between the assignor and assignee, but (as prescribed by subsection (3)) each is liable to pay their respective apportioned parts only when the whole rent is next payable. This accords with the general rule laid down in section 3 of the 1870 Act.

Paragraph (b) repeats the rule enshrined in section 4 of the 1870 Act. The new landlord must recover the entire rent from the tenant when it is next due and then apportion it between himself or herself and the previous landlord. This does not apply where rent is payable in advance: see subsection (5).

Paragraph (c) consolidates in a simple form provisions to be found in section 3 of the 1870 Act and section 50 of Deasy's Act. It extends those provisions by applying to all cases of termination by both the landlord and the tenant. Thus it covers service of a notice to quit and forfeiture and re-entry by the landlord. It also covers surrender and exercise of a break option by the tenant.

Subsection (4)

This applies the general rule contained again in section 3 of the 1870 Act.

Subsection (5)

*This confirms the rule adopted by the courts : see *Dublin Corporation v Barry* [1897] 1 IR 65; *Ellis v Rowbotham* [1900] 1 QB 740.*

Rent review

40.— (1) Subject to *subsection (3)*, where a tenancy makes provision for rent review the tenant has a default obligation to pay any reviewed rent determined in accordance with the provisions of *Schedule 3*.

(2) The provisions of *Schedule 3* may be amended or substituted by regulation.

(3) *Subsection (1)* does not apply to any tenancy to which Part 3 of the Act of 2004 applies or to any lease to which sections 3 and 5 of the Landlord and Tenant (Amendment) Act 1984 apply.

Explanatory Note

Section 40 implements the recommendation in paragraph 8.12 that provision should be made for a statutory model of rent review clauses, to operate on a “default” basis. These would apply largely to commercial tenancies, as Part 3 of the Residential Tenancies Act 2004 has separate provisions for rent reviews. RTA 2004 does not apply to tenancies of some dwellings, particularly public housing. Section 40 would then apply unless excluded by the tenancy agreement. The model clauses are set out in Schedule 3 to the Bill.

Subsection (1)

This makes it clear that, as “default” obligation, it will remain open to the parties to agree provisions different from the statutory model.

Subsection (2)

This makes provision for the statutory model to be varied from time to time by regulation. This would include an entire substitution of a new model.

Subsection (3)

This contains a saving for the provisions in Part 3 of the 2004 Act and the provisions for rent reviews relating to reversionary and sporting leases in the 1984 Act.

Recovery of rent

41.— (1) The remedy of distress for rent so far as it survives is abolished.

(2) The landlord or other person entitled to rent may bring an action in court to recover-

- (a) any arrears of rent still recoverable,
- (b) where a tenancy has terminated rent up to the date of actual recovery of possession of the premises.

(3) The doctrine of mitigation of loss does not apply where the landlord seeks to recover arrears of rent.

(4) An action under *subsection (2)* may be brought in the District Court subject to its jurisdictional limits.

(5) This section does not apply to a tenancy to which section 23 of the Act of 2004 applies.

Explanatory Note

Section 41 implements various recommendations made in Chapter 8 of the GLCP (see paragraphs 8.14, 8.18 and 8.20).

Subsection (1)

This abolishes the ancient, originally feudal, remedy of distress recognised by section 51 of Deasy’s Act. This sort of “self-help” remedy is of doubtful constitutionality, may not comply with the European Convention on Human Rights and is subject to extremely complex procedural requirements. It can no longer be invoked in respect of a dwelling (section 19 of the Housing (Miscellaneous Provisions) Act 1992). This subsection does not refer to the special statutory action of ejectment governed by sections 52-58 of Deasy’s Act. This will go with the repeal of those sections without any replacement. It is important to note that this abolition does not affect other ejectment remedies, which are more commonly invoked nowadays even in non-payment of rent cases, such as ejectment on the title or for overholding based on a forfeiture for breach of covenant. Such actions for the recovery of possession are dealt with in sections 72-79 of the Bill.

Subsection (2)

This preserves the right of action provided for by section 45 of Deasy's Act. Paragraph (b) extends the provision in section 66 of Deasy's Act (which is confined to ejectments for non-payment of rent) to all cases where a tenancy has come to an end. It, therefore, replaces the confusing provision in section 77 of Deasy's Act.

Subsection (3)

This clarifies a matter upon which there has been some doubt and which was discussed recently in the context of common law jurisdictions by the English Court of Appeal: see Reichman v. Beveridge [2006] All ER (D) 186 (Dec). It was held in that case that an action to recover arrears of rent is an action to recover a debt and not an action for damages for breach of contract to which the principle of mitigation of loss should apply.

Subsection (4)

This preserves the existing jurisdiction of the District Court and has been added because the definition of "court" in section 3 is confined to the High Court and Circuit Court.

Subsection (5)

This provides a saving for the dispute resolution provisions (Part 6) provided for by section 23 of the RTA 2004.

DA 1860,
S.47

Receipts for rent

42.— In any action or other proceeding a receipt or acknowledgment for rent or for money paid on account of rent which fails to specify the period covered by the payment which has been accepted is *prima facie* evidence that all rent accrued due (whether in advance or arrear) at the date specified in the receipt or, if there is no such date, at the date of the payment has been paid and accepted.

Explanatory Note

This section re-enacts the substance of section 47 of Deasy's Act. Notwithstanding that section's apparent "imperative" form, the sanction for failure to provide a receipt specifying the gale which a rental payment covers seems to be the procedural provision later in the section. Section 42 turns the provision round to reflect this. Again references to "gales" have been dropped.

DA 1860,
S.46

Use and occupation

43.— (1) Where the owner of land allows or has allowed another person to hold, occupy or use it without any agreement as to rent which the parties intended should be paid, that owner may bring an action in court to recover reasonable compensation for the use and occupation of the land.

(2) *Subsection (1)* does not affect the right of an owner of land to recover compensation against a trespasser.

Explanatory Note

This section implements paragraph 8.15 of the GLCP.

Subsection (1)

*This preserves the action for “use and occupation” provided for by section 46 of Deasy’s Act. There is no equivalent of subsection (3) of section 40, because it would appear that the District Court has no jurisdiction in this area (probably because of the need to assess what the appropriate “compensation” should be). The wording of section 46 has been changed to make it clear that this provision applies only where it was the intention of the parties that rent should be paid, but they have failed to specify it or how it should be fixed. Subsection(2) provides further clarification. In *Harrisrange Ltd. v. Duncan* (High Court, 25 January 2002), McKechnie J. held that this provision does not apply where a tenant continues in occupation pending determination of an application for a new tenancy. He ruled that section 28 of the Landlord and Tenant (Amendment) Act 1980 means that he pays the rent under the expired tenancy. The word “compensation” has been substituted for the somewhat odd “satisfaction”.*

Subsection (2)

This has been added to implement the recommendation that the distinction between an action for use and occupation and an action for mesne profits or rates should be clearly drawn. Deasy’s Act (especially section 77) seems to confuse them. The former concerns the situation where the owner of the land suffers the other person to occupy the land; the latter concerns the situation where there is no permission (express or implied) and the occupier is clearly a trespasser. Subsection (2) substitutes “compensation” for the archaic “mesne profits or rates”.

Outgoings

44.— (1) The tenant has a default obligation to pay, when due, any outgoings applicable to the premises.

(2) In *subsection (1)* “outgoings” includes –

- (a) rates and other charges,
- (b) electricity, gas and water charges which are the primary responsibility of the occupier,
- (c) payments for provision of electronic communication, telephone, television and other facilities and services, but does not include rent coming within *section 38*;

Explanatory Note

This section implements paragraph 8.22 of the GLCP and provides a “default” provision requiring the tenant to pay outgoings. The reference to taxes has been dropped as no longer appropriate. It is intended to replace the provision in section 42 of Deasy’s Act.

Subsection (1)

This makes it clear that the obligation is a “default” one only, which the parties may exclude or vary by the terms of the tenancy. Another vital word in paragraph (a) is “applicable”, ie, the provisions apply only where relevant to the particular tenancy or premises to which it relates.

Subsection (2)

This provides definitions of “outgoings”. No reference to service charges or insurance premiums is made because of the definition of “rent” in section 3 of the Bill, which includes such recurring or regular payments.

Repairs

DA 1860,
SS. 38

45.— (1) The law of waste no longer applies to a tenant and is replaced by the provisions of this section.

(2) The tenant has default obligations to –

- (a) maintain the premises in their condition at the commencement of the tenancy and to yield them up at the end of the tenancy in the same condition,
- (b) carry out, as soon as is reasonably practicable, such repairs as are necessary to ensure compliance with *paragraph (a)*,
- (c) notify the landlord of any defect or state of disrepair in the premises which the landlord is obliged to repair.

(3) The tenant has overriding obligations to –

- (a) allow the landlord, or any person acting on behalf of the landlord, access to the premises for the purpose of –
 - (i) inspection of the premises on reasonable notice being given to the tenant,
 - (ii) enabling the landlord to carry out such repairs to the premises or to do other works which the landlord is obliged to carry out under the terms of the tenancy or any statutory provision,
 - (iii) enabling the landlord to carry out such repairs to the premises or to do other works which the tenant is obliged, but has failed within a reasonable time of being called upon by the landlord, to carry out under the terms of the tenancy or any statutory provision.
- (b) reimburse the landlord all reasonable costs and expenses incurred under *sub-paragraph (a)(iii)* within 21 days of the tenant's receipt in writing of their full particulars.

(4) The tenant is not liable for a breach of *subsection (2)(a)* until *subsection (2)(b)* is breached.

(5) In *subsection (2)* –

“maintain” includes doing repairs to correct any state of disrepair however it has arisen and carrying out minor tasks which it is reasonable to expect a tenant using the premises in a tenantlike manner to carry out;

“repair” includes, where it is reasonably necessary to restore any part of the premises to full effectiveness or fitness for its purpose, renewal or replacement of that part or other work which may have the incidental effect of rendering that part better than its condition at the commencement of the tenancy or which is required in order to comply with current building or repairing standards or relevant statutory requirements, but does not otherwise include improvements or any work to deal with deterioration in the condition of the premises owing to normal wear and tear which is consistent with the length of occupation and proper use of the premises by the tenant.

(6) This section does not apply to any tenant to which section 16 of the Act of 2004 applies.

Explanatory Note

This section implements paragraphs 10.01 – 10.10 of the GLCP and would replace numerous provisions (sections 25-29 and 42) of Deasy’s Act.

Subsection (1)

This implements the recommendation in paragraph 10.05 of the GLCP; that the law of waste should no longer apply as between landlords and tenants. The other recommendation (that sections 25-39 of Deasy’s Act should be repealed without replacement) will be implemented by section 9(2) and Schedule 2 of the Bill.

Subsection (2)

This aims to provide a set of “default” obligations in respect of maintenance and repairs. Note that, as provided by subsection (6), it does not cover residential tenancies governed by sections 16 and 17 of the RTA 2004.

Paragraph (a) covers maintenance of the premises in their condition at the commencement of the tenancy and yielding them up in the same condition. When read with paragraph (b), subsection (4) and the definition in subsection (5), this implements the recommendations in paragraph 10.08 of the GLCP. There is no obligation “to put” the premises into repair, where there is disrepair at the commencement of the tenancy, and no strict liability – the tenant is not in breach unless he fails to take action within a

reasonable time. If such liability is sought it would have to be provided for expressly in the lease.

Paragraph (b) contains the basic default obligation to repair “as soon as is reasonably practicable”. Subsection (4) makes it clear that the obligation under paragraph (a) is not breached unless paragraph (b) is breached. This implements paragraph 10.08 of the GCLP.

Paragraph (c) implements the recommendation in paragraph 10.10 of the GCLP that some of the provisions in section 16 of the RTA 2004 should be given wider effect. This is similar to the provisions in section 16(d).

Subsection (3)

This contains some overriding obligations.

Paragraph (a) again implements paragraph 10.10 and adapts provisions in section 16(c), (e) and (g) of the RTA 2004. Subparagraph (i) gives the landlord a right of inspection on reasonable notice. Subparagraph (ii) gives a right of access to enable the landlord to meet his or her repairing obligations or statutory obligations. Subparagraph (iii) gives the landlord a right of access to enable him or her to discharge obligations which the tenant has failed to discharge.

Paragraph (b) contains an obligation by the tenant to reimburse all reasonable expenses incurred by the landlord in exercising the right of access under subparagraph (d)(iii). This adapts a provision in section 16(g) of the RTA 2004. Note that there is a limitation to such recovery in certain cases covered by section 50 of the Bill: see subsection (3) of that section.

Subsection (4)

This confirms that the liability of the tenant for maintenance and repairs is not strict, as recommended by paragraph 10.08 of the GLCP.

Subsection (5)

This aims to clarify the operation of subsection (2) by providing useful definitions. The definition of “maintain” reflects what has been established by caselaw: eg, Warren v Keen [1953] 2 All ER 1118. The concept of “tenantlike” use includes unblocking sinks and toilets, turning off the stop-cock on lengthy absences in cold winters if the heating is not left on and similar sensible precautions.

The definition of “repairs” attempts to clarify the distinction between “repairs” and “improvements”, which causes much confusion. It reflects the distinctions drawn in the caselaw, which recognises that repair often has the effect of “improving”, in the sense that, because of modern building techniques and materials, the item in question will inevitably be better than what existed before: see Black J in Groome v Fodhla Printing Co [1943] IR 380 at 414-415. There may also be statutory requirements which have this consequence, eg, under building regulations or environmental controls.

Subsection (6)

This contains a saving for the provisions in section 16 of the Residential Tenancies Act 2004.

Insurance

LT (GR) A
1967, S.30

46.— (1) Where the landlord insures the buildings, under section 30 or otherwise, the tenant has overriding obligations –

- (a) not to do or permit to be done in or on the premises any thing which may cause the building's insurance to become void or voidable,
- (b) where the tenant's actions or omissions result in an increase in the insurance premiums, to pay any such increase.

(2) Where the tenant has an obligation, however it arises, to effect insurance of the buildings on the premises –

- (a) with a specified insurer or an insurer approved or selected by the landlord or another person, or
- (b) through a specified agent or an agent approved or selected by the landlord or another person,

the obligation takes effect as if it were an obligation to effect either directly or through any agent, such insurance with any insurer who holds for the time being an authorisation under the Insurance Acts 1909-1989.

(3) The section does not affect any obligation a tenant may have under section 16(i) and (j) of the Act of 2004.

Explanatory Note

This section needs to be read with section 30. Together the two sections implement the recommendations in Chapter 11 of the GLCP.

Subsection (1)

This is a corollary to the landlord's default obligation under section 30 to insure the buildings and implements the recommendation in the GLCP paragraph 11.09(e) and (f). Paragraph (b) has been added to make it clear what the position is if paragraph (a) is not complied with.

Subsection (2)

This implements the recommendation in paragraph 11.02 of the GLCP that section 30 of the Landlord and Tenant (Ground Rents) Act 1967 should be extended to all tenants. It reproduces the substance of section 30, but adapts the language to that of the Bill.

Subsection (3)

This contains a saving for the provisions in the RTA 2004 relating to insurance obligations on the tenant: see 16(i) and (j).

Chapter 5

Enforcement of obligations

Release or waiver

47.— (1) Subject to *subsection (4)*, a general release of a landlord or tenant obligation or a waiver of a particular breach of such an obligation shall be in writing signed by the party releasing or waiving or by that party's agent authorised in writing.

(2) Where –

- (a) the landlord gives consent to the tenant in a particular instance to do any thing which under a tenant's obligation requires consent or which would otherwise be a breach of obligation by the tenant, or
- (b) the landlord or tenant waives a particular breach of obligation by the other party to the tenancy,

such consent or waiver is confined to that particular instance or breach of obligation and is not a general release of the obligation.

(3) Where a consent or waiver coming within *subsection (2)* or a general release of an obligation by either the landlord or the tenant is –

- (a) given to one or more, but not all, of the co-landlords or co-tenants of the same premises, or
- (b) restricted to part only of the premises,

such consent, waiver or release does not prevent enforcement of the obligations against the other co-landlords or co-tenants or in respect of another part of the premises.

(4) *Subsection (1)* does not affect the doctrine of estoppel or other equitable principles.

Explanatory Note

This section deals with the law of waiver and consolidates the various, overlapping provisions contained in the Law of Property Amendment Acts 1859 (sections 1 and 2) and 1860 (section 6) and Deasy's Act 1860 (sections 22 and 43). In doing so, it is intended to clarify and simplify the existing law. The caselaw frequently refers to a waiver generally (which means that the landlord cannot invoke the covenant in question thereafter) and waiver of a particular breach (which means that the landlord remains free to take action in respect of future breaches). In order to reflect this distinction, section 46 refers to the former as a general release and uses the term "waiver" only in respect of the latter. Hence the heading of the section in the alternative.

Subsection (1)

*This would replace section 43 of Deasy's Act, but makes it clear that it covers both a general release and a particular waiver. This point has been in some doubt over the decades, but McCracken J ruled that section 43 covered both in *Crofter Properties Ltd v Genport Ltd* (15 March 1996). However, he also surmised that, notwithstanding the statutory need for writing, a landlord might be estopped from enforcing a covenant or a particular breach through action or oral representations. Subsection (4) recognises the possibility of invocation of such equitable principles. Subsection (1) extends section 43 to cover all landlord and tenant obligations – there seems no reason why release or waiver should not apply equally to a tenant in respect of a breach of obligation by the landlord. The wording also makes it clear that release or waiver by an agent is effective only if the agent is authorised in writing – this accords with section 11 of the draft Bill.*

Subsection (2)

This consolidates the provisions in section 1 of the LPAA 1859, section 6 of the LPAA 1860 and section 22 of Deasy's Act.

Subsection (3)

This amplifies and clarifies section 2 of the LPAA 1860. It is not confined to licences to assign or sublet or do other things prohibited without a licence,

but would apply to all obligations of both the landlord and tenant. Paragraph (a) clarifies that it also applies to a consent, waiver or release given to some (not just one), but not all, of co-owners of the landlord's and tenant's interest.

Subsection (4)

This clarifies that subsection (1) does not rule out the application of equitable principles – a statutory provision is not to be used as an instrument of fraud. This accords with the view of McCracken J.

DA 1860,
S.48

Set-off in proceedings

48.— (1) Subject to *subsections* (3) and (4), in any proceedings by the landlord or the tenant against the other for breach of any obligation under the tenancy either party may set off any sum owed by the other in connection with the tenancy.

(2) For the purposes of *subsection* (1) –

(a) “any sum owed” includes both a liquidated and, subject to *subsection* (3), an unliquidated sum,

(b) the right of set-off applies equally where the sum owed was owed by the other party’s predecessor in title and remains undischarged.

(3) A party seeking to set off an unliquidated sum shall provide full particulars of the claim to that sum in the proceedings in order to avoid unnecessary delay in completion of those proceedings.

(4) *Subsection* (1) displaces any right of set-off available under the general law.

Explanatory Note

This section replaces section 48 of Deasy’s Act and implements the recommendations in paragraphs 8.16 and 8.17 of the GLCP.

Subsection (1)

This clarifies some issues concerning the operation of section 48. First, it extends the right of set-off to any proceedings for breach of obligation (not just in respect of rent). Secondly, it applies to both landlords and tenants (not just tenants). Thirdly, it confines the right of set-off to its proper context, ie, as a defence in court proceedings. It should not be confused (as it often is) with a right of deduction, which can be exercised independently of court proceedings (this is covered by section 48).

Subsection (2)

This clarifies two points with respect to the right of set-off. Paragraph (a) reverses the position taken hitherto by the Irish courts, but not by the English courts in recent times, which confines the right to liquidated sums. This implements the recommendation in paragraph 8.17 of the GLCP. The

qualification in subsection (3) should be noted. Paragraph (b) clarifies a point on which there is some doubt as to the position in Ireland. The English courts have recently held that the right of set-off is personal in respect of sums owed by the existing landlord (see Edlington Properties Ltd v J H Fenner & Co Ltd [2006] 3 All ER 1200) and cannot invoked in respect of sums owed by the previous landlord and remaining undischarged. Paragraph (b) makes it clear that this limitation does not apply under section 48.

Subsection (3)

This requires a party seeking to set off an unliquidated sum to substantiate the claim in the proceedings without delay.

Subsection (4)

In order to introduce certainty this makes it clear that the new statutory right also displaces any right, such as an equitable right, of set-off which may exist apart from section 48 of Deasy's Act. The existence of such a separate right has been a matter of some controversy over the years- the point came up recently, but was not resolved, in The Leopardstown Club Ltd v Templeville Developments Ltd [2006] IEHC 133.]

Deductions from rent

49.— (1) Subject to *subsections (2) and (4)*, where –

- (a) the tenant serves a notice in the prescribed form calling upon the landlord to carry out any landlord’s obligation under the tenancy,
- (b) the landlord fails within 21 days of receipt of such a notice to serve on the tenant a counternotice in the prescribed form which either –
 - (i) specifies why there is no need to comply with the tenant’s notice, or
 - (ii) undertakes within 14 days to comply with that notice,
- (c) the tenant subsequently performs the landlord’s obligation,

the tenant may, without prejudice to the right to sue the landlord for breach of obligation, make such deductions from the next and subsequent payments of rent as are necessary to recompense the tenant for any reasonable expenditure actually incurred in performing the landlord’s obligation.

(2) Where the landlord fails to carry out an undertaking given in a counternotice served under *subsection (1) (b)*, the counternotice may be treated by the tenant as if it had not been served.

(3) A tenant making such deductions shall serve on the landlord, not less than 21 days before making the first deduction, a notice in the prescribed form specifying –

- (a) particulars of the expenditure actually incurred,
- (b) details of the deductions proposed to be made.

(4) Where deductions are made in accordance with this section in respect of any payments of rent, the rent is to be deemed duly paid and the landlord shall issue receipts accordingly.

(5) This section takes effect subject to the terms of the tenancy.

Explanatory Note

This section deals with the tenant's right to make deductions from rent and other payments under the tenancy (such as service charges), where the tenant performs an obligation which should have been performed by the landlord. It is important to note that the right is so confined – it does not extend to a right to withhold rent simply because of the landlord's failure in other respects, as was mooted in paragraphs 10.16-10.20 of the GLCP. This section would replace section 87 of the Landlord and Tenant (Amendment) Act, 1980, but widen its scope (it is confined to the landlord's repairing obligations), as recommended by paragraph 4.55 of the BTCP.

Subsection (1)

This both extends and tightens up section 87 of the 1980 Act. It now applies to any landlord's obligation (not just the repairing one). Paragraph (a) requires the tenant to serve a prescribed notice on the landlord before carrying out the landlord's obligation. Paragraph (b) allows the landlord to serve a counternotice either explaining why the tenant's notice is inappropriate or undertaking to comply with the tenant's notice. The tenant right to make deductions arises only if the landlord does not serve a counternotice or, if one is served, the landlord fails to honour an undertaking given in it: see subsection (2). Under paragraph (c) deductions can only be made where the tenant carries out the landlord's obligation. It is also made clear, as recommended by paragraph 4.55 of the BTCP, that the deductions must be made from the next payments of rent due and relate to actual expenditure.

Subsection (2)

This provides the sanction where the landlord fails to honour an undertaking given in a counternotice.

Subsection (3)

This clarifies section 87 by requiring the tenant to notify the landlord both of the actual expenditure and the proposed deductions.

Subsection (4)

This reproduces the substance of a provision in section 87 of the 1980 Act.

Subsection (5)

This enables the right of deduction to be excluded or varied by the terms of the tenancy.

Damages for breach of tenant's repairing obligations

50.— (1) Damages recoverable by the landlord in any proceedings for breach of any obligation by the tenant to do repairs shall not in any case exceed the amount by which the value of the landlord's interest in the premises is diminished by the breach or the cost of repairs actually carried out by the landlord, whichever is the greater.

(2) Save where the disrepair is shown to be due, wholly or substantially, to the deliberate and intentional action or omission of the tenant, no such damages are recoverable if it is shown that –

- (a) having regard to the age and condition of the premises, their repair in accordance with the tenant's obligation is physically impossible, or
- (b) having regard to the age, character, condition and situation of the premises, their repair in accordance with the tenant's obligation would involve expenditure which is excessive in proportion to their value, or
- (c) having regard to the character and situation of the premises, they could not when so repaired be profitably used or could not be profitably used unless re-built, re-constructed or structurally altered to a substantial extent.

(3) This section applies so as to exclude or restrict reimbursement of the landlord's costs under *section 45(3)(b)* as it applies to recovery of damages for breach of the tenant's obligation to do repairs.

Explanatory Note

This section replaces section 65 of the Landlord and Tenant (Amendment) Act 1980 and implements the recommendations in paragraph 4.46 of the BTCP.

Subsection (1)

This reproduces the substance of section 65(1) and (2) of the 1980 Act, but with various modifications recommended in paragraph 4.46 of the BTCP. First, as was a general recommendation (see paragraphs 3.42-3.43), the provision is no longer confined to "tenements", but applies to all tenancies.

*Secondly, it applies to a tenant's obligation to repair however that obligation arises. Thirdly, the definition of "premises" in section 3 of the Bill (as meaning the land which is the subject-matter of the tenancy) makes it clear that the diminution in value includes the value of the site (an issue on which the courts have expressed conflicting views in relation to section 65 : see *Groome v Fodhla Printing Co Ltd* [1943] IR 380 and *Gilligan v Silke* [1963] IR.1). Subsection (1) also recognises that diminution in the value of the landlord's interest may not be an accurate reflection of the damage or cost to the landlord of the tenant's failure to repair in particular cases. It provides for the other measure frequently adopted by the courts, the cost of doing repairs which the landlord may incur.*

Subsection (2)

This reproduces the substance of section 65(3) of the 1980 Act, with appropriate modifications, such as substitution of "obligation" for "covenant" and of "premises" for "tenement".

Subsection (3)

*This implements the recommendation in paragraph 4.46 of the BTCP that a landlord should not be able to circumvent the provision by doing repairs the tenant should have done and suing to recover the expenditure incurred: see section 45(3)(b) of the Bill. The English courts have held that such an action is a suit to recover a debt and not an action to recover damages for breach of covenant (and so outside the scope of the equivalent provision in the English Leasehold Property (Repairs) Act 1938 : see *Jervis v Harris* [1996] 1 All ER 303).*

Damages for breach of landlord's repairing obligations

51.— (1) Where the tenant continues in occupation of the premises despite a breach of any obligation by the landlord to do repairs, the tenant may recover general damages for losses suffered as a consequence of the breach.

Explanatory Note

This section implements the recommendation in paragraph 10.15 of the GLCP that there should be a statutory right to damages in such circumstances. It had been a matter of some doubt whether a tenant who “soldiered on”, and thereby continued to enjoy occupation of the premises, could seek damages for annoyance, disruption or inconvenience. In more recent times the courts on both sides of the Irish Sea have been prepared to award damages in such circumstances: see, eg, Jiminez v. Morrissey [2005] IEHC 251, [2006] IEHC 18. Section 51 now settles the matter.

Condition of consent

52.— (1) Where the tenant is in breach of any obligation under the tenancy, the landlord may make it a condition of giving consent for any thing coming within *Chapter 3* of this Part that either –

- (a) the tenant complies with the obligation before that thing takes effect, or
- (b) the proposed assignee or subtenant rectifies the breach within a reasonable time specified by the landlord.

(2) For the avoidance of doubt, it is hereby declared that the imposition of such a condition does not constitute an unreasonable withholding of consent for the purposes of *section 32*.

Explanatory Note

This section implements paragraph 10.14 of the GLCP.

Subsection (1)

This gives the landlord the option to require either the tenant or the incoming assignee or subtenant to rectify the breach of obligation..

Subsection (2)

This provides the clarification recommended by paragraph 10.14 of the GLCP.

PART 4

TERMINATION OF TENANCIES

This Part deals with the various ways in which a tenancy may be terminated. It implements the recommendations largely contained in Chapters 12 – 16 of the GLCP.

Chapter 1

Surrender

Formalities

DA 1860,
S.7

53.— Subject to *section 54*, a tenancy shall be surrendered at law only in writing signed by the tenant or the tenant’s agent.

Explanatory Note

This section reproduces the substance of section 7 of Deasy’s Act, as recommended by paragraph 2.21 of the GLCP. The exception for “act and operation of law” is covered by section 54. The wording of section 53 accords with that in section 11 of the Bill (which deals with the grant of a tenancy), except there is no requirement for the tenant’s agent to be authorised in writing..

Implied surrender

54.— Notwithstanding *section 53*, an implied surrender takes effect in law where –

- (a) the tenant surrenders the keys and vacates the premises or otherwise signifies yielding up possession to the landlord with the acceptance or agreement of the landlord, or
- (b) the landlord grants a new tenancy to the tenant or, with the agreement of the tenant, to a third party with the intention of displacing the existing tenancy, or
- (c) there is continued occupation or use of the premises by the tenant as a caretaker or licensee or in some other capacity inconsistent with that of a tenant, or
- (d) other circumstances arise or the relationship between the landlord and tenant alters so to indicate that the relationship of landlord and tenant no longer exists.

Explanatory Note

This section deals with implied surrender, or, as it is commonly described and referred to in section 7 of Deasy’s Act, surrender by “act and operation of law”. It attempts to give the guidance recommended in paragraph 2.22 of the GLCP. Paragraphs (a) – (c) refer to the sort of circumstances where the voluminous caselaw establishes that such a surrender takes place. Paragraph (d) is the usual “catch-all” provision, to cover cases not falling exactly within the specific examples in paragraphs (a) – (c).

Variation of tenancy

55.— (1) The landlord and tenant may make a variation of the tenancy in writing or by way of an endorsement on or attachment annexed to any lease relating to the tenancy without the need for a surrender of the tenancy and the regrant of a new tenancy.

- (2) A variation under this section may comprise –
- (a) an addition or subtraction of land to or from the premises or other alterations of the premises, or
 - (b) an extension or reduction of the term originally granted under the tenancy or as subsequently varied, or
 - (c) an addition, alteration, deletion or other modification of any provision of the tenancy, or
 - (d) any other variation agreed by the landlord and tenant to take effect without a surrender and regrant,

and may include such consequential adjustments to the other terms of the tenancy as the landlord and tenant consider appropriate.

- (3) Upon the making of such a variation the tenancy otherwise continues in operation as varied.

Explanatory Note

This section deals with the controversial subject of how far a variation of a lease triggers a surrender and re-grant of a new lease. It implements the recommendations in paragraph 2.24 of the GLCP.

Subsection (1)

This introduces the flexibility for the parties to a tenancy which paragraph 2.24 recommended. It is important to note the language used here: “may” indicates that it will remain open to the parties to have a surrender and regrant if they wish. The subsection is couched in broad terms and is amplified by subsections (2) and (3).

Subsection (2)

As indicated by paragraph 2.24, this would considerably extend the existing law by enabling the parties to make a wide range of variations without having to bring about a surrender of the existing tenancy and to execute a new grant of the tenancy as varied. This applies in particular to paragraph (b). The last part of the subsection covers things such as altering the rent or service charges to reflect the addition or subtraction of land to or from the premises.

Subsection (3)

This confirms that a variation results in the existing tenancy continuing as varied.

Renewal of headtenancy

56.— (1) A headtenancy may be surrendered for the purpose of its renewal or substitution without the need to surrender any subtenancies granted out of it.

(2) Subject to *subsection (3)*, upon such a renewal or substitution the headlandlord, headtenant, and subtenants have the same rights and obligations in respect of each other as they would have had if no surrender had taken place.

(3) *Subsection (2)* does not affect any new rights and obligations created by the renewal or substitution of the headlease and enforceable as between the headlandlord and headtenant only.

Explanatory Note

This section replaces, with clarification, section 8 of Deasy’s Act, as recommended by paragraph 2.25 of the GLCP.

Subsection (1)

This re-enacts the provision in section 8 that a head tenancy may be surrendered without surrendering sub-tenancies, where the purpose is to renew the head-tenancy. The words “or substitution” here have added to extend the scope of the provision. The word “renewal” suggests “more of the same”, whereas “substitution” would cover “something different”.

Subsection (2)

This preserves the position of the parties upon such a renewal or substitution, but makes it clear now that the position of the subtenants is also preserved, as recommended by paragraph 2.25 of the GLCP.

Subsection (3)

This makes it clear that, notwithstanding the general provision in subsection (2), the renewed or substituted headtenancy may alter the position of the headlandlord and headtenant, but only as between themselves.

RPA 1845,
S.9

Surrender of headtenancy

57.— (1) Upon the surrender of a headtenancy the headlandlord becomes the landlord of any subtenancy granted out of it and all rights and obligations created by the subtenancy remain enforceable as between the headlandlord and subtenant accordingly.

(2) *Subsection (1) does not affect the operation of section 101.*

Explanatory Note

This section replaces section 9 of the Real Property Act 1845, as recommended by paragraphs 2.26 and 12.04 of the GLCP.

Subsection (1)

This recasts section 9 in more modern and simple language. It also extends its provisions to all tenancies, as recommended by paragraph 12.04 of the GLCP. Section 9 also applied to mergers. An equivalent provision for mergers is section 58 of the Bill.

Subsection (2)

This is a saving for the replacement of section 78 of the Landlord and Tenant (Amendment) Act 1980, which appears in a later Part (8) of the Bill (see section 101).

Chapter 2

Merger

Merger of headtenancy

RPA 1845,
S.9

58.— Upon the merger of a headtenancy in a superior interest the owner of that interest becomes the landlord of any subtenancy granted out of the headtenancy and all rights and obligations created by the subtenancy remain enforceable as between that owner and the subtenant accordingly.

Explanatory Note

This section is the equivalent for mergers of the provision in section 57 relating to surrenders of a headtenancy. The position of subtenants following both surrenders and mergers was covered by section 9 of the Real Property Act 1849. This provision operates only where a merger actually occurs. Often none will occur because there is a declaration of non-merger. Under section 28(4) of the Judicature (Ireland) Act 1877, merger will not take effect if there is a contrary intention expressed in the document vesting the two estates or interests in the same person.

Partial merger

59.— (1) For the avoidance of doubt, it is hereby declared that it is, and always has been, possible to merge in the reversion immediately expectant on a lease an inferior interest in part of land held under the same lease.

(2) Such a partial merger does not affect the enforcement of rights and obligations as between the owner of that reversion and lessees of other parts of the land.

Explanatory Note

This section is designed to resolve a doubt as to whether there can be a “partial” merger of a leasehold interest. This has long been a controversial issue in relation to the application of the ground rents legislation to so-called “pyramid” titles. It implements the recommendation for clarification made by the Law Reform Commission some time ago: see Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30 – 1989), paragraphs 10 – 12.

Subsection (1)

This confirms that it has always been possible to have a partial merger of a leasehold interest.

Subsection (2)

This confirms what the effect of a partial merger is, as recommended by the Commission.

Chapter 3

Discharge

Frustration

60.— For the avoidance of doubt it is hereby declared that the doctrine of frustration of contract applies, and always has applied, to a tenancy.

Explanatory Note

*This section would replace section 40 of Deasy's Act, a controversial provision as explained by paragraphs 11.03-11.07 and 12.12-12.13 of the GLCP. Some of the recommendations made there have been implemented by section 30 of the Bill. However, the view has been taken that section 40 has outlived its usefulness and should be regarded as replaced by the general doctrine of frustration of contract, as developed by the courts. It has, however, been a matter of controversy over the years how far that doctrine applies to tenancies, but the view eventually emerged that it does in exceptional circumstances: see the English House of Lords decision in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, the reasoning of which was accepted by the Supreme Court in *Neville & Sons Ltd v Guardian Builders Ltd* [1995] 1 ILRM 1. Section 60 is designed to resolve this doubt, as has been done in other common law jurisdictions like Canada (eg, the *British Columbia Commercial Tenancy Act 1996*, section 30; *Ontario Tenant Protection Act 1997*, section 10; *New Brunswick Residential Tenancies Act 1975*, section 11). The section does not attempt to specify the circumstances where the doctrine would apply. This is best left to the courts to evolve and to apply to the circumstances of particular cases.*

Repudiation by landlord

61.— For the avoidance of doubt it is hereby declared that the doctrine whereby a party may be discharged from a contract owing to a repudiatory breach or breach of a fundamental term may be, and always has been capable of being, invoked by a tenant against the landlord.

Explanatory Note

This section would resolve a doubt as to whether a recent development in the law of England applies here. A number of recent English cases have held that the contractual doctrine, whereby a party may treat himself or herself as discharged from any further performance of contract where the other party has clearly repudiated the contract or been guilty of a fundamental breach, may be invoked by a tenant against the landlord: see Hussein v Mehlman [1992] 2 EGLR 83; Chartered Trust plc v Davies [1997] 2 EGLR 83; Nynehead Developments Ltd v RH Fibreboard Containers Ltd [1999] 1 EGLR 7; Petra Investments Ltd v Jeffrey Rogers plc [2000] 3 EGLR 120. There has been no Irish case on the subject but arguably the grounding of the relationship of landlord and tenant on “contract” by section 3 of Deasy’s Act meant that there was no reason why the doctrine could not have been invoked. Section 61 makes the position clear. The section does not apply to landlords since they already have adequate remedies, such as the right of forfeiture.

Chapter 4

Notice of termination

Scope of Chapter 4

62.— This Chapter –

- (a) applies to any tenancy other than a tenancy to which the Act of 2004 applies,
- (b) displaces the common law in so far as it conflicts with any provision in this Chapter,
- (c) subject to *section 66*, does not affect the operation of a break option or other method of termination by notice expressly provided for by the terms of the tenancy.

Explanatory Note

This section clarifies the scope of Chapter 4 which implements the recommendations in Chapter 13 of the GLCP. Paragraph (a) contains a saving for the extensive provisions governing termination of residential tenancies in Part 5 of the Residential Tenancies Act 2004. Paragraph (b) makes it clear that the statutory provisions in Chapter 4 displace any common rules, some of which are not entirely clear, so far as they relate to any matter covered by Chapter 4. They would also replace the provisions in the Landlord and Tenant (Ireland) Act 1870 and Notices to Quit (Ireland) Act 1896, both of which Acts would be repealed by the Bill. Paragraph (c) makes it clear that the new statutory provisions do not apply to break options or other express provisions which may be contained in the lease, apart from section 66.

Notices terminating a tenancy

63.— (1) A tenancy for any recurring period may be terminated by the landlord or the tenant serving a notice (in this Chapter referred to as a “notice of termination”) on the other in accordance with this Chapter.

(2) A notice of termination shall –

- (a) be in writing,
- (b) be signed by the party serving it or that party’s agent,
- (c) specify the minimum period of notice required under *section 64*,
- (d) specify a date for termination of the tenancy
- (e) sufficiently describe the premises and tenancy being terminated so as not to mislead the other party.

Explanatory Note

This section contains basic provisions for notices served by landlords or tenants to terminate a periodic tenancy. It avoids use of the somewhat pejorative term “notice to quit” and instead uses the expression “notice of termination”. It also sets out the minimum requirements for an effective notice, as recommended by paragraph 13.07 of the GLCP. These are amplified by subsequent sections.

Period of notice

64.— (1) Subject to *subsections* (2) and (3), the minimum period of notice equates to the recurring period of the tenancy.

(2) The minimum period for termination of a yearly tenancy is 6 months.

(3) Where the recurring period of a tenancy is uncertain or unknown, the minimum period is 3 months.

(4) For the purpose of calculating the minimum period of notice the following provisions apply –

(a) the period runs from the date of service of the notice,

(b) the period may –

(i) include the day of service and specified date for termination,

(ii) end on any day provided the minimum period is given.

Explanatory Note

This section specifies the minimum period of notice required to be given and clarifies certain aspects of the common law.

Subsection (1)

This retains the general common law rule that the period should equate to the recurring period of the tenancy, eg, a week's notice for a weekly tenancy and a month's notice for a monthly tenancy.

Subsection (2)

This retains the common law rule for yearly tenancies.

Subsection (3)

This introduces a new statutory rule for such cases, which would replace the common law presumption of a yearly tenancy (and which also arises under section 5 of Deasy's Act), as recommended by paragraph 13.07 of the GLCP.

Subsection (4)

This clarifies the common law, again as recommended by the GLCP. Paragraph (a) makes it clear that the period runs from the date of service (section 65 deals with “service”, by supplementing the general provisions in section 4 of the Bill). Paragraph (b)(i) makes it clear that the period can be calculated by including the day of service and specified date for termination. This seems to be the common law rule. Subparagraph (ii), however, probably reverses the common law and, at least, clarifies and simplifies matters.

Service of notice

65.— (1) Subject to the terms of the tenancy, a notice of termination may be served at any time during the tenancy.

(2) Such a notice served by or on one or more joint landlords, but not by one or more (but not all) joint tenants, is effective to terminate the tenancy.

(3) For the avoidance of doubt, where the landlord or tenant has died, the notice may be served by addressing it to the deceased's "personal representatives", whether or not a grant of representation has issued.

Explanatory Note

This section deals with service of a notice of termination. It is important to note that the provisions in section 4 of the Bill apply to service of notices terminating a tenancy, so section 65 contains supplementary provisions only. These are designed to simplify the common law.

Subsection (1)

This gets rid of complicated rules under the common law as to when a notice to quit may be served. In all cases the rule in future will be that a notice of termination can be served at any time during the tenancy, unless the parties have agreed otherwise.

Subsection (2)

This clarifies the law where there are joint landlords or joint tenants. It makes it clear that service of a notice by one or more joint landlords is effective, but not service by one or more (but not all) joint tenants. This accords with the rule under the RTA 2004 as regards tenancies coming within that Act- section 73(3) provides: "Any rule of law that a notice of termination served by any of 2 or more multiple tenants under a periodic tenancy of a dwelling without the concurrence of the other or others, or without the knowledge of the other or others, is effective to terminate that tenancy is abolished."

Subsection (3)

This seeks to clarify the position where the landlord or tenant has died. Again it seeks to introduce a simple rule to be used in applying the provisions of section 4 of the Bill. It adapts the procedure for agricultural and pastoral tenancies in section 4 of the Notices to Quit (Ireland) Act 1876.

Thus the landlord will be able simply to send a notice to the premises addressed to the tenant's (naming him or her) "personal representatives" (without naming them).

Subtenants

66.— (1) Subject to *subsection (3)*, where a headtenancy is terminated by

—

- (a) a notice of termination, or
- (b) exercise of a break option or other method of termination by notice expressly provided for by the terms of the tenancy,

any subtenant holding under it may apply to the court for relief as if the headtenancy had been forfeited by the headlandlord under Chapter 5.

(2) In considering what relief (if any) to grant the court shall take into consideration the potential loss of statutory rights which the subtenant might suffer as a consequence of termination of the headtenancy.

(3) *Subsection (1)* does not affect any other statutory rights to which the headlandlord or subtenant may be entitled.

Explanatory Note

This section deals with the position of subtenants which would appear to be precarious as explained in paragraphs 13.08-13.11 of the GLCP. Unlike subtenants given statutory protection in the case of surrenders or mergers (see sections 57 and 58 of the Bill), or under equitable jurisdiction or statutory provisions in the case of forfeiture (see section 74 of the Bill), there is no general statutory protection under current law. It is also doubtful whether statutory rights under the Landlord and Tenant (Amendment) Act 1980 are protected : see paragraph 13.11 of the GLCP.

Subsection (1)

This implements the recommendation in paragraph 13.10 of the GLCP that subtenants should be entitled to apply to the court for relief analogous to equitable relief in the case of forfeiture of the head tenancy. Such relief is dealt with in section 74 of the Bill. It is important to note that unlike the other provisions of Chapter 4 this provision also applies to termination of a fixed-term head tenancy by exercise of a break option or other notice procedure expressly provided for. It would appear that under current law there is no protection for subtenants in such cases either : see paragraph 13.09 of the GLCP.

Subsection (2)

This implements another recommendation in paragraph 13.11 of the GLCP, to reflect the likelihood that section 78 of the 1980 Act probably does not apply to cases of termination by notice

Subsection (3)

This implements another recommendation in paragraph 13.10 of the GLCP.

Chapter 5

Forfeiture

Scope of Chapter 5

67.— This Chapter—

- (a) applies to any tenancy other than a tenancy to which *section 27(1)* of the Landlord and Tenant (Ground Rents) (No. 2) Act 1978, as amended by *Schedule 1*, or the Act of 2004 applies,
- (b) replaces any express provisions in a lease relating to forfeiture or re-entry by the landlord other than a provision excluding a right of forfeiture or of re-entry.

Explanatory Note

Chapter 5 implements Chapter 14 of the GLCP and section 67 defines its scope. Paragraph (a) retains the restriction contained in the 1978 Act and the new provisions in the RTA 2004. However, Schedule 1 of this Bill extends section 27(1) of the 1978 Act to protect any other lessee who is entitled to acquire the fee simple or to the grant of a reversionary lease under Part III of the Landlord and Tenant (Amendment) Act 1980. The view has been taken that such persons also hold such a substantial interest in the premises that it is equally inappropriate that they should be at the risk of forfeiture for non-payment of what will usually be a very small rent. Otherwise, as recommended by paragraph 14.06 of the GLCP the new statutory provisions apply to all tenancies. Paragraph (b) implements the various recommendations for simplification of the law, ie, in future any forfeiture would be governed by Chapter 5.

Right of forfeiture

68.— (1) Subject to *subsection (2)* and any provision excluding a right of forfeiture or of re-entry, the landlord may forfeit the tenancy in accordance with this Chapter for breach of any of the tenant's obligations under the tenancy.

(2) For the avoidance of doubt it is hereby declared that section 49 of the Bankruptcy Act 1988 and sections 217 to 219 of the Companies Act 1963 apply to any forfeiture under this Chapter.

Explanatory Note

This section implements the recommendations for a unified right of forfeiture applicable to all types for breach of the tenant's obligations: see GLCP paragraph 14.06.

Subsection (1)

This contains the general right, subject to the two exceptions mentioned. There are also the statutory restrictions mentioned in section 67(a).

Subsection (2)

This implements the recommendation in paragraph 14.03 of the GLCP that the position in cases of insolvency should be clarified. The provisions in the 1988 and 1963 Act are designed to protect an insolvent tenant's assets for the benefit of creditors, but there is doubt as to their scope.

Forfeiture notices and counternotices

69.— (1) Subject to *subsection (9)*, a landlord wishing to forfeit a tenancy shall serve on the tenant a notice in the prescribed form (in this Chapter referred to as a “forfeiture notice”).

(2) A forfeiture notice shall –

- (a) specify the breach of obligation by the tenant upon which the landlord relies,
- (b) call upon the tenant to remedy that breach or, if the landlord considers it more appropriate, to pay damages within a time specified in accordance with *subsection (3)*.
- (c) warn the tenant that a failure so to remedy the breach or pay damages may result in the landlord seeking to recover possession by way of forfeiture.

(3) For the purposes of *subsection (2)(b)* the time to be specified in the forfeiture notice is –

- (a) where the breach of obligation is nonpayment of rent or other monetary sums, not less than 14 days, or
- (b) in the case of any other breach to be remedied other than by payment of damages, such period as gives the tenant a reasonable opportunity to remedy it, or
- (c) where the forfeiture notice calls upon the tenant to pay damages, not less than 14 days.

(4) A tenant who wishes to dispute–

- (a) whether there has been the breach of obligation specified in the forfeiture notice, or
- (b) whether the time specified for its remedy accords with *subsection (3)(b)*, or
- (c) any other aspect of the forfeiture notice,

shall serve on the landlord, within the time prescribed by *subsection (5)*, a counternotice in the prescribed form setting out the ground of dispute.

- (5) A counternotice under *subsection (4)* shall be served –
- (a) in a case coming within *subsection (3)(a)* within 14 days, or
 - (b) in a case coming within *subsection (3)(b)*, within 28 days, or
 - (c) in a case coming within *subsection (3)(c)*, within 14 days,

of service of the forfeiture notice.

- (6) In any subsequent –
- (a) proceedings by the landlord based on the forfeiture notice, or
 - (b) application by the tenant for relief against forfeiture,

no breach of obligation or ground of dispute shall be relied upon unless it is established to the satisfaction of the court that there was good reason why such breach or ground was not specified in the forfeiture notice or counternotice.

(7) *Subsections (2) and (3) of section 65* apply to a forfeiture notice and counternotice served under this section as they apply to a notice served under that section.

(8) Upon the application of the landlord or tenant the court may, provided it is satisfied that no prejudice has or will occur to any party, order that a forfeiture notice or counternotice which has been served is valid notwithstanding a failure to comply strictly with this section.

(9) This section does not apply where the landlord applies to re-enter under *section 76* or takes action under *sections 77 or 78*.

Explanatory Note

This section provides for the much modified procedure for all cases of forfeiture as recommended by paragraphs 14.07-14.15 of the GLCP. The effect of following this procedure is dealt with by section 71.

Subsection (1)

This provides for use of a prescribed form of forfeiture notice to be served on the tenant. As recommended by paragraph 14.14 it is envisaged that the prescribed form will greatly simplify the requirements of section 14 of the Conveyancing Act 1881 – in essence warning the tenant of the intention to forfeit and identifying the breach of obligation relied upon.

It is important to note that this procedure does not apply where the landlord wishes to resume possession of abandoned premises or takes emergency action to protect premises. Those matters are covered by sections 76 and 77 – hence the qualification in subsection (9). The court’s discretion to deal with cases of minor non-compliance with section 69 should also be noted – see subsection (8).

Subsection (2)

This sets out the basic requirements of the prescribed form.

Subsection (3)

This attempts to bring a degree of certainty as to the time to be allowed to a tenant to remedy a breach before the landlord can put forfeiture into effect.

Subsection (4)

This enables a tenant to challenge a forfeiture notice by serving a counternotice.

Subsection (5)

This sets out the timelimits for serving a counternotice.

Subsection (6)

This prevents a landlord or tenant from later relying on a breach or ground of dispute not specified in the forfeiture notice or counternotice, unless the court can be convinced that there is a good reason.

Subsection (7)

This incorporates the provisions dealing with joint landlords or joint tenants and service of notices in the case of death.

Subsection (9)

This preserves the right of the landlord to take quick action without having to follow the notice procedure in certain cases.

Recovery of possession

70.— Where the tenant –

- (a) fails to remedy the breach of obligation or to pay the damages within the time specified in the forfeiture notice, or
- (b) fails to serve a counternotice within the time specified by *section 69(5)*, or
- (c) the tenant serves a counternotice within that time, but the landlord rejects its substance,

the landlord may apply for a possession order under *Chapter 6*.

Explanatory Note

This section entitles the landlord to put forfeiture into effect where the tenant does not respond appropriately to a forfeiture notice. This is to be done by invoking the new provisions for summary possession proceedings set out in Chapter 6. These replace the ejectment provisions in Deasy's Act. It sets out the circumstances in which the landlord can initiate possession proceedings. It does not refer to the emergency or abandoned premises situation, because section 70 is concerned with putting a forfeiture notice into effect. Section 68(9) exempts such cases from that notice procedure. Instead such cases are covered by the special provisions in section 75 and section 76.

Effect of forfeiture notice

71.— (1) Subject to *subsection (2)*, where the landlord serves a forfeiture notice, the tenancy is not forfeited and all obligations and provisions under it remain in full force unless and until the landlord recovers actual possession under a possession order made under *Chapter 6*.

(2) *Subsection (1)* does not prejudice the landlord's right to recover from the tenant damages for losses consequential upon the forfeiture, including –

- (a) costs and expenses reasonably incurred in reletting the property,
- (b) compensation for loss of rental income.

Explanatory Note

This section clarifies the effect of a forfeiture notice as recommended by paragraph 14.26 of the GLCP.

Subsection (1)

*This institutes a straightforward rule that forfeiture does not occur until the landlord obtains actual possession under a court order under Chapter 6 or an order confirming emergency action under section 76 or resumption of possession of abandoned premises under section 75. This reverses the current position whereby the tenancy is deemed to be forfeited upon issue of possession proceedings, so that, notwithstanding that the tenancy may only be suspended thereafter and be reinstated upon failure of those proceedings or the granting of relief to the tenant, the landlord can claim no rent after that issue and must rely upon a claim to mesne rates or profits: see *Moffat v Frisby* [2007] IEHC 140.*

Subsection (2)

This qualifies the general proposition in subsection (1) that recovery of possession puts an end to the relationship of landlord and tenant and thereby releases them from obligations to each other. The right to recover rent up to the date of actual recovery of possession was confirmed by section 41(2)(b) of the Bill. This implements paragraph 14.26 of the GLCP.

Chapter 6
Possession proceedings

Possession order

72.— (1) Subject to *subsection (8)*, the landlord or owner of premises may recover possession by applying for an order under this Chapter (referred to in this Chapter as a “possession order”), where –

- (a) the tenant has overheld following expiry of –
 - (i) the term of the tenancy,
 - (ii) the date when a surrender of the tenancy or vacation of the premises under a surrender was to take effect, or
 - (iii) a valid notice of termination served under *Chapter 4*, or
 - (iv) a valid break or other notice terminating the tenancy in accordance with its provisions, or
- (b) the landlord wishes to forfeit the tenancy under Chapter 5, or
- (c) the landlord or owner wishes to recover occupation or possession of –
 - (i) abandoned premises under *section 76*, or
 - (ii) premises from permissive occupants under *section 78*.

(2) Such application may be made to the District, Circuit or High Court (and in this Chapter and Chapter 5 “the court” shall be read accordingly) subject to their respective jurisdictional limits.

- (3) Such an application –
- (a) where made to the High Court or Circuit Court shall be by motion,
 - (b) where made to the District Court shall be by summary proceedings,

and the court when considering the matter may make such interim or interlocutory order (if any) as it considers appropriate.

(4) Where prior to such an application the tenant has applied for relief under Part 8, the Circuit Court may also hear an application under this Chapter in relation to the same premises and, if an application in such case under this Chapter is made to the High Court, the High Court may remit that application to the Circuit Court to which the application for relief under Part 8 was made.

(5) *Subsection (3)* does not apply where there is a dispute on a point of substance or other substantive issue which in the opinion of the court renders proceedings in accordance with that subsection inappropriate.

(6) Where the landlord applies for an order under *subsection (1)(a)*, the tenant remains liable for payment of rent and performance of all other obligations as if the tenancy continues in force until the landlord recovers actual possession under the order.

(7) Where any such payment relates to services to be provided by the landlord or comprises reimbursement of expenses incurred by the landlord in relation to the premises, the landlord's obligations in relation to those matters also so continue in force.

(8) *Subsection (1)* does not –

(a) apply to any tenancy to which *section 27(1)* of the Landlord and Tenant (Ground Rents) (No. 2) Act 1978, as amended by *Schedule 1*, or the Act of 2004 applies,

(b) prejudice any statutory rights to continue in occupation or possession vested in the tenant.

(9) Where a person is entitled to –

(a) acquire the fee simple in premises other than a dwellinghouse by virtue of Part II of the Landlord and Tenant (Ground Rents)(No 2) Act 1978, or

(b) a reversionary lease in respect of any premises under Part III of the Landlord and Tenant (Amendment) Act 1980,

a covenant giving the lessor a right to re-enter and take possession of the premises where rent is in arrear is not enforceable but this does not affect any other civil remedy of the lessor.

Explanatory Note

This and the following few sections replace the numerous provisions in sections 52 – 102 of Deasy’s Act and implement the recommendations for simplification contained in Chapter 15 of the GLCP.

Subsection (1)

This lists the various cases where in future the new simplified possession proceedings could be used. The alternative references to “owner” and “occupation” are necessary because, of course, there is no relationship of landlord and tenant in the case of caretakers, licensees, etc and such persons technically have occupation or use only – not possession (which remains in the owner, licensor, etc.)

Subsection (2)

This implements the recommendation that the summary procedure should be available in all courts: see paragraph 15.10 of the GLCP.

Subsection (3)

This emphasises the summary nature of the new procedure and adapts the provision in section 160 of the Planning and Development Act 2000 for planning injunctions.

Subsection (4)

This is designed to prevent a multiplicity of actions. If the Circuit Court is already seised of an application for relief under Part 8, it should also deal with any possession proceedings.

Subsection (5)

This provides for an exception to the summary procedure where there is a dispute or other substantive issue which requires a full hearing.

Subsection (6)

This makes it clear that wherever a tenant overholds after termination of the tenancy he or she remains liable for the rent and performance of other obligations until the landlord recovers actual possession. This accords with the rule for forfeiture cases set out in section 71.

Subsection (7)

This confirms that the landlord will also remain obliged to perform or meet other obligations which the overholding tenant pays for directly or indirectly.

Subsection (8)

Paragraph (a) is the same saving as contained in section 66 (a). Paragraph (b) preserves rights such as a tenant has under the Landlord and Tenant (Amendment) Act 1980 to remain in occupation pending a decision on new tenancy rights. (see section 94 of the Bill).

Subsection (9)

This extends the provision in section 66(a) of the 1967 Act to other situations where it is considered that the tenant's interest in the premises is so substantial that the landlord should not be able to forfeit the lease for non-payment of what is usually a very small rent.

Procedure

73.— (1) Notice of an application for a possession order shall be served on the specified persons and any other person in actual possession or occupation of the premises.

(2) For the purposes of *subsection (1)*, the “specified persons” are –

- (a) in a case coming within *section 72(1)(a)*, the tenant and any subtenant who may be entitled to claim relief under *section 66*,
- (b) in a case coming within *section 72(1)(b)*, any person who may be entitled to claim relief under *section 74*,
- (c) in a case coming within *section 72(1)(c)(i)*, the tenant who has abandoned the premises,
- (d) in a case coming within *section 72(1)(c)(ii)*, the permissive occupant within *section 78*.

(3) In a case coming within *section 72(1)(b)*, the landlord shall furnish in the proceedings a copy of the forfeiture notice served under *section 69* upon which the landlord relies and of any counternotice served by the tenant in accordance with that section.

Explanatory Note

This section requires notice of an application for a possession order given to appropriate persons, depending upon the circumstances of the particular case. It also requires lodging in court of the forfeiture notice and any tenant’s counternotice served under section 69 in forfeiture cases.

Application for relief

74.— (1) Where the landlord applies for a possession order under *section 72(1)(b)* the following persons may, subject to *subsections (2) and (3)* apply in those proceedings for relief under *section 75* –

- (a) any subtenant of the premises,
- (b) any mortgagee of the tenant,
- (c) any other person deriving title from or under the tenant, including an interest under an enforceable contract for the assignment of the tenancy or the grant of a subtenancy.

Any person coming within *subsection (1)* and not a party to the landlord’s proceedings may also seek relief by a separate application to the court dealing with the landlord’s application at any time before expiry of 28 days from that application.

(4) Any persons who can establish that the failure to comply with the 28-day limit in *subsection (2)* was due to circumstances beyond their control or otherwise not their fault may recover damages from the tenant for loss occasioned by the failure.

(5) Nothing in this section affects the operation of *section 101*.

Explanatory Note

This section implements the recommendations for simplification and clarification of the law relating to relief against forfeiture contained in paragraphs 14.21-14.25 of the GLCP.

Subsection (1)

*In view of the new procedure for forfeiture under Chapter 6, which would apply to all cases, it would seem that an application for relief by the tenant should normally be made in the landlord’s application for a possession order. Paragraphs (a) – (c) replicate the substance of the provisions in sections 4 and 5 of the Conveyancing Act 1892. The definition of “mortgagee” in section 3 of the Bill (which incorporates that in the LCLR Bill 2006) includes a chargee and so implements the recommendation in paragraph 14.24 of the GLCP. Paragraph (d) clarifies that a person deriving title from or under the tenant includes someone which has entered into an enforceable contract with the tenant. This accords with the view of Costello J in *Enoch v Jones Estates Ltd* [1983] ILRM 532. The words “not otherwise” are designed to make it clear that in future relief must be based*

on this statutory jurisdiction, ie, there will be no separate equitable jurisdiction.

Subsection (2)

This provides additional protection for subtenants, mortgagees, etc by enabling such interested persons to make a separate application for relief, but, as recommended by paragraph 14.23, with a 28-day time-limit. It is also provided, as recommended by paragraph 14.22, that the application must be made to the same court as is dealing with the landlord's application for possession.

Subsection (3)

This implements the recommendation in paragraph 14.23 of the GLCP.

Subsection (4)

This is a saving in the replacement of section 78 of the Landlord and Tenant (Amendment) Act 1980.

Order for relief

75.— (1) Upon an application for relief under *section 74* the court may direct whatever inquiries and make whatever order it thinks fit in the circumstances of the case.

(2) Without prejudice to the generality of *subsection (1)* such an order may include an order –

- (a) confirming the landlord’s right to forfeiture and granting an order for possession to the landlord,
- (b) dismissing the landlord’s proceedings,
- (c) continuing any subtenancy as if the tenancy had not been forfeited, subject to such modifications of terms as the court thinks fit,
- (d) vesting the tenancy in or granting a new tenancy or mortgage to a person coming within *section 74(1)*, or
- (e) combining any such orders.

(3) Where the court makes an order under *subsection (2)(c)* or *(d)* it may, subject to the parties’ agreement –

- (a) extend the term of any tenancy, subtenancy or mortgage continued or vested in a person and vary any of its provisions,
- (b) specify the term and fix the provisions of any new tenancy or mortgage vested in a person.

Explanatory Note

This section implements the recommendations in paragraph 14.25 for clarification of what relief the court can grant. Because section 74 contemplates applications for relief in the landlord’s proceedings and possibly after the landlord has obtained possession (which is what under section 71 effects the forfeiture), the nature of the relief will vary from case to case.

Subsection (1)

This confirms the general discretion the court would have in dealing with applications for relief. As indicated above this covers applications by

subtenants and mortgagees who may be applying after the landlord has obtained an order for possession. This explains the different orders listed in subsection (2).

Subsection (2)

This lists the various orders the court could make, but without prejudice to the general discretion under subsection (1). This implements the recommendations in paragraph 14.25 of the GLCP. Paragraph (a) confirms that the court may refuse relief. Paragraph (b) confirms that the landlord may fail in the possession proceedings and so the status quo is maintained. Paragraphs (c) and (d) deal with the different sorts of relief that subtenants and mortgagees might obtain and clarifies that there is a wide discretion as recommended by paragraph 14.25. Paragraph (e) allows a combination of orders to be made, eg, vesting the tenancy in a subtenant, but subject to a charge over it held by the headtenant's mortgagee.

Subsection (3)

This resolves doubts as to the extent of the court's discretion under section 4 of the Conveyancing Act 1882 and again implements the recommendations for clarification; paragraph 14.25 of the GLCP.

Abandoned premises

76.— (1) In any case where the landlord has reasonable grounds for believing that the premises have been abandoned by the tenant, the landlord may make an *ex parte* application to the court for an order permitting the landlord immediately to re-enter the premises.

(2) Such an application –

(a) may be made in the same way as an application under *section 72* and, subject to this section, the provisions of that section apply accordingly,

(b) shall specify the grounds for the landlord's belief and give such other particulars of evidence of abandonment as are available.

(3) The court may grant an order under this section upon such terms and conditions as it thinks fit.

(4) Without prejudice to the generality of *subsection (3)*, the court may require the landlord to give an undertaking to safeguard any tenant's property left in, on or under the premises for such period and on such terms as the court thinks fit.

(5) The court may authorise the landlord to sell such tenant's property and to use the proceeds to defray any arrears of rent, other liquidated or unliquidated sums owing under the tenancy and reasonable costs and expenses incurred in connection with the application under this section or such sale.

(6) Re-entry of premises under an order made under this section has the same effect as a forfeiture of the tenancy under *Chapter 5* and *section 74* applies accordingly as it applies to an application for a possession order under *section 72(1)(b)*.

(7) Nothing in this section prejudices the right of the landlord to re-enter premises under *section 77* without a court order.

Explanatory Note

This section deals with abandoned premises and implements the recommendations in paragraph 15.05 of the GLCP. It replaces the convoluted provisions in sections 78 and 79 of Deasy's Act and is designed to facilitate speedy action without the notice. Note also the special emergency proceedings in section 77.

Subsection (1)

This facilitates an ex parte application for permission to re-enter.

Subsection (2)

This requires the landlord to furnish evidence of the abandonment,, and to safeguard tenant's property left on the premises.

Subsection (3)

This enables the courts to impose terms and conditions, eg as to how re-entry can be made.

Subsection (4)

This enables the court to order the landlord to safeguard tenant's property.

Subsection (5)

This enables the court to authorise the landlord to sell that property and use the proceeds to defray rent arrears etc.

Subsection (6)

This specifies the effect of re-entry in such cases.

Subsection (7)

This preserves the right to re-enter without a court order under section 77.

Emergency action

77.— (1) Notwithstanding the other provisions of this Chapter, the landlord or owner may re-enter the premises without first applying for a possession order or an order under *section 76* in any case where it is necessary to –

- (a) deal with an emergency which puts the premises or its occupants or property in, on or under the premises at risk of substantial damage, or
- (b) protect by immediate action the premises or the landlord’s or owner’s interest in them from substantial damage caused by –
 - (i) abandonment of the premises by the tenant or permissive occupants, or
 - (ii) unauthorised or illegal activity in or on the premises by the tenant or others.

(2) Such re-entry shall not terminate any tenancy of the premises unless and until the landlord obtains an order under this section.

(3) A landlord who has re-entered premises under *subsection (1)* may apply to the court for an order authorising the landlord to retain possession of the premises (in this section referred to as a “retention order”).

(4) Such an application –

- (a) may be made in the same way as an application under *section 72* and, subject to this section, the provisions of that section apply accordingly,
- (b) shall specify the grounds upon which the landlord re-entered the premises and any other relevant circumstances.

(5) Notice of such an application shall be served on the tenant and any persons who would come within *section 73* if the landlord were seeking a possession order under *section 72(1)(b)*.

(6) The court may grant an order under this section upon such terms and conditions as it thinks fit and, without prejudice to that generality, *subsections (4) and (5) of section 75* apply as they apply to an application under that section.

(7) A retention order has the same effect as recovery of actual possession under an order made under *section 72)(1)(b)* and *sections 71, 74 and 75* apply accordingly.

Explanatory Note

This section provides an important exception to the general rule under Chapter 6 that the landlord must obtain a court possession order to terminate a tenancy where the tenant is unwilling to vacate the premises. It preserves the right to make a “peaceable re-entry” in certain circumstances.

Subsection (1)

This specifies the circumstances in which the landlord can re-enter without a possession order.

Subsection (2)

This makes it clear that re-entry in such circumstances does not by itself terminate any tenancy in the premises. For this to happen, the landlord or owner of the premises must obtain a “retention order” from the court.

Subsection (3)

This makes provision for obtaining a retention order.

Subsection (4)

This provides that the same summary procedure as applies to obtaining a possession order applies to applications for a retention order.

Subsection (5)

This is designed to protect persons who, in addition to the tenant, might be entitled to claim relief against what, in effect, amounts to a forfeiture of the tenancy.

Subsection (6)

This confers a wide discretion on the court as to the terms and conditions of a retention order and applies the provisions of section 75 relating to tenant’s property in or on the premises.

Subsection (7)

This makes it clear that it is the making of the retention order which terminates any tenancy of the premises, having the same effect as a forfeiture (as prescribed by section 71). On that basis the provisions relating relief against forfeiture in sections 74 and 75 apply.

Permissive occupants

78.— (1) Where the owner of premises wishes to recover occupation or possession from a permissive occupant, the application for a possession order shall confirm that the permission to occupy or use the premises has been withdrawn in accordance with the agreement relating to permission or the terms upon which it was given.

(2) For the purposes of *subsection (1)*, “permissive occupant” includes any caretaker, licensee or other person permitted to occupy or use the premises other than as a tenant.

Explanatory Note

This section replaces the provisions relating to a “caretaker’s summons” contained in sections 84 – 86 of Deasy’s Act, dropping the provisions relating to “cottier tenants”, as recommended by paragraph 15.06 of the GLCP.

Subsection (1)

This requires the landlord to make it clear that permission has been withdrawn, which must be consistent with what was agreed or the terms upon which it was granted.

Subsection (2)

This provides a wide definition of “permissive occupant” (Deasy’s Act refers only to “servant, herdsman or caretaker”) as recommended by paragraph 15.06 of the GLCP.

Further claims

79.— (1) The landlord may include in any application for a possession order a claim for damages for breach of any tenant's obligation.

(2) Where an application for a possession order is brought in the Circuit Court the tenant may claim a new tenancy or other statutory rights by way of counterclaim provided a notice has been served under *section 87*.

Explanatory Note

This section is designed to facilitate parties making further claims in the same action.

Subsection (1)

This enables the landlord to include in an application for a possession order a claim for damages against the tenant.

Subsection (2)

This implements the recommendation in paragraph 15.10 of the GCLP that a tenant entitled to claim statutory rights should not have to issue a new civil bill.

PART 5

STATUTORY RIGHTS

This Part would replace the provisions in Part II (but note the saving in section 84(3) of the Bill) and parts of Parts I, IV and VI of the Landlord and Tenant (Amendment) Act 1980 (as amended by later Acts). It deals essentially with the right to a new tenancy and to compensation for disturbance where a new tenancy is not granted for certain reasons. It does not deal with reversionary leases, as that subject, like the related subject of the right to acquire the fee simple, is outside the scope of the Commission's current project. Nor does it include provisions relating to compensation for improvements (also dealt with by Part IV of the 1980 Act). The other substantive subject dealt with by the 1980 Act (see Part V), covenants in leases, is covered by Part 6, Chapter 3 of this Bill.

Part 8 implements the recommendations in the Consultation Paper on Business Tenancies (LRC CP 21-2000) (the "BTCF").

Chapter 1

Scope of Part 8

General application

80.— This Part –

LTA 1980,
S.5

- (a) applies to tenancies arising or granted after the commencement of this Part,
- (b) does not apply to a tenancy –
 - (i) granted and expressed to be granted for or dependant on the tenant's continuance in any office, employment or appointment or provision of any service for or on behalf of the landlord,

provided the nature of the office, employment, appointment or service is stated in the lease or other instrument relating to the tenancy,

- (ii) where the tenant has renounced in writing, whether for or without any consideration, entitlement to a new tenancy under this Part and has received independent legal advice in relation to the renunciation.

Explanatory Note

This section would replace some of section 5 of the 1980 Act (other parts are dealt with in section 85 of the Bill) and implement the recommendations in paragraphs 3.14-3.16 and 4.09 of the BTCP. A number of features should be emphasised.

First, as was done with the provisions relating to covenants now in Part 6, Chapter 3 of the Bill (replacing Part V of the 1980 Act), the section drops the concept of a tenement. Part 8 applies to tenancies generally, subject to specific restrictions such as those in paragraph (b) and imposed later (eg, confining the right to a new tenancy largely to business tenancies – see section 84).

Secondly, as mooted in paragraph 3.16 of the BTCP, the section drops the need for buildings on the land and, in so doing, avoids the distinction which is often difficult to draw between land which is subsidiary and ancillary to buildings and land which is not. In future a tenant who runs a business on land without buildings (such as a carpark or farming activities) will be entitled to statutory rights, provided other conditions are met. Those

conditions include holding a tenancy and not some other interest, such as a licence to use land or a conacre or agistment arrangement, and continuous occupation for the relevant period (see section 84 of the Bill). The recommendation in paragraph 3.18 of the BTCP that there should be statutory guidance on the criteria for a tenancy is implemented by section 11 of the Bill.

Thirdly, it is important to emphasise that the recommendation in paragraph 3.10 of the BTCP that there should be scope for general contracting-out of the right to a new tenancy (and not just in the case of office premises) has been implemented by a provision in the Civil Law (Miscellaneous Provisions) Bill (No 20 of 2006) : see section 57. This extends the provision introduced by section 4 of the Landlord and Tenant (Amendment) Act 1994 (but it does not incorporate the recommendation requiring a “health warning” notice to be served on the tenant, as recommended by paragraph 3.11 of the BTCP). That provision is now incorporated in section 80 (b)(ii) of this Bill.

Fourthly, the expression “arising or granted” in paragraph (a) would seem to be wide enough to cover any method whereby a tenancy comes into existence – there seems, therefore, no need to repeat the phrase used by the 1980 Act in several places – “express or implied or arising by statute” (see, eg, sections 5(2) and (3)(a) and 6(b) of the 1980 Act).

Fifthly, paragraph (b)(i) implements the recommendation in paragraph 4.09 of the BTCP that the requirement to state the nature of a temporary convenience should apply also in the case of tenancy granted in connection with an office, etc. In fact, paragraph (b)(i) drops the reference to temporary convenience lettings since this category no longer seems necessary in view of the general contracting-out provision in paragraph (b)(ii).

Sixthly, other important provisions in section 5 of the 1980 Act, such as those in subsections (2) (State bodies) and (3) and (4) (relating to companies), are to be found later in Chapter 2, as they relate to who is entitled to claim the statutory rights (see section 85).

Interpretation

81.— In this Part, unless the context otherwise requires –

“business” means –

- (a) any trade, profession or business, whether or not it is carried on for gain or reward,
- (b) any activity for providing cultural, charitable, educational, social or sporting services,
- (c) the public service,

the carrying out of any of their functions by any statutory body.

“predecessors in title” –

- (a) when used in relation to a tenant, means all previous tenants under the same tenancy or any tenancy of which that tenancy is or is deemed to be a continuation or renewal,
- (b) when used in relation to a landlord, means all previous landlords;

Explanatory Note

This section supplements section 3 of the Bill which supplies several definitions for expressions which were covered by section 3 of the 1980 Act, eg, “covenant”, “development” and “development plan”, “landlord”, “lease”, “lessee”, “lessor”, “Minister”, “planning authority” and “planning permission”, “prescribed” and “state authority”. Section 81 adds a few definitions specific to Part 8. The definition of “business” relates to section 83. Paragraph (d) widens the provision in section 3 of the 1980 Act to cover any statutory body. The definition of “the court” is needed to countermand the definition in section 3 of the Bill. The definition of “predecessors in title” also relates to section 83.

LTA 1980,
S.4

Application to State

82.— (1) This Part applies to the State both as landlord and tenant save where the appropriate State authority is satisfied that it would not be in the public interest for a particular tenant to be entitled to invoke Chapter 2 or Chapter 3 and so certifies in writing.

(2) Where a State authority so certifies it shall furnish a copy of the certification to –

- (a) the tenant to whom it applies,
- (b) any subtenant of that tenant.

Explanatory Note

This section would replace section 4 of the 1980 Act and implements the recommendation in paragraph 3.13 of the BTCP that the State should no longer have blanket exemption as a landlord. It adapts, as recommended, the certification system for individual cases introduced by section 70 of the 1980 Act in relation to the right to acquire the fee simple. It also implements the recommendation in paragraph 4.07 of the BTCP that there should be an obligation on the State to notify inferior tenants of such certification.

LTA 1980,
S.6

Application to local authorities

83.— Where premises were or are provided or deemed to be provided by a housing authority under the Housing Act 1966, the following provisions have effect, unless the premises are let for the purpose of carrying on, in all or part thereof, a business –

- (a) if the premises are held by the housing authority in fee simple, this Part does not apply to the premises,
- (b) if the premises are held by the housing authority under a tenancy, the housing authority shall be deemed for the purposes of that Part to be the tenant and to be in exclusive occupation of them.

Explanatory Note

This section largely re-enacts section 6 of the 1980 Act. A few, minor modifications have been made to make it conform with the rest of the Bill.

Chapter 2

Right to a new tenancy

Entitlement

LTA 1980,
SS. 13

84.— (1) A tenant is entitled to a new tenancy under this Chapter, beginning on the termination of the previous tenancy, provided –

- (a) subject to *subsection (2)* and *section 85*, the premises have been continuously occupied by the tenant as tenant or the tenant's predecessors in title and *bona fide* used wholly or partly by them for the purposes of carrying on a business during the whole of a minimum period of 5 years immediately prior to that termination, or
 - (b) the tenant has, without any breach of the terms of the tenancy, made improvements to the letting value of the premises which, at that termination, are worth not less than one-half the letting value of the premises as improved.
- (2) For the purposes of *subsection (1)(a)* –
- (a) a temporary break in the use of the premises shall be disregarded if the court considers it reasonable to disregard it.
 - (b) occupation by the tenant –
 - (i) includes occupation by others in accordance with *section 85*,
 - (ii) remains such occupation where the tenant permits occupation or use by a franchisee, licensee or other person not occupying under a tenancy.
- (3) This section does not affect the operation of section 192 of the Act of 2004.

Explanatory Note

This section defines the entitlement to a new tenancy and would replace the provisions in sections 13 and 16 of the 1980 Act. It implements various recommendations made in paragraphs 3.24-3.25, 3.30-3.31 and 4.11-4.14 of the BTCP. It should be read together with section 85 which implements other recommendations.

Subsection (1)

Paragraph (a) deals with the so-called “business equity”. The following points should be noted about the recast language –

- (i) In conformity with other provisions in the Bill, it drops the reference to tenements.*
- (ii) It requires continuous occupation and business use by the tenant (including predecessors in title) as tenant during the whole of the qualifying period – see paragraph 3.24 of the BTCP.*
- (iii) The BTCP mooted raising this to, say, 10 years, but the ultimate conclusion was to retain the 5-year qualification period.*
- (iv) Paragraph (a) makes it clear that qualification (entitlement) is linked to the date of termination of the previous tenancy (from when the new tenancy runs). This adheres to the majority view expressed by the Supreme Court in Twil Ltd v Kearney – see paragraphs 4.11-4.14 of the BTCP. This does not prevent a tenant applying for relief before that date and obtaining a conditional order – but it will be conditional on the tenant qualifying under paragraph (a) at the termination date (eg, a tenant who appeared to qualify at the date of application because the minimum period of occupation for business purposes has been met by then, may cease to qualify by the termination date because the business has ceased or a breach of covenant has occurred or circumstances have arisen which entitle the landlord successfully to oppose a new tenancy). See further section 88.*

Paragraph (b) retains the “improvement” equity, as recommended in paragraph 3.31 of the BTCP. It has been recast to reflect the fact that the provisions in the 1980 Act relating to compensation for improvements have been dropped – see paragraphs 3.38 – 3.40.

Subsection (2)

Paragraph (a) re-enacts the provision in section 13(2) of the 1980 Act. Paragraph [b] adds clarification- subparagraph (ii) again follows Twil Ltd v Kearney.

Subsection (3)

This contains a saving for the provision in section 192 of the Residential Tenancies Act 2004, which concerns the “long occupation” equity: see para 3.30 of the BTCP.

Occupation by others

LTA 1980,
S.5

85.— (1) For the purposes of *section 84(1)*, where the tenant is a State authority that authority shall be deemed to be in exclusive occupation of the premises notwithstanding that they may be occupied for the purposes of another State authority.

(2) Where a subtenant of part of the premises held under a tenancy comes within *section 84(1)* the headlandlord may, in any application by the subtenant for relief under *section 88* or by separate application, seek an order under *subsection (6)*.

(3) Subject to *subsection (5)*, the following are entitled to a new tenancy under *section 84(1)* –

- (a) where the premises are used with the tenant’s permission, by a private company for the purpose of carrying on a business which the tenant carried on in the premises up to the time when it began to be carried on by the private company, that private company;
- (b) where the premises are used for the purposes of carrying on a business by an individual who is the majority shareholder of the company which is the tenant, that individual;
- (c) where the premises are so used by a subsidiary company of which the tenant is the holding company, that subsidiary company;
- (d) where the premises are so used by a holding company of which the tenant is a subsidiary company, that holding company;
- (e) where the premises are so used by a subsidiary company of a holding company of which the tenant is also a subsidiary company, the subsidiary company so using the premises.

(4) In *subsection (3)* the expressions “private company”, “company”, “subsidiary company” and “holding company” have the meaning given to them by the Companies Act 1963.

(5) The landlord may, in any application by an individual or any company coming within *subsection (3)* or by separate application, seek an order under *subsection (6)*.

(6) On an application by the landlord under *subsections (2) or (5)*, the court may order that –

- (a) any new tenancy should be granted to –
 - (i) the headtenant in respect of the whole of the premises comprised in the headtenancy, but subject to a subtenancy of part of those premises, or
 - (ii) the subtenant in respect of the whole of the premises comprised in the headtenancy,
- (b) any new tenancy should be granted to –
 - (i) the tenant rather than the individual or any company coming within *subsection (3)*, or
 - (ii) the individual or any such company but subject to a guarantee given by the tenant or other person,

and in any such case the court may impose such other terms and conditions as it thinks fit.

Explanatory Note

This section deals with various situations where the premises are occupied or used by someone other than the “paper” tenant.

Subsection (1)

This re-enacts section 5(2) of the 1980 Act.

Subsection (2)

This is a new provision designed to protect landlords from fragmentation of their property in the case of subtenants qualifying for new tenancies. It implements the recommendation in paragraph 3.27 of the BTCP.

Subsection (3)

This re-enacts the substance of section 5(3) and (4) of the 1980 Act, modified as recommended in paragraphs 3.20 – 3.22 of the BTCP. Paragraph (a) re-enacts the provision in section 5(3)(c)(i), with the addition of the reference to a purported assignment without consent (as recommended in paragraph 3.21 of the BTCP). Paragraph (b) is a new provision and fills a gap in section 5(3)(c), as again recommended by paragraph 3.21 of the BTCP. Paragraph (c) re-enacts section 5(3)(c)(ii), paragraph (d) re-enacts section 5(3)(c)(iii) and paragraph (e) re-enacts section 5(3)(c)(iv).

Subsection (4)

This re-enacts section 5(4) of the 1980 Act.

Subsection (5)

This provides protection for landlords where the trading person or company is not the “paper” tenant, as recommended in paragraph 3.22 of the BTCP.

Subsection (6)

This gives the court a discretion to order an arrangement that might suit the landlord better in cases where there is a subletting or trading by an entity other than the “paper” tenant. The implements the recommendations in paragraphs 3.22 and 3.27 of the BTCP.

Restrictions on right to new tenancy

LTA 1980,
S.17

86.— (1) A tenant is not entitled to a new tenancy under this Chapter if –

- (a) the tenancy has been terminated as a consequence of action or default by the tenant, or
- (b) the landlord establishes to the satisfaction of the court a good and sufficient reason for refusing to renew the tenancy.
- (c) where the landlord is a planning authority, and its intention is to obtain possession in furtherance of the objectives of its development plan,
- (d) where the landlord is a local authority, and its intention is to obtain possession, within five years after termination of the existing tenancy, for any purpose for which the local authority is entitled to acquire property compulsorily,
- (e) where the landlord is any other statutory authority and which requires possession, within five years after termination of the existing tenancy, in order to carry out its functions.

(2) For the purposes of *subsection (1)(a)* action or default by the tenant includes –

- (a) action involving a surrender or merger of the tenancy, discharge from the tenancy or service of a notice of termination, break notice or other method of termination by the tenant,
- (b) breach of any obligation by the tenant which results in a forfeiture of the tenancy,
- (c) action leading to the landlord obtaining a possession order under *section 76* or a retention order under *section 77*.

(3) For the purposes of *subsection (1)(b)*, but without prejudice to the court being satisfied on other grounds relevant at the date of the court hearing, any of the following are a good and sufficient reason –

- (a) the landlord's intention to resume possession of the premises for occupation by the landlord or the landlord's agents, employees or other persons claiming under the landlord,

- (b) the landlord's intention or agreement to pull down and rebuild or to reconstruct any building or part of a building included in the premises,
 - (c) the landlord's intention to carry out a scheme of development of property which includes the premises and requires vacant possession,
 - (d) the creation of a new tenancy would not be consistent with good estate management.
- (4) In evaluation of the intention of the landlord for the purposes of *subsection (3)(b)* or *(c)* the court may take into account whether the landlord has applied for or obtained planning permission for the work in question.
- (5) Where the court is satisfied that –
- (a) the landlord has established a good and sufficient reason based on any of the circumstances specified in *subsection (3)(b)* or *(c)*,
 - (b) the landlord will not require possession for the purposes in question until after the expiration of a period of six months from the date of termination of the tenancy or date of the order of the court, whichever is the later,

the court may, if the tenant so requests, continue the existing tenancy until that continued tenancy is terminated by the landlord for the purposes in question by service of six months' previous notice in writing, but subject to the condition that the continuation of the tenancy is without prejudice to the right of the tenant to relief under this Chapter on the termination of the continued tenancy.

- (6) Where, in a case in which –
- (a) the tenant has been induced not to apply for relief under this Chapter by a representation by the landlord that such an application would be opposed under *subsection (1)(b)* and in reliance upon any circumstances specified in *subsection(3)(a)* to *(c)*, or
 - (b) the court has refused the tenant relief under *subsection (1)(b)*.

it appears to the court that the intention or agreement in question has not been carried out by the landlord within a reasonable time, the court may order the landlord to pay the tenant damages for misrepresentation.

Explanatory Note

This would replace section 17 of the 1980 Act and recast its provisions as recommended in paragraphs 3.32 – 3.33 and 4.16 – 4.25 of the BTCP.

Subsection (1)

Paragraphs (a) to (e) implement the recommendation in paragraph 3.33 of the BTCP that the other restrictions in section 17 of the 1980 Act should be re-cast into two broad categories – default or voluntary action by the tenant and an overriding need by the landlord. These concepts are further explained in subsections (2) and (3). They adopt provisions in the 1980 Act, but paragraph (e) is an extension of the paragraphs (c) and (d) categories.

Subsection (2)

This sets out all the circumstances which may involve action or default by the tenant depriving him or her of the right to a new tenancy. It seeks to clarify the provisions in section 17 of the 1980 Act as recommended in paragraphs 4.16 – 4.25 of the BTCP.

Subsection (3)

This sets out the “good and sufficient reason” factors and incorporates various provisions in section 17 of the 1980 Act, plus a new one in paragraph (a). It should be read with subsection (4). Subsection (4)

This implements the recommendation in paragraph 4.22 of the BTCP that in future the issue of planning permission should simply be one of factors to be taken into account in determining whether a good and sufficient reason has been established to the satisfaction of the court.

Subsection (5)

This re-enacts the substance of section 17(4) of the 1980 Act. It clarifies a couple of doubts about that provision. It makes it clear in paragraph (b) from what date the six months period the landlord does not need possession should be calculated from. It will either be from the date of the court order or, if the existing tenancy is still running then, from the date of its termination: see paragraph 4.24 of the BTCP.

Subsection (6)

This replaces section 17(4) of the 1980 Act and introduces a less draconian sanction, as recommended in paragraph 4.25 of the BTCP. It also covers now where the landlord induces the tenant not to apply for relief by invoking the provisions in question.

Notice of intention to claim relief

LTA 1980,
S.20

87.— (1) A tenant wishing to claim relief under this Chapter shall, within the time limited in *subsection (2)*, serve on each person against whom the claim is intended to be made a notice of intention to claim relief in the prescribed form.

(2) Such a form may be served –

- (a) in the case of a tenancy terminating by the expiration of a term of years or other certain period or by any other certain event –
 - (i) not more than two years before the termination of the tenancy, or
 - (ii) subject to the landlord serving on the tenant (not earlier than three months before the termination of the tenancy) a notice in the prescribed form of the expiration of the term or period or the happening of the event, at any time after that termination but before the expiration of three months after service of the notice;
- (b) in the case of a tenancy terminating by the happening of any uncertain event, subject to the landlord serving on the tenant a notice in the prescribed form of the happening of the event, at any time after that event but before the expiration of three months after service of the notice;
- (c) in the case of a tenancy which is terminable by notice of termination under Chapter 4 of Part 7, at any time before the expiration of three months after service of the notice.

(3) A notice served under *subsection (1)* shall specify the duration of the new tenancy, if less than 10 years is sought, and may include a claim in the alternative for compensation under Chapter 3.

(4) This section does not prejudice the right of the landlord and tenant to agree to refer the fixing of the terms of the new tenancy to arbitration.

(5) Where there is such an agreement, but subject to its terms –

- (a) the arbitrator shall fix the terms of the new tenancy on the same basis as the court may do under this Chapter,
- (b) the arbitrator's award in such case has the same effect as a court order under this Chapter,

and sections 89 to 93 apply accordingly with such modifications as may be appropriate.

Explanatory Note

This would re-enact the substance of section 20 of the 1980 Act, but with some modifications of the language.

Subsection (1)

The language here has been put in a more positive form. It substitutes “tenant” for “claimant”

Subsection (2)

Again the language in paragraph (a) has been put in more positive form.

Paragraph (b) drops the reference to “fall of a life” because of section 14 of the Land and Conveyancing Law Reform Bill. Part 8 of this Bill applies only to tenancies arising or granted in the future – see section 80(a).

*Re paragraph (c) such termination in future would be governed by Chapter 4 of Part 7 – under section 63(2)(d) the notice of termination must specify a date for termination. This implements the recommendation in paragraph 3.29 of the BTCP to deal with the point raised in *Mealiffe v Walsh Ltd*.*

Subsection (3)

This is a new provision designed to implement the recommendation in paragraph 4.28 of the BTCP.

Subsection (4)

This is also a new provision designed to encourage parties to use arbitration instead of going to court.

Subsection (5)

This further encourages use of arbitration by adapting the Bill’s provisions to such a process.

Application for relief

88.— (1) In default of agreement as to the grant or as to the appointment of an arbitrator, or terms of a new tenancy or compensation under Chapter 3, a tenant who has served a notice under *section 87* or the landlord may, at any time not less than one month after such service, apply to the court to determine the right to relief and, as the case may be, to fix the terms of the new tenancy or the amount of compensation to which the tenant is found to be entitled.

(2) An application under this section may be made, heard and determined either before (but not more than two years before) and in anticipation of or after the termination of the tenancy.

(3) Whenever the court hears an application under this section it shall determine the application on the basis of the tenant's rights at the date of the termination of the tenancy.

(4) When the court hears an application under this section in anticipation of the termination of the tenancy it may make such conditional or interim order as it thinks fit.

(5) If the notice served under *section 87* did not include a claim in the alternative for compensation under Chapter 3, the court may, on the application of the tenant, amend the notice in such terms as the court thinks fit by inserting in it such an alternative claim and deal with that claim in accordance with *subsection (1)*.

Explanatory Note

This section largely re-enacts section 21 (and elements of sections 16 and 19) of the 1980 Act, but adds some provisions.

Subsection (1)

This modifies some of the language of section 21 (and the superfluous provision in section 19(a)) of the 1980 Act to accord with other parts of the Bill.

Subsection (2)

This re-enacts the provision in section 21(3) of the 1980 Act but inserts a two-year limit to early applications.

Subsection (3)

This implements the recommendation in paragraph 4.14 of the BTCP to clarify the position on the basis of the majority view given in the Supreme Court decision in Twil Ltd v Kearney.

Subsection (4)

This also implements a recommendation in paragraph 4.14 of the BTCP.

Subsection (5)

This incorporates elements of section 19 of the 1980 Act, but modifies its language to conform with the rest of the Bill.

Award of a new tenancy

89.— (1) Where on an application under *section 88* the court finds that the tenant is entitled to a new tenancy, it shall –

- (a) fix the terms of the new tenancy in accordance with *sections 90 and 91*,
- (b) make an order requiring the landlord, and any superior landlord whose joinder may be necessary, to grant or join in the grant of, and the tenant to accept, a new tenancy accordingly.

(2) Such person or persons shall grant or join in the grant of, and the tenant shall accept, a new tenancy on the terms specified in the order, commencing on the termination of the previous tenancy.

(3) A tenant awarded a new tenancy is not entitled to compensation under Chapter 3.

(4) If any dispute, failure or question arises or occurs in the carrying out of an order made under *subsection (1)(b)*, the court may, on the application of any person concerned, make such an order as it thinks fit.

Explanatory Note

This re-enacts section 18 of the BTCP, but with some modifications.

Subsection (1)

This amalgamates subsections (1) and (2) of section 18.

Subsection (2)

This re-enacts section 18(3).

Subsection (3)

This re-enacts the substance of section 18(4).

Subsection (4)

This re-enacts the substance of section 18(5).

LTA 1980,
S.18

Fixing the terms of the new tenancy

LTA 1980,
S.23

90.— (1) Where the court awards a new tenancy under *section 89* it shall fix the duration of the tenancy at ten years or such less term as the parties may agree.

(2) The rent payable by the tenant under the new tenancy shall be not less than (as the case may require) –

- (a) the rent payable by the landlord in respect of the premises, or
- (b) such proportion of the rent payable by the landlord in respect of the premises and other property as is in the opinion of the court fairly apportionable to the premises.

(3) Subject to *subsection (2)*, the rent shall be the gross rent reduced, where appropriate, by the allowance for improvements provided for by *subsection (5)*.

(4) The gross rent shall be the rent which, without payment of a fine or premium, in the opinion of the court a willing tenant not already in occupation would give and a willing landlord would take for the premises, in each case on the basis of –

- (a) vacant possession being given,
- (b) having regard to –
 - (i) the terms of the new tenancy,
 - (ii) the letting values of premises (if any) of a similar character to the premises and situate in a comparable area,
- (c) without regard to any goodwill which may exist in respect of the premises.

(5) The allowance for improvement shall be such proportion of the gross rent as is, in the opinion of the court, attributable to improvements made by the tenant or the tenant's predecessors in title without any breach of obligation of the tenancy.

(6) The tenancy shall be subject to such other terms as the parties may agree but, in the absence of such agreement, the court shall fix the terms on the basis of the terms (apart from rent) of the previous tenancy, but subject to

such modifications as the court thinks reasonable in all the circumstances of the case.

(7) The court may, as one of the terms of the new tenancy, require the intended tenant, within such time as the court thinks fit, to carry out, or expend a specified sum of money in the execution of, specified repairs (including painting for the purposes of preservation but not painting for the purposes of mere decoration) to the premises.

(8) Where the court makes a requirement under *subsection (7)* –

- (a) it may authorise postponement of the grant of the new tenancy until the requirement has been complied with,
- (b) if the intended tenant fails or refuses to comply with the requirement, it may declare the tenant to be no longer entitled to a new tenancy and discharge any award made under *section 89*.

(9) In fixing the terms of the new tenancy, the court may include provision for rent reviews on a basis other than that which applies under *section 91*.

Explanatory Note

This re-enacts section 23 of the 1980 Act, with some modifications recommended by the BTCP.

Subsection (1)

This modifies section 23(1) and (2) of the 1980 Act (as amended by section 5 of the Landlord and Tenant (Amendment) Act 1994). As recommended in paragraph 3.25 of the BTCP the maximum duration is further reduced to 10 years (rather than the 15 years originally recommended)(from the 20 years set by the 1994 Act). It also changes the 1994 Act to provide that in future anything less than 10 years would have to be agreed by both parties – both have a stake in this and it is not clear why the tenant alone should have a power to nominate a lesser term (albeit subject to a 5-year minimum unless the landlord agrees otherwise).

Subsection (2)

This re-enacts the substance of section 23(3) of the 1980 Act.

Subsection (3)

This re-enacts section 23(4) of the 1980 Act.

Subsection (4)

This re-enacts section 23(5), but with some modifications (eg dropping the reference to “tenement”).

Subsection (5)

This modifies section 23(6) of the 1980 Act to take account of the fact that there is no equivalent of the provisions for compensation in the 1980 Act in this Bill.

Subsection (6)

This modifies section 23(9) of the 1980 Act to implement the recommendation in paragraph 4.30 of the BTCP that the basis upon which the court fixes the “non-rent” terms should be clarified.

Subsection (7)

This re-enacts most of section 23(7) of the 1980 Act, modified to clarify that the court can order specified repairs as an alternative to ordering expenditure of money on repairs, as recommended by paragraph 4.31 of the BTCP.

Subsection (8)

This re-enacts the rest of section 23(7) and the provision in section 23(8) of the 1980 Act. The wording of the latter has been modified in paragraph (b) – reference to “forfeiture” is confusing, given the technical meaning that concept has in the context of landlord and tenant law. The new wording reflects what it means in the present context.

Subsection (9)

This has been added for clarification, as recommended in paragraph 4.32 of the BTCP. This enables the parties to argue for rent review provisions other than those which would otherwise apply under section 91.

Rent review

91.— (1) Where –

- (a) the terms of a new tenancy provide that the rent shall be reviewed by the court in accordance with this section, or
- (b) the terms of a new tenancy are fixed under *section 90* without any provision for rent reviews,

the landlord or the tenant may have the rent reviewed in accordance with this section.

(2) The person seeking the review shall serve on the other party notice of intention to have the rent reviewed.

(3) The notice may be served –

- (a) for the first review not more than six months before the fifth anniversary of the date of commencement of the new tenancy,
- (b) for subsequent reviews not more than six months before each subsequent successive fifth anniversary of that date.

(4) In default of agreement on the rent, the person seeking the review may apply to the court to have the rent reviewed not earlier than one month after service of the notice under *subsection (2)*.

(5) On such a review the rent shall be fixed in accordance with the relevant provisions of *section 90* as the case may be, by reference to the fifth or subsequent fifth anniversary of the date of commencement of the new tenancy and the reviewed rent is payable from that anniversary.

Explanatory Note

Subsection (1)

This modifies section 15(1) of the 1984 Act by inserting the provision in paragraph (a) to implement the recommendation in paragraph 4.32 of the BTCF.

Subsection (2)

This re-enacts section 15(2) of the 1984 Act (dropping the “his”).

Subsection (3)

This modifies section 15(3) to implement the recommendation in paragraph 4.32 of the BTCP, which referred to an earlier Commission recommendation to make review dates accord more with commercial practice (LRC 44 – 1992, pages 20-21).

Subsection (4)

This re-enacts section 15(4), with the addition of the last words for clarification.

Subsection (5)

This modifies section 15(5) and (6) again as recommended by LRC 44-1992.

Subsequent termination

LTA 1980,
S.26

92.— Where following the making of an order under *section 89* the existing tenancy is terminated in such manner that the tenant would under *section 86(1)* not be entitled to a new tenancy –

- (a) the obligation to grant the new tenancy becomes void,
- (b) where a new tenancy has been granted under an order made under *section 88(5)*, that new tenancy becomes void.

Explanatory Note

This re-enacts section 26 of the 1980 Act.

Continuation of existing tenancy

LTA 1980,
SS. 27

93.— (1) Except where *section 86(1)(a)* applies, where a tenant has served a notice under *section 87* the existing or previous tenancy shall, subject to *subsection (2)*, continue in force until any application under *section 88* is determined by the court or, in the event of an appeal, by the final appellate court.

Any tenancy continued under *subsection (1)* or *section 86(5)* or any new tenancy granted under this Chapter, is or is deemed to be, for the purposes of this Act, a continuation of the tenancy previously existing and a graft upon that tenancy.

(3) The interest of the tenant under such a continued tenancy is subject to any equities or rights arising from its being such a graft.

Explanatory Note

This amalgamates sections 27 and 28 of the 1980 Act and makes various modifications as recommended by paragraphs 4.34 – 4.35 of the BTCP.

Subsection (1)

This introduces the following modifications –

- (1) *The exception now covers all cases of renunciation of rights and disqualification by the tenant's own actions or default – see paragraph 4.35(ii) of the BTCP.*
- (2) *The tenant's rights run from the date of service of the notice to claim relief, rather than the date of application for relief – see paragraph 4.35(iv).*
- (3) *The existing or previous tenancy continues, not just a right of occupation – see paragraph 4.35(i). This was a dubious distinction, as illustrated by the recent ruling by Finlay Geoghegan J in Crofter Properties Ltd v Genport [2007] IEHC 80 that a tenant continuing in occupation is still subject to the terms of the tenancy and so the landlord can invoke the right of re-entry for breach of covenant and seek an injunction to stop the defaulting tenant continuing in occupation pending determination of his or her application.*
- (4) *The continuation is automatic rather than “if the tenant so desires” – see paragraph 4.35(iii).*

(5) *The reference to “any” application includes a landlord’s application under section 89(2) – see paragraph 4.35(iv).*

Subsection (2)

This re-enacts the substance of section 27 of the 1980 Act but seeks to clarify its provisions as recommended in paragraph 4.34 of the BTCP. Thus it makes it clear that the provision is now confined to continuation provisions and new tenancies granted under the Act. It drops the confusing reference in section 27 to “for all purposes”.

Subsection (3)

This re-enacts the remaining provision in section 27 of the 1980 Act.

Chapter 3

Compensation for disturbance

Entitlement

94.— (1) A tenant who would otherwise be entitled to a new tenancy and whose application under *section 88* fails under any of the grounds specified in *section 86(1)(b)* to *(e)*,

may, in default of agreement with the landlord, apply to the court to assess compensation to be paid by the landlord on the tenant giving up clear possession of the premises.

(2) The measure of compensation is the pecuniary loss, damage or expense which the tenant incurs or sustains or will sustain by reason of giving up the premises and which is a direct consequence of that giving up.

(3) In assessing the compensation the court shall take into account as it thinks fit –

- (a) the availability and cost to the tenant of alternative premises suitable to the tenant's business,
- (b) what efforts the tenant has made to find such alternative premises and otherwise to mitigate loss.

(4) Subject to *section 95*, the compensation is payable on –

- (a) the expiration of one month from the date of the agreement or assessment by the court as to its amount, or
- (b) the giving to the landlord by the tenant of clear possession of the premises,

whichever is the later.

(5) A landlord who fails to pay compensation within the time limited by *subsection (4)* is guilty of an offence under this Act, but without prejudice to the obligation to pay the compensation.

Explanatory Note

This would replace section 58 of the 1980 Act with various modifications as recommended in paragraphs 3.34 – 3.37 and 4.37 – 4.39 of the BTCP.

Subsection (1)

This re-enacts the entitlement to compensation where a new tenancy is refused on a ground without default by the tenant.

Subsection (2)

This re-enacts, with slight changes to the wording, section 58(2) of the 1980 Act.

Subsection (3)

This is a new provision adding factors to be taken into account, as recommended by paragraph 3.36 of the BTCP. The provision in section 58(3) of the 1980 Act relating to decontrolled dwellings has been dropped, as also recommended in that paragraph.

Subsection (4)

This re-enacts, with minor adjustments, section 58(4) of the 1980 Act.

Subsection (5)

This would replace section 58(5) of the 1980 Act with a new criminal sanction, as recommended by paragraph 3.37 of the BTCP. Offences are dealt with generally by section 7 of the Bill.

Termination of tenancy of obsolete buildings

95.— (1) Where –

LTA 1980,
S.60

- (a) a tenancy includes a building which –
 - (i) is situated in an area to which an integrated area plan relates, or
 - (ii) having regard to its age, character and condition could only be repaired through expenditure which would be excessive in relation to the value of the premises or could not profitably be used unless it were altered or reconstructed to a substantial extent or rebuilt, and
- (b) the landlord has a scheme for the development of property which includes the premises, being development for which planning permission has been granted,

the court, subject to *subsection (2)*, may, by order made on the application of the landlord on at least six months' notice in the prescribed form to the tenant, terminate the tenancy if it considers it reasonable to do so: provided that the unexpired term of the tenancy, at the time such notice is served, is not less than 3 and not more than 25 years.

(2) Upon the making of an order under *subsection (1)* –

- (a) the tenant becomes entitled to compensation to be assessed in accordance with *subsection (3)* and paid by the landlord,
- (b) the tenancy continues in full force until the later of –
 - (i) expiration of one year from the day on which the order is made, or
 - (ii) the day on which the compensation is paid.

(3) The measure of compensation is primarily the pecuniary loss, damage or expense which the tenant incurs or sustains or will incur or sustain by reason of giving up the tenancy or which is a direct consequence of such giving up, but there shall be added such amount as the Court considers reasonable for –

- (a) the pecuniary benefit accruing to the landlord which is referable to recovery of possession earlier than the landlord was entitled to under the tenancy, and

(b) any further hardship which the tenant sustains as a consequence of the order made under *subsection (1)*.

(4) In this section “integrated area plan” has the meaning given to it by section 7 of the Urban Renewal Act 1998.

(5) This section does not apply where the tenant is entitled to a reversionary lease under Part III of the Landlord and Tenant (Amendment) Act 1980 or would be so entitled but for section 33 of that Act.

Explanatory Note

This section re-enacts the substance of section 60 of the 1980 Act, but with modifications to reflect the dropping of the concept of a “tenement” from the Bill.

Subsection (1)

This section re-enacts the provision in section 60(2) of the 1980 Act. As recommended in paragraph 4.41 of the BTCP, subparagraph (a)(ii) refers to the value of the “premises”, ie the whole land comprised in the tenancy.

Subsection (2)

This recasts section 60 (3) and (4) of the 1980 Act and, in conformity with section 93 of the Bill, continues the tenancy, rather than confers a right to continue occupancy subject to the terms of the tenancy.

Subsection (3)

This recasts section (5) of the 1980 Act.

Subsection (4)

This re-enacts the amendment to section 60 of the 1980 Act made by section 199 of the Residential Tenancies Act 2004.

Subsection (5)

This repeats the exclusion contained in section 60(6) of the 1980 Act.

Set-off of compensation

LTA 1980,
S.61

96.— (1) Where compensation is payable by a landlord to a tenant under *section 95* and money is due and owing to the landlord by the tenant under or in respect of the tenancy or the tenant's interest in the premises, either party may set off the one amount against the other.

(2) Where a landlord claims that money is due and owing under *subsection (1)*, but –

- (a) the claim is disputed by the tenant, or
- (b) the amount is disputed or unliquidated.

the landlord may pay the compensation into court pending a determination under *subsection (3)*.

(3) Where compensation is paid into court under *subsection (2)*, the court shall, on the application of either party, determine –

- (a) the validity of the claim, or
- (b) the amount disputed or unliquidated,

and may make such other order in relation to those matters or the compensation as it thinks fit.

Explanatory Note

This section re-enacts section 61 of the 1980 Act but with some recasting.

Subsection (1)

This re-enacts the substance of section 61(1) of the 1980 Act.

Subsection (2)

This (and subsection (3)) completely recasts section 61(2) and, in so doing, clarifies the court's jurisdiction as recommended by paragraph 4.42 of the BTCP.

Subsection (3)

This sets out the power of the court and, in particular, makes it clear that it can settle a dispute over the money payable.

Mortgaged premises

LTA 1980,
S.62

97.— (1) Where the tenant's interest in the premises is subject to a charge or mortgage, that charge or mortgage attaches and extends to any compensation payable to the tenant under this Chapter.

(2) A landlord by whom such compensation is payable who has actual notice of such a charge or mortgage shall either –

- (a) with the consent of the tenant, pay the compensation to the owner of the charge or mortgage, or
- (b) with the consent of that owner, pay the compensation to the tenant, or
- (c) where that owner and the tenant direct that the compensation be paid in a particular manner, pay it in that manner, or
- (d) where no such consent or direction is given, pay the compensation into court.

(3) Where the compensation is paid into court the court may, on the application of any person interested, make such order in regard to it as it thinks fit.

Explanatory Note

This re-enacts section 62 of the 1980 Act, but with some modifications.

Subsection (1)

This recasts section 62(1) in more straightforward language.

Subsection (2)

This does the same with section 62(2).

Subsection (3)

As does this with section 62(3).

Protection of trustees and others

LTA 1980,
S.63

98.— Where the landlord’s interest in premises is vested in a trustee or other person otherwise than for that person’s own benefit (in this section referred to as a “trustee”) the following provisions apply to money payable as compensation under this Chapter or for charges, costs or expenses associated with a court order relating to such compensation –

- (a) the money is not recoverable personally against the trustee nor is the trust under any liability to pay it, but the trustee may, either before or after having paid the money, obtain from the court a charge on the premises and any other property held on the same trusts or in the same character as the premises to the amount of the money and of all costs properly incurred in obtaining the charge or raising the money,
- (b) if the trustee refuses or fails to pay the money within one month of the tenant delivering possession of the premises, the tenant may obtain from the court a similar charge to the amount of the money or so much of it as is then unpaid and of all costs properly incurred in obtaining the charge or in raising the money.

Explanatory Note

This recasts section 63 of the 1980 Act to clarify its provisions as recommended by paragraph 4.43 of the BTCP. The redraft makes it clear that the provision is confined to trustees or other persons in whom the landlord’s interest is vested (eg, a personal representative or liquidator) : see paragraph 4.43(i) of the BTCP. It also makes it clear that the costs, etc are confined to those associated with a court order for compensation : see paragraph 4.43(ii).

Paragraph (a) amalgamates section 63(i)(a) and (b) of the 1980 Act and makes it clear that the trustee must apply for the charge (as the tenant must under paragraph (c)) : see paragraph 4.43(iii) of the BTCP.

The somewhat obscure provision in section 63(2) has been dropped.

Chapter 4

General provisions

Notices requiring information

99.— (1) A tenant seeking a new tenancy under this Chapter may, in order to secure joinder of all necessary parties in the grant, serve –

- (a) a notice in the prescribed form upon the immediate landlord requiring information as to the nature and duration of the landlord's reversion and the name and address of the person for the time being entitled to the next superior interest,
- (b) a similar notice on each other person holding a superior interest.

(2) Where a person on whom a notice is to be served under *subsection (1)* cannot be ascertained or found, a notice in the prescribed form may be served on the person receiving the rent for the premises requiring the name and address of the person to whom the rent is paid by the person on whom the notice is served and any other information reasonably necessary for the purpose specified in *subsection (1)*.

(3) A person on whom a notice is served under this section shall, within one month of the service, give or send in writing such required information as is in that person's possession or procurement.

(4) Where a person served with a notice under this section fails or refuses to provide the information required, the person who served the notice may apply to the court for an order compelling the former to provide the information and such other order as the court thinks fit.

Explanatory Note

This section re-enacts section 84 of the 1980 Act, with a few, minor modifications.

Parties to grant

LTA 1980,
S.76

100.—(1) Where a necessary party is, by reason of having a fiduciary capacity or by reason of the restrictive terms of that party's tenancy, unable to comply with a requirement the court may, on the application of any person concerned, empower that party to do so.

(2) Where a necessary party is under some other incapacity or cannot be found or fails or refuses to grant or join in the grant of a new tenancy, the court may, on the application of any person concerned, appoint and empower an officer of the court to grant or join in the grant on behalf of the necessary party.

(3) Where, in relation to a tenancy, a necessary party is unascertained or unknown, the court may, on the application of any person concerned, appoint any person who is receiving the rent in respect of the applicant's interest in the premises, or such other person as the court may think fit, to represent such unascertained or unknown person in all proceedings in connection with the grant of a new tenancy and may appoint and empower an officer of the court to grant the new tenancy or join in the grant on behalf of the necessary party.

(4) Where an officer of the court is appointed under *subsection (2) or (3)* the court may order the rent payable under the tenancy to be paid into court or make such an order or give such direction in regard to the rent as it thinks fit.

(5) Where a person on whom a notice under this Chapter is required to be served cannot be ascertained or found, that person is deemed to be a necessary party for the purposes of this section and its provisions apply accordingly with the necessary modifications.

(6) A power conferred on the court by this section shall be exercised in relation to a ward of court only by leave of the court of which that person is a ward.

(7) In this section –

“necessary party” means a person who is required under this Chapter to grant or join in the grant of a new tenancy;

“requirement” refers to anything required of a person under this Chapter.

Explanatory Note

This section re-enacts section 76 of the 1980 Act, again with some minor modifications.

Termination of a headtenancy

101.—(1) Where a tenancy is terminated by –

- (a) surrender, or
- (b) merger, or
- (c) discharge, or
- (d) forfeiture,

any subtenancy granted out of that tenancy and subsisting at the date of termination continues for the purpose of preserving rights acquired or in the course of being acquired under this Part and the headlandlord becomes the landlord of the subtenancy.

(2) Subject to *subsection (3)*, all other rights and obligations created by the subtenancy remain enforceable as between the headlandlord and subtenant.

(3) The rent payable by the subtenant under the continued subtenancy is the greater of –

- (a) the rent payable under the subtenancy, or
- (b) such portion of the rent payable under the headtenancy as is fairly attributable to the premises occupied by the subtenant.

(4) Any dispute as to the apportionment of rent under *subsection (3)* may, on the application of either the headlandlord or subtenant, be determined by the court.

Explanatory Note

This recasts section 78 of the 1980 Act and clarifies its operation as recommended in paragraph 13.11 of the GLCP and paragraphs 4.04 – 4.05 and 4.52 of the BTCP.

Subsection (1)

This makes it clear that a subtenancy continues automatically under this section only in the situations specified in paragraphs (a) – (d). A termination by notice (to quit) or exercise of a break option is covered by section 66(2) of the Bill (ie, no automatic continuation, but discretion in the court). This implements the recommendation in paragraph 13.10 of the

GLCP. The wording now makes it clear that this provision is designed to preserve statutory rights which a subtenant might have acquired or was in the course of acquiring when the head tenancy is terminated

Subsection (2)

This recasts in much simpler language the effect of section 78 of the 1980 Act.

Subsection (3)

This re-enacts the substance of section 78(2). The reference to the “premises occupied” also makes it clear that the subtenancy is continued only in respect of premises in respect of which the subtenant could claim a new tenancy under Part 8. Section 84 requires continuous occupation. Thus if the subtenant has created a sub-subtenancy of part of the premises comprised in the subtenancy, the subtenancy is continued only in respect of the part remaining in the occupation of the subtenant. The rent payable under that continued subtenancy must reflect that part so remaining.

Subsection (4)

This introduces a mechanism for resolution of disputes as to apportionment of rent.

Extension of time limits

LTA 1980,
S.83

102.— Where a person fails to do any act or thing provided for by or under this Part, the court may, on such terms as it thinks fit (and shall unless satisfied that injustice would be caused), extend the time where it is shown that the failure was occasioned by disability, mistake, absence from the State, inability to obtain requisite information or any other reasonable cause.

Explanatory Note

This re-enacts section 83 of the 1980 Act.

SCHEDULE 3
Reviewed Rent
PART 1

GENERAL PROVISIONS

1.— In this Schedule –

“the assessor” means an arbitrator or expert nominated under *paragraph 5*;

“the determination” means the determination of the reviewed rent in accordance with this Schedule and of any matter incidental or relevant to that or referred to the assessor in connection with it;

“the Institute” means the Irish Auctioneers and Valuers Institute;

“the Law Society” means the Law Society of Ireland;

“the President” includes another officer endowed with the functions of that office holder;

“the review date” means each of the first day of the sixth, and, as appropriate, the eleventh and subsequent 5-yearly anniversary years of the term and any additional date notified under *paragraph 13*; and “relevant review date” shall be construed accordingly;

“review period” means the period during which a reviewed rent is payable;

“reviewed rent” means the rent agreed or determined in accordance with this Schedule;

“the Society” means the Society of Chartered Surveyors;

“the term” means the term of years granted by and commencing on the date the tenancy was created.

2.— The rent under the tenancy shall be reviewed at each review date in accordance with this Schedule.

3.— From and including each review date the rent shall be as agreed or determined in accordance with *paragraph 4*.

4.— Subject to *paragraph 3* the reviewed rent –

- (i) may be agreed at any time by the landlord and tenant, or
- (ii) in the absence of such agreement, may be determined not earlier than the relevant review date by an assessor agreed or nominated under *paragraph 5* and in accordance with Part 2.

5.— An assessor shall be nominated in accordance with the following provisions -

- (i) an application for nomination shall be made –
 - (a) by the landlord but, if the landlord fails to make an application within 28 days of being requested in writing to do so by the tenant, by the tenant,
 - (b) not more than 2 months before or at any time after the review date;
- (ii) the application shall be for nomination of either an arbitrator or an independent expert as –
 - (a) specified by the terms of the tenancy, or
 - (b) if not so specified, agreed by the landlord and tenant at the date of the application;
- (iii) in the absence of agreement, the nomination shall be of an arbitrator;
- (iv) unless the terms of the tenancy specifies, or the landlord and tenant agree, otherwise, the application shall be made for nomination, at the discretion of the party entitled to make the application, by the President of either –
 - (a) the Institute, or
 - (b) the Law Society,
 - (c) or the Society;
- (v) if the said President is unable or unwilling to make the nomination, it may be made by the next senior officer of the body in question who is so able and willing;

- (vi) any arbitrator nominated under this paragraph shall be subject to the provisions of the Arbitration Acts 1954 to 1998;
- (vii) any expert nominated under this paragraph –
 - (a) is not an arbitrator and any determination on matters of fact only by the expert is conclusive and final as between the landlord and tenant,
 - (b) shall give notice in writing of the nomination to both the landlord and the tenant,
 - (c) shall afford both the landlord and the tenant a reasonable opportunity of making, on such terms as the expert may stipulate, representations on any matter relevant to the determination,
 - (d) shall consider any such representations but, subject to such consideration, shall make the determination in accordance with the expert's own judgment,
 - (e) may, as often as is reasonably necessary to the determination, enter the premises for the purpose of examination and inspection,
 - (f) may obtain advice on any matter which the expert reasonably considers relevant to the determination,
 - (g) may fix the expert's reasonable fees in relation to the determination;
 - (h) may determine in what proportion a party should be liable for payment of the expert's fees and all costs and expenses incurred by the expert and any party in relation to the determination.

6.— If any assessor nominated under *paragraph 5* –

- (i) relinquishes or resigns from the nomination , or
- (ii) is removed from office by a court order, or
- (iii) for any other reason becomes unable, unfit or unwilling, or fails, to complete the determination,

a substitute may be nominated under that paragraph as if it were a first nomination and its provisions apply accordingly.

7.—If the reviewed rent for any review period is not agreed or determined by the relevant review date, the following provisions apply-

- (i) the rent payable immediately before that date continues to be payable until the next date for payment of rent succeeding the date when the reviewed rent is agreed or its determination is notified in writing to the tenant;
- (ii) where the reviewed rent is greater than the rent payable immediately before that date, within 7 days of such agreement or notification the tenant shall pay to the landlord the appropriate instalment of the reviewed rent together with –
 - (a) any shortfall between the aggregate rents actually paid for any part of the review period and rent at the rate of the reviewed rent for the interval between the relevant review date and the next succeeding date referred to in sub-paragraph (i),
 - (b) interest, computed on a day to day basis, at the prescribed rate on that shortfall.
- (iii) where the reviewed rent is less than the rent payable immediately before that date, the landlord shall –
 - (a) credit against the next payment of rent any overpayment of rent made from that date, plus interest, computed on a day-to-day basis, at the prescribed rate on such overpayment,
 - (b) within 7 days of such agreement or notification notify the tenant in writing of the credit to be made in the next payment of rent.

8.— In the case of a determination by an expert, the expert shall give notice in writing to both the landlord and tenant of the reviewed rent within such time as may be stipulated by the terms of the expert's nomination or, if there is no such stipulation, within 6 months of acceptance of the nomination, but

such notice may be deferred until such times as the expert's fees and expenses in relation to the determination have been fully paid.

9.— The landlord or the tenant may pay any fees or expenses which, as a consequences of the assessor's decision, are the responsibility of the other party and, if that is done, may recover from that other on demand the amount so paid as a simple contract debt.

10.— Upon agreement or determination of any reviewed rent the landlord shall draw up a memorandum specifying that rent for signature by both the landlord and tenant and attachment to or endorsement on the lease and any counterpart relating to the tenancy.

11.— The parties shall each bear their own costs and expenses in relation to the said memorandum.

12.— For the purposes of this Schedule time is not of the essence.

13.— If at any review date the landlord's right to collect, increase or otherwise review rent as from that date is modified or restricted by law, but the modification or restriction is subsequently relaxed or removed, the following provisions apply –

- (i) the landlord may, by giving not less than 7 days' notice in writing to the tenant, specify an additional review date;
- (ii) the additional review date shall be the date at expiration of the notice or such other later date as is specified in the notice;
- (iii) the reviewed rent payable on such additional review date shall otherwise be agreed or determined in accordance with this Schedule.

PART 2

DETERMINATION OF REVIEWED RENT BY ASSESSOR

14.— The assessor shall determine the rent which represents on the review date the open market rent for the premises on the basis that –

- (i) the premises are let by a willing landlord to a willing tenant –
 - (a) as a whole,
 - (b) without a fine or premium,
 - (c) with vacant possession,
 - (d) for a term, commencing on the review date, equal to the greater of 15 years or the residue then unexpired of the term,
 - (e) subject to the terms of the tenancy (other than as to the amount of the rent payable at the commencement of the tenancy);
- (ii) the assumptions set out in *paragraph 15* are made;
- (iii) regard is had to other open market rental values insofar as the assessor may deem them to be relevant to the determination;
- (iv) the matters set out in *paragraph 16* are disregarded.

15.— The assumptions are that –

- (i) all covenants by the tenant have been fully complied with up to and on the review date;
- (ii) in the event that the premises have been damaged or destroyed without having been fully repaired, reinstated or rebuilt, as the case may be, such damage or destruction had not occurred.

16.— There shall be disregarded any effect on letting value of –

- (i) the fact that the tenant is or has been in occupation of the premises or any part of them;
- (ii) any goodwill which has attached to the premises by reason of the business carried on by the tenant at in or on them;
- (iii) any works executed by and at the expense of the tenant at, in, on, to or in respect of the premises, other than required works.

17.— For the purposes of *paragraph 16* –

- (i) “the tenant” includes any predecessor in title of the tenant and any subtenant or other person lawfully occupying the premises or any part of them under the tenant;
- (ii) “required works” means works executed by the tenant under an obligation imposed on the tenant by –
 - (a) the tenancy or any previous tenancy of which the tenancy is a renewal (but excluding works required to be executed under an obligation arising from or under any statutory provision or imposed under powers conferred on any authority or court of competent jurisdiction), or
 - (b) an agreement for the granting of the tenancy or any previous tenancy of which the tenancy is a renewal, or relating to the premises,
 - (c) any licence or variation of the terms of the tenancy.