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The *Housing Bill*

Bill 11 of 2003-04

This Bill will replace the existing housing fitness standard with a Housing Health and Safety Rating System. It will introduce two new licensing regimes for private rented properties and will bring in a new requirement to produce a Home Information Pack before marketing a residential property. The Bill also contains other provisions, including changes to the Right to Buy.

There have been several consultation exercises on the main provisions in this Bill. The Bill itself was published in draft form in March 2003 and was subject to scrutiny by the ODPM: Housing, Planning, Local Government and the Regions Committee. Some of the recommendations made by the Committee have been taken into account in the final version.

This paper gives background to the Bill's provisions and highlights continuing areas of concern. The Second Reading debate on the Bill will take place on 12 January 2004.

The Bill extends only to England and Wales.

Wendy Wilson

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Summary of main points

The *Housing Bill,* which was presented on 8 December 2003, will take forward a number of the Government's objectives that were first set out in the Housing Green Paper, *Quality and Choice: A Decent Home for All,* in April 2000. The Bill's measures are targeted primarily on the operation of the private sector of the housing market. Many of these measures have been the subject of lengthy consultation and development over several years. In March 2003 the Bill was published in draft form and was scrutinised by the ODPM: Housing, Planning, Local Government and the Regions Select Committee. The Minister for Housing, Keith Hill, advised this Committee that the draft Bill was 'a central element in the Government's action plan to tackle the problems in private sector housing.' The current Bill is made up of seven parts, each of which is briefly summarised below.

Part 1 will replace the Housing Fitness Standard (a pass or fail test of housing fitness) with a new Housing Health and Safety Rating System (HHSRS) and will adapt and extend powers available to local housing authorities to tackle poor housing conditions by means of enforcement. The HHSRS will provide a new system of assessment that is aimed at identifying dwellings that pose the greatest threat to occupants' health. The system will allow for a cumulative assessment of all hazards present in a dwelling and will enable dwellings and housing conditions to be ranked according to the seriousness of the health threat posed. While there is general agreement over the deficiencies associated with the current fitness standard, practitioners have expressed 'considerable reservations' about the implementation and enforcement of the HHSRS.

Parts 2, 3 and 4 of the Bill are closely related. **Part 2** will fulfil the Labour Party's manifesto commitments of 1997 and 2001 to introduce a mandatory licensing scheme for houses in multiple occupation (HMOs). Mandatory licensing will only apply to certain 'high risk' HMOs while authorities will gain additional discretionary licensing powers in respect of other HMOs. The Bill will also amend the definition of an HMO. **Part 3** will give authorities power to designate certain areas as subject to 'selective' licensing schemes. Within these designated areas, which will be areas of low housing demand or areas suffering from anti-social behaviour that is contributed to by the failure of private landlords to tackle their tenants, <u>all</u> private landlords will be required to obtain a licence. **Part 4** provides for enforcement action by local authorities in respect of properties that will be licensable under Parts 2 and 3.

The Bill's licensing provisions are aimed at improving conditions in the private sector; it is accepted that this sector contains some of the worst physical conditions and housing management practices. Housing bodies have generally welcomed the licensing provisions but many, including the ODPM Committee, have called for the Government to go further and extend mandatory licensing to all HMOs and for local authorities to have discretionary powers to license all private sector landlords. Private landlords themselves do not accept that licensing is the answer to the problem of poor standards in the sector and have said that Scotland's experience of mandatory HMO licensing provides a 'salutary lesson.'

Part 5 of the Bill will place a new legal duty on people marketing residential property to prepare a Home Information Pack (HIP) comprising certain standard documents, including a House Condition Report, <u>before</u> marketing a property. HIPs will be made available to prospective buyers. By making this information available at the start of the house buying process the Government believes that people will make more informed decisions, that fewer house sales will fail and that the house buying and selling process will be conducted more speedily, thereby reducing the incidence of gazumping. The measures are very similar to those contained in the *Homes Bill 2000/01* which fell for lack of time before the 2001 General Election. Despite being the subject of extensive research and consultation since 1998, the ODPM Committee found that many witnesses, including advocates of HIPs, foresaw potential problems with implementation. The Committee recommended that HIPs should not be made compulsory until more research and pilot-testing had been carried out.

Part 6 covers several different areas of housing. It will strengthen authorities' powers to tackle anti-social behaviour. Changes will be made to the Right to Buy (RTB) that are aimed at curbing abuses by property developers and tenants, and maintaining the availability of social housing in the longer term. For example, tenants will have to wait longer before being able to exercise the RTB (5 years compared to 2 currently) and a proportion of the discount obtained on purchase will remain repayable on resale for a longer period (5 years compared to the current 3). The RTB was another area where the ODPM Committee wanted the Government to go further by bringing the RTB rules into line with those that apply to the Right to Acquire and giving local authorities the flexibility to adjust the RTB to local circumstances. The Right to Acquire is exercisable by certain assured tenants of registered social landlords (RSLs). This scheme offers less generous discount levels and the resulting capital receipts must be used for the provision of new affordable housing.

The succession rights of unmarried same sex couples will be equalised with those of unmarried different sex couples. An Office of the Social Housing Ombudsman for Wales will be established to investigate complaints against RSLs in the principality and eligibility for disabled facilities grants will be extended to include all those occupying caravans as their only or main residence.

A controversial measure contained in Part 6 is an extension of the powers of the Housing Corporation and the National Assembly for Wales to allow them to give grants to bodies other than RSLs. These grants will be used 'with a view to widening the opportunities for encouraging new housing development.' RSLs are concerned that private companies bidding for grant will not be competing 'on a level playing field' because they will not be subject to the same regulatory regime as RSLs.

Part 7 of the Bill contains supplementary provisions such as requiring housing authorities to maintain a register of licences granted under Parts 2 and 3. This part of the Bill also contains the new definition of an HMO.

The Bill's provisions extend to England and Wales aside from clause 169 and Schedule 8 in regard to the Social Housing Ombudsman for Wales. These provisions will only apply in relation to Wales.

Several witnesses to the ODPM Committee lobbied for the inclusion of measures in the final version of the Bill that were not part of the draft Bill. A significant campaign was mounted to persuade the Government to introduce a statutory tenancy deposit scheme, while owners of park homes saw the Bill as an opportunity to enact the recommendations of the Park Homes Working Party which reported in July 2000.

The ODPM Committee on the draft Bill concluded that measures to introduce a tenancy deposit scheme should be included in the *Housing Bill* but recommended separate legislation to tackle park home-owners' rights 'within the next two years.' The Bill does not cover either of these issues. On tenancy deposits, the Government has said that it is inclined to address the problem through a requirement for written tenancy agreements and is considering the Law Commission's November 2003 report, *Renting Homes,* which contains specific proposals in this area. On park homes, the Government has said that it will introduce a narrowly focused Bill that will draw on the Park Homes Working Party report but that it 'cannot be held to any particular timetable.'

This paper gives background to the Bill's provisions and highlights continuing areas of concern. It does not provide a guide to each clause as this is covered by the Explanatory Notes issued with the Bill (Bill 11-EN). For ease, the paper's seven parts follow the order of the Bill.

CONTENTS

I Part 1: Housing conditions

Part 1 of the Bill will replace the current Housing Fitness Standard with a new Housing Health and Safety Rating System (HHSRS) and will adapt and extend powers available to local housing authorities to tackle poor housing conditions by means of enforcement.

A. Background

1. The current Housing Fitness Standard

The current Housing Fitness Standard is set out in section 604 of the *Housing Act 1985* (as amended by the schedule 9 to the *Local Government and Housing Act 1989*). The standard has been in place since April 1990.[1] It is a set of basic requirements that a home should meet in order to be considered an acceptable place to live. The standard is used by local authorities as the basis for action against unfit homes and to guide decisions on the declaration of renewal areas and for other purposes, such as assessing the condition of the housing stock.

A dwelling is unfit if, in the opinion of the authority, it fails to meet one of the requirements set out in paragraphs (a) to (i) of s.604(1) and, by reason of that failure, is not reasonably suitable for occupation. The requirements constitute the minimum standards deemed necessary for a dwelling house (including a house in multiple occupation, HMO) to be fit for human habitation. The Fitness Standard has been described as a 'bricks and mortar approach.' It takes account of structural stability; disrepair; dampness; lighting; heating and ventilation; the drinking and hot and cold water supply; food preparation facilities; internal WC; bath; shower and drainage facilities. The additional risks in HMOs are acknowledged through an extended standard for these properties which includes fire safety and additional amenities.

If a local authority identifies a property as unfit it has a duty to take action. It is for the authority to decide the most satisfactory course of action. In deciding the most satisfactory course of action a local authority must have regard to Department of the Environment[2] Circular 17/96.

More information on the Standard and enforcement action under it is contained in the DETR's 1998 consultation paper, *The Housing Fitness Standard*.[3]

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1 It replaced a standard that had been in use for over 35 years.

2 Now the Office of the Deputy Prime Minister, ODPM

3 This is accessible online at: http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_601669.pdf

2. Problems with the Fitness Standard

On the introduction of the Housing Fitness Standard various aspects of it, and the associated enforcement regime, were criticised almost immediately. Subsequent research by the Department of the Environment confirmed these criticisms. In *Monitoring the New Housing Fitness Standard*[4] the Legal Research Institute (LRI) at the University of Warwick (on behalf of the DoE) found:

> New requirements were needed to allow assessments of internal arrangement, thermal efficiency, the local environment, fire safety and radon. The report also identified legislative anomalies in definitions, enforcement procedures and the various standards, which could apply to dwellings. It also showed that local authorities were not coping with the existing number of dwellings failing to meet the Fitness Standard.[5]

In 1995 two reports from the Building Research Establishment (BRE), which used a system of risk assessment, showed that some of the most serious health and safety hazards in the housing stock were outside the Fitness Standard, e.g. hazards associated with excessive indoor temperatures, fall hazards and hazards from fire.[6] There was also general concern that the Fitness Standard did not include energy efficiency considerations, that it was difficult to interpret and inconsistent in application. The Standard does not distinguish between defective dwellings and those which present a genuine health and safety risk to the occupants. This pass/fail aspect of the Standard has resulted in it being described as something of a 'blunt instrument.'

3. The review of the Fitness Standard

As a result of the concerns outlined in section **A.2** (above) the then Government began a review of the Fitness Standard in 1996. This review was initiated by a discussion paper in December 1996 which identified what the Department considered to be the fundamental issues and suggested a range of possible options for consideration.[7] Respondents strongly supported the retention of a Housing Fitness Standard and endorsed the issues identified for review but came up with few ideas on how these issues should be addressed.[8] Research was commissioned by the LRI at the University of Warwick and the BRE in order to inform the review. The LRI published its research in 1998;[9] on the Standard itself the LRI found:

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4 DOE, 1993
5 *ibid* para 1.04
6 *Building regulation and health* & *Building regulation and fire safety*
7 These are listed on page 8 of the DETR 1998 consultation paper, *Housing Fitness Standard*
8 DETR consultation paper, *Housing Fitness Standard,* February 1998, para 5.2
9 *Controlling Minimum Standards in Existing Housing*

- Widespread support for continued emphasis on condition and amenities in the Standard; a call for more emphasis on design and layout.
- Widespread support for amending the approach to fitness decisions to apply a test of 'reasonable suitability' to a cumulative assessment of conditions.
- Some support for including an assessment of the needs of occupiers.
- A desire to include in the Standard:
  - dangerous design defects;
  - fire safety;
  - thermal efficiency;
  - internal arrangement;
  - lead;
  - thermal insulation; and
  - sound insulation.
- Substantial support for a single definition of the dwelling unit to which standards should apply.
- Concern that the Standard did not differentiate between serious housing hazards and those of a longer term threat with less serious outcomes.
- Strong support for more consistency in legislation dealing with housing standards.

On the use of the Standard the LRI found:

- The Standard served a variety of purposes but was an inadequate means of identifying properties in the worst condition. It was not enforced where the properties were owned by the local authority and rarely enforced on owner occupied properties.

- Enforcement powers accounted for only a fifth of local authority officers' activities.

- Enforcement provisions involving the service of notices were contradictory and clumsy.

The LRI recommended a new system of housing assessment to identify dwellings that pose the greatest threat to occupants' health. It was thought that the new system should require evaluation by reference to an assessment of the health risks in a property 'informed by recent scientific studies of the relationship between housing conditions and health.' The LRI thought that this Housing Fitness Rating System 'would allow for a cumulative assessment of all hazards present in a dwelling, ranking both dwellings and housing condition according to the seriousness of the health threat posed'.[10]

In addition, the LRI recommended a fundamental review of the mechanisms used by local officers in their implementation of housing standards.

[10] *ibid* para 16 of the summary

4. Proposals for reform

In February 1998 the DETR issued a consultation paper, *The Housing Fitness Standard*, in which it sought views on proposals and options for changes to the Standard. These proposals were drawn up taking into account responses to the 1996 discussion paper, the results of the LRI research and discussions with practitioner bodies and housing professionals.[11]

Overall the proposals in the paper received a 'broadly favourable response' but the proposal to develop a housing fitness rating system attracted 'overwhelming support.' In July 1998 the Minister announced that such a system would be developed. The LRI of the University of Warwick was commissioned to undertake the development work with additional technical support provided by the BRE.

The objectives of the project to develop the Housing Health and Safety Rating System (HHSRS) were:

- To devise a logical and practical means of assessing and grading dwellings from a health and safety perspective, with such a system being capable of replacing the current Housing Fitness Standard;
- To develop an electronic dwelling hazard survey programme for use with hand-held computers;
- To make recommendations for the interpretation of results, including banding and action levels; and
- To assess the implications of a hazard based assessment system for enforcement and suggestions for options for action.

In July 2000 the DETR published the LRI's *Housing Health and Safety Rating System: Report on Development*[12] which describes in detail the development and piloting process of the new system. It also details the principles guiding the development and the range of options considered. At the same time the Department published detailed guidance, written by the University of Warwick, on the type of hazards that might be found in the home, the assessment procedure and a computer programme used to carry out the rating.[13]

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[11] DETR press release 89/1998, 10 February 1998

[12] A summary of the Report on Development is online at: http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_603899.pdf

[13] *Housing Health and Safety Rating System: The Guidance (Version 1)*

The Department's Housing Research Summary 123, published in July 2000, provided a quick guide to the HHSRS.[14] The Department also published examples of how the HHSRS should work in practice in Housing Research Summary 142 (2001).[15]

The Office of the Deputy Prime Minister (ODPM) issued an Explanatory Fact Sheet on the HHSRS alongside the publication of the *Housing Bill – Consultation on draft legislation* in March 2003.[16] This fact-sheet gives an overview of the proposed HHSRS:

> **HHSRS: the system of assessment**
> Like the fitness standard, the new enforcement framework and the enforcement options available to local authorities will apply to all types of dwelling. There are additional provisions under Part 2 of the Bill for dwellings defined as HMOs for the purposes of licensing.
>
> The purpose of the HHSRS assessment system is not to set a standard but to generate objective information in order to determine and inform enforcement decisions. HHSRS assesses twenty-four broad categories of housing hazard, including factors which were not covered or covered inadequately by the housing fitness standard. It provides a rating for each hazard. It does not provide a single rating for the dwelling as a whole or, in the case of multiply occupied dwellings, for the building as a whole. The hazards are those associated with or arising from:

Cold	Falls	Fire	Hot surfaces
Damp/mould growth	Carbon monoxide	Radiation	Electrical
Noise	Lead	Asbestos	Intruders
Crowding and space	Explosions	Domestic hygiene	Food safety
Personal hygiene	Sanitation/drainage	Contaminated water	Structural failure
Inadequate lighting	Uncombusted fuel gas	Entrapment	Poor ergonomics

> The HHSRS assessment is based on the risk to the *potential occupant who is most vulnerable to that risk.* For example, stairs constitute a greater risk to the elderly, so for assessing hazards relating to stairs they are considered the most vulnerable group. The very young as well as the elderly are susceptible to low temperatures. A dwelling that is safe for those most vulnerable to a hazard is safe for all.

14 This summary is online at: http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_603898.pdf

15 These examples are accessible online at: http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_603879.pdf

16 Cm 5793 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/downloadable/odpm_house_023168.pdf

HHSRS: the enforcement framework
Action by local authorities will be based on a three-stage consideration: (a) the hazard rating determined under HHSRS; (b) whether the LA has a duty or discretion to act, determined by the presence of a hazard above or below a threshold set in Regulations; and (c) the authority's judgement as to which is the best means of dealing with the hazard. Hazards above the threshold are defined as Category 1 hazards and those below as Category 2 hazards.

The courses of action available to authorities where they have either a duty or a power to act are:

- to serve an Improvement Notice, which performs a similar function to a repair notice;
- to make a Prohibition Order, which closes the whole or part of a dwelling or restricts the number of permitted occupants;
- to suspend these types of action, for example where the current occupant not identified as vulnerable to the hazard in question;
- to serve a Warning Notice;
- to make a Demolition Order - available for Category 1 hazards only (unless subject to Order);
- to declare a clearance area - available for Category 1 hazards only.

Although the HHSRS score is based on the most vulnerable potential occupant, authorities will take account of the vulnerability of the *actual* occupant in deciding the best course of action. Where the actual occupant is not particularly vulnerable to a hazard, an authority may decide to allow longer for the hazard to be dealt with, or may suspend action pending a future change of occupant.

Authorities have been encouraged to adopt the principles of the system informally alongside their existing enforcement work and as part of their local stock condition surveys. It was hoped that, as well as providing practical experience of the operation of the system on the ground, this would enable authorities to gather information about the likely enforcement costs in comparison with the costs of enforcement under the current legislation.

B. The Bill (Clauses 1-43) & comment

Part 1 of the Bill will replace the current Housing Fitness Standard with a new Housing Health and Safety Rating System (HHSRS) and will adapt and extend powers available to local housing authorities to tackle poor housing conditions by means of enforcement. It is expected that the main benefit to be gained from the implementation of the HHSRS will be 'health gains owing to better targeted intervention over a number of years.'[17] Its

[17] Regulatory Impact Assessment - Housing Bill Part 1 – Housing Health & Safety Rating System, December 2003, http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_026053.pdf

introduction is likely to impact mostly on the private rented sector.[18] The Explanatory Notes to the Bill[19] provide a detailed commentary on the Bill's clauses and section **A.4** of this paper (pp15-16 above) provides an overview of the proposed HHSRS and enforcement system. The sections below focus on responses to the Government's proposals, including the conclusions of the ODPM: Housing, Planning, Local Government and the Regions Committee, which scrutinised the draft *Housing Bill* and which reported in July 2003.[20] The Regulatory Impact Assessment issued with the current Bill states that there have been no major changes to the policy proposals as a result of the consultations but some changes are being made to the technical guidance on the HHSRS.[21]

1. The Housing Health & Safety Rating System (HHSRS): general comment

Despite broad consensus that the Fitness Standard does not reflect a modern understanding of the health and safety hazards and risks within dwellings there are still concerns about the HHSRS. The Department issued a further consultation paper in March 2001, *Health and Safety in Housing: replacement of the Housing Fitness Standard by the Housing Health and Safety Rating system.*[22] The purpose of this paper was to:

> Set out in broad terms how the Government proposes that HHSRS should be used to support the decisions local authorities need to take to enforce standards. It also considered the impact of the new system on some other decision-making processes that currently use the housing fitness standard.[23]

A summary of responses to this paper was subsequently published. On the principle of the HHSRS it was noted:

> 52% of respondents, including key players, agreed with the HHSRS in principle, with 9% opposing it. 30% had no view, and 9% gave 'other' responses. 13 respondents opposed HHSRS, including nine local authorities. However, some respondents wanted more analysis of the assumptions that underpin HHSRS, including the range of hazards and the definition of vulnerability. There were also concerns over the reliability and robustness of the system and its reliance on professional judgement.[24]

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[18] *ibid*

[19] Bill 11 – EN http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmbills/011/en/04011x--.htm

[20] HC 751-I, Tenth Report of 2002-03, The Draft Housing Bill, http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

[21] Regulatory Impact Assessment - Housing Bill Part 1 – Housing Health & Safety Rating System, December 2003, http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_026053.pdf

[22] http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/page/odpm_house_601670.pdf

[23] *ibid*, para 1.5

[24] DETR, Responses to the March 2001 consultation paper: summary. Accessible online at: http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_601671.pdf

Several respondents wanted to see changes to the HHSRS proposals:

> 22% of respondents said that changes were required to the HHSRS. Support for changes was strongest amongst London Boroughs. Nine respondents, including key players, wanted changes to the hazard system to allow for fewer (generic) hazards and/or a whole-dwelling score. There was also a request that the system be adapted to produce SAP ratings.[25]

55% of respondents felt that the HHSRS would lengthen inspection times and result in authorities incurring additional costs.[26]

The ODPM: Housing, Planning, Local Government and the Regions Committee scrutinised the draft *Housing Bill* earlier in 2003. This involved taking evidence on the HHSRS measures in the Bill from interested bodies. The Chartered Institute of Environmental Health's (CIEH) submission to the Committee said:

> There is a wide range of opinion among environmental health professionals on the HHSRS, with some opposed to its introduction altogether.[27]

The ODPM carried out an evaluation of Version 1[28] of the guidance on the new system in 2003 and found that practitioners expressed 'considerable reservations' about the system as they had experienced it.[29] The ODPM Committee was concerned to discover that reservations over the implementation and enforcement of the HHSRS still existed after five years of development and consultation.[30] Some of the Committee's specific concerns with the HHSRS are discussed in sections **2** to **7** below.

2. The guidance

Local authorities have been encouraged to use Version 1 of the guidance alongside the existing Fitness Standard in order to become familiar with the new method of calculating the seriousness of hazards. The ODPM's evaluation of the implementation of Version 1 found:

> 90% of authorities have some knowledge of the system, but fewer than 30% have 'hands on' experience of using the system other than in training courses. The

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25 *ibid*

26 *ibid*

27 ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

28 *Housing Health and Safety Rating System: The Guidance (Version 1)*, 2000

29 Housing Research Summary 185, ODPM 2003, *Evaluation of the Housing Health and Safety Rating System (Version 1)* http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_608668.pdf

30 ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 14

> extent of use of the system by local authorities was rather less than expected. Experience of using the system in the field appeared to be quite limited—very few authorities had carried out more than a very small number of surveys in houses.[31]

Housing bodies, such as the Chartered Institute of Housing (CIH), were critical of the fact that Version 2 of the guidance had not been issued before the publication of the draft Bill. The CIH's evidence to the ODPM Committee noted that it was not possible to comment in a meaningful way on how the HHSRS might work in the absence of Version 2.[32]

The ODPM Committee was 'disappointed' that the Government had consulted on the draft Bill in the absence of Version 2 of the guidance on the HHSRS:

> Witnesses are being asked to comment on a system and Parliament may subsequently be asked to approve its introduction without sight of the details about how the system is to be implemented.[33]

The Government rejected the Committee's concerns:

> The principles of HHSRS have been in the public domain since 2000. The Government does not intend to ask Parliament to approve the introduction of HHSRS without making available the underlying detail. A draft of the version 2 technical guidance, which will update the statistical data in version 1 and will also include new operational guidance specifically on the use of the system in houses in multiple occupation, will be made available later this year. In addition, we will be launching consultation, before the end of the year, on draft enforcement guidance for local authorities on the use of the powers which will be available to them under the Bill.[34]

A draft of Version 2 of the HHSRS technical guidance was published in December 2003.[35]

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31 Housing Research Summary 185, ODPM 2003, *Evaluation of the Housing Health and Safety Rating System (Version 1)*

32 ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 16 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

33 *ibid*

34 *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 6: http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

35 The draft is accessible online at:
http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/page/odpm_house_026446.pdf

3. The basis of enforcement action

Under the proposed new rating system officers will be required to assign a numerical score to each of the 24 hazards[36] in accordance with the risk it presents. The risk is defined as follows:

> Risk = probability of an occurrence causing major harm x severity of likely harms caused

The ODPM's evaluation of the Version 1 guidance found significant concerns amongst local authorities about assigning specific scores to each hazard and the extent to which these scores might have to be justified during the enforcement process:

> The key concern raised about HHSRS relates to enforcement. Local authorities had concerns that inconsistency in scoring may undermine their case in an enforcement situation. Local authorities lacked confidence in their hazard scores—they were uneasy about the degree of judgement involved in deciding on a score. Authorities and bodies representing property owners had not expected that there would be a need for this element of judgement. There had been an expectation that the statistical evidence would provide the 'right' answer for that hazard.[37]

The research concluded that:

> There would be considerable merit in asking the local authority Environmental Health Officer (EHO) to select a range of a probability of an occurrence, rather than a specific number, and the broader the ranges adopted, the greater comfort the EHO is likely to feel in the decision they make. We recommend that the guidance should have limited focus on numeric scores in the enforcement process and instead focus on the particular circumstances that lead the EHO to consider that particular features pose a threat to the health and safety of residents and others.[38]

The ODPM Committee recommended that the Government should address this issue before returning to Parliament with the final version of the Bill.[39] The Government accepted this recommendation:

> The Government accepts this recommendation and will consider how this can best be achieved in the final version of the Bill. The Government does not intend

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36 see page 15

37 Housing Research Summary 185, ODPM 2003, *Evaluation of the Housing Health and Safety Rating System (Version 1)*

38 *ibid*

39 ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 19 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

> that the justification for an authority's enforcement action should be based upon a hazard score alone. Whether a hazard falls into category 1 or 2 will depend upon the range or band into which the score falls, and the Government proposes to make this clearer in the Bill and in the version 2 technical guidance. It will be for the local authority to determine the action to take in the light of both the band and the current occupation of the dwelling.[40]

The Explanatory Notes to the current Bill make it clear that enforcement action by a housing authority will be based on (a) the Band into which a hazard falls as a result of the HHSRS calculation; (b) whether the authority has a duty or a power to act; and (c) the authority's judgement as to the best means of dealing with the hazard.[41]

The Government launched a further consultation exercise on the guidance for councils to enforce the new regimes under Part 1 of the Bill on 22 December 2003.[42]

4. Disrepair

In its March 2001 consultation paper, *Health and Safety in Housing: replacement of the Housing Fitness Standard by the Housing Health and Safety Rating system,*[43] the Department asked for views on the case for retaining a power for local authorities to deal with defects that cause occupants discomfort but which will not be prioritised for action under the HHSRS-based enforcement provisions.[44] Currently section 190 of the *1985 Housing Act* gives authorities power to take action against housing which, although not unfit, requires 'substantial repairs' or is in such a condition to 'interfere materially with the personal comfort of the occupying tenant.'

A majority of respondents to the 2001 consultation paper expressed support for this proposal.[45] The ODPM Committee noted that the draft Bill proposed to repeal a number of existing pieces of legislation, including those dealing with disrepair. The National Houses in Multiple Occupation Network submitted a memorandum to the Committee in which it called for the retention of section 190:

> There is concern over the proposed repeal of section 190 of the Housing Act 1985 which covers substantial disrepair and material comfort. This will remove an enforcement tool for tackling disrepair that is of concern to the tenants. Many

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40 *The Draft Housing Bill – Government Response Paper,* Cm 6000, November 2003 para 7 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

41 Bill 11 – EN para 49 http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmbills/011/en/04011x--.htm

42 ODPM press release, 2003/0281, 22 December 2003, *Consultation to enforce better housing conditions*

43 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/page/odpm_house_601670.pdf

44 *Health and Safety in Housing: replacement of the Housing Fitness Standard by the Housing Health and Safety Rating system,* March 2001 para 4.23

45 DETR, Responses to the March 2001 consultation paper: summary. Accessible online at: http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_601671.pdf

> disrepair matters will not be covered by the rating system. Dealing with disrepair and the overall improvement of houses is a fundamental plank of Housing Renewal Policy. Tackling disrepair can prevent houses from falling into major disrepair and becoming unsafe. Disrepair is also an element of the Decent Homes Standard.[46]

The ODPM Committee called for the retention of section 190 with amendments to take account of the HHSRS.[47] The Government agreed to consider this but pointed out that authorities will not be prevented from dealing with substantial disrepair under the new system:

> The 'hazards from structural failure', set out in version 1 of the HHSRS guidance, illustrate the kinds of disrepair which can give rise to these hazards and against which authorities will have either a duty or a discretionary power to take action, according to their severity. Minor disrepair, and conditions giving rise to discomfort, are not likely to justify priority attention by authorities under the enforcement provisions of the Bill. Guidance on how these issues may be approached by authorities will be included in the enforcement guidance to be produced for consultation later this year.[48]

The current Bill still provides for the repeal of section 190 of the 1985 Act.

5. Options for remedial action by authorities

Local authorities currently have a number of options available to them to tackle unfit dwellings. Under the new system authorities will still decide which of the available tools to use in a particular case: the most serious hazards (Category 1 hazards) will attract swift remedial action. The proposed enforcement framework will apply to all dwellings including HMOs.[49] Clause 5 will place a general duty on local authorities to take enforcement action where a Category 1 hazard is identified while clause 7 lists the powers that will be available to authorities to tackle Category 2 hazards.

The range of proposed mechanisms includes:

a. Improvement notices

These will replace Repair Notices currently served under section 189 of the 1985 Act. An Improvement Notice will require appropriate action (to be determined by the local

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[46] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 23 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

[47] *ibid*

[48] *The Draft Housing Bill – Government Response Paper,* Cm 6000, November 2003 para 8 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

[49] Part 2 of the Bill will introduce a mandatory licensing scheme for certain HMOs. The presence of serious hazards in an HMO will be taken into account in the operation of a licensing scheme.

authority), including works of repair and/or improvement to remove or minimise hazards. The Notice will specify a timetable and programme for action and can also require action in respect of faults which *could* contribute to a hazard if not addressed within 12 months.

As with Repair Notices, local authorities will have the power to carry out works with the owner's agreement or in default. Failure to comply with an Improvement Notice without reasonable excuse will be a criminal offence.

A number of respondents to the 2001 consultation paper asked for 'fast track' or emergency powers to deal with serious hazards, similar to powers under the statutory nuisance provisions of the *Environmental Protection Act 1990*.[50] This was echoed in the Chartered Institute of Environmental Health's (CIEH) evidence to the ODPM Committee:

> The CIEH continues to believe that there is a need for an expedited procedure to deal with life threatening hazards. Enforcement of serious hazards should not be restricted, neither should an appeals procedure allow the responsible person to delay compliance for over a year. For such emergency works appeal rights should be the same as those that already exist under the Section 80 of the Environmental Protection Act (1990).[51]

The ODPM Committee recommended the inclusion of emergency procedures to deal with Category 1 hazards that present an immediate risk to the occupier,[52] and the Government agreed to consider how best to achieve this.[53]

b. Prohibition Orders

These will replace Closing Orders[54] and Overcrowding Directions and will prohibit the use of all or part of a dwelling to all occupants or to members of a vulnerable group. The circumstances in which a Prohibition Notice might be served include a property where conditions present a serious threat to health and safety, but where the cost of remedial action is considered unreasonable or impractical. A Prohibition Notice might also be used where a dwelling is too small for the size of the household in occupation. A Notice will not affect existing occupation but will prohibit future occupation in excess of a specified number.[55] It will be possible to serve a Prohibition Notice in combination with an

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50 DETR, Responses to the March 2001 consultation paper: summary. Accessible online at: http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_601671.pdf

51 ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 24 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

52 *ibid*

53 *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 9 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

54 Section 264 of the 1985 Act

55 As with section 354 of the 1985 Act in respect of HMOs at present.

Improvement Notice, e.g. where the facilities are inadequate for the numbers in occupation.

Prohibition Notices met with majority approval (60%) from respondents to the 2001 consultation paper although there were some concerns over their use to deal with overcrowding. There was also a view that the proposed notices attempted to deal with an unrealistic range of situations.[56]

c. Suspended Improvement and Prohibition Notices

All or part of the action required by an Improvement Notice or Prohibition Notice may be suspended where, for example, a hazard exists but the current occupant is not identified as vulnerable to the particular hazard. Authorities will be required to reconsider the most appropriate course of action within a year of serving a Suspended Notice. Deferred Action Notices, served under section 81 of the *Housing Grants, Construction and Regeneration Act 1996* will be replaced by Suspended Notices.

Respondents to the 2001 paper agreed with the power to suspend Improvement and Prohibition Notices but there was concern that 12 monthly reviews would place a heavy financial and administrative burden on authorities.[57] The Government has rejected this argument:

> …the issue of Suspended Improvement Notices will be at LHA's discretion. Furthermore, LHAs already monitor the condition of dwellings that are borderline under the HFS.[58]

Prohibition Notices (whether suspended or not) and Improvement Notices will be registered as local land charges. This proposal met with 70% approval from respondents to the 2001 consultation paper.[59]

d. Hazard Awareness Notices

Local authorities will have discretion to serve a Hazard Awareness Notice where Category 1 or 2 hazards are identified. The Notice will specify the hazard and the category into which it falls and will detail the remedial action that the authority considers it would be practicable and appropriate to take in relation to the hazard.

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56 DETR, Responses to the March 2001 consultation paper: summary. Accessible online at: http://www.odpm.gov.uk/stellent/groups/odpm_housing/docments/pdf/odpm_house_pdf_601671.pdf

57 *ibid*

58 Regulatory Impact Assessment, Housing Bill Part 1 – Housing Health & Safety Rating System, December 2003, http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_026053.pdf

59 DETR, Responses to the March 2001 consultation paper: summary. Accessible online at: http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_601671.pdf

e. Demolition Orders

These are to be retained in order to provide an alternative to closure of a dwelling. They will only be available to local authorities as a course of action for dealing with Category 1 hazards.

f. Clearance Areas

The definition of a clearance area will be amended so that one can only be declared if there is one or more Category 1 hazards in each dwelling in the area and if other buildings (if any) in the area are dangerous or harmful to the health and safety of inhabitants in the area. Currently local authorities' duties in clearance areas may be triggered if the houses in the area are unfit for human habitation or "dangerous or injurious to the health" of local inhabitants because of their bad arrangement or the "narrowness or bad arrangement of the streets." The Local Government Association's evidence to the ODPM Committee expressed concerns about the effect of this change on authorities' use of clearance powers:

> There are concerns, particularly amongst low demand pathfinder authorities, regarding the effect that the HHSRS will have upon the usage of housing clearance powers. Clearance will inevitably have to be a significant feature of the Pathfinders' proposals if market re-structuring is to be achieved. Until now local authorities have generally been able to use Section 289 Housing Act 1985 to regenerate designated areas of private sector housing because there have been high levels of unfitness, and the cost of remedying it has been high. The proposal within clause 56 of the Bill, which will amend Section 289, is expected to seriously limit its future use for area regeneration.[60]

The ODPM Committee recommended that hazards identified by the HHSRS should not be the only basis on which a clearance can be declared.[61] The Government responded thus:

> In enabling authorities to have regard to factors other than the presence of hazards when considering whether to declare a clearance area, the Bill follows the existing provisions of the Housing Act 1985. Authorities may declare an area to be a clearance area if they are satisfied that the residential buildings are dangerous or harmful to the inhabitants of the area as a result of their bad arrangement or the bad arrangement of the streets; and any other buildings in the area are dangerous or harmful to the health or safety of the inhabitants of the area. However, the Government recognises that these circumstances are not always present, and therefore that the unfitness of dwellings has come, in some cases, to

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[60] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 28 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

[61] *ibid*

> represent the sole justification for clearance action. The Government also recognises that the case for clearing properties will often rely on their position within low-demand areas, or their obsolescence, rather than their condition, and that in these circumstances the presence of hazards may not be a relevant consideration.
>
> The Government believes that the declaration of a clearance area should remain available to local authorities as an option for tackling serious health and safety hazards in dwellings, but will consider what additional mechanisms may be necessary to ensure that clearance is readily available as a means of addressing the wider policy objectives mentioned by the Committee.[62]

The current Bill provides a discretionary power for an authority to declare a clearance area if it is satisfied that the residential buildings in the area, and any other buildings in the area (if any), are dangerous or harmful to the health or safety of the inhabitants of the area (clause 39). There will also be provision for the declaration of a clearance area if a Category 2 hazard exists in each of the residential buildings in the area, and any other buildings in the area (if any), are dangerous or harmful to the health or safety of the inhabitants of the area and the circumstances of the case are specified or described in an Order made by the Secretary of State (or the National Assembly for Wales via clause 197).

6. Duty to inspect and report on the condition of housing

The draft Housing Bill proposed the repeal of section 606 of the *1985 Housing Act*. This section requires local authority officers to submit a written report to the authority regarding unfit properties and potential clearance areas and requires the authority to consider such reports. It also requires officers to carry out an inspection in response to a complaint from a Justice of the Peace, or a parish or community council, that a property is unfit or that an area should be dealt with as a clearance area, and to report the outcome of the inspection to the authority. The ODPM Committee said that this section helps to counter pressure on officers not to act, e.g. where grant funds are limited or where a re-housing obligation might arise, and provides 'important protection' for a council's own tenants.[63] The CIEH argued that section 606 should not be repealed and the Committee endorsed this view.[64] The Committee also recommended that the Bill should include a positive duty on local authorities to investigate housing complaints.[65]

The Government accepted the recommendation in respect of section 606:

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62 *The Draft Housing Bill – Government Response Paper,* Cm 6000, November 2003 para 11 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

63 ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 31 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

64 *ibid*

65 *ibid*

> In consulting on the draft Bill, the Government invited views on the possible repeal of section 606 because the Government felt that it did not seem to add to the powers of local authorities to improve housing conditions. Nor was the Government convinced that there was any longer a need for a formal remedy for specific complaints from Justices of the Peace or parish or community councils.
>
> However, the Government recognises that section 606 may have some value in protecting tenants and allowing complaints to be brought into the public domain. Section 606 cannot be retained without amendment, since it is expressed in terms of unfitness. The Government will therefore consider whether to amend section 606 to take account of HHSRS or to include an equivalent new provision in the Bill.[66]

Clause 4 of the Bill will replace section 606 with modifications. Local authority officers will be required to inspect premises on receipt of a complaint from a Justice of the Peace or a parish or community council. If such an inspection results in the identification of a Category 1 hazard, or if the officer believes the area should be declared a clearance area, a written report will have to be submitted to the authority.

The Government did not accept that there should be a positive duty on local authorities to investigate housing complaints:

> The Government has considered this recommendation, but is not convinced that it is necessary. The Government notes the Committee's view that there is a duty under the existing fitness legislation to investigate housing complaints, but believes that the only such duty is that in section 606 of the Housing Act 1985, which applies to complaints from Justices of the Peace and parish and community councils that a dwelling is unfit, or that an area should be dealt with as a clearance area. As discussed above, the Government now proposes to retain that duty in response to the Committee's recommendation that it should do so. The Government recognises that complaints are very often the initial trigger for enforcement action. It expects authorities to investigate all complaints, whatever their source, both to protect their residents and to contribute to the information on stock condition which they need in order to support their housing strategies. Against that background, the Government does not believe that it is necessary to introduce a new statutory duty upon authorities.[67]

Clause 3 will place a duty on authorities to consider housing conditions in their districts at least once a year in order to determine what enforcement action to take. This process will also inform local authorities' actions in regard to declaring renewal areas and providing financial assistance towards the cost of improvement and repair of residential property.

[66] *The Draft Housing Bill – Government Response Paper,* Cm 6000, November 2003 para 13 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

[67] *ibid* para 14

7. Costs

Evidence submitted to the ODPM Committee commented on the cost and complexity of the new system. The National Housing Federation warned:

> The proposed Housing Health and Safety Rating System (HHSRS) scoring system may be too complex involving over 20 possible hazards that have to be assessed in relation to their danger to different vulnerable groups that may occupy the dwelling.[68]

Others, including the CIEH, advised that officers had not yet received sufficient training on the system. Norman Parkinson of Kings College London thought that the system would be difficult to explain to landlords and owner occupiers on the grounds that it was already proving difficult to explain to professionals.[69] The ODPM's Regulatory Impact Assessment (issued with the draft Bill) noted that the HHSRS was not expected to be more costly to run than the existing system: the ODPM advised the Committee that it had 'no firm estimates' of the likely cost of administering the new system.[70]

The ODPM Committee recommended that the Government should ensure that sufficient funding is available for the start-up costs associated with the HHSRS, particularly for training officers. It also recommended that the Government should satisfy itself that the benefits of the HHSRS would outweigh any additional costs.[71] In its response, the Government said it would address this matter:

> The Government is committed to fully funding any new burdens that it places on local government. Its assessment of costs takes account of such information as local authorities and landlords were able to provide during the preparation of the regulatory impact assessment. In finalising the regulatory impact assessment, the Minister will need to be satisfied that the benefits will justify the costs and will make a declaration of this. The Government recognises the importance of the start-up phase and will pay full attention to officers' training needs.[72]

The Regulatory Impact Assessment issued by the ODPM alongside the current Bill contains more detail on the costs associated with implementing Part 1:

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68 ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 25 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

69 *ibid* para 26

70 *ibid* para 27

71 ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 27

72 *The Draft Housing Bill – Government Response Paper*, Cm 2000, November 2003 para 10 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

The annual total cost, in England and Wales, of works carried out as a result of the LHA having a duty to act under HHSRS is estimated as approximately £260m, at 2001 prices. This compares with £470m under the HFS (see Annex A). This represents an annual cost saving of approximately £210m. This may be explained by two factors. Firstly, both figures represent the minimum cost required to undertake all urgent repair and replacement work and the cost to rectify the problems of unfitness (for the HFS), or to remove or reduce the hazard (for the HHSRS). However, under the HHSRS Local Housing Authorities will have the discretion to act according to local circumstances, or to require work upon hazards that score just under the threshold for mandatory action. Secondly, some quite serious hazards are not that expensive to remove or reduce. Over a thirty-year period, the Net Present Value of complying with the HHSRS is calculated as £4.8bn, as compared to £8.7bn with the HFS. This represents a cost saving over thirty years of £3.9bn.

If the assumption that the number of inspections will be the same under HHSRS as it was under HFS is dropped then there are the following results. In the instance that there were 10% more inspections per year then the annual cost of compliance is approximately £285m, leading to a thirty year saving from introducing the HHSRS of £3.4bn. Given a 10% decrease in the number of inspections annually, then there would be an annual cost of compliance of approximately £235m, leading to a thirty year cost saving of £4.4bn.

Based on soundings with LHAs, the following costs are estimated. For additional equipment required, including the hand-held computers, there could be a cost of approximately £300 per Officer. Initial training is estimated at 5 days per Officer. Training costs are estimated at around £2,300 per officer.

The running costs faced by local authorities are not expected to be any higher than under the existing HFS system. However, one LHA estimated that there would be costs of £10,000 in purchasing the relevant software and altering existing databases to accommodate the new information. [73]

8. Overcrowding

Information on the current statutory overcrowding standard can be found in Library Standard Note SN/SP/1013.[74] The ODPM Committee recommended that the Bill should be used to modernise the current standard.[75] The Government rejected this recommendation:

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73 Regulatory Impact Assessment, Housing Bill Part 1 – Housing Health & Safety Rating System, December 2003 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_026053.pdf

74 http://hcl1.hclibrary.parliament.uk/notes/sps/snsp-01013.pdf

75 ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 32 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

> The Bill enables overcrowding to be dealt with through HHSRS, with the statutory standards remaining in place as a fall-back. The Government takes the view that to raise the overcrowding standards in isolation from other factors would be essentially symbolic and would lead to increased demand for housing, to the detriment of other people whose living conditions may be worse; and would make it more difficult for authorities to juggle their priorities. The Government believes that the better approach to the problem of overcrowding is to improve housing supply through the substantial resources which are being provided, rather than try to tackle a single symptom of housing pressure.[76]

The Bill will not amend the statutory overcrowding standard.

II Part 2: Licensing houses in multiple occupation (HMOs)

Part 2 of the Bill will introduce a mandatory licensing scheme for certain HMOs. The aim of this regime is to provide greater protection to the health, safety and welfare of HMO occupants. The Labour Party's 1997 and 2001 manifestos contained a commitment to introduce such a scheme.

A. Background

1. What is an HMO?

Section 345 of the *1985 Housing Act* defines an HMO as a house occupied by persons who do not form a single household. This definition was extended by the *Local Government and Housing Act 1989* to include parts of buildings, i.e. flats in multiple occupation. The most problematic aspect of deciding whether a property constitutes an HMO has usually concerned the issue of whether the occupants form a single household; there are no certain criteria for this. Whether occupiers of a dwelling make up a single household is a question of fact and degree that depends on the circumstances in each case. Guidance on what factors should be taken into account by a local authority when considering whether a household forms a single household is contained in Department of the Environment Circular 12/93.[77] The rather vague nature of the definition has given rise to numerous legal challenges.[78]

The Department of the Environment, Transport and the Regions issued a consultation paper in 1999, *Licensing of Houses in Multiple Occupation,*[79] in which it noted that the existing definition of an HMO is unsatisfactory. On the one hand it is too wide in that it applies to types of buildings that do not require the same regulation as people's homes (e.g. tourist accommodation) and on the other it is too narrow; e.g. it might, in some circumstances,

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76 *The Draft Housing Bill – Government Response Paper,* Cm 2000, November 2003 para 15 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

77 para 2.2.2

78 Some of these cases are discussed in section **A** of Library Standard Note SN/SP/708

79 The Welsh office published a similar paper for Wales.

not apply to shared student accommodation. The definition has been deemed to be too vague for the purposes of developing an HMO licensing scheme.

2. Risks in HMOs

HMOs provide an affordable housing option (and are sometimes the only available option) for many people on low incomes such as students, benefit claimants and asylum seekers.[80] However, research has established that some of the very worst standards of accommodation are found in HMOs. The 1999 consultation paper, *Licensing of Houses in Multiple Occupation,* identified the following risks associated with HMOs:

> 10. HMOs can present a number of risks to the health and safety of those who live in them. Firstly, there are the risks associated with deficiencies that can occur in any type of housing - such as structural instability, disrepair, damp, inadequate heating, lighting or ventilation and unsatisfactory kitchen, washing and toilet facilities. All these matters are covered by the existing housing fitness standard, which applies to all dwellings. Authorities have a variety of options for action in houses which do not meet the standard. Although the EHCS[81] found that just under 10 per cent of all HMOs in the private rented sector failed the fitness standard, a higher rate of around 20 per cent was recorded in two particular types of HMO - houses converted into self-contained flats and houses comprising bedsits. They were most likely to be unfit as a result of disrepair and a lack of satisfactory heating.
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> 11. There are additional health and safety risks associated with HMOs arising from multiple occupancy. For example, although kitchen, washing and toilet facilities are present, they may be insufficient for multiple occupancy. There has been widespread public concern about fire safety standards in HMOs. The EHCS found that a further 40 per cent of houses comprising bedsits were unfit for the number of occupants. In over 40 per cent of cases this was a result of inadequate kitchen facilities, but around 80 per cent also lacked adequate means of escape from fire and other fire precautions.
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> 12. Research for the Department by Entec Ltd identified several factors, in addition to the number of occupants, which influence the risk from fire in HMOs. These include: the number of storeys - HMOs of three or more pose a significantly higher risk; the nature of the occupancy - HMOs housing dependant or vulnerable persons pose a higher risk than those housing the able bodied and cognisant; the quality of management in the HMO; and a number factors relating to the internal design of the HMO, such as the degree of self-containment of the units of accommodation, and the number of escape routes and their fire rating.

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[80] Regulatory Impact Assessment, *Housing Bill Part 2 – Licensing Houses in Multiple Occupation,* December 2003,
http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_026058.pdf

[81] English House Condition Survey

> 13. The risk of death from fire in HMOs will vary considerably, as all these factors will interact differently in each individual case. However, Entec found that in several types of HMO the risk is considerably higher than in comparable single occupancy dwellings. For example, occupants of houses comprising bedsits are about six times more likely to die as a result of fire than adults in an ordinary house. But in other cases, for example two storey shared houses and houses with lodgers, there may be little or no additional risk.[82]

3. Enforcing standards in HMOs

The provisions relating to standards in HMOs are currently contained in Part XI of the *1985 Housing Act*; these provisions were substantially amended by the *1996 Housing Act* (Part II). The main powers at the disposal of authorities are outlined in Library Standard Note SN/SP/708.[83] Several problems with enforcing standards in HMOs using the existing powers available to local authorities were identified in the 1999 consultation paper, these are summarised below:

- With the exception of the duty in relation to fire safety, the powers available under the 1985 Act are discretionary. Their level of use varies across the country.
- The standards applied through these powers also vary.
- There are limits to what an authority can achieve through section 352 of the 1985 Act in respect of fire safety precautions. Research has indicated that foam filled furniture is the first item to be ignited in about 50 per cent of fires but authorities cannot use section 352 to require a landlord to remove such furniture from HMOs.
- In specifying the works in a section 352 notice the only factors that an authority can take into account are the physical conditions and characteristics of the premises and the number of occupants. In the case of fire safety there is a view that this may not lead to the most appropriate specification for the risk posed. Entec found that the number of occupants does influence the fire risk in HMOs but their research demonstrated that fire risk depends on a number of other factors that integrate in different ways in different properties. For example, the risk in a two storey house shared by six, able bodied, cognisant adults would be much less than that in a similar house occupied by the same number of mentally or physically disabled or elderly persons.[84]

4. The Government's proposals

The April 1999 consultation paper set out some proposals for introducing a mandatory licensing system for HMOs. The key proposal was that local authorities would be given a statutory duty to introduce a licensing scheme for HMOs in their areas. This would act as

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82 DETR, *Licensing Houses in Multiple Occupation*, April 1999

83 http://hcl1.hclibrary.parliament.uk/notes/sps/snsp-00708.pdf

84 DETR, *Licensing Houses in Multiple Occupation– England*, April 1999

the main mechanism for regulating standards in HMOs and would provide local authorities with powers to ensure appropriate standards through licensing conditions.[85]

Other key proposals in the consultation paper included:

- Placing a duty on the person managing and/or the person having control of the property to ensure the HMO is licensed and to nominate a single individual licensee, resident in this country, who would be responsible for ensuring compliance with licensing conditions. There would be powers to refuse a licence if the licensee or the person managing, or the person having control, are not considered to be a 'fit and proper' person.
- An amendment to the definition of an HMO. A wide but precise definition would be adopted which would exclude certain specific types of properties.
- A proposal that licences should specify a maximum number of occupants to reflect the condition of the premises and standards of management. There would be (as now) discretion to set a lower number of occupants as an alternative to carrying out certain improvements. The option of a condition prohibiting the use of parts of a house (e.g. an attic bedroom with inadequate means of escape) would also be provided.
- The licensing regime would provide for the refusal or revocation of the licence in order to persuade licensees to remedy matters which are capable of being remedied. This was the main rationale for introducing such a scheme. The Government proposes that compliance with appropriate standards would be made a condition of any licence issued and that failure to comply would, after due warnings, lead to revocation or non-renewal.

B. The Bill (Clauses 44-65 & 191-196) & comment

Part 2 of the Bill will place a duty on local authorities to ensure that certain prescribed HMOs in their areas are licensed. Local authorities will also gain additional, discretionary licensing powers in respect of HMOs. It will be possible to exempt certain licensable HMOs from the requirement on a temporary basis (three months). Applications for a licence will be made to the local housing authority and a fee, determined by the authority, will be payable. Regulations may specify matters concerning applications, e.g. their contents, the manner in which they should be made and the maximum fee chargeable. Local authorities will be able to grant or refuse a licence based on whether the property in question is reasonably suitable for occupation by the number of persons or households specified in the application, whether the proposed licence holder is a 'fit and proper' person, whether the proposed manager of the HMO or an agent or employee of that person is a 'fit and proper' person and whether the proposed management arrangements are satisfactory.

[85] *ibid*

It will be possible for an authority to grant a licence including certain conditions, e.g. to carry out necessary works within a given period. Health and safety issues should be tackled using the powers in Part 1 of the Bill rather than through licence conditions. Licences will last for up to five years.

Authorities will be able to revoke licences; the Bill specifies a procedure to be followed in these circumstances which includes an appeals procedure. The most important sanction available to authorities will be the refusal or revocation of a licence. This will prevent the landlord from letting a property unless the authority is satisfied that suitable alternative management has been put in place. Landlords letting property in breach of the licensing provisions will commit an offence punishable by a fine of up to £20,000. Where a landlord is deemed not to be 'fit and proper' they will have the option of putting an alternative manager in place, e.g. a local managing agent, if this is satisfactory to the local authority. Where no alternative can be found and the property is occupied, the authority will have to make an interim management order (see section **IV**, p49 below). In addition, no rent will be payable by occupiers of unlicensed premises that ought to be licensed: this provision will not affect the terms of the residents' occupancy, including their security of tenure.

The Bill will also amend the definition of an HMO.

The Explanatory Notes to the Bill provide a detailed commentary on the clauses relating to HMOs. The following sections **1-5** focus on the more controversial aspects of the proposals identified during the 1999 consultation process and scrutiny of the draft *Housing Bill* by the ODPM: Housing, Planning, Local Government and the Regions Committee.

1. HMO definition

The 1999 consultation paper proposed the use of a new HMO definition based on that adopted in Scotland:

> Houses which are occupied by persons who are not all members either of the same family or of one or other of two families.[86]

Respondents to the consultation exercise expressed 'strong support' (47%) for this definition.[87]

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[86] *ibid* p18

[87] *Housing Bill – Consultation on draft legislation*, Cm 5793, p26 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/downloadable/odpm_house_023168.pdf

Clauses 191-192 (in Part 7 of the Bill) set out the new HMO definition. The Government has moved away from its initial proposal (see above) to adopt a broad definition with specific exemptions from the licensing requirement, and has instead drawn up a detailed definition spanning several clauses. The definition will essentially mean that HMOs will be houses, hostels, self-contained flats or other relevant buildings that are occupied by persons who do not form a single household where there is a degree of sharing of facilities, such as cooking facilities, or where the accommodation lacks such facilities or is not self-contained. Subsequent clauses 193-195 refine this definition and Schedule 9 provides for the exemption of certain buildings from the definition, e.g. buildings owned by local housing authorities, registered social landlords (RSLs) and certain buildings occupied by students.

Witnesses to the ODPM: Housing, Planning, Local Government and the Regions Committee's scrutiny of the draft *Housing Bill* identified problems with the new definition and the intention to exclude properties owned by certain landlords. One witness said that the definition was 'extremely complex and easy to misinterpret.'[88] Others argued that it was 'naïve to assume that all HMOs managed by RSLs are low risk' and that the exemption of HMOs managed by educational establishments 'failed to recognise the risks facing students.'[89] In 1999 the Independent Housing Ombudsman, who investigates complaints of maladministration against RSLs from RSL tenants, stated that Housing Corporation regulation alone cannot ensure associations' homes are properly managed.[90] Alternatively, the Chartered Institute of Housing (CIH) supports the exclusion of RSLs, as does the National Housing Federation (NHF), but the CIH recommends a review of the existing regulatory mechanisms over RSL owned HMOs to ensure that they produce adequate standards.[91] The British Property Federation has argued that the same regulatory regime should apply to HMOs irrespective of the sector in which they are based.[92]

The ODPM Committee recommended a return to the definition proposed in the 1999 consultation paper and the inclusion in the definition of RSL owned properties and properties owned by educational establishments.[93] The Government accepted that the definition may require 'further work' but rejected the inclusion of RSL properties and those owned by educational establishments:

88 The National HMO Network's written submission to the ODPM: Housing, Planning, Local Government and the Regions Committee, (DHB 10) http://pubs1.tso.parliament.uk/pa/cm200203/cmselect/cmodpm/751-ii/751w11.htm

89 The National HMO Network, National Union of Students, Brent Private Tenants Group – evidence to the ODPM Committee.

90 'RSLs must be licensed', *Housing Today*, 8 July 1999

91 Licensing houses in multiple occupation: response by the CIH, July 1999

92 BPF responds on licensing of houses in multiple occupation, 16 July 1999

93 ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 51 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

> The Government's approach to HMO licensing has been to try and ensure that any additional regulatory burden is proportionate to the potential risks to the health, safety and welfare of tenants in the properties concerned. On this basis, the Government does not feel that there is a convincing case for the inclusion of either registered social landlords (RSLs) or educational establishments to fall within the HMO regime.
>
> The Government considers that, in the case of RSLs, there is already a sufficiently robust regulatory framework in place to protect tenants. Similarly, the Government considers that is not necessary to bring educational establishments within the HMO regime. Research on fire risk, for example, in purpose-built HMOs, such as halls of residence, indicates that risks are relatively low.
>
> Local authorities should already know of these properties. So there should be no need for a system of licensing to identify them - say, for the purpose of a local authority's role in enforcing against health and safety problems, using its powers under Part 1 of the Bill.[94]

2. The principle & scope of mandatory licensing

Clause 50 of the Bill will place a duty on local authorities to license all HMOs to which Part 2 of the Bill applies. Clause 44 provides that Part 2 will apply to any description of HMO that is prescribed in regulations by the 'appropriate national authority.' The appropriate national authority (defined in clause 196(1)) will have power to prescribe descriptions of HMOs for this purpose (clause 44(3)). The Explanatory Notes to the Bill state that 'it is intended to prescribe HMOs of 3 storeys and above in which at least 5 people live.[95] The licensing provisions will also apply to any description of HMOs specified in additional licensing schemes made by a local housing authority under clause 45.

There is general support from local authorities and bodies such as the Chartered Institute of Environmental Health, Shelter, the National HMO Network and the Campaign for Bedsit Rights for the introduction of mandatory licensing of HMOs. This support is based on a recognition of the need to drive up standards in multi-occupied accommodation. On the other hand, landlords and letting agents are not persuaded about the need to extend local authority registration powers over HMOs.

The National Federation of Residential Landlords (NFRL) believes that the experience of mandatory licensing of HMOs in Scotland provides a salutary lesson. Mandatory

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[94] *The Draft Housing Bill – Government Response Paper,* Cm 6000, November 2003 para 25 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

[95] Bill 11 – EN para 141 http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmbills/011/en/04011x--.htm

licensing of HMOs was introduced in Scotland from 1 October 2000 by an Order under the *Civic Government (Scotland) Act 1982*. Since that date owners of HMOs have been required to apply for a licence and councils have been able to refuse a licence where there are concerns over factors such as fire safety, physical conditions and poor management standards. Initially the threshold for licensing was properties with more than five occupants but this was reduced in October 2003 to cover all properties occupied by three or more people who are members of more than two families.[96] The Scottish scheme also covers communal accommodation such as student residences and RSL owned properties, although since March 2003 publicly accountable bodies have been able to 'self-certificate.'[97]

The NFRL's November 2001 Journal stated that the new licensing arrangements in Scotland had been met with 'massive non-compliance:'

> The experience in Scotland shows that once licensing starts, its purpose, scope and method of implementation broadens wildly. Landlords have to confront new and unforeseen problems and deterrents. Enforcers pronounce and threaten in efforts to overcome the massive non-compliance. The latent anti-landlord culture becomes inflamed as the confrontational, adversarial regime reasserts itself. Thus the compliance bill rockets well beyond anything originally contemplated and the supply side is massively disenchanted. Is all this really the way to raise safety and physical standards in the HMO market?[98]

Hector Currie's *Review of the First Year of Mandatory Licensing of HMOs in Scotland* also found 'wilful evasion of the licensing scheme by too many HMOs.'[99] *The Scotsman* reported in December 2002 that more than 50 per cent of landlords in Edinburgh had yet to register under the HMO legislation.[100]

The NFRL argues that low rental income (exacerbated by housing benefit delays) is a crucial factor behind poor conditions and standards of management in HMOs:

> The conclusion of landlords is that the proposed licensing solution is misconceived and is likely to backfire in practice. Moreover, the problems in HMOs are largely a function of the lowish levels of rental income, the age of the dwellings and the nature, attitude and behaviour of some of the tenants. Overall however, 78% of all private tenants are very or fairly satisfied with their landlord, against 73% of housing association tenants and 67% of council tenants.[101]

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96 Scottish Executive Press Notice, 1 October 2003, *Tenants to get greater protection*
97 Scottish Executive Press Notice, 19 March 2003, *New rules for multiple occupancy*
98 Residential Renting, Issue 18, November 2001 pp 30-31
99 Scottish Executive Social Research, 2002, http://www.scotland.gov.uk/cru/kd01/blue/mlhmo.pdf
100 'More than half of private landlords ignoring safety regulations,' 7 December 2002
101 Residential Renting, Issue 18, November 2001 pp30-31

The approach favoured by the NFRL is to tackle fire problems in HMOs by 'harnessing technology in the installation of safety equipment and other measures and by education programmes to teach private tenants and their landlords about the bad practices which cause fire and what to do in the event of fire.'[102] The NFRL has also argued for a reappraisal of the need for mandatory licensing on the grounds that 'there have been fundamental developments which question the whole strategy of licensing' since the Entec research on fire fatalities was conducted.[103]

On the question of which HMOs will be covered by the mandatory licensing scheme, witnesses to the ODPM Committee on the draft *Housing Bill* said that by only including HMOs of three or more storeys in which at least five people live, a number of high risk properties will be excluded; it is estimated that this definition will cover 120,000 properties.[104] The Committee concluded that it was 'not convinced' that mandatory licensing should be limited to these properties and pointed out 'the Government's evidence suggests that high risks in HMOs are caused by a range of factors – the number of storeys and the number of occupants are only two amongst many.'[105] The Government did not accept this recommendation:

> Whilst the Government recognises that risks in HMOs are not simply determined by the number of storeys and occupancy, they are important factors and provide a starting point for establishing the core categories of HMOs to be subject to mandatory licensing. The Government is keen to ensure a balance between required and undue regulation. Licensing will place burdens on landlords and local authorities alike and it is for that reason that we are keen to ensure mandatory licensing targets the highest-risk properties.
>
> However, we recognise that a 'one size fits all' approach is not adequate to deal with all properties that present risks to the welfare of their occupants. The Bill therefore provides discretion for local authorities to extend licensing to deal with other categories of problematic property in response to local circumstances.
>
> The draft Bill provides that properties to be subject to mandatory licensing will be prescribed by secondary legislation. The Government is not currently persuaded that it is necessary to require mandatory licensing more widely than to properties of three or more storeys and five or more people. However, the Government is committed to reviewing the operation and implementation of the HMO regime, including the scope of the licensing system. If it becomes apparent that a wider scope for mandatory licensing is justifiable, as suggested by the Committee, the

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[102] *ibid*

[103] Residential Renting, Issue 23, August 2003, pp14-15

[104] Regulatory Impact Assessment, *Housing Bill Part 2 – Licensing Houses in Multiple Occupation*, December 2003, http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_026058.pdf

[105] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 52 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

> Government will amend the licensing regime accordingly; this could be achieved without amending primary legislation.[106]

3. Discretionary licensing

Clause 45 of the Bill will allow local housing authorities to designate all or part of their areas as subject to additional licensing requirements for certain specified descriptions of HMOs. Approval for such a designation will have to be sought from the 'appropriate national authority' (clause 47)[107] and no designation will last for longer than five years (clause 49).

The ODPM Committee was critical of the proposal to give local authorities discretionary licensing powers. It referred to the Government's 1999 consultation paper which said that existing discretionary powers had led to significant variations in the level of enforcement activity and in the standards applied around the country.[108] The Committee concluded:

> The Government's two-tier approach to licensing Houses in Multiple Occupation (mandatory licensing of larger properties and discretionary powers to license smaller properties) does not meet its aim of having a consistent approach to HMOs across the country.[109]

The Government responded:

> The Government recognises the desirability of a consistent approach to licensing. The existing legislation has led to significant differences across the country in how this type of property is regulated at present. However, as explained in the response to recommendation 26 above,[110] the Government considers that a two-tier approach delivers flexibility to deal with problems at a local level, whilst keeping to a minimum the regulatory burden on landlords and local authorities.[111]

4. Fit and proper person

A range of witnesses told the ODPM Committee that the definition of a 'fit and proper person' in relation to the licensing proposals in the draft Bill was 'too negative.' The Residential Landlords Association said:

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106 *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 26 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

107 General approvals may be issued.

108 DETR, *Licensing of Houses in Multiple Occupation – England*, p7

109 ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 54 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

110 see p38 above

111 The Draft Housing Bill – Government Response Paper, Cm 6000, November 2003 para 27

> The whole tone of the Bill unfortunately is rather negative. There is nothing positive, there is nothing that gives encouragement to landlords.[112]

The Committee took up the Independent Housing Ombudsman's (IHO) suggestion that membership of the Ombudsman scheme should be included as a condition of licensing.[113] The Government rejected this as a short term option but said it would 'explore the scope for expanding the remit of the IHO into the private sector generally in the context of the Law Commission's work on tenancy agreements.'[114] The Committee also recommended the adoption of a 'carrot and stick' approach to private landlords such as that advocated by Shelter and the Joseph Rowntree Foundation's independent commission on the future of the private rented sector:[115]

> Under such an approach all landlords would be expected to pass a test to display an understanding of landlord and tenant law and the standards expected of them. In return the forum proposes that landlords should then be able to offset management costs against tax.[116]

The Government's response is reproduced below:

> Landlords are already able to offset a number of expenses against their personal tax bill. The specific changes proposed have a number of wider implications which need to be fully considered. For example, allowing landlords to offset their management time against their tax bill would effectively give rise to an additional income stream which would itself be taxable, potentially off-setting any benefit to the landlord.
>
> In addition, there are potential difficulties in introducing changes to UK-wide taxes in order to support the introduction of an English registration package. There will clearly be implications for the devolved administrations. These and other issues would need to be explored. Changes to the tax regime are for the Chancellor of the Exchequer, and the Finance Bill, rather than a Housing Bill.
>
> The Government encourages local authorities to provide or facilitate programmes of voluntary training. Training schemes are currently being developed to improve the professionalism of the private rented sector - not least by the landlords' organisations themselves. The Government welcomes these developments.[117]

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[112] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 37 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

[113] *ibid* para 38

[114] *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 17 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

[115] *Private Renting: A new settlement*, the report of the Commission on the Private Rented Sector, May 2002

[116] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 40

[117] *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 19

5. Sanctions

The Chartered Institute of Housing called for an enforcement regime for HMOs 'based on a spectrum of intervention, starting with fines and moving on through management orders.'[118] The Institute argued that the enforcement regime for HMO and selective licensing (see section **III** of the paper, p44) should be a process with a series of sanctions that bite at different points. It also suggested a staged approach to fines based on the rentable value of the property concerned:

> …a more positive way might be to say to the landlord, 'You need to accept a lower amount of rent rather than the full amount of rent' linked to a clearly defined action plan for moving the situation from the negative, where it is, to the positive, so you will see an incentive for the landlord to improve their situation rather than just absolutely no rent at all where the biggest problem is likely to be the tenant being evicted.[119]

The ODPM Committee recommended a staged approach to sanctions for non-compliance but the Government rejected this:

> The Government accepts that it is important that the licensing framework produces a system that provides incentive and opportunity for landlords to comply with it. However, non-compliance with the regime's requirements will vary widely in both form and severity. The Government considers that the current system of sanctions provides the flexibility for the prosecuting authority and the courts to make a judgement as to the appropriate action to take.[120]

The provision that no rent will be payable by the residents of an unlicensed licensable HMO is controversial. The ODPM Committee received evidence from witnesses who argued that the most likely result of this would be tenants losing their homes. For example, the Local Government Association said:

> We can understand why the link between non-licensing and rent has been made but we do feel that puts the tenants in a very difficult position. Most tenants now have very little security of tenure and to put them in a position where they are not paying rent may lead some rogue landlords to evict them and find somebody else to come into the property.[121]

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118 ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 65 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

119 *ibid*

120 *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 33 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

121 ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 67

The Government told the Committee that tenants would not be evicted from unlicensed licensable properties where no rent is paid because local councils would intervene with interim or final management orders (see section **IV,** p49) and would take over management of the properties. The Committee questioned whether this overestimated councils' capacity to intervene.[122] The Committee recommended that if these provisions were retained, the final version of the Bill 'must include adequate safeguards so that tenants cannot be evicted because their landlord is unlicensed.'[123] The Government responded thus:

> The Government accepts the principle that tenants should not be evicted because their landlord is unlicensed. However, the Government does not consider that it is appropriate that a person engaged in a criminal activity (that is, operating a property without a licence) should benefit from that activity by lawfully receiving or demanding rent. The Government accepts the need to refine the provision, especially to ensure that tenants are safeguarded against eviction for non-payment of rent, where the only reason for such failure is on account of the provision. This is a matter to which the Government is giving further consideration.[124]

The Bill provides, in these circumstances, for tenants' security of tenure to remain unaffected but questions still remain over the ability of local authorities to enforce the non-payment of rent by tenants and to intervene where non-payment results in eviction.

6. Costs

The Chartered Institute of Environment Health's evidence to the ODPM Committee on the draft Bill urged the Government to make additional resources available for local authorities in the form of a Supplementary Credit Allocation to deal with the initial licensing of HMOs.[125] The Government has said that it will keep the likely costs involved under review but is committed to fully funding any new burdens that it places on local government.[126] The Regulatory Impact Assessment on licensing HMOs issued alongside the Bill gives more information on the likely costs involved in the scheme:

> It has been possible to make some provisional estimates of the costs of the different options. These costs are a mixture of both policy and enforcement costs and estimates are based on analysis of implementation under existing HMO registration schemes. Under options 2 and 3 landlords would incur additional costs relating to physical improvements, taking a more proactive and responsible management role and providing evidence of their character. These would be over

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[122] *ibid* para 68
[123] *ibid* para 69
[124] *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003, para 34 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf
[125] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 55 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf
[126] *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 28

and above the cost of the licence fee itself and repairs or safety measures associated with HHSRS; and are highly problematic to quantify particularly given the risk-based regime proposed.

Local authorities will also incur substantial costs, since officers will need to administer the scheme, usually involving a visit to each property, and enforce the system. Estimates of costs to local authorities are in the region of £100 per unit of accommodation - per bedsit for example - although there would be discretion to charge a range of licence fees up to a maximum depending on the degree of action needed, probably between £55 and £110 per unit. Those properties already checked as part of an existing registration scheme would be "passported" into the new system without a fee. After the initial start-up costs this system of charges would provide for a self-financing licensing scheme, a principle accepted by the Local Government Associations for England and Wales.

In addition to exemptions for certain landlords and properties such as Registered Social Landlords and university halls of residence, local authorities would have the discretion not to charge a fee at all. A local authority could, for example, decide to charge no fee or a nominal one where the landlord is part of an existing voluntary accreditation scheme run by the authority.

Under our proposal, an estimated minimum of 120,000 HMOs in England would be subject to mandatory licensing. It is estimated that around a quarter of these higher-risk HMOs would be passported into licensing, around half of the remaining properties would attract the highest charge and half would attract a lower say 50% charge. Assuming that these larger HMOs had on average six units of accommodation, 270,000 units would attract the higher fee and a similar number a lesser fee. This gives a total cost of licensing in fees of £44.55m. The licence would cover a five year period, giving a cost of just under £9M per annum. In Wales it is estimated that up to 5,000 HMOs would be subject to mandatory licensing. Extrapolating this from the above example would imply a comparative cost range of £0.5 - 0.7M.

Landlords might be expected to seek to recover additional fees and costs associated with licensing through higher rents. However, even if the maximum licensing fee of £110 per unit were charged this would amount to only 42 pence per unit per week during a five-year licence, significant feed-through into higher costs for tenants and Housing Benefit seems unlikely. Some landlords might be tempted to consider reacting by reducing the supply of HMO accommodation, although this impact will be minimised if licensing is confined to the highest-risk properties (Option 2).[127]

[127] Regulatory Impact Assessment, *Housing Bill Part 2 – Licensing Houses in Multiple Occupation*, December 2003, http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_026058.pdf

III Part 3: Selective licensing schemes

Part 3 of the Bill will provide local authorities with powers to license private sector landlords in their areas. These powers are primarily intended to address the impact that poor quality private landlords, and their anti-social tenants, can have on the wider community. The powers have been developed with the need to tackle problems in areas of low housing demand in mind.

A. Background

In the April 2000 Housing Green Paper, *Quality and Choice: A Decent Home for All*,[128] the Department of Environment, Transport and the Regions identified a problem of poorly managed private rented accommodation in areas of housing surplus and asked for views on a proposal to give local authorities discretionary licensing powers in these areas:

> There are, however, areas of declining housing demand, particularly in parts of our northern cities, where the large-scale operations of some unscrupulous landlords, often linked to criminal activities such as Housing Benefit fraud, drug-dealing and prostitution, are destabilising local communities, creating a range of social and economic problems, and seriously hampering efforts at regeneration. Not only can they make life very difficult for respectable tenants, but also they are increasingly offering homes to anti-social households, including some who have been excluded because of their misbehaviour from nearby social housing.
>
> This unholy alliance of bad landlords and bad tenants creates a complex and intractable set of problems, requiring multi-agency approaches, a theme of both Policy Action Team (PAT) 8, looking at anti-social behaviour, and PAT7, looking at unpopular housing, as part of the Social Exclusion Unit-led work on neighbourhood renewal.
>
> One possible ingredient in these approaches would be to give local authorities discretionary powers to impose licensing of privately rented dwellings or of landlords on particularly problematic types of property, or neighbourhoods. In these situations, where some of the problems arise from a surplus of housing rather than a shortage, licensing would be unlikely to have the same damaging side-effects as elsewhere, though the powers would need to be used highly selectively, following careful analysis of local conditions. As we propose for houses in multiple occupation, landlords could be required to meet specified standards on condition and management.
>
> We welcome views on this proposal, and the form that it might best take. A particularly difficult issue is how the areas for licensing should be selected and defined, so as to ensure that action is concentrated where it is most needed rather

[128] http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_601699.pdf

> than extending into a more general and potentially counter-productive regulatory regime.[129]

The Government published its Housing Policy Statement, *The Way Forward for Housing,* in December 2000.[130] This document noted that the proposal to give local authorities discretionary licensing powers for private rented sector properties in areas of low housing demand received 'particularly strong support.'[131] The Government then published a consultation paper, *Selective Licensing of Private Landlords,* in October 2001 which set out the proposal in more detail and sought further views on its applicability.[132] The proposals were also considered as part of the ODPM: Housing, Planning, Local Government and the Regions Committee's scrutiny of the draft *Housing Bill.*

The Regulatory Impact Assessment published alongside the current Bill states that the results of these consultations 'confirm the widespread desire by local authorities and associated bodies to provide greater powers to act against private sector landlords in areas of low housing demand and, where there are compelling reasons to do so, elsewhere. On that basis, reliance on existing powers to deal with the problems that exist was considered as unacceptable.'[133]

The Government estimates that there are around one million dwellings in low demand in parts of five regions in the north and midlands in England.[134] Of these, approximately 640,000 are thought to be in the private sector. One in five of these are viewed as likely to be privately rented[135] giving a total of 128,000 privately rented dwellings subject to low demand. In Wales there are an estimated 72,000 properties in the private rented sector as a whole.[136] On the assumption that selective licensing will be taken up by a majority of authorities that have low demand areas, the Government expects that 75% of low demand dwellings will be required to obtain a licence in England. Work by the National Assembly for Wales has indicated that a further 32,000-40,000 properties will be subject to licensing in the Principality.[137]

B. The Bill (Clauses 66-85) & comment

The Bill (clause 67) will give local authorities the power to designate certain areas as subject to selective licensing. The conditions necessary for establishing such a scheme include an area being one of low housing demand, or likely to become an area of low

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129 *ibid* paras 5.32-5.35
130 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/page/odpm_house_601904.pdf
131 *ibid* para 3.2
132 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/page/odpm_house_601676.hcsp
133 Regulatory Impact Assessment, *Housing Bill Part 2 – Selective Licensing of Private Landlords,* http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_026059.pdf
134 Comprising the North East, Yorkshire and Humberside, North West, East Midlands and West Midlands.
135 Estimated from 2001 Housing Investment Programme data
136 Regulatory Impact Assessment, *Housing Bill Part 2 – Selective Licensing of Private Landlords*
137 *ibid*

demand, where such a designation will contribute to the improvement of social or economic conditions in the area. They will also be able to establish a selective licensing scheme if there is a problem with anti-social behaviour that is contributed to by private landlords failing to tackle their tenants. Selective licensing schemes will cover all private landlords in these designated areas (clause 72).[138] Designation will be subject to approval by the 'appropriate national authority' (clause 69).

Licensing schemes will require the licencee to be a 'fit and proper' person (i.e. no relevant criminal convictions and no record of serious property mismanagement) (clause 75). Local authorities will need to use their judgement in determining the fitness or otherwise of landlords (clause 76). A criminal conviction in itself will not necessarily be an indication that a landlord is not fit, but a past housing conviction relating to the carrying out of his/her landlord duties may be relevant. Licensing will also require that the properties concerned are managed properly. It is intended that conditions relating to the management of the properties should not be unduly onerous. Landlords will be able to provide evidence to the local authority in the form of relevant certificates or declarations, i.e. that they meet the appropriate standards in relation to gas, electricity and furniture safety standards.[139]

As part of the licensing regime landlords will be required to play their part in addressing the impact that their tenants have on the wider community. Landlords will not be held responsible for everything their tenants do, but they will be expected to respond to complaints about behaviour that impacts on others and explain that such behaviour is unacceptable. Landlords will be expected to take greater care over whom they let to by asking for references from prospective tenants. As part of this the Government expects that many local authorities will want to offer some kind of reference checking service for landlords as part of the licensing regime. This will not determine whether a landlord can let to a particular person, but it will provide the landlord with more information so as to be able to make an informed decision.

As with the Part 2 provisions, authorities will be able to grant or refuse a licence, or grant a licence subject to certain conditions (clause 77). Failure to licence a licensable property will be an offence; the maximum fine will be £20,000 (clause 82). No rent will be payable by the residents of an unlicensed licensable property. Non-payment of rent in these circumstances will not affect the residents' security of tenure (clause 83).

The Explanatory Notes to the Bill provide a detailed commentary on the clauses relating to selective licensing. The following sections **1-5** focus on the more controversial aspects

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[138] Except those licensed under Part 2 of the Bill, where a temporary exemption notice is in force or if the property is subject to a management order under Part 4.

[139] Regulatory Impact Assessment, *Housing Bill Part 2 – Selective Licensing of Private Landlords* http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_026059.pdf

of the proposals and scrutiny of the draft *Housing Bill* by the ODPM: Housing, Planning, Local Government and the Regions.

1. Designation of areas for selective licensing

The ODPM Committee took evidence from witnesses who thought that selective licensing as set out in the draft Bill would miss out some areas that suffer from significant problems. Mr Newey of the Royal Institute of Chartered Surveyors said:

> Actually, in areas of low housing demand tenants can vote with their feet because there will be alternative accommodation, and therefore we feel that this should be amended to cover areas with high demand and a high percentage of tenants in receipt of housing benefit, and then we would support selective licensing.[140]

The Transport, Local Government and the Regions Select Committee's inquiry on Empty Homes (2002/03) considered the Government's proposals for selective licensing and concluded that they did not go far enough:

> Across the country some of the poorest tenants are living in some of the worst quality private rented accommodation. The Government should give all local authorities the discretion to license those private landlords whose tenants are in receipt of housing benefit. Only properties which are fit for habitation should receive a licence.[141]

The ODPM Committee recommended that all councils should have a discretionary power to license private landlords 'enabling them to take account of local housing conditions and housing strategies.'[142] The Government's response makes it clear that there is no intention to introduce licensing for all private landlords.[143] The Bill *will* allow for licensing in non-low demand areas where problems exist. The Government expects that where local authorities make a reasonable case to exercise licensing powers to tackle anti-social behaviour in areas where there is a problem with the private rented sector, but no problem of low demand, the requests will be granted.[144]

The Regulatory Impact Assessment issued with the Bill does acknowledge that there may be potential 'negative impacts' on areas not subject to licensing if 'problem' landlords and tenants are displaced to nearby areas:

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[140] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 56 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

[141] The Sixth Report of the Transport, Local Government and the Regions Select Committee on Empty Homes, HC 240 of Session 2001-2002, paragraph 36

[142] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 57

[143] *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 29 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

[144] *ibid* para 31

> Careful consideration of these points in designing individual schemes should help minimise this problem. This will entail looking at how the boundaries of schemes are defined to prevent displacement into neighbouring streets and the use of the scheme beyond currently low-demand areas where there is significant evidence that there is potential for similar decline. It will be important for this aspect of the licensing regime to be one of the features that is closely monitored when assessing the operation of the schemes.[145]

2. Landlords' duty of care

The London Borough of Newham and others have argued that many of the licensing and enforcement provisions in the Bill could be simplified by placing a duty of care on private landlords to maintain their properties to certain standards and conditions.[146] The ODPM Committee on the draft Bill recommended the introduction of a duty of care but the Government responded by pointing out that there are already legislative provisions that impose positive obligations on landlords to maintain their properties to certain standards. It is intended that detailed provisions on how managers of licensed properties should act in caring for their tenants will be set out in an approved code of practice or prescribed in management regulations.[147]

3. Obtaining approval for schemes

The ODPM Committee received evidence from authorities that the requirement to get Secretary of State (or National Assembly for Wales) approval prior to establishing a selective licensing scheme 'will unnecessarily delay implementation.' There was emphasis on the need to respond rapidly to changing conditions in their areas.[148] The Committee recommended the removal of the requirement to obtain approval. In response, the Government pointed out that the Bill will provide for the Secretary of State to dispense with the need for authorities to seek consent before they proceed to selective licensing.[149] The Government undertook to 'discuss with the Local Government Association and others the basis on which this dispensation might be exercised' and said that it 'had not ruled out the possibility of dispensation from the date on which the relevant order comes into effect.'[150]

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[145] Regulatory Impact Assessment, *Housing Bill Part 2 – Selective Licensing of Private Landlords*, http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_026059.pdf

[146] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 45 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

[147] *The Draft Housing Bill – Government Response Paper,* Cm 6000, November 2003 para 24 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

[148] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 63

[149] See clause 69 of the current Bill

[150] *The Draft Housing Bill – Government Response Paper,* Cm 6000, November 2003 para 32

4. Sanctions

The comment on sanctions that will apply under selective licensing schemes mirrors that made in relation to mandatory HMO licensing schemes. See section **II.B.5** (p41) above.

5. Support for private landlords

While welcoming the draft Bill's provisions in relation to anti-social private sector tenants, the ODPM Committee accepted evidence from the Chartered Institute of Housing and the Local Government Association that stressed the need for appropriate support for private landlords to ensure that eviction is only used as a last resort:

> Local authorities and other public agencies, such as the police and primary care trusts, have a range of tools which can be used to tackle anti-social behaviour. It is important that these agencies provide the 'support and guidance' to private landlords referred to in the Government's consultation document on selective licensing. As we recommended in our Empty Homes inquiry, local authorities should ensure that landlord licensing schemes link into local agencies such as the police and youth offending teams, who can provide the appropriate response to anti-social behaviour problems.[151]

The Government agreed with this recommendation and said that it intended to make it clearer that selective licensing 'will encourage local authorities and other agencies to work with licensed landlords in tackling anti-social behaviour problems in accordance with local community, crime reduction and housing strategies. This will be made explicit in guidance the Government intends to issue on selective licensing.'[152]

IV Part 4: Additional control provisions (Clauses 86-118)

Part 4 of the Bill contains additional provisions for enforcement action in respect of properties that are licensable under Parts 2 and 3. In certain limited circumstances authorities will also be able to take enforcement action against properties that are not licensable. The mechanisms that authorities will have at their disposal include interim management orders (IMOs), final management orders (FMOs) and overcrowding notices.

The most important sanction that an authority will have at its disposal will be the refusal or revocation of a licence which will prevent the landlord from letting the property until the authority is satisfied that suitable alternative management arrangements have been made. Letting a property in breach of these provisions will be a criminal offence subject to fines of up to £20,000. The Regulatory Impact Assessment issued with the Bill states

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[151] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 42 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

[152] *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 21 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

that 'it is likely to be in the interests of both the landlord and the local authority to find a suitable manager of the property.'[153] However, in certain circumstances (see below) the authority will have to make an interim management order (IMO) if the property in question is occupied. This will ensure that the property is properly managed until a longer-term solution can be found. If a solution cannot be found within 12 months the authority will be able to make a final management order (FMO) which will place the longer-term management of the property in the hands of the authority.

A. Interim management orders

A local authority will be able to make an interim management order (IMO), which will last for 12 months, for the purpose of securing that certain steps are taken in relation to a property licensable under either Part 2 or 3 of the Bill. An IMO will require immediate steps to be taken to protect the health and safety of the persons occupying the property, or persons occupying or with an interest in properties within the vicinity. An IMO may also specify any other steps that the authority thinks appropriate to secure proper management of the house pending a license being granted or the making of a final management order.

Clause 87 sets out the circumstances in which an IMO must be made. These include where an HMO, or a house subject to a selective licensing scheme, ought to be licensed but is not and there is no reasonable prospect of it being licensed in future, or where the health and safety condition (defined in clause 89) is not met. It will be possible to issue an IMO where a house *is* licensed but the authority intends to revoke the license and there is no reasonable prospect of it becoming licensed again in the near future. Authorities will also be able to apply to the county court for special interim management orders in respect of HMOs or other houses that are not licensable. Clause 88 sets out the conditions the court must have regard to in granting a special IMO. Regulations may prescribe the circumstances in which a special IMO application may be made; these must relate to combating anti-social behaviour or other prescribed circumstances in which a Part 3 (selective) licensing regime can be set up.

Fulfilling the 'health and safety condition' will involve it being necessary to make an IMO to protect the health and safety of the occupiers or persons occupying or owning property in the vicinity. It will also be fulfilled where occupiers are being threatened with eviction in order for the landlord/agent to avoid the licensing requirements under Part 2 of the Bill (clause 89).

When an IMO is made the authority will have to take immediate steps to protect the health and safety and welfare of the occupiers and those living nearby. It must also take steps to put in place long-term management arrangements and ensure that the property is properly managed until these arrangements are determined. In respect of licensable

[153] Regulatory Impact Assessment, *Housing Bill Part 2 – Selective Licensing of Private Landlords*, http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_026059.pdf

properties, the authority concerned will have to grant a licence or make a final management order (FMO). Where the properties are not subject to licensing the authority will have to consider whether, at the end of the IMO, it ought to make a FMO or take no further action (clause 91).

IMOs will enable authorities to take over many of the rights and obligations of the landlord in respect of the property. They will be able to manage the properties or authorise a manager to do so on their behalf but they will not acquire ownership of the legal estate (clause 92). Authorities will be able to permit others to take up occupation of the properties (with the written consent of the legal owner) but these tenants will not acquire secure tenant status (clause 106(3)). Occupiers will retain the same rights as they had before the IMO was made (clause 106). The effect of an IMO on the immediate landlord and others, e.g. mortgagees, is covered in clause 93. Landlords will not be able to receive rent or grant tenancies while the IMO is in force but an IMO will not affect any mortgage on the house nor the rights of the mortgagee or a superior leaseholder.

While an IMO is in force the authority will be able to spend rent and other payments on ‘relevant expenditure’ in relation to the property. The balance must be paid to the relevant landlord. The authority will have to account for any income and expenditure (clause 94).

It will be possible to vary IMOs (clause 95) or revoke them in certain circumstances (clause 96).

B. Final management orders

Final management orders (FMOs) will be made in order to secure the proper management of properties on a long-term basis in accordance with a ‘management scheme’ that will be provided in the orders themselves. FMOs will last for no longer than 5 years (clause 98).

Authorities will have to make an FMO where an IMO is ending and the house is licensable but a licence cannot be granted. Where an IMO is ending and the property concerned is not subject to a licensing regime the authority will also be able to make an FMO if it is deemed necessary to protect, in the long-term, the health, safety or welfare of the occupants or others in the vicinity (clause 97).

When an FMO is in force the authority will have to take steps to secure the proper management of the house through the management scheme. It will be obliged to review the order and scheme from time to time (clause 99). Clause 102 provides that an FMO must contain a management scheme and sets out what *must* and what *may* be included in the scheme, such as financial arrangements between the landlord and the authority and a description of how the authority intends to manage the house. Landlords will have a right of appeal against anything in a management scheme (Schedule 6). Clause 101 makes similar provision in respect of FMOs as clause 93 does for IMOs (see above).

It will be possible to vary (clause 103) or revoke (clause 104) FMOs in certain circumstances. Clause 105 provides for Schedule 6 to have effect in relation to procedural requirements and appeals in respect of IMOs and FMOs. As with IMOs, occupiers of a property subject to an FMO will retain the legal status they had before the order was made (clause 106).

Clause 107 sets out the effect of a management order on existing agreements between the immediate landlord and the suppliers of services or facilities to the house. The authority will be able to take over certain legal proceedings commenced against the immediate landlord on the service of notice to that effect. Clause 110 provides for the financial arrangements on the termination of a FMO.

Local authorities will have power to enter a house subject to an IMO or FMO for certain purposes. It will be an offence for an occupier, having received notice, to obstruct the authority in entering the property for these purposes (subject to a fine of up to £5,000) (clause 112).

C. Overcrowding notices

Clause 113 will enable an authority to serve an overcrowding notice in respect of HMOs that are not licensable or subject to an IMO or FMO. It will only be possible to serve a notice if it is considered, having regard to the number of available rooms, that there are, or are likely to be, an excessive number of occupants in the house. Clause 114 provides for the content of an overcrowding notice; it must state the maximum number of persons who may occupy each room or specify that a room is not suitable for occupation. Clause 15 will require the relevant person not to allow a room to be occupied as sleeping accommodation other than in accordance with the notice. Clause 116 will prevent overcrowding being created by new residents. Landlords will be able to appeal against an overcrowding notice to the county court within 21 days of service. It will be possible, on application by the relevant person, to revoke or vary an overcrowding notice.

V Part 5: Home Information Packs (HIPs)

Part 5 of the Bill will require a Home Information Pack to be prepared before a residential property is marketed. The aim of this requirement is to reduce the rate of transaction failure in the housing market by making the process more certain and speeding up the critical part of the process between offer, acceptance and exchange of contracts.

A. Background

1. Buying and selling residential properties in England & Wales

In England and Wales, an offer to buy a home and acceptance of that offer are made "subject to contract." Such an offer and its acceptance do not constitute a legally binding agreement. This is usually only achieved with an exchange of contracts. Between agreeing terms and exchanging contracts, both the buyer and seller do a number of things. For the seller, this includes:

- obtaining the title deeds to the property;
- establishing title and producing Land Registry office copy entries where the property is registered;
- replying to pre-contract enquiries;
- preparing a draft contract.

The buyer will:

- conduct local land charge searches; and
- commission a survey of the property if required.

These documents and this information normally become available only after terms have been agreed "subject to contract". At any time prior to exchange of contracts the buyer or seller can withdraw from the process without incurring a penalty. No contract has been entered into so no breach of contract occurs despite the fact that the parties, particularly the prospective buyer, may have incurred costs.

2. Buying and selling residential properties in Scotland

The key difference under the Scottish system of conveyancing is that the contract (which takes the form of a series of letters known as 'missives' that are signed by the parties' solicitors) is entered into at a much earlier stage of the process. Once an offer has been accepted on all points a legally binding contract exists and neither party can withdraw without potentially being held liable for consequent losses of the other party. By entering into a legally binding contract at an early stage of the process the opportunity for 'gazumping' is reduced.

The Department of Environment Transport and the Regions (now the Office of the Deputy Prime Minister, ODPM) published research into the house buying and selling process in England, Wales and Scotland in 1998[154]. The report of this research rejected the option of adopting the Scottish system of conveyancing in England and Wales:

> The Scottish system works well in Scotland where the volume of transactions is lower than in England and Wales. It is doubtful, however, whether it would be as effective if applied to more active housing markets in England and Wales where there would be a much higher incidence of failed bids and abortive costs. Also, there is a tradition in Scotland for sellers to move into temporary accommodation to take out bridging loans so that sales are not held up. It would be difficult and

[154] DETR, *Key research on easier home buying and selling – DETR Housing Research Report*, December 1998

> probably unpopular to adopt this tradition in England and Wales where it currently does not exist.[155]

The Government does not propose to replicate the Scottish system of buying and selling properties in England and Wales. It has been argued that adoption of the Scottish system of conveyancing would result in gazumping becoming illegal. This is not the case; in fact, there are recent reports of instances of gazumping taking place in Scottish property 'hotspots.'[156] Gazumping is still possible in Scotland if sellers/buyers withdraw from the process before the missives have been signed. It is suggested that the Scottish system has traditionally worked well because the people involved acted 'honourably' but there seems to be evidence that this may be changing.[157] A further complicating factor is an increased tendency to make conditional offers on a property, eg bids that are 'subject to survey.' These conditions mean that it takes much longer for the missives to be signed with the result that the window of opportunity for a seller to accept a higher offer, or for a buyer to pull out, is extended.[158]

From April 2004 a pilot project will go on trial in four areas of Scotland under which the responsibility for commissioning surveys in the conveyancing process will switch from potential purchasers to sellers. There are certain parallels between this development and the HIP proposals.[159]

3. Problems with the conveyancing process in England & Wales

The research carried out on behalf of the Department of Environment, Transport and the Regions in 1998 found that:

- Home buying and selling in England and Wales is cheap but slow by international standards.
- It typically takes eight weeks from acceptance of an offer on a property to exchange of contract. The majority of problems and delays arise during this period.
- The more prepared a buyer or seller is, the shorter and less prone to problems the period prior to exchange of contracts is.
- The typical cost to buyers of a transaction is £1,060. The costs for sellers are higher, at around £1,400.
- The process is inefficient, with professionals waiting to hear from other professionals, agencies or the consumers before they take action.

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155 *ibid*

156 'Scots feel scourge of the gazump,' *The Scotsman*, 16 October 2003

157 *ibid*

158 *ibid*

159 See Scottish Executive Press Notice, *Seller to pay for survey pilot*, 5 November 2003, http://www.scotland.gov.uk/pages/news/2003/11/SEnw1024.aspx

- Buyers, sellers and the professionals all agree that sellers should provide surveys/valuations on the property or offer more information at the start of the process.[160]

The report concluded that in England and Wales:

> The housing transaction process does not seem to be designed with the interests of the consumer in mind. While the role of the professionals is felt to be satisfactory, there is a general dissatisfaction with the process as a whole.
>
> There is a need to spread the risks of the transaction process more evenly between buyers and sellers. At present it is the buyer who runs most financial risk if the transaction fails or if problems arise with the property after exchange of contracts. Currently the seller has no incentive or requirement to be pro-active in the provision of information about the property.
>
> There is a need to reduce the 'period of uncertainty' that accompanies most transactions. Measures are needed to reduce the overall time in which things can go wrong.[161]

4. The Seller's Information Pack proposals

On 7 December 1998 the Government published a consultation paper entitled *The key to easier home buying and selling*[162] in which it set out a package of proposals aimed at making the house buying and selling process quicker, easier and more efficient. The Government's main aim was to reduce the time between making an offer and completing a sale. In the consultation document, it stated:

> Everyone who has his or her offer on a home accepted worries in case someone makes a better offer (gazumping). Sellers worry that they will be forced to sell at a lower price (gazundering). In fact, these problems are rare – they happen on average in fewer than one in fifty transactions.
>
> Some people have suggested that gazumping should be made illegal but sometimes a seller may be justified in accepting another offer. We think it would be more useful <u>to speed up the whole process</u> and so reduce the time when gazumping and gazundering can happen.[163]

The main proposal contained in the consultation paper was the provision of a seller's information pack. According to the Government, a seller's information pack would:

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[160] DETR, *Key research on easier home buying and selling – DETR Housing Research Report*, December 1998
[161] *ibid*
[162] DETR, *The key to easier home buying and selling – A consultation paper*, December 1998
[163] DETR summary, *The key to easier home buying and selling – A consultation paper*, December 1998

> … make anyone who wanted to put a home on the market responsible for having a standard set of information and paperwork ready for would-be buyers right at the start. This would cost sellers money up front but would save some money if they were also buying a property.[164]

The consultation period on the house buying and selling process ended on 31 March 1999.[165]

On 11 October 1999 the Government announced that it would be proceeding with 'a package of complementary measures aimed at making the home buying and selling process in England and Wales faster, more transparent and consumer-friendly.'[166] The key measure would involve the provision of more information at the start of the process. Before putting their homes on the market people would be required, by law, to create a pack of standard information for prospective buyers. The pack would be likely to have to include copies of documents that the seller currently provides later in the transaction.

The Government confirmed that it would expect buyers to improve their preparation for the transaction by obtaining 'in principle' mortgage offers and that targets for the provision of title deeds and the carrying out of searches would have to be met by lenders and local authorities. Lenders would also be encouraged to develop 'chain-breaking' loans that will be suitable for a wider range of people than current bridging loans.

5. The Bristol Pilot Scheme

The Consumers' Association, lawyers, surveyors and lenders were asked to work with the Government on the detail of the proposals. A pilot study on some aspects of the seller's information pack was set up in the Bristol area covering some 250 home sellers.[167]

To encourage take-up of the seller's pack free packs were offered to sellers in the Bristol City Council area who marketed their home through estate agents who were members of the industry's voluntary Ombudsman Scheme. The pilot ran until July 2000 and the findings were published in November 2000.[168]

The documents used in the pilot pack that are not normally assembled as part of the conveyancing process included a Home Condition Report (HCR) and an energy report. The idea of the HCR was to give the buyer and seller a precise statement of the condition of the property and to help in negotiations over price. It was devised by a group led by the

[164] *ibid*
[165] Responses to the consultation document are discussed in Library Research Paper 00/98, *The Homes Bill*
[166] DETR press release 940/99, 11 October 1999
[167] Information on the Bristol pilot scheme is on the ODPM's website at: http://www.odpm.gov.uk/stellent/groups/odpm_control/documents/contentservertemplate/odpm_index.hcst?n=1249&l=4
[168] DETR, *Evaluation of a Pilot Seller's Information Pack: the Bristol scheme*

Royal Institute of Chartered Surveyors. It involved the same level of inspection as a mid-range Homebuyers Survey and Valuation, but did not contain a valuation and presented information in the form of a ratings scale from one to four. The energy efficiency report was designed to give the consumer information on the energy efficiency rating of their home: the intention was to increase awareness about energy efficiency and influence householders' patterns of energy consumption.[169]

The key findings of the Bristol pilot scheme are reproduced below:

> **Transparency.** The pack gave buyers a clearer understanding of the property they are purchasing. Information on the condition of the home was much more easily understood by consumers compared to the legal documentation in the pack, the content and significance of which generally requires legal advice. Nearly two-thirds of buyers consulted the Home Condition Report (HCR) prior to making an offer, and over 90 per cent consulted the HCR at some stage in the process. By contrast very few buyers read the legal documentation at any stage in the process.
>
> **Certainty.** The pack helped to identify and resolve any potential problems with the sale much earlier in the process. The pack increased certainty because there were fewer transaction threatening problems after an offer has been made, there was more consumer confidence that the transaction will proceed successfully to completion.
>
> **Satisfaction.** Approval for the system of buying and selling with a pack was high amongst consumers, particularly with buyers. In the Bristol pilot, one in 20 buyers were dissatisfied with the process overall compared to two in five buyers nationally under the current system (DETR, 1998).
>
> **Pack Assembly.** Packs were assembled in an average of 11 working days. 50 per cent of packs were assembled in nine days or less. Half of all packs that took over two weeks to assemble were leasehold properties.
>
> **Conveyancing.** Conveyancers believed the process of assembling legal information was more efficient under a seller's pack compared to the current system. This was because much of the crucial preparatory legal work took place in a matter of days, rather than being spread out over several weeks with time being wasted waiting for someone else to do something before progress can be made.
>
> **Estate Agency and Marketing.** Views among estate agents were mixed. Some agents, who saw clear benefits in the seller's information pack, had invested greater time in understanding the potential advantages for the consumer, and consequently spent more time advising clients about the purpose and nature of the pack. Other agents believed assembling the pack delayed the marketing of the

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169 *ibid* p7

> property and, under a voluntary scheme such as the Bristol Pilot, this could mean clients missing out on prospective purchasers particularly in a fast moving market.
>
> **Home Condition Report.** The HCR is well received by buyers, over half preferring it to other types of survey. Over 90% consulted the HCR at some stage and half took a copy home to consult. Most of the sellers were also satisfied, though it should be borne in mind that in the pilot they did not have to pay for the report. Surveyors were content with the level of inspection for the HCR, but their main concern was about the amount of detail to be included in the HCR. They were also concerned about being exposed to professional indemnity claims which could arise if sufficient explanatory narrative is not included to support opinion about the condition of different elements of the property. Both surveyors and estate agents' thought the HCR used in the pilot does not provide sufficient detail when compared to a similar mid-range report such as a Homebuyers Survey and Valuation (HSV).
>
> **Improvements.** Whilst the research has shown the pack delivers a range of benefits for both consumers and professionals, it is clear the potential benefits could be improved further. In particular, the Home Condition and Energy Efficiency Reports, although warmly received by consumers, were felt to need further work on layout and content. Some conveyancers also believed their role could be extended to include summarising and decoding the legal elements of the pack in a consumer friendly format.[170]

The Bristol Pilot came in for a great deal of criticism during the passage of the *Homes Bill* through Parliament. It was argued that take up of the scheme had been 'disappointing' and that the findings were not 'robust.'[171] The pilot had aimed for a sample of 250 participants but achieved only 189 of which only 90 sales were completed during the pilot period. Of these 90, much was made of the fact that 30 were sales of newly built properties that would be exempt from the Home Condition Report requirement under the Government proposals. It was suggested that the speed of these sales would have 'skewed' the results of the pilot scheme.[172] The packs and Home Condition Reports for those taking part in the pilot were free. Some commentators thought that this was not taken fully into account in the analysis of the scheme's success:

> It is fundamental to any serious analysis of the pilot scheme that the participants were given their packs, including surveys, by the Government. That may explain the substantial satisfaction of those involved in the scheme when asked about it. Perhaps it is even more significant that one third of those who were involved in

[170] DETR, *Evaluation of a Pilot Seller's Information Pack: the Bristol scheme* http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/page/odpm_house_601730.pdf

[171] HC Deb 8 January 2001 cc730-1

[172] HC Deb 8 January 2001 cc731-2

> the pilot still insisted on their own survey, quite separate from the home condition report.[173]

Others questioned why Bristol had been chosen as the pilot area:

> The first question must be: why Bristol? It is hardly typical. It has a relatively buoyant property market, with relatively high property values. Many of the properties in the pilot were valued in the £150,000 range or above--not exactly Labour heartlands.[174]

6. The Homes Bill 2000/01

The *Homes Bill 2000/01* was presented in the House on 12 December 2000. Part 1 of this Bill contained measures aimed at improving the house buying and selling process in England and Wales.[175] Although the Bill made progress it fell for lack of time before the 2001 General Election. The provisions in Part 5 of the current Bill are similar to those in the *Homes Bill* except that the description 'home information pack' (HIP) has replaced 'seller's packs' and the duties under Part 5 will be enforced by civil rather than criminal remedies.

Information on the main issues raised in connection with seller's packs during the passage of the *Homes Bill* through Parliament is contained in Library Standard Note SN/SP/2097.[176]

B. The Bill (Clauses 120-145) & comment

Part 5 of the Bill will place a new legal duty on people marketing residential properties in England and Wales to prepare a Home Information Pack before the start of the marketing process. The contents of HIPs will be prescribed in regulations, although clause 133(5) does list the sort of information that the Secretary of State may consider relevant. The marketing of certain properties will be exempt from the HIP requirement (clause 131). Enforcement of the duty will be by Trading Standards Officers (who act for local weights and measures authorities). The penalties imposed by these Officers will take the form of penalty charge notices, which are civil remedies.

[173] *ibid*
[174] HC Deb 8 January 2001 cc731-2
[175] See Library Research Paper 00/98 http://hcl1.hclibrary.parliament.uk/rp2000/rp00-098.pdf
[176] http://hcl1.hclibrary.parliament.uk/notes/sps/snsp-02097.pdf

The Explanatory Notes to the Bill provide a detailed commentary on the clauses in Part 5.[177] The following sections aim to summarise the most controversial aspects of the proposals and focus on responses to the *Homes Bill* and Part 5 of the draft *Housing Bill*[178] together with the Government's reactions to these comments.[179]

1. The need for HIPs and their potential impact

The ODPM Committee received conflicting evidence on the need for HIPs. Consumer bodies are generally supportive of the proposals: they are of the opinion that HIPs will assist potential purchasers to reach an *informed* decision over what is the largest financial commitment that most people will make. Others, such as the Royal Institute of Chartered Surveyors (RICS), support the objective behind HIPs but feel that there are still issues of detail that need to be addressed.

Several witnesses to the Committee repeated concerns about the validity of the Bristol pilot project[180] while others argued that foreign examples of HIPs cited by the Government[181] could not easily be applied to the UK because of the different nature, and legislative basis, of their housing markets. The Government has used the experience of HIPs in Denmark and New South Wales to support the view that their introduction in England and Wales will not significantly affect housing market supply. It has been argued that HIPs will result in fewer 'speculative' sellers entering the market.[182]

Some witnesses were of the opinion that technological advances in conveyancing would speed up the process of house buying and selling automatically and would make HIPs unnecessary.[183]

The Committee recommended that the Pack should be introduced nationally 'only when further research and extensive pilot testing has been carried out in different parts of the country.' It was of the view that there was a need to establish the extent to which HIPs

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177 Bill 11 – EN http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmbills/011/en/04011x--.htm

178 *The Housing Bill – Consultation on draft legislation*, ODPM, March 2003, Cm 5793: http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/downloadable/odpm_house_023168.pdf

179 *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

180 See section **A.5** of this paper (above)

181 Denmark and New South Wales operate compulsory HIPs – see *Housing Market Transactions: International Comparisons,* ODPM: http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_603948.pdf

182 ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 86 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

183 *ibid* para 89

'may have adverse effects in different types of markets.' The Committee concluded that 'at this stage' it could not recommend that HIPs should be made compulsory.[184]

The Government responded by defending its decision to make HIPs compulsory:

> Home information packs enjoy strong consumer support. International experience and UK research points to the likelihood that home information packs will not have a detrimental effect on supply. The introduction of similar changes in Denmark and New South Wales have had a barely discernible effect on the supply of homes to the market and are widely accepted as having improved significantly the efficiency of the home buying and selling process. Industry expectations suggest that in many cases all or some of the up-front costs will be deferred. Moreover, a national survey carried out by Countrywide Assured Group plc, the UK's largest estate agency group, found that even if sellers had to pay up front for the pack, 87 per cent would still offer their home for sale. The study concluded that the pack would only take out of the market people who were not serious about selling anyway. A housebuyers survey published by Yorkshire Bank in January this year revealed that the majority of the 2,500 people questioned for the survey believed that the introduction of home information packs could go some way to easing the buying process. There is no reason why home information packs should cause house prices to rise. Indeed, the inclusion in the pack of a home condition report will ensure that prices reflect the genuine condition of the property.
>
> Local pilot studies are useful for testing the mechanics of operating home information packs and getting consumer reactions. The Government is currently testing home condition reports in this way in different areas and markets. But voluntary local pilots cannot replicate a compulsory national scheme and are unlikely to add significantly to the existing knowledge of the impact of home information packs on the market, for a number of reasons:
> a. the reforms involve a step change in culture for everyone involved in the process. This cannot be generated or tested by local pilot studies;
> b. the market will not adapt (e.g. deferment of costs and utilisation of home condition reports by lenders) for localised studies; and
> c. employing, training and regulating prospective home inspectors has to be organised on a national basis. Local pilots cannot replicate this nor provide the required degree of consumer confidence.
>
> Chains of transactions extend beyond local or even regional boundaries. Home information packs will only be fully effective if all the transactions in the chain have one. About 60% of transactions involve chains. Industry estimates suggest the average chain has four transactions. In a chain of transactions, a single property marketed without a home information pack could negate the benefits of the packs provided for other transactions.

[184] *ibid* para 93

> Research shows that problems with the present process apply to all areas and all markets. For special cases, the draft Bill provides a power for the Secretary of State to make different provisions for different areas and property types. Where necessary, this will allow special provision to be made for applying the pack to particular types of property and in particular areas. For example, it is proposed that first sales of new homes covered by an approved housing warranty scheme should not be required to include a home condition report in the home information pack; and the Government is considering the case for special arrangements for very low-value homes in areas of low demand.
>
> The power to make different provisions for different areas could also be used to facilitate a phased introduction of compulsory home information packs as part of a rollout across England and Wales, if this were found to be practicable and advantageous.
>
> The Government is discussing further options with consumer and industry stakeholders for implementing home information packs. The Government is also encouraging the rollout of voluntary home information packs to help pave the way for a compulsory national scheme.[185]

2. The content of Home Information Packs (HIPs)

The precise content of HIPs will be specified in regulations but clause 133(5) and (6) provides an indicative list of the contents of a HIP. One of two complementary consultation papers published alongside the draft Bill invited views on the documents and information to be included in the packs.[186] This paper also set out the purpose of HIPs and the perceived benefits that they will offer:

> The purpose of the *home information pack* is to bring together at the very start of the transaction process key information and documentation which is important to the decisions that home sellers and buyers need to make, and to present this information where possible in a user-friendly format. This will mean that sellers and buyers are much better prepared. Having this information available right from the start will have a number of benefits, including:
>
> • enabling buyers and sellers to negotiate from an informed position;
>
> • increasing openness and transparency, helping to make the process less adversarial and stressful;
>
> • helping the parties commit more quickly to the transaction, and shortening the period of uncertainty between acceptance of an offer and exchange of contracts;

185 *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 37 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

186 *Reforming the home buying and selling process in England and Wales - Contents of the Home Information Pack:* http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/page/odpm_house_609321.pdf

- increasing certainty by avoiding unwelcome surprises which currently cause renegotiations and transaction failures after terms have been agreed;
- reducing wasted costs resulting from high rates of failed transactions; and
- helping shorten the overall transaction timescale.

The consultation document explained the rationale behind the sort of information that the pack is likely to include:

> 2.8 In considering what the contents of a compulsory *home information pack* should be, it is important to strike a reasonable balance between comprehensiveness and cost. There are various levels of information that might be of interest to prospective home buyers. The same or equivalent information might be available from more than one source. It would not be proportionate or necessary to require all relevant information to be provided at the outset of the transaction in the *home information pack*. We wish to avoid unreasonable cost and unnecessary duplication.
>
> 2.9 It is proposed that documents required to be included in the *home information pack*, and information required to be contained in those documents should be restricted to matters:
>
> - relevant to the property or the sale of the property;
> - relevant to all, or at least the vast majority of, transactions;
> - of interest to the majority of potential buyers, that would help them reach informed
> decisions on whether to commit themselves to proceeding with the transaction, and on what terms;
> - which if not disclosed up front could later threaten or delay the transaction; and
> - for which any additional cost involved in early disclosure is likely to be outweighed by the benefits.
>
> 2.12 Discussions with consumer representatives and key industry stakeholders have identified the following documents and information as potentially key components of the statutory *home information pack*:

Thus the following 'key' documents are likely to be specified in regulations:

- terms of sale;
- evidence of title;
- replies to standard searches;
- planning consents, agreements and directions, and building control certificates;
- seller's property information form;
- warranties and guarantees;
- home condition report, including an energy efficiency assessment; and additionally for leasehold properties –
- the lease;
- recent service charge accounts and receipts;

- current and planned future works;
- insurance for the building, and receipts for premiums;
- regulations made by the landlord or management company;
- memorandum and articles of the landlord or management company.

This list is very similar to the contents of the packs used in the Bristol pilot except that the draft contract has been replaced by a document setting out the terms of the sale.
During the committee stages of the *Homes Bill* Opposition amendments were moved to remove local authority searches from the pack and also the Home Condition Report (HCR).[187] Concern over the inclusion of searches relates to the time it may take to complete them (two to three weeks was quoted)[188] and the fact that they would become out of date and would have to be redone.

Nick Raynsford defended the inclusion of local authority searches and HCRs in packs:

> Local searches are important to home buyers and mortgage lenders. If problems are revealed by the search, they can lead to further investigations and delays, possible renegotiation over the price, or even transactions collapsing altogether. The whole point of the seller's pack is to introduce transparency into the system by exposing potential problems and information that might threaten the transaction right at the beginning of the process. The local authority search is an important component. It is a check against other components of the pack, including the home condition report, and the property information form. The search, therefore, needs to be available up front, and I believe that the effect of the amendment would be catastrophic to the good working of the scheme. I hope that the Committee will reject it.[189]

The Minister said he expected online searches (provided through National Land Information Service, NLIS) to be 'available in the not-too-distant future.'[190] He also confirmed that it would be possible to market a property with a pack explaining that the searches would be included as soon as they are available.[191]

The ODPM Committee on the draft *Housing Bill* made a specific recommendation in relation to land searches carried out by local authorities in response to evidence from witnesses detailing the inadequate speed of authorities in this area:

> The rapid provision of local authority search information in electronic form is vital to the success of the Home Information Pack. We recommend the introduction of a system of financial incentives for local authorities to invest in

[187] The HCR is discussed in section **B.3** (p66) below
[188] SCD 18 January 2001 c150
[189] SCD 18 January 2001 c155
[190] SCD 18 January 2001 c155
[191] SCD 18 January 2001 c156

> providing on-line searches, including the potential for differential fees to be charged by councils.[192]

The Government rejected this call for financial incentives:

> Significant incentives already exist in the form of potential cost and efficiency savings and increasing competition from private sector search businesses. £2.2m has already been allocated from the Office of the Deputy Prime Minister's Local e-Government Programme 2003/4 to support work to identify and overcome the barriers to developing electronic local land and property gazetteers (essential building blocks for electronic searches). The Government will continue to consider ways of encouraging electronic delivery of search information. Local authorities have the necessary powers to introduce differential charging for dealing with non-statutory search enquiries, based on the cost of providing the service. Electronic service delivery is cheaper to administer than paper-based systems.[193]

The ODPM Committee recommended that HIPs should include: 'a checklist of the key matters not included in its contents of which the purchaser should be aware and should be encouraged to ask questions about.'[194] The Government responded thus:

> The Government proposes to restrict the contents of the home information pack to important information about the property and its sale. This is necessary to strike a reasonable balance between comprehensiveness and cost. It is proposed that the pack should include a prescribed form for use by sellers in providing answers to standard enquiries commonly raised on behalf of prospective buyers. This will provide information on matters of interest to buyers, which may not be provided elsewhere in the pack - for example, in the evidence of title. The pack is not intended to provide information that is not relevant to the property, for example details of local schools, even though such information may be important to some prospective buyers. It is not feasible to provide in the pack a checklist of omitted matters about which a buyer might want to be aware. The Government does, however, propose to meet the Committee's underlying concern by including a checklist of what is in the pack.[195]

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[192] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 159 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

[193] *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 51 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

[194] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 100 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

[195] *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 39

3. The Home Condition Report (HCR)

Serious misgivings were expressed during the committee stage of the *Homes Bill* about the independence and reliability of the HCR. The Government has argued that HCRs will be covered by a certification scheme to ensure that reports 'are produced by suitably qualified inspectors with professional indemnity insurance.'[196]

Other issues raised in relation to the preparation/inclusion of HCRs include:

- Whether there will be enough trained surveyors in place to carry out the HCRs when the HIP provisions come into force. The Government has estimated that around 7,500 to 8,500 Home Inspectors will be needed in England and Wales.[197]
- Whether sellers, buyers and lenders will be able to bring proceedings in the event of them relying on a HCR that turns out to be defective. (It is the Government's intention that all interested parties should be able to rely on the HCR and bring proceedings against the inspector should it prove necessary.)[198]
- Whether inspectors will face potential conflicts of interest in carrying out HCRs for buyers, sellers and lenders.
- The cost of the HCR and who will be liable to pay for it. (Sellers will commission and be liable to pay for HCRs.)
- The 'shelf-life' of HCRs.
- The issue of including a property valuation as part of the HCR.
- What the HCR should cover, eg energy efficiency (this has been accepted[199]), the suitability of the property concerned for occupation by a disabled person, the risk of mining subsidence and the presence of radon gas.

These issues are discussed in more detail in the following sections (***a-e***) below.

a. Home Inspectors: training & insurance

The Royal Institute of Chartered Surveyor's (RICS) evidence to the ODPM Committee questioned whether the new Home Inspectors would be sufficiently qualified to ensure the quality of HCRs.[200] The Government proposes that qualification as a Home Inspector will require a two-year university course for a person with no experience in the profession, or a one-year Further Education course for anyone with some experience.

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[196] SCD 18 January 2001 c158 (see clause 134)

[197] *The Housing Bill – consultation on draft legislation*, ODPM, March 2003, Cm 5793, p260 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/downloadable/odpm_house_023168.pdf

[198] SCD 23 January 2001 c208

[199] HC Deb 7 February 2001 c1018 (see clause 133(5)(e))

[200] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 118 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

Qualified Chartered Surveyors will need to undertake a three-day "bridging" course to qualify as Home Inspectors.[201]

Doubt has been expressed over the feasibility of setting up new courses and training adequate numbers of people in time for the introduction of compulsory HIPs in 2006.[202] The Minister for Housing, Keith Hill, told the ODPM Committee that research had been commissioned on this issue.[203]

The need for adequate insurance arrangements for Home Inspectors was an issue raised by RICS and the Consumers' Association in their evidence to the Committee. The Committee noted that the Government appears not to view this as problematic:

> Although indemnity insurance premiums are rising steeply, our advice suggests that the home condition report, with surveyors liable for negligence to both the buyer and the seller, is, in itself, unlikely to result in any significant increase in the cost of this cover.[204]

The Committee recommended that HIPs should become compulsory only once sufficient numbers of inspectors are trained and:

> We would expect by the time of the second reading of the Bill that the Government will have fully investigated and published information on the difficulties of underwriting insurance for home inspectors, and will have decided whether it thinks it will be necessary to underwrite the cost for the first few years.[205]

The Government responded thus:

> The Government would not introduce compulsory home condition reports until it was satisfied that sufficient numbers of home inspectors and satisfactory insurance arrangements are available. Research on this is due to report very shortly. Emerging findings indicate that there will be a sufficient number of inspectors and that adequate insurance will be available.[206]

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201 *The Housing Bill – consultation on draft legislation*, ODPM, March 2003, Cm 5793, p260-261

202 ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 126

203 *ibid*

204 *The Housing Bill – consultation on draft legislation*, ODPM, March 2003, Cm 5793, p262 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/downloadable/odpm_house_023168.pdf

205 ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 131 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

206 *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 44 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

b. The HCR & property valuations

At the committee stage of the *Homes Bill* Nick Raynsford explained why a property valuation would not be included in the HIP:

> We have deliberately chosen not to include a valuation in the pack for two main reasons: first, inclusion would unbalance and inhibit the usual bargaining process; and, secondly, a valuation is subjective and could become out of date very quickly in a fast-moving market. In our view, the home condition report would generally be reliable for six months or so without a valuation attached, but its reliability would be seriously compromised if it included a valuation that became out of date in a matter of weeks.[207]

The Council of Mortgage Lenders' evidence to the ODPM Committee on the draft Bill gave some support to the idea that Inspectors should be qualified to carry out valuations as part of the HCR.[208] The Committee noted that this approach could result in savings in the process[209] but RICS rejected the idea:

> The home condition report, it needs to be made clear, is not proposed to include a valuation of the property because it is very difficult to provide a valuation up-front and we feel that could interfere with the proper operation of the market between a buyer and a seller.[210]

The Bill does not provide for the inclusion of a property valuation as part of the HCR.

c. Third party reliance on HCRs

The issue of third parties (purchasers) being able to rely on a HCR that they have not commissioned was also considered by the ODPM Committee. Keith Hill reiterated that the *Contract (Rights of Third Parties) Act* would create a contractual obligation between the purchaser and the Inspector so that the purchaser would be able to take legal action directly against the Inspector.[211] The Committee concluded:

> We remain concerned that particularly in the early years of the Pack, purchasers may be reluctant to trust a report that they have not commissioned.[212]

The Government sought to reassure the Committee on this point:

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[207] SCD 18 January 2001 c157

[208] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 122 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

[209] *ibid* para 119

[210] *ibid* para 123

[211] *ibid* para 132

[212] *ibid*

> Research published earlier this year by Yorkshire Bank revealed that fewer then two in ten house buyers said they would not trust a survey provided by the seller. Experience of voluntary home information pack schemes has demonstrated wide acceptance of home condition reports by buyers. And buyers would be able to trust the home condition report in the home information pack, for many reasons:
>
> a. the home inspector will owe a legal duty to the buyer, who will be able to sue for damages in exactly the same way as if the buyer had commissioned the report;
> b. only inspectors qualifying under a certification scheme approved by the Secretary of State will be able to prepare the home condition report;
> c. the home condition report will be required to be objective and unbiased;
> d. it will be prepared in accordance with national occupational standards;
> e. inspectors will be required to have suitable insurance cover that covers buyers and lenders as well as the seller;
> f. there will be monitoring and auditing of inspectors' work. This will be robust to ensure that standards are maintained; and
> g. if inspectors fail to maintain the correct standard or act in a way that is partial to one party contrary to the rules of the scheme, their certification can be removed, along with that their ability to produce home condition reports.[213]

Clause 133(8) of the current Bill contains provision to 'enable the Secretary of State to ensure that buyers, potential buyers, lenders and any other person involved in the sale of the property have a legal right to rely on the home condition report and other documents in the HIP.'

d. The 'shelf-life' of HCRs

In regard to the 'shelf-life' of HCRs, the National Association of Estate Agents (NAEA) told the ODPM Committee on the draft Bill that if an HCR is deemed necessary it should only be ordered when there is an offer on the property concerned. Others, such as the Consumers' Association and RICS do not regard time-sensitivity to be an insurmountable obstacle:

> The majority of properties transact within a reasonable timeframe. If we say the average property transacts within 13 weeks we feel that the HCR would be sufficiently robust to be relied upon for that period of time. Having said that, there are of course properties that take some months to sell, perhaps in low demand, low value areas, and in those cases we believe *caveat emptor* is the right thing.[214]

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[213] *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 45 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

[214] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 96 (RICS) http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

The consultation paper on the content of HIPs contains the following statement on the 'shelf-life' of HCRs:

> 9.16 It is not intended to place a limit on the effective life of the HCR. As with any survey, the HCR will provide a 'snapshot' of the condition of the property at the time it was inspected. The longevity of the HCR will be enhanced by the exclusion of a valuation assessment. In the normal course, the HCR should continue to provide valuable information for some months after it has been prepared. Where the HCR indicates a need for urgent repairs to prevent further damage, or where the locality in which the property is situated experiences severe weather or flooding after the HCR inspection, a fresh inspection of the whole or relevant part of the property might be advisable. But we do not intend to make this a requirement. Rather, we consider that such decisions are best left for buyers and sellers and their professional advisers to take depending on the circumstances of each case.
>
> 9.17 It is proposed to require that the HCR in the *home information pack* should not be more than three months old at the time the property is first marketed. It is not intended that where the HCR reveals problems with the property this should delay marketing. Some sellers will wish to market the property forthwith and to take account of the need for repairs in setting the asking price and in negotiations with a prospective buyer. Other sellers might choose not to delay marketing, but to carry out repair work while marketing is in progress. However, some sellers may see advantage in delaying marketing while repairs are carried out and then to offer the property for sale with a clean bill of health. In some cases, such a seller might see advantage in having a fresh report indicating that the property is being marketed in good repair. We believe that these decisions should be left to the discretion of the seller. Where more than one HCR is prepared on the same property with a short period (say, twelve months), we propose that copies of all of those reports should be included in the *home information pack*. This will act as an aid to transparency, and thus more generally remove any temptation for sellers to shop around in the hope of obtaining a more favourable report.[215]

Despite concerns about the HCR it is still the Government's intention that these will be included in HIPs.

e. Energy efficiency etc

The ODPM Committee welcomed the inclusion of energy efficiency ratings in the HIP and recommended that where satellite imaging is available it should be provided in the pack.[216] The Government agreed to consider the suggestion of satellite imaging but was skeptical about its potential on the grounds that it is 'unproven technology' and 'is

[215] http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/page/odpm_house_609321.pdf

[216] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 136 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

unlikely to become a commercially viable technique for assessing the energy efficiency of homes in the immediate future.'[217] More information on energy audits is contained in Library Standard Note SN/SC/2836.

4. The trigger for producing a HIP

The trigger for the duty to produce a pack, i.e. the definition of when a property will be judged to have been put on the market, was probed at length during the passage of the *Homes Bill* through Parliament.[218] The definition was amended slightly in the draft *Housing Bill* to include the term 'with a view to marketing the property.' This is also the term used in the current Bill (clause 121(1)).

5. Paying for HIPs

The cost of each HIP will be dictated by the market and will depend on the type, size and location of the property concerned. The Government has estimated, for illustrative purposes, that the cost of a pack for a semi-detached house in a provincial town will cost around £635.[219] The National Association of Estate Agent's evidence to the ODPM Committee on the draft Bill expressed considerable resistance to the idea that payment for the HIP could be deferred until a sale is achieved. However, the ODPM official made it clear that the industry expects deferral of costs to be the norm. The Committee recommended:

> If the home information pack were made compulsory, it has to be made available at the point when the property is put on the market. We have heard evidence of one voluntary scheme in which fees are deferred to the point of sale. We recommend that the Government considers this option as one means of alleviating some of the problems associated with the Pack. [220]

The Government rejected the idea of providing for the compulsory deferment of HIP costs in the Bill on the grounds that this 'would get in the way of choice, flexibility and innovation and would involve major intervention in the market.'[221]

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[217] *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 46 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

[218] For more detail on this issue see section **A** of Library Standard Note SN/SP/2097

[219] *Questions and Answers on the Housing Bill*, December 2003 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_026257.pdf

[220] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 116 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

[221] *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 43 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

6. Updating HIPs

As with the *Homes Bill,* there is no provision for the updating of HIPs in the *Housing Bill.* This is a controversial area that was raised several times during the debate on Part 1 of *The Homes Bill*. Specific concerns about the 'shelf-life' of HCRs are discussed in section **3.d** above (p69). During the committee stage of the *Homes Bill* Geoffrey Clifton-Brown noted that local authority searches are time-limited to 28 days and that reputable surveyors would want their surveys to be time-limited 'because conditions can change.'[222] In response, Nick Raynsford said there would be no obligation to produce a new pack and commented on the issue of updating information:

> On the issue of updating the information, a prospective buyer may feel if a property has been on the market for some time that it is appropriate to obtain more up-to-date information. Local authority searches are the one area where there is general agreement that after—perhaps—three months there is a need for a new check. The Government hope that, with the introduction of the national land information service, such information will be available at a tiny price. That would be one benefit of the modernisation of the processes of obtaining information for conveyancing. The NLIS will make that kind of update possible. The majority of the information in the seller's pack will continue to be viable and valid for several months beyond that period. In some cases, it will still be valid a year or more after the seller's pack was produced. The Bill does not create an obligation on the seller to produce another pack, so the suggestion that it will load on additional costs is wrong.[223]

The ODPM Committee on the draft *Housing Bill* also addressed the issue of updating HIPs and concluded:

> It is important that the Pack is available from the point of marketing a property, but the Government needs to address the issue of shelf-life of the Packs. Norms need to be established governing what components of the Pack will need renewing, when, and at what cost. In order to cater for markets where sales take months, sometimes years, we would recommend that Packs are only required to be renewed when a serious buyer is found.[224]

The Government rejected this recommendation:

> The only items in the pack that are likely to be time-sensitive are the search results and the home condition report. Both should be valid for some time. Search results are normally accepted for up to six months, and electronically-available search information should allow anyone to update these quickly and

[222] SCD 16 January 2001 c23

[223] SCD 16 January 2001 c24

[224] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 99 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

> economically if they wish. As with any survey, the home condition report will provide a snapshot of the property on the day it is inspected. Even so, as the home condition report will not contain a valuation, it should continue to provide valuable help for quite some time. The Government is not, therefore, proposing to require the contents of home information packs to be renewed.
>
> Rather, the Government considers that any renewal should be left to the discretion of sellers and buyers, who will be able to take account of the circumstances of each case.[225]

7. HIPs and low value/low demand areas

There was much discussion during the committee stages of the *Homes Bill* about the possibility of exempting owners of low value properties from the requirement to produce a seller's pack. There was concern that the additional cost of preparing a pack, and having to update it if a property took a long time to sell, would disproportionately affect these owners and possibly prevent them from marketing their homes altogether. In areas where homes are sold for less than £10,000 the cost of the HIP (estimated to be around £500[226]) would represent over 5% of the cost of the property, compared with 0.25% of a property valued at £200,000. On the other hand, there was also a feeling that exempting properties below a certain value might further stigmatise them.

In February 2001 the Government announced that it would consult on the impact of seller's packs in areas of low housing demand.[227] *The Home Information Pack in low demand low value areas* was subsequently published alongside the draft *Housing Bill* in March 2003.[228] At the same time, the ODPM published research that it had commissioned into the problem of low value and low demand areas.[229] The consultation paper noted:

> The research findings suggest that there is little or no support for applying alternative means of operating the home information pack in areas of low demand and low value. But minds are certainly not closed and the Government will assess the responses to this consultation paper before reaching a final decision.[230]

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[225] *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 38 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

[226] The Minister for Housing, Keith Hill's evidence to the ODPM: Housing, Planning, Local Government and the Regions Committee (Q713)

[227] DTLR press notice 062/2001, 7 February 2001

[228] http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/page/odpm_house_609322.pdf

[229] *Buyers and Sellers' perspectives in low demand low value housing areas,* http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_609301.pdf & *The potential impact of the Home Information Pack in low demand low value housing markets,* http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_609300.pdf

[230] *The Home Information Pack in low demand low value areas,* http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/page/odpm_house_609322.pdf

The Government further noted, 'subject to the outcome of this consultation, it is felt that if there is justification for the exemption of sales from the home information pack duties this should apply only to properties at the bottom of the market (sales under £10,000 perhaps). These sales are unlikely to be part of the normal owner occupied market.'[231]

The ODPM Committee on the draft Bill took evidence from witnesses on this issue and concluded that many of them were of a mind to leave this issue 'to the market'. There was no support for exemptions for defined 'low value low demand areas' on the grounds that this would result in formal 'red-lining.'[232] The Committee remained concerned that HIPs would be unaffordable where house prices are very low and recommended:

> That the Government pursues an approach to Home information packs in low demand areas based on house price rather than designated areas - this will help all vendors whose house prices are low and will ensure that pockets of buoyancy in otherwise weak markets will not be stigmatised. Homes valued at less than £30,000 should be exempt from the Home information pack obligation. This should be reviewed after two years of operation with an aim of reducing the price at which exemptions take place.[233]

The Government confirmed that the Bill would provide for this to be done by regulation and saw 'potential merit' in a value based approach to any exemption. It intends to take 'wider soundings' before coming to a final conclusion on this issue:

> The final decision will take account of consultation responses and views expressed during the Bill's passage in Parliament.[234]

Clause 132 of the Bill gives the Secretary of State power to make regulations to specify circumstances in which the duty to provide a HIP will not apply. The Explanatory Notes to the Bill state that this 'would allow the Secretary of State to make different arrangements with regard to the sale of low value properties in areas of low demand.'[235]

8. Enforcement

A significant area where the current Bill differs in content from the *Homes Bill* concerns the enforcement of the requirement to produce HIPs. Originally the Government intended that failure to produce a pack would be a criminal offence. This was changed in

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[231] *ibid*

[232] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 104 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

[233] *ibid* para 106

[234] *The Draft Housing Bill – Government Response Paper,* Cm 6000, November 2003 para 41 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

[235] Bill 11 – EN para 244 http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmbills/011/en/04011x--.htm

the draft *Housing Bill* (and retained in the current Bill) to provide that failure to observe the HIP requirements would be backed up by civil sanctions:

> Local weights and measures authorities would have primary responsibility for enforcing the home information pack obligations. Trading standards officers would have a wide discretion in determining appropriate action depending on the circumstances of each case. For example, trading standards officers could provide information and assistance to help a person comply with the home information pack obligations rather than taking formal enforcement action. Similarly, they could give a warning. They would also have the power to issue a civil penalty notice. This would be a fixed penalty, the amount of which would be prescribed by the Secretary of State. Initially, it is envisaged that the amount would be in the region of £150 to £200.
>
> Trading standards officers would be able to notify the Office of Fair Trading of any breach by a person acting as estate agent, and would have a duty to do so in cases where a penalty notice was served. This could trigger action by the Office of Fair Trading under the Estate Agents Act 1979 which, ultimately, could result in the person being required to cease trading. The Government is consulting the Law Society about ways of applying these or equivalent enforcement arrangements to solicitors who market homes for sale.
>
> In addition, a person who breached the home information pack obligations would be liable to be sued by prospective buyers for recovery of the costs of obtaining documents which should have been provided in the pack but which were not.
>
> These civil sanctions replace the criminal sanctions that were originally proposed for enforcement of the pack duties in the former Homes Bill.[236]

Some witnesses to the ODPM Committee doubted whether Trading Standards Departments would have the legal and financial resources, or staff trained to the requisite level, to enforce packs thoroughly and consistently.[237] Concerns were also expressed over the weakness of the power of authorised officers.[238] The Committee recommended:

> There must be sufficient human and financial resources to provide effective enforcement of the legal requirement to have a Home Information Pack. Additional central funding may be necessary.[239]

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[236] *The Housing Bill – consultation on draft legislation,* ODPM, March 2003, Cm 5793, Section 1 pp21-22 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/downloadable/odpm_house_023168.pdf

[237] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 145 (RICS) http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

[238] *ibid* para 146 (Local Government Association and Chartered Institute of Environmental Health)

[239] *ibid* para 148

The Government has agreed that effective enforcement is important and said that it will fund any increased burden this will place on local government.[240]

VI Part 6: Other housing provisions

A. Anti-social behaviour (Clauses 146 & 155-157)

Information on existing remedies available to social landlords for tackling anti-social behaviour can be found in Library standard note SN/SP/264, *Anti-social behaviour in social housing*.[241] A separate note deals with remedies for tackling anti-social behaviour in private housing, SN/SP/1012.[242] The *2003 Anti-social Behaviour Act* further strengthened local authorities' powers in this area.[243]

1. Introductory tenancies

The *1996 Housing Act* gave local housing authorities the discretion to operate introductory tenancy schemes. Where these schemes are adopted all new tenants are 'introductory tenants' for an initial 12 months. During this period if the tenant(s) exhibit anti-social behaviour it is easier for the landlord to evict them (compared with the procedure that applies to the eviction of secure tenants).[244] If no anti-social behaviour is exhibited the tenancy automatically becomes a secure tenancy on the expiry of the 12 month period.

The Home Office White Paper, *Respect and Responsibility – Taking a Stand Against Anti-Social Behaviour*[245] said that measures would be introduced to enable social landlords to extend the initial 12 month period of introductory tenancies by a further period of 6 months where there are continuing concerns about behaviour.[246] These measures were not included in the *2003 Anti-social Behaviour Act* but the Ministerial Foreword to the draft *Housing Bill* and consultation paper stated that a proposal to give local authorities this power would be introduced.[247]

Clause 146 of the Bill will add two new clauses to the 1996 Act to enable local housing authorities to extend the period of an introductory tenancy by 6 months. The new

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[240] *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 48 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

[241] http://hcl1.hclibrary.parliament.uk/notes/sps/snsp-00264.pdf

[242] http://hcl1.hclibrary.parliament.uk/notes/sps/SNSP-01012.pdf

[243] See Library Research Paper 03/34 http://hcl1.hclibrary.parliament.uk/rp2003/rp03-034.pdf

[244] For more information see Library Research Paper 96/12 http://hcl1.hclibrary.parliament.uk/rp96/rp96-012.pdf

[245] Cm 5778, 2003

[246] *ibid*, p60

[247] *Housing Bill – Consultation on draft legislation*, ODPM, March 2003, Cm 5793 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/downloadable/odpm_house_023168.pdf

sections set out the conditions under which such an extension can take place and the procedure by which the decision may be reviewed. Local authorities have welcomed the power to extend introductory tenancies.

The ODPM Committee on the draft Bill recommended that local authorities should be given the option of extending introductory tenancies for an additional 6 months; this would have increased the potential period of an introductory tenancy to 24 months.[248] The Government rejected this recommendation on the grounds that 18 months is a sufficiently long enough period within which to decide whether to institute possession proceedings for anti-social behaviour or allow conversion to a full secure tenancy.[249]

2. Suspension of certain rights in connection with anti-social behaviour

a. Mutual exchange: withholding consent

Tenants of social landlords are able to swap their homes by legally assigning their tenancies to each other. The permission of the landlords of both tenants is required before this process can be completed. Schedule 3 to the *1985 Housing Act* lists the grounds on which this permission may be refused.

Clause 155 will add a new ground for refusal (2A) to list in Schedule 3. Under this ground a landlord will be able to refuse an application for a mutual exchange if a relevant injunction order, or possession order granted on the grounds of nuisance, is in force or if court action to obtain such an order or a demotion order[250] is pending against the tenant, the proposed assignee or a person who resides with either of them.

b. Suspension of the landlord's obligation to complete the RTB

Currently, if a secure tenant reaches the stage of the Right to Buy process where they can seek an injunction to force completion under section 138 of the *1985 Housing Act,* then even if there is court action pending against the tenant for anti-social behaviour, the authority is obliged to complete the sale of the property.

Clause 156 of the Bill will prevent tenants, against whom an application is pending for a demotion order or a possession order sought on the basis of ground 2 of Schedule 2 to the 1985 Act (anti-social behaviour), from compelling the completion of a RTB sale until those proceedings have ended. Where a possession or demotion order is granted, the tenants will lose their security of tenure and also, therefore, the right to buy.

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[248] ODPM: Housing, Planning, Local Government and the Regions Committee, Tenth Report of Session 2002-03, The Draft Housing Bill, HC 751-I, para 43 http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

[249] *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 22 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

[250] Demotion orders were introduced by the *2003 Anti-social Behaviour Bill*. Where one is granted the previously secure tenant is effectively reduced to an introductory tenant – see section **A.1** (p76) above.

c. Disclosure of information in respect of anti-social behaviour

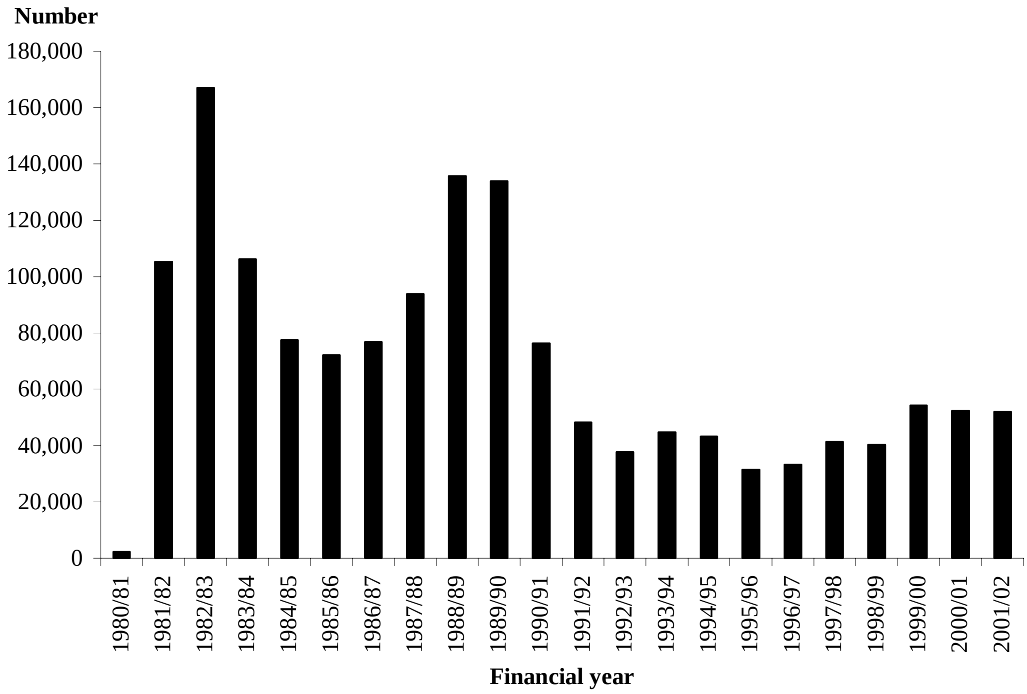
Clause 157 will allow any person to provide information to a landlord to enable the landlord to carry out its functions in accordance with the new provisions introduced into the 1985 Act by clauses 155 and 156 (see sections ***2.a & 2.b*** above) of this Bill. This will include information as to whether any of the specified orders or proceedings relating to anti-social behaviour are in force or pending.

B. The Right to Buy

1. Background

The statutory Right to Buy (RTB) was introduced on 3 October 1980 in England, Wales and Scotland.[251] Since its introduction local authorities, new town corporations and housing associations have sold over 2.2 million properties. The chart below shows the number of RTB sales since 1980/81.

RTB sales in England: 1980/81 to 2001/02



In England and Wales secure council and non-charitable housing association tenants have been able to receive a discount of between 32-60 per cent on a house, and 44-70 per cent

[251] Separate legislation applies in Scotland.

on a flat, subject to a maximum discount level. The level of discount to which a tenant is entitled increases with the time spent as a public sector tenant.[252]

In February 1999 the Government acted to improve the value for money of the RTB by reducing the maximum discount available under the scheme and introducing regional variations to the maximum discount.[253] Previously the nationally applied maximum discount was £50,000; this was replaced by regional maximums ranging between £22,000 in the north-east to £38,000 in London and the south-east. In March 2003 further reductions to maximum discount levels were introduced in 41 local authority areas in high housing demand areas of London and the south-east; the maximum discount in these areas is now £16,000. The Government has also made changes to the cost floor rule[254] and has made it easier to limit the loss of properties through the RTB in rural areas.[255]

More detailed background on the RTB is contained in Library Research Paper 99/36.[256]

The key aim behind the RTB measures contained in this Bill is to modernise the Right to Buy scheme 'to discourage profiteering and help local authorities to maintain the availability of social housing in the longer term.'[257]

2. Evidence of RTB abuses

On May 1st 2002 the then Housing Minister, Sally Keeble, stated in a written answer that the Government had commissioned research by Heriot-Watt University to "examine the scale, nature and impact of the misuse of the right to buy policy by companies."[258] The results of this research were published on 6 March 2003.[259]

In July 2002 the new Housing Minister, Lord Rooker, spoke at Labour's rural conference during which he reportedly stated that the RTB scheme had been "open to too many abuses" and indicated that the Government was prepared to amend certain aspects of the scheme in a bid to halt the decline in availability of affordable housing.[260]

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252 For more information on the operation of the RTB see: *Your right to buy your home: a guide for tenants of councils, new towns and registered social landlords including housing associations.* This leaflet is on the ODPM website at:
http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/page/odpm_house_601827.pdf

253 SI 1998/2997 & SI 1999/292

254 This rule involves limiting the discount that a tenant can get when exercising the RTB where a landlord has recently spent large amounts on buying, improving, or building the property concerned.

255 For more information on the March 2003 changes see Library Standard Note SN/SP/1983

256 http://hcl1.hclibrary.parliament.uk/rp99/rp99-036.pdf

257 *Sustainable Communities – building for the future*, ODPM, February 2003, para 6.6
http://www.odpm.gov.uk/stellent/groups/odpm_communities/documents/pdf/odpm_comm_pdf_022184.pdf

258 HC Deb 1 May 2002 cc807-8W

259 *Exploitation of the right to buy scheme by companies:*
http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_609025.pdf

260 "Move to limit council house sales", *The Observer*, 21 July 2002

John Prescott, in his speech to the Labour Party Conference on 20 September 2002, referred to the desperate shortage of affordable homes in London and the south-east and referred specifically to the impact of the RTB in these areas:

> In these areas of severe housing shortage, the Right to Buy is denying families the right to a home. Now, I am not saying we will end the Right to Buy. No one is seeking to turn the clock back 20 years. But the Right to Buy undermined - and continues to undermine - social housing in designated housing crisis areas.
>
> When the Tories saw the Right to Buy causing similar problems in some rural areas, they made exemptions.
>
> So, in those areas, where exploitation and abuse of the system exist, when people suffer as a result, when our public services are undermined, and where the Right to Buy undermines the Right to Live in decent conditions, it would be irresponsible not to act.
>
> So we will act.[261]

Several 'abuses' of the RTB have been identified. These are discussed in the following sections ***a-d*** below.

a. Avoiding the resale penalties: 'incentive companies'

Under the current provisions people who exercise the RTB are required to repay all or some of the discount that they receive on the purchase if they sell the property within three years.[262] There is no equivalent requirement where the ex-tenant rents out the property after completion.

Research carried out by the London Housing Unit (LHU) in early 2002 concluded that companies are "cashing in" on the discounts offered to tenants by exploiting the fact that there are no sanctions for renting out properties after purchase. Companies offer to fund tenants' purchases on the understanding that the tenant vacates the property immediately on completion of the sale, the company then lets the property at a market rent. The contract (between the tenant and the company) provides for ownership to pass to the company on the expiry of three years after completion. This process enables possession, and eventually ownership, to pass to a lettings company without triggering the discount repayment penalties.[263]

In return, it is reported that companies give the tenants a one off cash incentive payment of between £5,000 and £25,000 depending on the size, location and condition of the

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261 http://www.labour.org.uk/johnprescottconfspeech/
262 The discount repayable reduces by a third in each year that passes.
263 "Exploiting the system," *London Housing*, October 2002

property concerned. The companies take the value of the RTB discount as additional equity in the property. Once ownership passes to the company on the expiry of three years they have the option of continuing to let it at a market rent or sell it at a profit. The companies involved in this process solicit business through local advertising, leaflet drops and in the national press.[264]

The LHU research indicated that around 20 companies are involved in this process in London, many of which are subsidiaries or partners of others. Most of the companies are property developers with large property portfolios within their parent company. The practice is thought to be linked to rising property values and is concentrated in areas of high housing demand.[265]

Iain Coleman spoke of abuses of the RTB in his constituency (Hammersmith and Fulham) during the 2002 Whitsun Adjournment debate. He gave an example of two cases where, having entered into an under-lease with a company, ex-tenants had requested assistance with re-housing from the local authority:

> In my local authority of Hammersmith and Fulham, there have been two recent cases in which, having vacated their properties, tenants have attempted to present themselves as homeless and in need of re-housing. One of the tenants has a history of mental illness. Of course the local authority will not accept such applications because the individuals concerned are in practice intentionally homeless and therefore not entitled to local authority housing support. I am advised that the Department for Transport, Local Government and the Regions believes that, in such cases, a landlord should be able to recover the discount because a contract of sale exists. The opinions of various counsel were sought on this matter, but regrettably they disagreed with the Department.[266]

The research carried out by the School of the Built Environment at Heriot-Watt University (commissioned by the ODPM) identified the following key findings in relation to the activities of RTB 'incentive companies:'[267]

- RTB incentives companies began operation in early 1998 and their activities have taken off in parallel with the recent boom in buy to let. At present the activities are confined primarily to inner London. Thousands of properties are likely to have been acquired in this way, in addition to even more individuals buying council housing on their own account.

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264 *ibid*
265 *ibid*
266 HC Deb 24 May 2002 cc499-500
267 i.e. companies who provide incentives for tenants to buy their home and leave via a sale and lease arrangement. This enables tenants to access some of the equity in their home built up under the RTB. This is equity that they would not otherwise receive because they either live in a home that they do not wish to buy, or cannot wait to receive, for example if they plan to emigrate.

- There has been a significant transformation in the tenure of housing in London. Around 26% of ex-local authority properties bought over the last three years in two case study areas in inner London (Camden and Lambeth) are now privately rented. Rents can be as high as £1,000 per month.
- The schemes operated by incentives companies enable them to build a portfolio of rented properties relatively cheaply but the economics is dependent on a shortage of rented housing in both the public and private sectors.
- The schemes are not attractive to most tenants but do offer an opportunity, particularly for those in high rise blocks, problem estates or those wishing to move anyway. These tenants may be unable to purchase their home because their property is not mortgageable by standard sources and would therefore be difficult to sell on, or they do not wish to buy the home they occupy.
- The lump sum that tenants receive in return for selling to a RTB incentives company is probably the equivalent of just a quarter of the discount they are entitled to under the RTB scheme.[268]

b. RTB & regeneration

Evidence submitted to the Transport, Local Government and the Regions Select Committee on Empty Homes, which reported in March 2002, led the Committee to conclude that tenants whose properties are included in regeneration schemes often exercise the RTB specifically to benefit from the council buying back these properties in order to carry out the necessary regeneration works:

> In areas where demand is generally strong, there remain "poorly designed estates which can yield a large amount of unpopular housing, management and social problems, crime, lack of security and high turnover," despite a shortage of affordable housing. In Tower Hamlets, we visited the Ocean Estate a typical example of dire urban planning (built between 1949 and 1975) which the council intends to rebuild. A number of residents have exercised their Right to Buy since the regeneration scheme was proposed prior to the point at which a possession order can be granted by the court. This has made the project more expensive and difficult because the council then needs to buy back those houses from their new owners at market value - representing an additional cost to the council of up to £70,000 per flat, as a result of the high house prices in the area. The cost of purchasing these privately owned properties (approximately £25 million) is equivalent to the entire budget for housing available through the Ocean Estate New Deal for Communities programme. Whilst this is a significant problem in Tower Hamlets, it potentially has wider implications throughout London and

[268] *Exploitation of the right to buy scheme by companies,* March 2003:

> other areas where house prices are high, as councils seek to regenerate their housing stock.[269]

Research published by the Association of London Government (ALG) in May 2003 concluded that 'regeneration schemes in many London boroughs are becoming financially unviable because of surges in RTB applications from tenants.'[270]

The Select Committee on Empty Homes recommended that councils should be allowed to suspend the RTB "where they have passed a formal resolution to consult on clearance to save the additional cost to the public sector of purchasing homes from private owners in places where house prices are high."[271]

The Heriot-Watt researchers found:

> In regeneration areas the research found increasingly frequent surges in RTB applications in London but the phenomena is not ubiquitous. The picture is clouded by the fact that there were during the period covered by the research only a relatively small number of regeneration projects, inevitably variable in their stage of development, some many years away from fruition. There is also no definitive evidence of such activity outside London. The research found no specialist companies promoting the RTB in regeneration areas but there is evidence of RTB Services and Incentives companies operating in these areas. While it appears that there is an increasing awareness of the financial attractions to tenants of exercising their RTB in these circumstances, the opportunity to benefit in this way is still not well known outside London. However, there is no reason why the practice could not become more commonplace.[272]

c. RTB service companies

The Heriot-Watt researchers also considered the activities of RTB 'service companies,' i.e. companies that offer services to council tenants to help them purchase their home by offering assistance such as filling out the relevant forms, negotiating with the council, and arranging solicitors and mortgages. The researchers found:

- RTB services companies have been subject to criticism by local authorities concerning some of their marketing techniques especially cold calling and the claims in their advertising. However, the evidence is that tenants who use their services find them helpful.

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[269] The Sixth Report of the Transport, Local Government and the Regions Select Committee on Empty Homes, HC 240 of Session 2001-2002, paragraph 34 http://pubs1.tso.parliament.uk/pa/cm200102/cmselect/cmtlgr/240/24002.htm

[270] *Right to buy and the impact on regeneration schemes,* May 2003, ALG http://www.lhu.org.uk/docs/421briefing_rtb.pdf

[271] The Sixth Report of the Transport, Local Government and the Regions Select Committee on Empty Homes, HC 240 of Session 2001-2002, paragraph 34

[272] ODPM, *The Exploitation of the Right to Buy Scheme by Companies,* 6 March 2003

- The RTB applications stimulated by these companies can cause considerable administrative strain on local authorities, much of it fruitless, as a very high proportion of these applications is subsequently withdrawn.
- Many of the people who use these RTB services companies are attracted by the opportunity to receive a mortgage that is unavailable on the high street. These tenants may require sub-prime finance because they cannot certify their income, have County Court Judgements against them or have significant arrears. Sub-prime lending also encompasses properties that high street lenders will not as a general rule lend on, for example, high rise flats above five storeys and prefabricated buildings.
- Sub-prime lending appears to have risen in significance as the result of the changed nature of households exercising the RTB. The characteristics of RTB purchasers tend to be younger compared with the 1980s and there is a greater variation in the types of households buying. This reflects the socio-economic demographic structure of tenants and house types in council housing today.
- To date sub-prime lending to tenants exercising the RTB has not caused a significant incidence of financial problems but this may reflect the current macro-economic conditions.[273]

d. Excess profits

Shelter's report, *Time for a Change: reforming the right to buy,*[274] argues that the RTB enables tenants to make large profits from the scheme, particularly where house prices are rising:

> This was highlighted in a recent report by Camden Council. In one case, a property bought for £165,000 was sold just two months later for £297,000. Although, under the rules of the scheme, the tenant had to repay the discount, they still made a profit of just under £100,000. In another case, a property bought for £230,000 with a discount of £50,000 was subsequently sold for £525,000, a profit of nearly £300,000.

3. Impact on the supply of affordable housing

In his speech to the 2002 Labour Party Conference John Prescott said, "Governments of both sides have failed on housing for decades. We have simply not built enough homes." He went on to say that there is "a desperate shortage of affordable homes" in London and the south-east.[275] Various housing organisations have made the point that the RTB has played a role in depleting the supply of affordable housing.

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[273] *ibid*
[274] 2002
[275] 30 September 2002, http://www.labour.org.uk/johnprescottconfspeech/

The Chartered Institute of Housing and the Institute for Public Policy Research published a joint report in June 2002 on the potential for developing equity stakes in social housing.[276] As part of this report they considered the impact of the RTB:

> While local authority RTB receipts have been considerable, since 1990 most authorities have only been allowed to spend 25% of them directly, the remainder generally having to be set aside against debt. Yet RTB sales in England have totalled well over 1.5 million, compared to the current social housing stock of just over 4 million, and have generally involved the most desirable of the country's social rented homes. The receipts have not generally been available to councils to replace the 'lost' rented stock.
>
> It is true that the RTB has helped many families meet their home ownership aspirations, and it is often claimed that the resultant diversification of tenure on large local authority estates is beneficial. But this is not the whole story as before RTB was introduced social housing was in much readier supply and was able to cater for a wider range of households than today. While the tenure may have been the same, the concentration of lettings amongst the most needy and disadvantaged households that is now forced on many social landlords just did not apply until the 1980s. The resulting stigma has worsened significantly social housing's reputation, and has increased the proportion of households expressing a preference for owner occupation, no matter how realistic such a preference might be.
>
> The ongoing impact of RTB varies from area to area, often according to the pressure on social housing supply. To some extent the north-south divide applies, but this is only broadly the case with some examples of low demand in the south and high demand in the north. Where social housing supply is under greatest pressure, generally the extent of the RTB is greater and housing supply is under pressure in all tenures. Whilst it may be argued that continuing RTB sales in low demand areas do not damage landlords' ability to meet housing need in crude terms (i.e. setting aside the popularity of the homes available), there is distinct and costly damage in areas of high demand.
>
> Current RTB policy also has the effect in some areas of encouraging people into purchasing in order to save money on their housing costs, and some to purchase dwellings with high service or maintenance costs. Because landlords can only reject RTB applications for narrowly defined reasons, dwellings are often sold in circumstances where a more appropriate policy response would be to embargo the sale – for example where demolition is planned.[277]

The same report talks about the cost of the RTB in terms of the discounted loss of a public asset at the expense of the re-housing possibilities of future tenants. The authors compare the net public sector receipt from the RTB with the cost of replacing a home

[276] *A Stake Worth Having?* Stephen Hill, Mark Lupton, Graham Moody, Sue Regan, June 2002
[277] *ibid*, pp40-41

"because in high need areas the home would meet the housing requirements of a high need household whenever it became vacant:"

> If we confine our analysis to the ODPM Regions of London, the south-east and the south west, three of the highest need regions, and where this need is projected to be sustained for the foreseeable future, then the average RTB receipt increases from a national average of around £29,000 to some £40,000. This may be compared with the average amount of public subsidy to replace the home using Social Housing Grant. This calculation has become slightly more complicated with the advent of rent restructuring, but we estimate it at some £65,000. RTB can therefore be estimated to cost in the order of £25,000 per unit sold, amounting to some £450 million per annum in these three regions alone.[278]

RTB sales in London average around 11,424 per year. A total of 254,195 properties were sold under the RTB in London between 1 October 1980 and 31 December 2002. Sales have outstripped social housing completions in London in virtually every year since the statutory RTB was introduced. The years where social housing completions exceed RTB sales include the first two years after the scheme was introduced (1980/81 and 1981/82) and 1995/96.[279]

Shelter's evidence to the Urban Affairs Sub-Committee's 2002 inquiry into affordable housing reiterated the call for changes to the RTB:

> Shelter recognises that the Right to Buy offers council tenants an affordable way of owning their own home. However, the sale of council properties under the scheme currently far exceeds the number of new homes built. More than 53,000 local authority homes were sold under the Right to Buy in 2000/01, an increase of around 60 per cent since 1996/97. In contrast, only 18,000 new units of affordable housing were completed that year. In London, where the shortage of affordable housing is most acute, more than 11,000 properties were sold in 2000/01 and only 3,000 new affordable homes built.
>
> Continuing to haemorrhage properties on this scale is dramatically eroding the social housing stock in many areas where there is already a shortage of affordable housing. This also does not make financial sense. Right to Buy sales generate average receipts of £28,000 per home. The average cost of each new unit of social housing is £50,000. This represents a net loss to the Exchequer of over £20,000 per home. Reducing the number of properties lost in this way could significantly reduce the need for new affordable housing.[280]

When the RTB was first introduced the then Government asserted that it would have little impact on the availability of social housing for around 30 to 40 years on the grounds that

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[278] *ibid,* p41
[279] DTLR, Progress on Council House Sales to September 2001
[280] http://www.shelter.org.uk/images/pdfs/campaign/affordable_housing.pdf

properties sold would continue to be occupied by the same household. However, the Environment Select Committee's report, *Council House Sales,* (June 1981)[281] concluded that "the effect of council house sales on the numbers of new lettings and transfers available in the local authority sector will over a period be substantial." A written answer in April 2002 confirmed that of the 120,000 flats sold in London under the RTB only half continue to be occupied by the original leaseholder.[282]

4. The Bill (Clauses 147-154)

In *Sustainable Communities: Building for the Future*[283] the Government set out its vision for building sustainable, inclusive communities and made a commitment to introduce a Housing Bill that would, *inter alia:*

> Modernise the Right to Buy scheme to discourage profiteering and help local authorities to maintain the availability of social housing in the longer term.[284]

The Bill will amend the *1985 Housing Act* to extend the qualifying period for the RTB from two to five years (clause 147). Tenants will not be penalised in discount terms by this change.[285] A new exception to the RTB will be added to Schedule 5 to the 1985 Act covering properties which are due to be demolished during the next 18 months where the landlord has followed the prescribed notification process. This measure is aimed at tackling the abuses highlighted in section **2.b** above. The Government initially rejected the suggestion that action should be taken to suspend the RTB in clearance areas:

> It would be unfair to tenants if a council introduced such a restriction before a clearance scheme had been properly planned and costed, or to apply it to Right to Buy applications already submitted. It would also be difficult to prevent tenants applying on the basis of rumour in advance of a formal council resolution.[286]

The draft *Housing Bill*[287] did not contain measures relating to clearance areas but their inclusion was recommended by the ODPM: Housing, Planning, Local Government and the Regions Committee which scrutinised the draft Bill:

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281 HC 366 of Session 1980-81, 2nd Report of the Environment Select Committee
282 HC Deb 10 April 2002 c74W
283 ODPM, February 2003, http://www.odpm.gov.uk/stellent/groups/odpm_communities/documents/pdf/odpm_comm_pdf_022184.pdf
284 *ibid*, para 6.6
285 Bill 11 – EN para 268 http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmbills/011/en/04011x--.htm
286 The Government's response to the Sixth Report of the Transport, Local Government and the Regions Select Committee on Empty Homes, Cm 5514, May 2002 http://www.renewal.net/Documents/Policy%20Guidance/Governmentresponsetransport.pdf
287 *Housing Bill – Consultation on draft legislation*, ODPM, Cm 5793, March 2003 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/downloadable/odpm_house_023168.pdf

> We recommend that Local Authorities be granted the powers to suspend the Right to Buy as soon as an area is designated for regeneration, or when individual dwellings or blocks are condemned for demolition.[288]

Despite the Government's initial reluctance, measures to tackle this form of abuse[289] have been included in the Bill (clause 148).

The Bill will also extend the period within which the discount is repayable on a 'relevant disposal'[290] from three to five years (clause 149).[291] Former landlords will be given discretion over whether or not to demand repayment of discount on early resale within the specified period. Guidance will be issued on the circumstances in which it would be appropriate to waive repayment of all or part of the discount.[292] The calculation of the amount of discount repayable will be changed from a flat-rate basis to a percentage basis in relation to the RTB. This will have the effect of recouping for the public purse a proportion of any appreciation in the value of a property originally sold at a discount which is resold within five years. The repayment taper will be amended so that one-fifth will be repayable per year instead of one-third.

The ODPM Committee's report on the draft *Housing Bill* welcomed these changes:

> We welcome reforms to the Right to Buy, limiting the scope for abuse and profiteering. In particular, we commend the extension of the qualification period as well as the discount repayment period to five years each, as well as the change to the method of calculating discount repayment.[293]

Clause 151 of the Bill is designed to tackle the problem of tenants exercising the RTB and entering into an agreement to sell the property after the discount repayment period ends. This type of abuse is described in section **2.a** above. The Bill will define such an agreement as a 'relevant disposal' which will trigger the repayment of discount. This provision was not included in the draft Bill; however, the Government has stopped short of acting on the ODPM Committee's recommendation that sub-letting properties *per se* during the discount repayment period should be outlawed[294]

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[288] ODPM: Housing, Planning, Local Government and the Regions Committee, The Draft Housing Bill, Tenth Report of Session 2002-03, HC 751-I Volume 1 http://pubs1.tso.parliament.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

[289] *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 56 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

[290] Only 'relevant disposals' trigger the repayment of RTB discount. They include, for example, property sales on the open market but exclude certain disposals between family members and on the death of the owner.

[291] This will also apply to the Rent to Mortgage Scheme provisions in the *1985 Housing Act*.

[292] Bill 11 – EN para 276 http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmbills/011/en/04011x--.htm

[293] ODPM: Housing, Planning, Local Government and the Regions Committee, The Draft Housing Bill, Tenth Report of Session 2002-03, HC 751-I Volume 1

[294] *ibid* para 175

> …the Government believes that subletting is often a legitimate way of exercising life choices. Moreover, policing an outright ban on subletting would not be straightforward and could be intrusive.[295]

The Regulatory Impact Assessment on the Bill's RTB provisions states that attempts to address tenants buying to let at market rents 'present problems of definition and of timing and raise Human Rights Act issues. For example, it is difficult to define 'subletting' in a way that does not include legitimate activities, (e.g. accommodating a relative or friend; letting during a short-term absence for employment reasons or while acting as a carer) and hence limit mobility unfairly.'[296]

The Government *has* acted on the Committee's recommendation that social landlords should have first refusal to buy back properties acquired through RTB if they come on the market within ten years following the exercise of the RTB.[297] This will be achieved by clause 152. The detailed operation of this right of first refusal will be set out in regulations.

The ODPM Committee recommended placing a legal duty on local authorities to provide tenants with access to third party advice on the implications of home ownership and said that Home Information Packs, if introduced, should apply to RTB purchases.[298] Clause 153 will place a duty on landlords to supply information to tenants on the responsibilities and consequences of being a homeowner 'to help them decide whether to exercise their RTB.'[299] Consultation will take place over what information it will be reasonable to provide and Regulations will specify what information must be provided. The duty to prepare a Home Information Pack will not apply to RTB purchases.

Clause 154 provides for the termination of the Rent to Mortgage Scheme with a grace period of 8 months after Royal Assent. This scheme, which was introduced in 1993, enables tenants to buy their homes on a shared ownership basis when they cannot afford to buy outright under the RTB. Only 300 sales under the scheme have taken place.[300] The Explanatory Notes to the Bill state that 'it is considered more sensible to reduce the number of home ownership schemes that are effective rather than have many that are seldom used.[301]

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295 *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 55 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

296 Regulatory Impact Assessment, Housing Bill – Right to Buy provisions http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/page/odpm_house_026061.hcsp

297 ODPM: Housing, Planning, Local Government and the Regions Committee, The Draft Housing Bill, Tenth Report of Session 2002-03, HC 751-I Volume 1 para 184 http://pubs1.tso.parliament.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

298 *ibid* para 180

299 Bill 11 - EN para 290 http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmbills/011/en/04011x--.htm

300 Regulatory Impact Assessment, Housing Bill – Right to Buy provisions

301 Bill 11 - EN para 291

5. Comment

As noted above, the ODPM Committee that scrutinised the draft *Housing Bill* welcomed the Government's proposals on the RTB but wanted the Bill to go further. Some of the Committee's recommendations have been acted upon but others have not. The Committee argued that the RTB should be brought into line with the Right to Acquire:[302]

> On grounds of consistency and fairness as well as to preserve social housing stock, we recommend that the Government explores the option of bringing Right to Buy regime to bring it into line with the Right to Acquire regime.
>
> If the differentiation between Right to Buy and Right to Acquire is retained, we recommend that the discount available to tenants exercising their Right to Buy should be universal, and that it should be brought into line with the Right to Acquire discount as well as with the level of discount available in the 41 Local Authorities where exemptions were imposed earlier this year.[303]

The Government responded thus:

> The Government recognises that there are arguments in favour of aligning more closely the terms of tenancies available from local authorities and housing associations. In 2001, the Government asked the Law Commission to conduct a review of housing tenure law, with the aim of producing a less complex framework that is more readily understandable and promotes choice and diversity. The Government has also asked the Home Ownership Task Force (HOTF) to look at the whole range of programmes aimed at helping people into home ownership, including the Right to Buy, the Right to Acquire, and shared ownership and cash incentive schemes, with similar objectives. The Law Commission's report was published on 5 November 2003. The HOTF report is expected shortly. The Government will consider both reports carefully.[304]

The Home Ownership Task Force's report was published in November 2003; [305] it also recommends the alignment of discounts and qualifying criteria for the RTB, Right to

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[302] Introduced by the *1996 Housing Act* this is a statutory right for certain assured tenants of registered social landlords (RSLs, this includes housing associations) to acquire their homes at a discount to the open market value. The discounts involved are less generous than those under the RTB outside of London and the South East.

[303] ODPM: Housing, Planning, Local Government and the Regions Committee, The Draft Housing Bill, Tenth Report of Session 2002-03, HC 751-I Volume 1 paras 167 & 168 http://pubs1.tso.parliament.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

[304] *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 53 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

[305] The Task Force report was published in November 2003 and can be accessed online at: http://www.housingcorplibrary.org.uk/housingcorp.nsf/AllDocuments/1878DD46947B554780256DDD004B2A1C/$FILE/HOTFSummary_web.pdf

Acquire and the Voluntary Purchase Grant[306] at 'a level close to that currently available for the Right to Acquire.'[307] The Government has not yet responded to this report.

The Government was not persuaded of the merits of bringing discounts under the RTB and the Right to Acquire in line; however, further 'targeted and proportionate changes' have not been not ruled out.[308]

The Committee also wanted additional protection for elderly people who are encouraged to exercise the RTB with financial assistance from their relatives, and who later find themselves being forced out of their homes.[309] The Government agreed to consider how to tackle the question of elderly and vulnerable tenants being exploited by relatives who persuade them to exercise their RTB.[310]

There was no movement by the Government on the idea that local authorities should be granted greater flexibility in adjusting the RTB to local circumstances:[311]

> The Government does not think that it should be possible for a right conferred by Parliament to be open to piecemeal variation, or that this would be fair to tenants. Nor does the Government think that such flexibility would necessarily be an effective means of addressing local housing problems. Local authorities would have to give notice of their intentions or be open to challenge on the grounds of acting unreasonably. Giving notice would alert tenants to imminent suspension and could persuade them to apply for the Right to Buy before suspension took effect, worsening the situation that the action was intended to ease.[312]

Further developments in the area of rural exclusions and equity shares[313] have not been ruled out:

> In January, the Government made it easier for landlords to restrict the resale of homes originally sold under the Right to Buy. They can already do so in National Parks, Areas of Outstanding Natural Beauty, and 26 areas designated as rural for

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306 This is a discretionary purchase scheme operated by some RSLs that enables their assured tenants to purchase their homes at a discount.

307 *A Home of My Own*, The Report of the Government's Low Cost Home Ownership Task Force, para 31 http://www.housingcorplibrary.org.uk/housingcorp.nsf/AllDocuments/1878DD46947B554780256DDD004B2A1C/$FILE/HOTFSummary_web.pdf

308 *The Draft Housing Bill – Government Response Paper,* Cm 6000, November 2003 para 54 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

309 ODPM: Housing, Planning, Local Government and the Regions Committee, The Draft Housing Bill, Tenth Report of Session 2002-03, HC 751-I Volume 1 paras 182 http://pubs1.tso.parliament.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

310 *The Draft Housing Bill – Government Response Paper,* Cm 6000, November 2003 para 58

311 ODPM: Housing, Planning, Local Government and the Regions Committee, The Draft Housing Bill, Tenth Report of Session 2002-03, HC 751-I Volume 1 para 188

312 *The Draft Housing Bill – Government Response Paper,* Cm 6000, November 2003 para 61

313 For information on equity shares see *Equity Shares for Social Housing*, ODPM, May 2003 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/page/odpm_house_609806.pdf

> this purpose by the Secretary of State - together these areas comprise approaching 40% of the total area of England. However, the Government does not rule out further changes, in the light of the forthcoming reports of the Home Ownership Task Force and the Law Commission. On equity shares, the Government has concluded that the costs of introducing these are likely to be substantial, while the scale of benefits is highly uncertain. Given this, the Government cannot justify introducing such a scheme now. Nevertheless, the Government will continue to keep a watching brief on developments and research elsewhere on equity share type initiatives, and does not rule out the possibility of introducing a scheme in the future should the evidence support it.[314]

The Local Government Association (LGA) has welcomed the measures aimed at limiting abuses of the RTB but believes 'there are further opportunities for consistency and reduction of abuses' and has signalled its intention to pursue these throughout the passage of the Bill.[315]

The Chartered Institute of Housing (CIH) and the Institute for Public Policy Research (IPPR) staged a joint symposium in May 2003 on the Right to Buy which was attended by politicians, policy makers, practitioners and leading academics with a wide range of views on the RTB. The ensuing debate produced a number of possible policy responses, some of which will be implemented by the current Bill. Those policy areas identified which the Bill does not cover are summarised below:

- **Flexibility to achieve strategic outcomes:** it was felt that authorities should be given greater freedom over some aspects of the RTB in order to give them scope to compensate for some of its more negative effects. It was suggested that authorities should be able to exempt certain properties from the RTB with affected tenants being given equivalent cash lump sums to purchase alternative properties. 'This would benefit landlords in low demand areas, as dwellings earmarked for demolition could be exempted, as well as those in high demand areas, by allowing them to retain certain property types that are in particularly short supply.'
- **Purchase on a shared equity basis:** this would involve the conversion of a proportion of the current discount into an equity share that the council retains. 'Such a shared ownership arrangement that would allow councils to retain a financial interest in the property could be particularly beneficial in high demand areas since the property remains available at lower than market cost even when the purchaser moves on. The equity share held by the original buyer could either be sold to another buyer or could be repurchased by the council for letting to households in housing need.'
- **Giving councils greater financial freedoms:** it is argued that councils should have the freedom to shape their housing portfolios to respond to different types of housing need in order to meet their strategic responsibilities. 'For example, in an area where there are

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314 *The Draft Housing Bill – Government Response Paper,* Cm 6000, November 2003 para 62 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

315 Queen's Speech 2003: LGA Briefing on the key Bills for local government, 26 November 2003 http://www.lga.gov.uk/Documents/Briefing/Lobbying/Legislative%20Programme/QSbriefing%202003.pdf

large numbers of one bedroom flats and too few larger properties, it may be appropriate to sell a number of the flats and provide resources to acquire a larger property that is more in line with needs and demand in the area.'

- **Measures for reinvesting a higher proportion of capital receipts in housing:** 'Income from receipts has allowed the Treasury to significantly reduce public spending on housing and there is impacting on the ability of councils and housing providers to meet the range of housing needs in their areas. A higher proportion of receipts could be reinvested I housing, either locally or nationally or both, with the proportion being increased by a few percentage points each year, to allow the Treasury to adjust its spending gradually.'[316]

A key message from the CIH/IPPR debate was that the RTB contradicts a number of strands of Government policy and impacts on its ability to meet targets, including: halting bed and breakfast use for families; narrowing the gap between deprived neighbourhoods and the rest of the country; creating sustainable communities; and providing more affordable housing in high demand areas. In the longer term the CIH/IPPR study supported further work on testing the viability of an equity stakes scheme.[317]

C. Discounts on non-RTB disposals (Clauses 158-164)

Clauses 158-160 carry over the changes made in respect of the Right to Buy in clauses 149-151 (see section **IV.B.4** above) to voluntary disposals by local authorities of properties at a discount under section 32 of the *1985 Housing Act.*

Clauses 161 and 162 carry over the changes made in respect of the Right to Buy in clauses 149-151 to voluntary disposals by registered social landlords of properties at a discount under section 9 of the *1996 Housing Act.*

Clauses 163 and 164 carry over changes made in respect of the Right to buy in clauses 149-151 to voluntary disposals by Housing Action Trusts of properties at a discount under section 79 of the *1988 Housing Act.*

D. Succession: same sex partners (Clause 165)

Clause 165 will give same sex partners the equivalent right to succeed to tenancies governed by the *1977 Rent Act* (regulated tenancies), the *1985 Housing Act* (secure tenancies), the *1996 Housing Act* (introductory tenancies) and the *1988 Housing Act* (assured tenancies) as is already given to unmarried partners of different sexes.

Provisions will be inserted in the relevant sections of these Acts to provide that where those living with the tenant 'as his or her husband or wife' or as 'a member of the tenant's

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[316] The Right to Buy – A Symposium for Debate, May 2003, CIH & IPPR, http://www.cih.org/policy/rtb1.pdf

[317] *ibid*

family' have the right to succeed to the tenancy, this definition will cover persons of the same sex as the tenant who are living with them in an equivalent relationship.

The existing provisions on succession to private and social rented tenancies are set out in Library Standard Notes SN/SP/1998 and SN/SP/2004. The question of whether homosexual partners can succeed to tenancies has been considered in several court cases. In *Fitzpatrick v Sterling Housing Association*[318] the House of Lords upheld a claim for succession to a private tenancy under the *1977 Rent Act* by Martin Fitzpatrick. Mr Fitzpatrick succeeded to an assured tenancy, i.e. he was given the same right of succession that a member of the late tenant's family would have acquired had they resided with him for two years prior to his death. More recently, the Court of Appeal considered the issue of the right of a surviving homosexual male partner to succeed to a statutory tenancy[319] under the 1977 Act on the death of the tenant in the light of article 14 of the European Convention of Human Rights. Article 14 provides that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The County Court judge in this case held that the surviving occupier, Mr Mendoza, could succeed to an assured tenancy on the death of his partner who had been a regulated tenant.[320] Mr Mendoza appealed. Lord Justice Buxton held that the Court of Appeal had to re-visit the decision in *Fitzpatrick* in the light of the ECHR and the *Human Rights Act 1998.* It was necessary to consider whether discrimination on the grounds of sexual orientation was excluded from the discrimination protection of article 14. The Court of Appeal held that sexual orientation was clearly recognised as an impermissible ground of discrimination. Consequently, it was held that the exclusion of same-sex relationships from paragraph 2 of Schedule 1 to the 1977 Act (as amended) as interpreted by the House of Lords in *Fitzpatrick*, infringed article 14 of the ECHR:

> In order to remedy that breach of the Convention the court should, if it could, read the Schedule so that its provisions were rendered compatible with the Convention rights of the survivors of same-sex partnerships.[321]

Therefore, Mr Mendoza was able to succeed to a statutory tenancy under the 1977 Act rather than an assured tenancy under the *1988 Housing Act,* i.e. he was given the same right of succession as a spouse or cohabitant. Like *Fitzpatrick*, this case concerned succession rights to a private sector tenancy but it was viewed as likely to have far-reaching implications for the granting of succession rights to same sex partners in social

318 *Fitzpatrick v Sterling Housing Association (The Times,* November 2 1999; [2001] 1 AC 27)
319 This is the tenancy that a spouse or cohabitant would succeed to under the 1977 Act.
320 *Ghaidan v Godin-Mendoza* (2002)
321 *The Times Law Report*, 'Sexual orientation no reason for bias,' 14 November 2002

rented housing. In fact a majority of local authorities are reported to already allow same-sex partners to succeed to tenancies as a matter of policy.[322]

The provisions of clause 165 will overcome issues of potential discrimination in relation to succession rights and same sex partners. The ODPM Committee on the draft *Housing Bill* recommended that the Bill should be used to amend the law on succession to tenancies 'to remove the current discrimination against single sex relationships and unmarried couples in the case of secure tenancies.'[323] The Government is reserving its position on unmarried couples and succession rights until the results of the Law Commission's review of housing tenure is completed.[324]

E. Grants for social housing (Clause 166)

Clause 166 will amend the *1996 Housing Act* to extend the power of the Housing Corporation in England and the National Assembly for Wales to allow them to give grants to companies other than registered social landlords (RSLs, often referred to as housing associations). These grants will be used for constructing, acquiring, repairing, converting or improving properties for disposal on an equity sharing or shared ownership basis; providing, constructing or improving houses that will be kept for letting; providing loans to assist people to acquire properties for their own occupation; and providing, constructing or improving houses for letting by RSLs.

At present the Housing Corporation and the National Assembly for Wales can only pay Social Housing Grant (SHG, capital finance for the supply of affordable housing) to bodies registered with them (RSLs). RSLs are required to submit to a detailed regulatory regime in return for receiving public funding. In *Sustainable Communities: building for the future*, published on 5 February 2003, the Government said that consideration was being given to extending the Corporation's power to fund bodies other than RSLs 'with a view to widening the opportunities for encouraging new housing development.'[325] It was proposed that this power would allow the National Assembly for Wales similar scope.

March 2003 saw the publication of *Increasing the effectiveness of powers to regulated registered social landlords*[326] in which the Government sought views on this proposal. The paper described the potential benefits that might arise from enabling private

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[322] see 'We are family', *Inside Housing*, 5 November 1999

[323] ODPM: Housing, Planning, Local Government and the Regions Committee, The Draft Housing Bill, Tenth Report of Session 2002-03, HC 751-I Volume 1, para 197 http://pubs1.tso.parliament.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

[324] *The Draft Housing Bill – Government Response Paper*, Cm 6000, November 2003 para 65 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf

[325] ODPM, February 2003, http://www.odpm.gov.uk/stellent/groups/odpm_communities/documents/pdf/odpm_comm_pdf_022184.pdf

[326] ODPM, 31 March 2003, section 6 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/page/odpm_house_609323.pdf

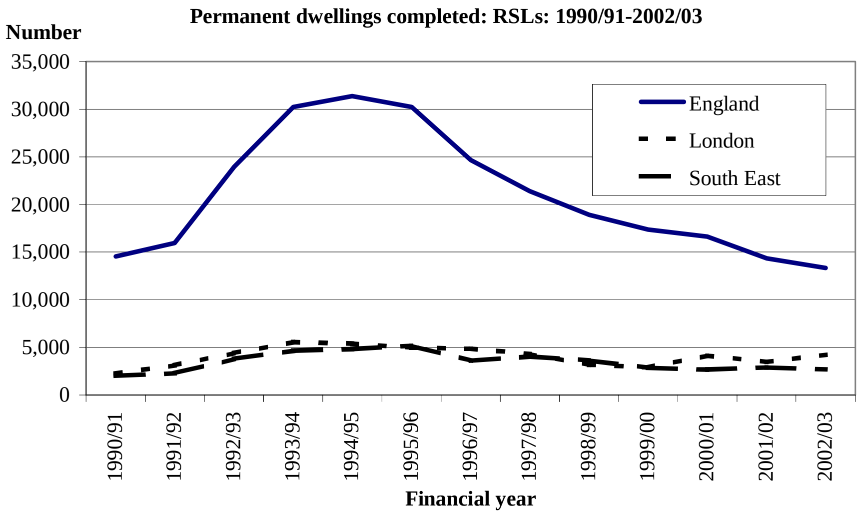
organisations to bid for Exchequer funds to develop affordable housing on a similar basis to RSLs:

> If this were to apply to sub-market rented housing it would add an extra dimension to the bidding process, challenging RSLs to compete with private developers on price, and developers to compete with RSLs on meeting the Corporation's scheme development standards. Private developer bidders would have to meet the same criteria as bidding RSLs in relation to rents and scheme standards. The subsequent performance of grant recipients, including their performance as landlords, would have to be secured through contracts, as they would not be subject to the Corporation's regulatory regime. The arrangements might therefore be more appropriate in delivering mixed developments, reflecting cross-sectoral housing policies, where the grant recipients would not necessarily retain social housing as landlords in the longer-term.[327]

The driving force behind the introduction of this measure is the need to increase the supply of affordable housing. The Minister for Housing, Keith Hill, has said:

> The demand for affordable homes is outstripping supply and the costs are rising. We need to consider alternative ways of increasing the availability and choice of decent homes for those who need them and to identify ways of securing better value for money for our housing programme. It is important we think as creatively and flexibly as possible and the proposal to pay grant to non-RSLs offers an alternative option deserving consideration.[328]

The graph below illustrates that provision by RSLs (the main providers of affordable housing) has reduced in recent years despite increased funding.



[327] *ibid*

[328] *Questions and Answers on the Housing Bill*, December 2003
http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_026257.pdf

While housing organisations agree on the need to increase the supply of affordable housing, the proposal to give grants direct to private organisations has proved controversial. The National Housing Federation, on behalf of RSLs, has argued that the private companies will not be competing 'on a level playing field' because they will not be subject to the same regulatory regime as RSLs. The Government has confirmed that private sector providers will not be subject to the same regulatory regime but has said that 'grant conditions will be framed to ensure as far as possible there is a level playing field for all bidders.'[329] It has also been argued that the need for these bodies to make a profit will lead to them 'cherry picking' the best developments, such as home ownership for key workers.[330] The Government has rejected the suggestion that there will be no incentive for bodies to register if access to SHG is widened:

> …there are a range of benefits to an organisation registered as an RSL beyond the ability to receive social housing grant. In a number of areas of activity (for example stock transfer from local authorities) registration is a basic requirement of policy, even though no grant is paid by the Corporation.[331]

The Chartered Institute of Housing is of the opinion that the Government's aims could be achieved without allowing private developers to bid for SHG:

> We would share the need to build more houses for a reduced amount of money. I think there are two prongs to the dangers, if you like. One is we think there are probably a whole load of reforms that can be brought into place to make the existing arrangements with registered social landlords more effective, not least planning reforms, some of which have been dealt with elsewhere. Also, something like reducing the total number of RSLs that do development…If you reduce the number of housing associations who can do development they will all do more development. The other thing that private developers will say is that they produce more standard house types. Again, you could look at that for RSLs. You can achieve the same kind of savings through modernising the RSL development process rather than giving grant to developers…Our fundamental concern is do not give grant to unregulated organisations, let us try first at improving and modernising the RSL development sector.[332]

Although this measure was not included in the draft *Housing Bill* the ODPM Committee referred to the March 2003 consultation paper and considered evidence from respondents on the issue. The Committee recommended that measures to pay SHG to private developers should not be introduced until the Government had considered ways to

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[329] *Questions and Answers on the Housing Bill*, December 2003 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_026257.pdf
[330] *ibid*
[331] *ibid*
[332] ODPM: Housing, Planning, Local Government and the Regions Committee, The Draft Housing Bill, Tenth Report of Session 2002-03, HC 751-I Volume 1, para 208 http://pubs1.tso.parliament.uk/pa/cm200203/cmselect/cmodpm/751/751.pdf

streamline and improve the effectiveness of RSLs.[333] The Government rejected this recommendation:

> The Government cannot go on accepting the delivery of fewer homes for more money. There is a need, at the same time as improving the effectiveness of RSLs' development performance, to progress new ideas and approaches which offer better value for money. That is why the Government has decided to add to the Bill a provision to enable the Housing Corporation (and the National Assembly for Wales) to pay grant to new developers and builders of affordable housing who are not RSLs. The objectives of the proposal are to widen the opportunities for the development of new affordable housing and to maximise the value of public subsidy by challenging RSLs to compete. The demand for affordable housing is too great to accept the status quo or to wait for single options to be tested.[334]

For their part private developers appear to be keen to take up the opportunity to bid for SHG. Terry Fuller, partnering director at Taylor Woodrow Developments, spoke at a recent conference on *Providing and Funding Social Housing* during which he argued that this type of private sector involvement was 'nothing new.'[335] He cited examples of private sector bids for the Starter Home Initiative, Urban Regeneration Grant and English Partnerships Gap Funding and outlined the advantages that he thought private developers could offer:

- The developer controls the land, planning, programme, infrastructure and majority of the investment;
- It cuts out the 'middle man' and their on-costs, i.e. developers already have supply chain management in place;
- Developers can provide speed, deliverability, mixed and balanced neighbourhoods and sustainability;
- They can deliver more for less.[336]

F. Disabled facilities grant (Clause 167)

Under Part 1 of the *1996 Housing Grants, Construction and Regeneration Act* mandatory disabled facilities grants (DFGs) are available, subject to a means test, for adaptations aimed at assisting disabled people to continue to live in their homes. Before approving a DFG the local authority must be satisfied that the proposed works are 'necessary and appropriate' to meet the needs of the disabled occupant, and also that the works are 'reasonable and practicable' given the age and condition of the property.

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[333] *ibid*
[334] *The Draft Housing Bill – Government Response Paper,* Cm 6000, November 2003 para 58 http://www.odpm.gov.uk/stellent/groups/odpm_housing/documents/pdf/odpm_house_pdf_025602.pdf
[335] Henry Stewart Conferences, 11 December 2003, Cafe Royal, London
[336] *ibid*

DFGs are available to disabled occupants of 'qualifying park homes' but are not currently available to occupiers of some caravans. Clause 167 will replace the term 'qualifying park home' with the term 'caravan' to extend the availability of these grants. The term 'caravan' is defined in the *1960 Caravan Sites and Control of Development Act* as a structure designed or adapted for human habitation that is capable of being moved.

G. Annual reports to tenants (Clause 168)

Clause 168 will remove the duty on local housing authorities to produce a report to tenants about their functions as housing authorities by removing section 167 from the *1989 Local Government and Housing Act.* The Explanatory Notes to the Bill state that 'the requirement on local housing authorities to produce annual reports has largely become redundant as they now have to produce a best value performance plan.[337]

H. Social housing Ombudsman for Wales (Clause 169)

In Wales the National Assembly for Wales currently investigates complaints against registered social landlords (RSLs) while in England this is carried out by the Independent Housing Ombusdman. Clause 169 of the Bill will amend the *1996 Housing Act* to provide for the establishment of a new office of the Social Housing Ombudsman for Wales (SHOW). The Local Commissioner in Wales will be the SHOW.

The National Assembly for Wales will be able to issue regulations to make provision for the investigation of complaints against RSLs in Wales. The Assembly will also have the power to amend or add to the descriptions of landlords who are to be treated as social landlords in Wales subject to consultation. Schedule 8 to the Bill will insert a new Schedule 2A into the 1996 Act which will make further provision about the SHOW.

VII Part 7: Supplementary & Final Provisions (Clauses 170-204)

Part 7 of the Bill will require local housing authorities to keep registers of licences and management orders and also provides for the preparation of statutory codes of management practice and for the making of management regulations in relation to houses in multiple occupation (clauses 170-172).

It will provide for documents and other information to be produced for the purposes of Parts 1-4 of the Bill (clauses 173-176). Local housing authorities will have a power to enter property and the 'appropriate national authority' will be able to prescribe the form of any notice, statement or document required under the Bill (clauses 177-182).

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[337] Bill 11 – EN para 308
http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmbills/011/en/04011x--.htm

Clauses 191-195 and Schedule 9 to the Bill provide the new definition of a house in multiple occupation for the purposes of Part 2 of the Bill. This is discussed in section **II.B.1** (pp34-36) of this paper.

Other supplementary provisions in Part 7 of the Bill provide for the way in which orders and regulations will be made and for offences. More information can be found in the Explanatory Notes to the Bill.[338]

[338] Bill 11 – EN paras 313–345 http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmbills/011/en/04011x--.htm