

SPICe Briefing

The Housing (Scotland) Bill

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The Housing (Scotland) Bill covers a wide range of issues concerning social and private housing. In particular, the main provisions in the Bill seek to:

- Abolish the right to buy
- Increase the flexibility social landlords have when allocating housing and allow social landlords to make best use of their stock
- Provide social landlords with additional tools to tackle antisocial behaviour
- Provide additional protections for tenants, particularly those with a short Scottish Secure Tenancy
- Transfer jurisdiction for civil cases relating to the private rented sector from the sheriff court to the First-tier Tribunal
- Establish a registration system for letting agents
- Amend the site licensing requirements for mobile home sites with permanent residents
- Amend local authority powers to enforce repairs and maintenance in private homes

This briefing sets out the background to the Bill and summarises its main provisions.



CONTENTS

EXECUTIVE SUMMARY	4
INTRODUCTION	6
SOCIAL HOUSING	6
CONTEXT	6
PART 1- RIGHT TO BUY	7
BACKGROUND	7
<i>Scottish Government Consultation</i>	8
THE BILL - RIGHT TO BUY (SECTION 1 AND 2)	9
PART 2 - SOCIAL HOUSING	11
ALLOCATION OF SOCIAL HOUSING - BACKGROUND	11
<i>Scottish Government Consultation</i>	12
THE BILL - REASONABLE PREFERENCE (SECTIONS 3 AND 4)	12
THE BILL - FACTORS WHICH MAY BE CONSIDERED IN ALLOCATION (SECTIONS 5 AND 6)	14
THE BILL - DETERMINATION OF MINIMUM PERIOD FOR APPLICATION TO REMAIN IN FORCE (SUSPENSIONS) (SECTION 7)	15
SOCIAL HOUSING TENANCIES (SECTIONS 8-16)	16
BACKGROUND	17
<i>Short SSTs</i>	17
<i>Possession</i>	17
<i>Anti-social behaviour</i>	18
<i>Scottish Government Consultation</i>	18
THE BILL - ANTISOCIAL BEHAVIOUR SHORT SSTS (SECTIONS 8,10,11,12)	18
THE BILL - GROUNDS FOR EVICTION: ANTISOCIAL BEHAVIOUR (SECTION 15)	20
THE BILL - GRANT OF SHORT SECURE TENANCY: HOMEOWNERS (SECTION 9)	21
THE BILL - ASSIGNATION, SUBLET AND JOINT TENANCY OF SST (SECTION 13)	21
THE BILL - SUCCESSION TO SST (SECTION 14)	22
OTHER ISSUES – PROBATIONARY TENANCIES	22
PART 3 – PRIVATE RENTED HOUSING	23
CONTEXT	23
<i>Scottish Government Private Rented Sector Strategy</i>	24
PRIVATE RENTED HOUSING DISPUTE RESOLUTION	25
<i>Background</i>	25
<i>Scottish Government Consultation</i>	27
THE BILL - TRANSFER OF SHERIFF'S JURISDICTION TO FIRST TIER TRIBUNAL (SECTIONS 17-21)	28
THE BILL - PRIVATE LANDLORD REGISTRATION (SECTION 22)	31
THE BILL - ENFORCEMENT OF REPAIRING STANDARD (SECTION 23)	32
STAGE 2 AMENDMENT - ENHANCED ENFORCEMENT AREAS	32
PART 4 – LETTING AGENTS	32
BACKGROUND	32
<i>Current regulatory framework</i>	33
<i>Scottish Government Consultation</i>	34
THE BILL- LETTING AGENTS (SECTIONS 26-52)	35
PART 5 - MOBILE HOMES WITH PERMANENT RESIDENTS, SITE LICENSING	37
BACKGROUND	37
<i>Current Site Licensing Regime</i>	38
<i>Other developments</i>	38
<i>Scottish Government Consultation</i>	39
THE BILL - MOBILE HOME SITES WITH PERMANENT RESIDENTS (SECTIONS 53-71)	39
PART 6- PRIVATE HOUSING CONDITIONS	42

BACKGROUND	42
<i>Scottish Government consultation</i>	43
THE BILL - TENEMENT MANAGEMENT SCHEME : MISSING SHARES (SECTION 72)	43
THE BILL - CHANGES TO WORK NOTICES, MAINTENANCE ORDERS AND REPAYMENT CHARGES (SECTIONS 73–76)	44
OTHER ISSUES - EXTENDING THE POWERS TO REQUIRE IMPROVEMENTS TO PROPERTIES	44
PART 7 - MISCELLANEOUS	45
THE BILL - RIGHT TO REDEEM A SECURITY AFTER 20 YEARS (SECTION 77)	45
THE BILL - SCOTTISH HOUSING REGULATOR: TRANSFER OF ASSETS FOLLOWING INQUIRIES (SECTION 79)	46
SOURCES	48
RELATED BRIEFINGS	54

EXECUTIVE SUMMARY

The Housing (Scotland) Bill covers a wide range of issues concerning social and private housing with the overall objectives of, "...safeguarding the interests of consumers, supporting improved quality and delivering better outcomes for communities." There has been no draft consultation on the Bill although in developing the proposals the Scottish Government has undertaken a series of discussions with stakeholders and issued a number of consultation papers. The main issues the Bill covers are:

Right to Buy

Part 1 of the Bill would abolish the right to buy (RTB) for social housing tenants. Tenants with a RTB would have three years to exercise it following Royal Assent. The majority of respondents to the Government's consultation on this issue were supportive of the proposed changes. Some respondents were concerned at the removal of tenants' existing rights.

Social Housing

Part 2 of the Bill would make changes to the current framework governing the allocation of social housing with the aim of giving landlords greater flexibility and allowing them to make best use of their stock. In general, consultation respondents have been supportive of the broad policy objectives. The extent to which the Bill does actually provide the intended flexibility is an issue likely to arrive at Stage 1 considerations.

Part 2 of the Bill also proposes changes to the social housing tenancy regime, some of which are aimed at giving landlords more tools to tackle antisocial behaviour. Additional protections are also proposed for tenants with a short Scottish Secure Tenancy. Respondents to the consultation were generally supportive of the broad policy aim of helping landlords tackle antisocial behaviour. Some of the issues that may arise at Stage 1 are what impact the proposed reforms will actually make in practice and whether the rights of tenants have been balanced with the powers of landlords. The Bill does not provide for "probationary tenancies" which was an issue that was consulted on and received some support during the consultation process.

Private Rented Sector

Part 3 of the Bill provides for the transfer of the sheriff's existing jurisdiction to deal with civil cases relating to the private rented sector the First-tier Tribunal (which is to be created under the Tribunals Bill, currently before the Parliament). The objective of this proposal is to promote a more efficient, accessible and specialist access to justice. The initial Scottish Government consultation on the matter indicated that social housing cases could be transferred to a Tribunal too, but the Government has decided against taking this forward at this stage. This is likely to be one of the issues raised by stakeholders at Stage 1.

Part 3 of the Bill also provides for a relatively minor adjustment to the private landlord registration system. It also provides for the creation of third party rights, for local authorities, in relation to enforcing the repairing standard. Further provisions are expected to be brought forward by the Scottish Government at Stage 2 to provide additional discretionary powers for local authorities that would enable them to target enforcement action at areas characterised by poor conditions.

Regulation of Letting Agents

Concern about poor practice operated by some letting agents has led to the development of proposals to regulate the sector. Part 4 of the Bill proposes a registration system for letting agents, based on the current system in place for property factors under the Property Factors (Scotland) Act 2011. Scottish Ministers would be required to establish and maintain a register of all letting agents in Scotland. Letting agents would have to pass a ‘fit and proper person test’ to be registered and comply with a statutory code of practice. The First-Tier Tribunal would provide a route for enforcement of the code of practice. Stakeholders have generally welcomed proposals for regulation of letting agents, although there have been some differing views on the details of what a regulatory regime should encompass.

Licensing of Residential Mobile Home Sites

Local authorities currently administer the site licensing regime for residential mobile home sites but, compared to other licensing regimes, the provisions are relatively basic. Part 5 of the Bill proposes to amend the current licensing regime for mobile home sites with permanent residents. The Bill would introduce statutory minimum application criteria, a ‘fit and proper person test’, and increased enforcement powers for local authorities. In response to the consultation on this issue, local authorities, and those who approached the proposals from the perspective of mobile home residents, were generally supportive of the policy objectives. Respondents who approached the proposals from the perspective of the mobile home industry disagreed with some of the suggested changes. In particular, some suggested that the proposed regime would be unlikely to tackle the problems created by a small number of less scrupulous site owners.

Private Housing

Part 6 of the Bill would give local authorities a power to pay a “missing share” of costs arising from repairs to tenements where one or more owners had failed to pay their share. The Bill would also make relatively minor changes to work notices, maintenance notices and maintenance plans under the Housing (Scotland) Act 2006. In general, the proposals have been supported by stakeholders.

Miscellaneous Provisions

Part 7 contains a number of miscellaneous provisions, including an amendment to the Land Tenure Reform (Scotland) Act 1974 to allow Scottish Ministers to exempt certain securities from the right to redeem after 20 years, and a modification of the Scottish Housing Regulator’s powers to direct a transfer of Registered Social Landlords’ assets.

INTRODUCTION

The Housing (Scotland) Bill (Scottish Government 2013a) was introduced in the Scottish Parliament on 21 November 2013 by Nicola Sturgeon MSP, Deputy First Minister (Government strategy and the Constitution) and Cabinet Secretary for Infrastructure, Investment and Cities, on behalf of the Scottish Government. A [Policy Memorandum](#) (Scottish Government 2013b) and [Explanatory Notes](#) (and other associated documents) (Scottish Government 2013c) have also been published. The Infrastructure and Capital Investment Committee has been appointed the lead committee for the purposes of Stage 1 scrutiny of the Bill.

The Bill covers a wide range of social and private sector housing issues, with the main policy objectives of, “safeguarding the interests of consumers, supporting improved quality and delivering better outcomes for communities.” There has been no consultation on a draft Bill, rather the Scottish Government has undertaken a series of discussions with stakeholders and has carried out seven consultations on policy areas where it was considering legislation. Many of the proposals have stemmed from the Scottish Government’s housing policy document, *Homes Fit for the 21st Century: The Scottish Government’s Strategy and Action Plan for Housing in the Next Decade: 2011-2020*, published in February 2011 (Scottish Government 2011a).

This briefing provides some context and background to the proposals in the Bill, details of the Bill’s main provisions, and discussions of some of the issues that may arise at Stage 1, taking into account responses from the relevant consultations. The Bill’s accompanying documents provide comprehensive explanation of the contents of the Bill and, this briefing, therefore, does not cover every provision in the Bill.

SOCIAL HOUSING

CONTEXT

Twenty-six councils and around 183 registered social landlords (RSLs) manage just over 600,000 properties in the social housing sector. Social landlords have faced a number of challenges in providing and managing social housing in recent years including: decreases in public funding; a more restrictive private lending market; population changes, including an ageing population and welfare reform.

Within this context demand for social housing remains strong. For example, there are around 184,000 households on local authority housing lists across Scotland,¹ but only 54,600 social housing properties became available to let last year i.e. 9% of the total stock.² With this high demand for social housing a key policy theme of the Government has been to encourage the supply of affordable housing, protect existing stock and ensure landlords can use their stock most effectively.

Since devolution there has been a substantial amount of housing legislation. A key piece of legislation relating to social rented housing is the Housing (Scotland) Act 1987 (‘the 1987 Act’), although it has been extensively amended over the years. Other important Acts include:

¹ As at 31 March 2013, Scottish Government personal communication, Dec 2013

² As at 31 March 2013, Scottish Government personal communication, Dec 2013

- the Housing (Scotland) Act 2001, ('the 2001 Act')
- the Homelessness etc Scotland Act 2003
- the Housing (Scotland) Act 2010 ("the 2010 Act")

SPICe Briefing [Housing: Subject Profile](#) (Berry 2011) provides further information on these Acts.

PART 1- RIGHT TO BUY

BACKGROUND

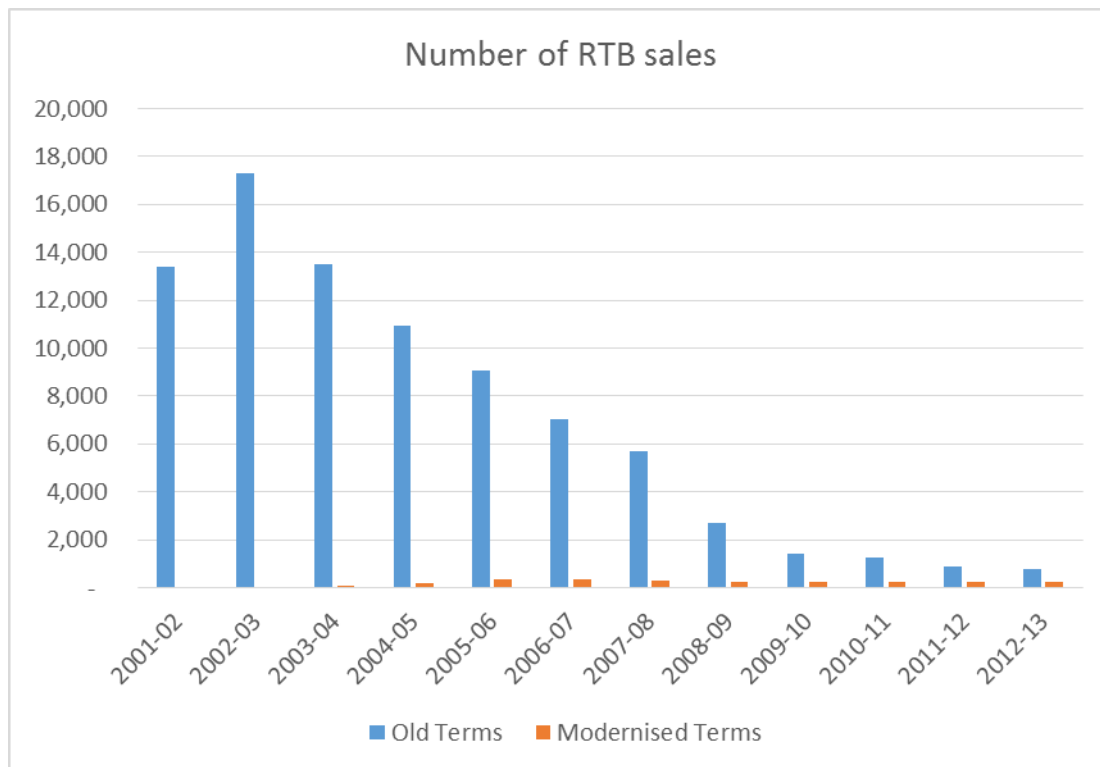
Since 1980, RTB has allowed around 455,000 tenants to buy their homes from their social landlord, and has been influential in increasing levels of home ownership in Scotland - around 64% of households in Scotland own their own home. However, the Housing Acts of 2001 and 2010 made reforms to RTB with the aims of protecting existing social rented stock in light of increased demand for social rented housing and encouraging landlords to build new houses without fear of losing them to the RTB.

The legislation governing the RTB is complex - more detail can be found in the documents on the Scottish Government's RTB [webpages](#). Very broadly speaking:

- Most tenants who had an existing RTB before 30 September 2002, and have not moved house since, have a 'preserved' RTB, with discounts of up to 70% of the value of the property.
- Most tenants whose tenancies began between 30 September 2002 and 1 March 2011 have a 'modernised' RTB, which was introduced by the 2001 Act, and which has a qualifying period of five years and a maximum discount of £15,000.
- First-time tenants whose tenancies began on, or after, 2 March 2011 have no RTB.
- Tenants of RSLs who had charitable status prior to 18th July 2001 have no RTB.
- Modernised RTB is subject to various exemptions and suspensions, and whether or not tenants can exercise their RTB depends on factors such as the age, type and location of the house, and the type of landlord.
- Local authorities can designate certain areas or house types as "pressured" for up to 10 years. Where a designation is in place, modernised RTB is suspended for local authority and RSL tenants for the duration of the designation period. Twelve local authorities currently have at least one designation in place.
- Some RSL tenants with modernised RTB are unable to exercise this due to a suspension that was in place until 30 September 2012, as a result of provisions in the 2001 Act, and has subsequently been extended, with Ministerial approval.

Although there was an upward spike in RTB sales in early 2002, Chart 1 shows that sales have been falling since the introduction of the reforms in 2002. Many tenants have already exercised their RTB and those who have not are less likely to do so. The more recent housing market downturn may also have depressed sales. RTB sales in 2012-13 were at a low of 1,020.

Chart 1: Number of RTB Sales 2001-02 to 2012-13



Source: Scottish Government 2013(d)

The 2010 Act did not seek to change the preserved RTB entitlements, as the Government's 2007 Manifesto commitment was to protect the rights of existing tenants (SNP 2007), although during the Bill's parliamentary consideration some stakeholders, the Scottish Federation of Housing Associations (SFHA) for example, suggested that ending the RTB altogether was the right way forward (Scottish Parliament Local Government and Communities Committee 2010).

Scottish Government Consultation

The Scottish Government's housing strategy and action plan, '*Homes Fit for the 21st Century*' (Scottish Government 2011a) signalled a change of direction and committed the Scottish Government to consult on ways to reform the preserved RTB, to make it fair for both tenants and landlords. The consultation paper [The Future of the Right to Buy in Scotland](#) (Scottish Government 2012a) set out the main reasons for reform:

- discounts of up to 70% for tenants with a preserved RTB cannot be justified
- it is unfair that some tenants benefit from much larger discounts than others
- the law in this area is too complicated and difficult to understand for landlords and tenants
- the RTB is outdated and may have no place in today's Scotland with our focus on increasing the availability of affordable housing for those who need it most.

Two main options for reform were put forward:

- move all tenants with preserved RTB onto modernised terms; or
- end all RTB entitlements in Scotland

Following the consultation process, the latter option was decided on as the way forward by the Government. An analysis of consultation responses was published (The Research Shop 2012) and individual responses to the consultation can be found here: <http://www.scotland.gov.uk/Publications/2012/09/2777> (Scottish Government 2012b).

THE BILL - RIGHT TO BUY (SECTION 1 AND 2)

Section 1 of the Bill would abolish RTB. However, the effect of section 85(4) (commencement section) of the Bill is that Scottish Ministers cannot abolish RTB until the end of a three year period from the date the Bill receives Royal Assent. Assuming Royal Assent is obtained in the summer of 2014, the RTB would end in the summer of 2017.

By ending RTB, the Government estimates that around 15,500 houses could be kept in the social sector over a ten year period (Policy Memorandum, para 46).

Consultation Responses - Right to Buy

There were 169 responses to the Scottish Government's consultation on the proposals regarding RTB. Respondents were asked, "Do you agree with the proposal to end the right to buy altogether?" Eighty-three percent of the 133 respondents who provided a view, agreed with the proposal. This included 92% of RSLs and 81% of local authorities who responded. Of the tenant/resident groups who provided a view, 80%, agreed (The Research Shop 2012).

The main reasons given for supporting the abolition of RTB was to stem the perceived loss of affordable houses for rent from the social rented sector. It was argued that retaining properties in the social sector would help maintain future investment in new build housing and assist with attaining the Scottish Housing Quality Standard. Two other common rationales for ending the RTB were provided. First, that it was the simplest option in order to remove the current complexities and to create a "level playing field" for tenants. Secondly, the abolition of RTB would allow social landlords to undertake better strategic stock management (The Research Shop 2012).

Sixteen percent of respondents disagreed with the proposal to end RTB altogether, including 19% of local authorities, 8% of RSLs, 33% of individuals and 13% of tenant groups that responded. Some of the reasons for not supporting the proposal were that it would take away existing tenants rights; ending RTB would not in itself create new homes and it was too soon after the changes made by the 2010 Act.(The Research Shop 2012). The Tenant Regional Network – Region 9's [response](#) to the consultation argued:

"We believe the work previously done on the Housing Scotland Act, and Allocations consultations are sufficient to bring the RTB to an end in due course through natural 'wastage'. It is not acceptable to remove the statutory right of those on a Scottish Secured tenancy. Doing so may give rise to legitimate challenge in the Court of Human Rights" (Scottish Government 2012b, Tenant Regional Network – Region 9 response)

Impact on Tenants

The proposal will impact on existing tenants who have RTB. It is estimated that there are around 534,000 tenants with a RTB. Of these, 207,000 are estimated to have the preserved RTB and 327,000 have the modernised RTB (Scottish Government 2012). However, not all of these tenants will be able to exercise their RTB, either now or within

the three year period prior to the abolition of RTB as they are subject to a limitation, for instance, their tenancy is in a pressured area where RTB is suspended.

Local authorities have the power to make, amend and revoke pressured designations, so they could decide to revoke a pressured designation prior to the abolition of the RTB. Local authorities could also declare new pressured areas within the 3 year period, as the Bill does not prevent this. Moray Council has recently extended its designation to cover all areas within the authority. RSLs with a suspension in place could also choose to end the suspension if they wished and allow tenants to exercise their RTB, although in practice this is unlikely to happen.

The Scottish Government argues that, although some tenants will lose the RTB, there is now a range of schemes in place to support tenants in becoming home owners, such as Help to Buy and the Low-cost Initiative for First Time Buyers (LIFT), which did not exist a number of years ago. However, it is worth noting that tenants are not guaranteed support from one of the home ownership initiatives, and the availability of housing under these schemes will, in some cases, be limited to specific geographical locations where property is available.

The Notice Period

The policy intention is that RTB would be abolished three years from the Act receiving Royal Assent. The consultation paper sought views on this and 74% of respondents who commented recommended a notice period of two years or less.

A shorter notice period was favoured more by landlords than by tenants' groups. Some of the arguments advanced in favour of a shorter notice period were that it would minimise the potential risk of stock loss and uncertainty and enable landlords to get on with strategic planning. There were two substantive arguments in favour of a longer notice period. First, that it would help to smooth any panic 'spike' in sales, and secondly, it would give tenants who wish buy time to do so (The Research Shop, 2012).

The ending of RTB potentially raises issues under the European Convention of Human Rights (ECHR). To ensure compliance, the Scottish Government is of the view that it should provide tenants with a reasonable opportunity to exercise their current rights if they wish to do so (Policy Memorandum para 43). It considers that a three year notice period strikes a balance between the need to protect housing stock as soon as possible and the need to give tenants the opportunity to consider their options and obtain financial advice.

A key issue for the Scottish Government and social landlords in implementing the proposals will be to ensure that tenants are informed of the changes in order to allow them time to consider whether they wish to exercise their existing RTB.

Financial Implications

One of main implications of the proposals is the potential loss of capital receipts that social landlords may face. When a property is sold under RTB the landlord receives a capital receipt, less the RTB discount. This capital receipt can be used by landlords as they decide (there is an exception where a small percentage of capital receipts from stock transfer landlords is returned to the government). Social landlords could, for example, choose to invest in existing or new stock or to repay housing revenue account (HRA) outstanding debt.

The impact of ending RTB would be greater in the local authority sector as the majority of sales occur in that sector. However, the significance of RTB receipts for local authorities

has declined in recent years (Financial Memorandum para 34) so, local authorities will already have been basing their capital expenditure plans on a reduced level of RTB sales.

The Financial Memorandum (paras 8-54) presents modelling using different scenarios to determine the impact of ending RTB on landlords' finances. The broad conclusion is that, "...the financial impacts of RTB reforms should not be significant and thus any rent increases or additional loans that arise as a result of the reforms should not be significant" (para 53). The [Association of Chief Local Authority Housing Officers](#) (ALACHO) response to the consultation seemed to support this view:

"ALACHO is broadly of the view that over time, the financial impacts of the proposals are likely to be broadly neutral across the country. In any event, we believe that the imperatives arising from the need to maximise the stock of affordable housing for rent will be a bigger factor in most councils' responses to the RTB consultation than financial considerations alone."
(Scottish Government 2012b, ALACHO response).

PART 2 - SOCIAL HOUSING

ALLOCATION OF SOCIAL HOUSING - BACKGROUND

Social landlords can find it a challenge to ensure that they have allocation policies that both meet the legislative requirements for allocating housing to those with housing need and also are able to meet the needs and demands of local communities. SPICe briefing [Allocation of Social Rented](#) (Berry 2012) provides more information about legislation and practice regarding allocations.

The 1987 Act gives anyone aged 16 or over the right to be admitted to a housing list. After a social landlord has added an applicant to the housing list they have to decide on the level of priority to award to that applicant. In doing so, social landlords must take into account legislative requirements. They should also take into consideration any relevant Scottish Government guidance, the requirements of the Scottish Social Housing Charter (Scottish Government 2012c), the regulatory framework and good practice. The 1987 Act sets out, in broad terms, the groups that social landlords must give "reasonable preference" to when allocating homes. It also sets out the factors that landlords cannot take into account.

Reasonable Preference

Section 20(1) of the 1987 Act provides that, in the selection of their tenants, social landlords must give "reasonable preference" to persons who are:

- occupying houses which do not meet the tolerable standard or
- occupying overcrowded houses or
- have large families or
- are living under unsatisfactory housing conditions and
- to homeless persons and persons threatened with homelessness.

The adequacy of the current legislative framework regarding allocations has been a topic of discussion for a number of years. Research (Craigforth 2007, Dudleston and Harkins 2007) has "raised questions about the perceived 'ambiguity' of some of the reasonable preference categories, concerns about reconciling responsibilities towards different

household types and debate as to whether or not these categories properly reflected contemporary housing need”(Bretherton J and Pleace N 2011).

Revised Scottish Government guidance on allocations, published in 2011, which was intended to encourage social landlords to use the flexibilities available in legislation, includes this advice on reasonable preference:

“Reasonable preference does not mean that you must allocate a house to someone in the reasonable preference groups regardless of its suitability for the applicant. Your allocation should aim for a sustainable, successful tenancy and make best use of the stock....The law does not restrict housing providers to taking only the factors in the reasonable preference groups into account. You can add other factors of your own, such as housing key workers coming into the area or re-housing people with medical conditions. But, you must not allow your own secondary criteria to dominate your allocation policy at the expense of factors in the legal list”. (Scottish Government 2011b)

Scottish Government Consultation

In [*Homes Fit for the 21st Century*](#) (Scottish Government 2011a) the Government committed to consult on changes to the way social housing is allocated and managed. In 2012, the consultation paper [*Affordable Rented Housing Creating Flexibility for Landlords and Better Outcomes for Communities*](#) (Scottish Government 2012d) set out proposals to make changes to the legislation to give landlords more flexibility in the way housing is allocated. In particular, the consultation proposed changes to the reasonable preference categories and what landlords could take into account in allocations. An analysis of responses to the consultation was published (ekosgen 2012) and individual responses can be found here: <http://www.scotland.gov.uk/Publications/2012/06/4149/downloads> (Scottish Government 2012e).

The consultation paper also proposed changes to social housing tenancies (see below). These proposals were developed by the Scottish Government with the advice of the [*Affordable Housing Advisory Rented Group*](#) which consists of key stakeholder groups and tenant representatives.

THE BILL - REASONABLE PREFERENCE (SECTIONS 3 AND 4)

Section 3 of the Bill proposes to substitute the reasonable preference provisions as set out in section 20 (1) of the 1987 Act described above with the following criteria:

- those who are homeless or threatened with homelessness
- those who are living under unsatisfactory housing conditions and in each of these cases the person must have unmet housing needs and
- tenants of houses held by the social landlord which the social landlord considers to be under-occupied.

Therefore, the existing categories of homeless, or those living in unsatisfactory housing remain, but there would no longer be a statutory requirement for social landlords to give reasonable preference when allocating homes to those occupying houses which do not meet the tolerable standard, those living in overcrowded houses or those who have large families.

Under the 1987 Act, those applicants falling into the existing reasonable preference groups must be given reasonable preference for housing, with no other qualification or criteria required to be met. The Bill proposes to change the existing position through the addition of a new criterion – applicants must also have unmet housing needs, which is defined as, “needs that are not capable of being met by other housing options which are available”. It is assumed that this provision is to reinforce the idea that social housing is to be targeted at those who need it the most, but it is unclear what this change would mean in practice, for example, with regards to how a social landlord would decide whether or not an applicant could have their housing needs met by another housing option. The Scottish Government is to produce guidance on this element of the Bill.

The Bill also proposes that landlords must give their own existing tenants (but not tenants of other social landlords) reasonable preference if they want to transfer and are living in housing which the landlord considers to be under-occupied. The Bill does not require existing tenants who are seeking a transfer to demonstrate that they have unmet housing need. According to the Scottish Government:

“.. some existing tenants wish to move simply because they wish to downsize and they may not therefore fall into one of the reasonable preference groups. Concerns about this in the sector were preventing some landlords from making the best use of their stock by taking a chain of lets approach to allocations. Under such an approach a property released by an under-occupying household can be used to meet the needs of an existing tenant, and their now vacant property is then used to house another household with priority under the allocation scheme. Letting properties in this way creates a vacancy chain which enable landlords to resolve several applicants' housing needs from one initial vacancy” (Scottish Government, personal communication, 4 December 2013).

Many social landlords already have policies which encourage under-occupying tenants to move, and many of these have been developed further in light of the “bedroom tax”.

Consultation Responses – Allocation of Social Housing

The Scottish Government’s consultation paper asked, “Do you think social landlords should have the flexibility to decide who gets priority for their housing?” Overall, 57% of respondents, who provided a reply, agreed with this proposal, while 16% disagreed with the general proposal, and 27% were unsure. Support for the proposal was highest from landlords, with 92% of those responding supporting the proposal. Some of the benefits identified were that it would help meet the needs of local communities and allow landlords to make more efficient use of available housing stock (ekosgen 2012).

The balance between prescription and flexibility

Respondents to the consultation were of the view that if the legislation simply replaced one set of reasonable preference criteria with another no practical difference would be made. A Chartered Institute of Housing (CIH) (Scotland) briefing on the Bill, commenting on what these changes may mean in practice said:

“In practice there is little change here other than the addition of under occupying tenants to the reasonable preference categories. The Policy Memorandum accompanying the Bill refers to replacing specified groups with a ‘broader definition of housing need’, with landlords then having to determine which groups they want to prioritise. But in the event, there are now three specific categories

instead of four, and there is no change to the flexibility landlords already have to prioritise other groups as long as they comply with the reasonable preference provisions.” (CIH Scotland 2013)

Groups to be protected nationally

A potential problem with giving social landlords greater flexibility to decide priority for housing, identified by respondents, was a risk that a range of different social groups such as the elderly, 'problem families', the economically active and homeless people could be marginalised (ekosgen 2012). The Bill does provide that homeless persons should still be given reasonable preference and section 4(2) provides Scottish Ministers with the power to make regulations regarding the categories of people that social landlords must include in their allocation policies. This is intended as a safeguard to ensure that specific categories of persons are not routinely omitted from landlord allocation policies (Explanatory Notes, para. 16).

Need for clarity and transparency

Some respondents to the consultation, e.g. Housing Options Scotland's [response](#) (Scottish Government 2012e) raised the issue that giving social landlords a greater level of flexibility could result in a more confusing process for applicants applying to more than one social landlord. Other respondents mentioned that greater flexibility could cause problems with existing common housing registers and common allocation policies (ekosgen 2012).

The Bill does provide, at Section 4(1), for new consultation requirements – social landlords will have to consult on priorities within their allocation policies and then publish a report on the outcome of that consultation. This may help address concerns about clarity and transparency.

The SFHA and Glasgow and West of Scotland Forum of Housing Associations (GWSFHA) considered that there should be greater clarity around the ability of landlords to consider “local connection” in their allocation policies. The Bill does not address this issue.

THE BILL - FACTORS WHICH MAY BE CONSIDERED IN ALLOCATION (SECTIONS 5 AND 6)

Sections 5 and 6 of the Bill would amend the list of factors that social landlords cannot take into account when allocating a property set out in section 20(2) of the 1987 Act.

Age

Under section 20(2) (a)(vi) of the 1987 Act, social landlords are currently prevented from taking account of an applicant's age unless properties are specifically designed or adapted for a particular age group. Section 5 of the Bill would repeal this provision therefore allowing social landlords to take age into account when allocating housing. Section 5b (inserting new section 2B into the 1987 Act) provides that where a social landlord takes age into account in allocating housing, they must treat the applicant as protected against age discrimination in terms of Part 2 of the Equality Act 2010.

The Equality Act does not apply age as a protected characteristic for those aged under 18 years in relation to services and public functions (the allocation of housing is a public function). However, the Bill as drafted specifies that landlords must treat applicants aged 16 and above as having a protected characteristic. This would mean that social landlords

would need to consider whether an age-based rule or practice could be objectively justified. According to the EHRC, the question of whether an age-based rule or practice can be objectively justified is approached in two stages.

- Is the aim of the rule or practice both legal and non-discriminatory, and one that represents a real, objective consideration?
- If the aim is legitimate, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances? Is there a less discriminatory approach that could be taken instead?

This proposal was not consulted on but social landlords considered that this would be a useful development to help them make best use of their stock. [River Clyde Homes](#), response to the consultation, for example, suggested that they, "...may wish to limit certain floors of multi-storey blocks or even an entire block to older people because they meet their needs very effectively, yet these properties are not 'specially designed or adapted' for them" (Scottish Government 2012e, River Clyde Homes Response).

Property Ownership

Under section 20(2) of the 1987 Act, landlords are also prevented from taking into account property ownership, or the value of property owned (or jointly owned) by an applicant. Section 6 of the Bill would allow a social landlord to take property ownership into account except in specified circumstances, for example, in the case of a property which has been let, the owner cannot secure entry to that property. The specific circumstances aim to reflect the fact that while an individual may own a property, they may not be able to secure access to it, or their health would be endangered, or they would be at risk of abuse if they did occupy it.

Consultation Responses – Property Ownership

The majority of consultation respondents who answered this question, (66%), were in agreement, 12% disagreed and 21% were unsure (ekosgen 2012). The practical impact of this proposal may be relatively limited. [SFHA](#), for example, argued that,

"...our members informed us that it is fairly rare for households who already own suitable housing to be allocated social rented housing. However we recognise that public perception is that the current rules are unfair and that this practice is commonplace." (Scottish Government 2012e, SFHA response)

THE BILL - DETERMINATION OF MINIMUM PERIOD FOR APPLICATION TO REMAIN IN FORCE (SUSPENSIONS) (SECTION 7)

At the moment, some landlords choose to "suspend" applicants from receiving an offer of housing for a period of time, most commonly where there is existing housing debt, antisocial behaviour or where offers of housing have been refused. Suspensions are used to encourage housing applicants to address the reason for their suspension, for example, by managing their rent arrears or ceasing from antisocial behaviour. Scottish Government guidance on allocations (Scottish Government 2011b) states that it is good practice to minimise the use of suspensions, and the length of time an applicant is suspended. Homeless applicants cannot be suspended from receiving an offer of housing.

The Bill, at section 7, proposes to legislate for this practice of suspending applicants from receiving offers of housing. Social landlords would be able to impose a requirement that a minimum period of time must elapse before an applicant, in specific circumstances, becomes eligible for an offer of social housing. The circumstances, set out in new section 20B inserted by section 7, relate to antisocial behaviour, outstanding tenancy debt, where a previous tenancy has been abandoned or where a decree for repossession has been granted against the applicant and circumstances where the applicant has refused one or more offers of housing and the landlord considers the refusal(s) to be unreasonable.

A minimum period requirement cannot be placed on homeless applicants to whom the local authority has a duty to provide settled accommodation. The maximum period during which a suspension can remain in force, and the previous time period that a landlord can take into account when considering an applicant's behaviour could be decided by Scottish Ministers through regulations. New section 20(B) (8) inserted into the 1987 Act also provides applicants with a new right to appeal to a sheriff against a landlord's decision to suspend them from receiving offers of housing.

Consultation Responses - Suspensions

The consultation paper asked, "Do you think social landlords should have the flexibility to consider previous antisocial behaviour by an applicant or their household when deciding their priority for affordable rented housing? However, priority and suspensions could be viewed differently in terms of the allocation process as an applicant could be given lower priority but not suspended from receiving an offer of housing, so it was perhaps a bit unclear about exactly what was being consulted on (the consultation also made no reference to suspensions for the other criteria e.g. rent arrears). Some respondents did suggest that if legislation made provisions for suspension then it would be beneficial. As CIH (Scotland) said:

"It appears that this proposal is designed to give clear legal backing to current practice and make it clearer to both landlords and tenants that antisocial behaviour can be taken account of and can impact on the ability to obtain social rented housing. On this basis CIH agrees with this proposal and considers it to be a welcome signal that behaving in an antisocial manner may have consequences." (Scottish Government 2012e, CIH (Scotland) Response)

As this provision effectively legislates for existing practice it is unclear what additional impact the legislation will have. Scottish Government statistics indicate that around 550 applicants were made ineligible for the allocation of housing between 2011 and 2012 across local authorities. Information from local authorities suggests that most relate to rent arrears (Explanatory Notes p62, footnote 11). Scottish Housing Regulator statistics indicate that RSLs made around 112 applicants ineligible for the allocation of housing between 2009 and 2010 (Explanatory Notes, page 66, footnote 23).

SOCIAL HOUSING TENANCIES (SECTIONS 8-16)

Sections 8-16 of the Bill propose changes to social housing tenancies, some of which the Scottish Government envisage will give landlords more tools to tackle antisocial behaviour. The following section provides some background information - further details can be found in the guidance *Scottish Secure Tenancy* (Scottish Government 2002).

BACKGROUND

Tenants in the social sector have a tenancy agreement with their landlord which sets out their respective rights and responsibilities. The current tenancy regime was introduced from September 30th 2002, as a result of provisions in the 2001 Act. The standard tenancy in the social rented sector is the Scottish Secure Tenancy (SST), although short Scottish Secure Tenancies (short SSTs) can also be provided in limited circumstances.

Short SSTs

Section 34 of the 2001 Act allows social landlords to grant a short SST in a limited number of circumstances which are set out in Schedule 6. These circumstances include temporary lets, for example, for people moving into the area for employment, and two circumstances related to antisocial behaviour:

- where a court has granted an order for recovery of possession against the prospective tenant in the last three years because of antisocial behaviour (para 1)
- where the prospective tenant or a member of their household is subject to an antisocial behaviour order (ASBO), under section 234AA of the Criminal Procedure (Scotland) Act 1995 or under section 4 of the Antisocial Behaviour etc. (Scotland) Act 2004 (para 2).

There are fewer rights associated with the short SST than the SST, for example, a tenant's security is limited to the duration of the tenancy, which can be for six months, and the tenancy cannot be succeeded to when the tenant dies. The possession proceedings are also different (see below).

Conversion to a short SST

Section 35 of the 2001 Act also allows landlords to convert SSTs to Short SSTs where the tenant (or a person residing or lodging with, or a subtenant of, the tenant) is subject to an ASBO, under section 234AA of the Criminal Procedure (Scotland) Act 1995 or under section 4 of the Antisocial Behaviour etc. (Scotland) Act 2004.

Where a short SST is provided to a new tenant or a tenant has their SST converted to a short SST in the circumstances related to anti-social behaviour, as described above, the 2001 Act provides that the landlord must ensure that that tenant receives the housing support services which the landlords considers are appropriate to help them sustain the tenancy and convert it to a full SST. These short SSTs convert automatically to a full SST after 12 months, unless the landlord has served on the tenant a notice that they intend to start possession proceedings.

Possession

The 2001 Act also sets out the procedures governing landlords' possession of a tenancy. To gain a court order for recovery of possession of one of its houses, landlords need to serve the correct notices in the timescales set out in the 2001 Act and associated regulations. In the cases of houses let under a SST, landlords would need to specify the grounds, set out in schedule 6 of the 2001 Act, on which they are seeking possession. Grounds 1-7 are "conduct" grounds, such as rent arrears and antisocial behaviour, and in these cases the court has to decide whether the relevant ground has been established and that it is reasonable to grant an order for possession. Grounds 8-14 are "management" grounds and the court must make the order if it considers that the ground for recovery of

possession has been established and other suitable accommodation will be available to the tenant.

The procedures for recovery of possession of a house let under a short SST are different. A landlord can recover possession after the specified period (the term) of the lease. All that is required is that the lease has come to an end and that the specified procedures have been followed.

Anti-social behaviour

There is a range of tools that social landlords can use to address antisocial behaviour, such as mediation or antisocial behaviour orders, but the use of Short SSTs on previous eviction or ASBO grounds is currently limited. Statistics for local authority landlords show that that only 30 (8%) of short SSTs granted in 2012-13 were granted on antisocial behaviour grounds (Scottish Government 2013e).

Evidence on the effectiveness of the use of short SSTs as a tool for addressing antisocial behaviour is also limited. The Financial Memorandum points to a 2009 study which interviewed 20 local authority antisocial behaviour co-ordinators. This found that, "There was a general view that conversion to SSST was an effective measure in tackling ASB. One co-ordinator estimated that about 50% of perpetrators will desist from ASB at this stage to keep their tenancy secure" (Scottish Government 2009a). The Financial Memorandum (para. 76) states that, "...this view is supported by anecdotal evidence from landlords."

Social landlords have claimed that it is difficult to take court action for possession proceedings, particularly in antisocial behaviour cases, because, for example, of the time that court action can take. Furthermore, it can be difficult obtaining the necessary evidence, because, for example, other residents affected by the antisocial behaviour are reluctant to get involved in court action.

Scottish Government Consultation

The Scottish Government's consultation paper (Scottish Government 2012d) noted that some landlords have argued that the current grounds for granting a Short SST are too restrictive, as they can only be used in limited circumstances that are related to previous court action, and set out proposals to widen the circumstances in which they could be used. Proposals were also made to simplify the court eviction process for tenants with SSTs where another court had already considered serious antisocial behaviour or criminal behaviour. Other issues relating to the tenancy regime, including changes to succession rights, were also consulted on.

THE BILL - ANTISOCIAL BEHAVIOUR SHORT SSTS (SECTIONS 8, 10, 11, 12)

Section 8(2) of the Bill (by amending the 2001 Act) would give social landlords the flexibility to grant short SSTs or convert existing SSTs to short SSTs "...where applicants or tenants have acted antisocially in or near their home within the last three years" (Financial Memorandum para 67). The policy intention of this provision is, "...to allow landlords to intervene in a meaningful way at an early stage of antisocial behaviour" (Financial Memorandum para 76).

As is already the case with granting short SSTs, or converting SSTs to short SSTs, on antisocial behaviour order or previous eviction grounds, the landlord would still have to

serve the correct notices, ensure housing support services considered appropriate by the landlord were provided to the tenant and the tenant would have a right to appeal to the court against the decision of the landlord to provide a short SST.

The Bill proposes that landlords would be required to have regard to any guidance issued by Scottish Ministers about the use of short SSTs in relation to antisocial behaviour (section 8(1) inserts new section 34(9) into the 2001 Act).

The Bill would also make further changes in order to provide greater protection to tenants with a short SST provided on any of the antisocial behaviour grounds.

In summary:

- section 10 would extend the minimum term of an SST from 6 to 12 months. It also clarifies the terms of a tenancy when it changes from a SST to a short SST and back again to a SST.
- section 11 would allow landlords to extend short SSTs that are intended to convert to SSTs at 12 months for a further one-off period of six months. Tenants must be given two months' notice of the extension (including the reasons for the extension) and must be provided with housing support services for a further one-off period of 6 months. An extension may be required because the tenant requires support for a further period in order for the tenant to be able to sustain a SST (Explanatory Notes para 24)
- section 12 would introduce a new requirement on social landlords to give tenants reasons why they are seeking to recover possession of any property let under a short SST in circumstances related to antisocial behaviour. The section also gives tenants a right to request that their landlord review the decision to seek recovery of possession before the case goes to court. This will give them the opportunity to discuss the reasons why repossession is being sought with their landlord (Policy Memorandum para 72). Finally, the section also seeks to resolve issues that prevent landlords from taking action to recover possession under a short SST by way of the SST procedure at any time during the term of a short SST.

Consultation Responses – Antisocial Behaviour Short SSTs

The consultation paper asked respondents to consider the benefits of the proposal to extend the circumstances related to antisocial behaviour in which short SSTs could be used. The main benefits identified were that it may lead to improvements in the behaviour of the individual (suggested by about 38% of respondents) and that it may create an improved environment for all i.e. neighbours, tenants, landlords and their communities (suggested by about 25% of respondents) (ekosgen 2012).

ALACHO (whose response was supported by COSLA) said:

“Subject to the quality of evidence test being established and met, most councils welcome this proposal as an aid to potentially reducing the incidence of anti-social behaviour, through demonstrating to perpetrators that sanctions will be imposed if tenancy conditions are not adhered to. It also re-assures existing tenants, who frequently become frustrated not only with the anti-social actions of a few, but with the apparent lack of effective powers available to councils to deal with those responsible.” (Scottish Government 2012e, ALACHO response)

The main problems identified by consultation respondents were issues relating to the evidence required to support decisions and the potential to apply the proposals inconsistently. Many respondents (about 25%) suggested a need for clarity as what conduct needs to be taken into account. Potential legal challenges and the lack of clarity regarding the appeals process was also mentioned by about 15% of respondents (ekosgen 2012). [Shelter \(Scotland\)](#) for example, stated

“While it is important that landlords are able to tackle antisocial behaviour effectively, this would constitute a serious erosion of existing tenant’s rights and would effectively make the landlord judge and jury in deciding if antisocial behaviour has taken place and what the consequences of that might be”.
(Scottish Government 2013e, Shelter (Scotland) response)

Therefore, the role of Scottish Government guidance will be crucial in terms of providing clarity to landlords as to what evidence is needed in order to grant a short SST in these circumstances. The consultation paper indicated that the Government would undertake further consultation on guidance, and in relation to what evidence would be required, “At this stage we would envisage this would include things like the effect of the behaviour on the community; actions taken by the tenant to address their behaviour or the behaviour of their household or visitors; and the warnings given to the tenant.” (Scottish Government 2012d)

The Bill contains provisions that seek to extend protections to tenants with SSTs (as described above), that may address some of the concerns identified in the consultation.

THE BILL - GROUNDS FOR EVICTION: ANTISOCIAL BEHAVIOUR (SECTION 15)

As discussed earlier, Schedule 2 of the 2001 Act sets out the grounds for recovery of possession of a property let under a SST. The ground set out in para 2 of Schedule 2 relates to where a tenant has been convicted of using the house for immoral or illegal purposes or of an offence punishable by imprisonment, committed in, or in the locality of the house. In relation to antisocial behaviour, such offences may include breach of an ASBO or convictions for the production or supply of drugs.

Section 15 of the Bill proposes that where this ground is specified in possession proceedings the court would not have to consider whether it was reasonable to make an order for eviction. A landlord would have to serve a notice that it intends to seek recovery of possession of a property on this ground within 12 months of conviction or the outcome of any appeal.

Therefore, as long as the criteria for possession had been met and the correct notices had been served in the correct timescales, the court would need to grant an order for recovery of possession. The tenant would retain the right to challenge a court action.

Consultation Responses – Grounds for eviction: antisocial behaviour

The majority of respondents to the Scottish Government’s consultation, 80%, supported the proposal to make evictions simpler where another court had already considered serious antisocial behaviour or criminal behaviour. Six percent were not in favour, while 20% were unsure. Support for the proposal was particularly high amongst landlords (93%)

(ekosgen 2012). [SFHA](#) supported the proposals, although they acknowledged the need for further detail and guidance:

“It is an additional tool to address anti-social behaviour, and should act as a deterrent. The proposal should help with tenancy sustainability and make for more pleasant neighbourhoods. As highlighted above, if the criteria for repossession can be established by other means this could reduce the considerable stress, anxiety and occasionally repercussions that appearing in court can cause to victims of anti-social behaviour and other witnesses.”
(Scottish Government 2012e, SFHA response)

The need for further clarity on the proposals and human rights issues were also raised by some respondents who suggested that defendants could challenge the proposed mandatory repossession actions on the basis of human rights legislation. The Policy Memorandum (para. 94-96) comments on human rights implications in Part 2 of the Bill, although no specific reference is made to this section of the Bill in particular. One of the issues that may arise during Stage 1 consideration is whether the Bill provides enough clarity regarding the proposals and whether it strikes the right balance between the powers of the landlord and the rights of the tenants.

In terms of the impact of this proposed change, the Scottish Government envisages that eviction in such circumstances will only be in a small minority of cases (Financial Memorandum, paras. 93 and 98), if landlords take early steps to address antisocial behaviour through the conversion of SSTs to short SSTs or by giving new tenants short SSTs.

THE BILL - GRANT OF SHORT SECURE TENANCY: HOMEOWNERS (SECTION 9)

Section 9 of the Bill proposes to create a new ground for granting a short SST in addition to those already listed in Schedule 6 of the 2001 Act. This ground is for homeowners, where the house is to be let expressly on a temporary basis to a person who owns heritable property, or where a person who it is proposed will reside with them owns heritable property.

The intention of this provision is to allow homeowners to make arrangements in respect of the property they own to allow that persons housing needs to be met, for example, to allow for the installation of adaptations (Explanatory Notes, para 22).

THE BILL - ASSIGNATION, SUBLET AND JOINT TENANCY OF SST (SECTION 13)

Under section 11 of the 2001 Act a tenant with a SST can request a joint tenancy. Under section 32 of the Act a tenant can assign their tenancy, i.e. they can pass on their tenancy to another person or they can sublet. The landlord has to consent to any of these changes and consent can only be refused if there are reasonable grounds to do so (for assignations and subletting the Act specifies particular grounds for refusing such consent). In the case of assignation the proposed assignee must have lived at the property for 6 months before the tenancy is assigned.

Section 13 of the Bill would amend sections 11 and 32 of the Act and introduce qualifying periods of 12 months before tenants can exercise their rights to request a joint tenancy, assign or sublet their tenancy. In all cases where a qualifying period applies, the individual

must have notified the landlord that they are living in the property as their only or principal home before the 12 month period begins. The Bill would provide additional grounds on which consent to assignation and sublet can be withheld:

- if the proposed assignee is not a person to whom the landlord would give reasonable preference to when selecting tenants to allocate properties to, or
- where, in the opinion of the landlord, the assignation would result in the property being under-occupied.

These proposals were developed by the Scottish Government through consultation with the Affordable Rented Housing Advisory Group.

THE BILL - SUCCESSION TO SST (SECTION 14)

When a tenant with a SST dies, the SST gives rights of succession to certain “qualifying persons”, as set out Schedule 3 to the 2001 Act. Currently, only a succeeding partner has to meet any qualifying period (6 months) of living with the tenant. For all other qualifying persons there is no qualifying period. As the Scottish Government consultation paper indicated, “Our early phase of consultation indicated that in some cases, people have succeeded to the tenancy after staying at the property for just a few days or weeks before the tenant's death. Some housing professionals have asked us to look at this issue.”

Section 14 of the Bill proposes to make it a requirement for partners (cohabitees), family members and carers to have lived at the property, as their only or principal home, for 12 months before they are eligible to succeed to a tenancy. In all cases where a qualifying period applies the individual must have notified the landlord that they are living in the property as their only or principal home before the 12-month period begins. There would be no qualifying period for a tenant's spouse, as is currently the case.

Consultation Responses - Succession Qualifying Periods

The consultation paper asked, “Do you think there should be a qualifying period before succession to a tenancy? The majority of respondents, 63% agreed with the proposal, 17% were against and 20% were unsure. The main benefit cited for the proposal was the prevention of abuse of the system, “...Many respondents mentioned the issue of “queue-jumping” – i.e. the practice of family members moving into a tenant's home shortly before the death of the family member and claiming it as their principle residence. This proposal is seen as a way of preventing this issue and would stop the abuse of succession rights.” (ekosgen 2012)

OTHER ISSUES – PROBATIONARY TENANCIES

As part of the Scottish Government's consultation process views were sought on whether an initial (probationary) tenancy for all new social housing tenants should be introduced, although this proposal is not being taken forward in the Bill. It was proposed to provide landlords with a discretionary power to give new social tenants a short SST for a year, which would automatically convert to a full SST after a year if the landlord had not taken steps to repossess the house. Using the Short SST as a form of initial/probationary tenancy for all new tenants was intended to allow social landlords and tenants to achieve a shared understanding of rights and responsibilities from the start. Social landlords could tackle any issues or breaches of tenancy conditions and resolve them at an early stage, including problems with paying rent and behaviour. Tenants who showed they could meet their tenancy responsibilities would move on to a full SST. The Policy Memorandum provides this explanation of why the proposal is not in the Bill:

“The responses to the Scottish Government’s consultation showed that opinion was divided around this proposal. Tenants were very supportive, but there was less support for such a move amongst landlords. Overall support was 62%. In view of the issues currently affecting social housing tenants, particularly the increased uncertainty that welfare reform is bringing to the sector, the Scottish Government rejected this approach. (Policy Memorandum, para. 79)

PART 3 – PRIVATE RENTED HOUSING

CONTEXT

The size of the private rented sector in Scotland has been increasing, reflecting both economic and lifestyle changes. In 2002, around 7% of properties were in the private rented sector, but ten years later, in 2012, this had increased to around 12%. In numerical terms, this means an increase of around 135,000 households in the sector (Scottish Government 2013f).

Traditionally, the private rented sector has offered a flexible housing option for students, those moving for employment, or those setting up homes for the first time. However, recently, the sector has also become a housing option for those seeking longer term accommodation, particularly those in the 16-34 age group (known by some commentators as the “Generation Rent” group) who, following the financial downturn, may find accessing home ownership difficult, with the need to save for a large deposit (Scottish Government 2012g).

The profile of landlords in the private rented sector has also been changing. A significant number of professional “Buy-to-Let” landlords invested in the sector during the housing boom years. More recently in light of the housing market downturn many “reluctant landlords”, who have been unable to sell their property or are waiting until the market improves, have entered the sector.

Both the current and previous governments have implemented measures to improve the condition of private sector homes and the standards of management in the sector. Recent policy developments have been informed by and the work of the Government’s [Scottish Private Rented Sector Strategy Group](#), chaired by Professor Douglas Robertson of Stirling University, with members from key groups such as COSLA, Scottish Association of Landlords (SAL) and Shelter (Scotland).

Legislation

The main legislative developments in recent years are listed below.

Houses in Multiple Occupation (HMO) licensing: Since 2000, it has been mandatory for all authorities to introduce an HMO licensing regime. The Housing (Scotland) 2006 Act (the “2006 Act”) provides the legislative framework of the scheme, which was previously set out in regulations under the Civic Government (Scotland) Act 1982. In order to be licensed by the local authority, landlords must pass a “fit and proper” test and provide proper tenancy management services. Furthermore, each property they let must meet certain space and safety requirements. The Private Rented Housing (Scotland) Act 2011 (the “2011 Act”) made some amendments to the licensing regime.

Private Landlord Registration: This requires that all private landlords operating in Scotland must register themselves, and each of the properties they are renting, with the relevant local authority. The registration process involves a ‘fit and proper person’ test,

which extends to any agent appointed to manage the property. These provisions have been in force since April 2006 as a result of provisions in the Antisocial Behaviour etc. (Scotland) Act 2004 (the “2004 Act”). The 2011 Act made some amendments to the scheme in order to make enforcement easier for local authorities.

Repairing Standard and Private Rented Housing Panel: The repairing standard, set out in Part 1, of the 2006 Act, covers the legal and contractual obligations of private landlords to ensure that a property meets a relatively basic physical standard. The [Private Rented Housing Panel](#) provides a mechanism for tenants to enforce the repairing standard.

Tenancy Deposit Schemes: Landlords are legally required to lodge deposits with one of three tenancy deposit schemes for the duration of the tenancy and to provide the tenant with specific information about this. This also includes a free adjudication process where disputes regarding the return of a deposit arise. The 2006 Act and associated regulations governs these requirements

Tenant Information Pack: Since 1 May 2013, private landlords have had a duty to provide new tenants with a tenant information pack, which contains information on the tenancy, the property, the landlord and the responsibility of tenants and landlords. The 2011 Act governs these requirements.

Illegal Premiums: The 2011 Act contained provisions to amend the 1984 Rent (Scotland) Act and to make regulations to clarify what “upfront” charges landlords, and letting agents acting on their behalf, can charge to their tenants. The existing legislation was clarified in November 2012, that only rent and a refundable deposit may be charged for the granting, continuance or renewal of a tenancy.

Tenancies

While there are a number of possible tenancy types³ for people renting homes in the private rented sector, by far the most common type is the short form of the assured tenancy, as introduced by the Housing (Scotland) Act 1988 (the “1988 Act”). Short assured tenancies are usually for an initial term of six months and can come to an end without a need for court action after the term has ended.

Older private sector tenancies, known as regulated tenancies, are regulated under the Rent (Scotland) Act 1984 (the “1984 Act”). Regulated tenancies provide security of tenure and control over rent levels and must be registered with Rent Service Scotland. There are about 6,000 of these in existence in both the private and social rented sectors (Policy Memorandum (para 109).

The legislation regarding private sector tenancies has remained largely unchanged since 1988, although the Scottish Government has committed to consult on the suitability and effectiveness of the tenancy regime as part of its private rented strategy (see below).

Scottish Government Private Rented Sector Strategy

The Scottish Government *Consultation on a Private Rented Sector Strategy for Scotland* (Scottish Government 2012) took place between 17 April and 10 July 2012 and received 82 responses. *A Place To Stay, A Place To Call Home*’ (Scottish Government 2013f), the Government’s strategy for the private rented sector was published on 30 May 2013, and set out its vision to create a private rented sector that “...provides good quality homes and

³ These are: assured tenancies, short assured tenancies, protected tenancies, contractual tenancies, tied tenancies and Part VII tenancies.

high management standards, inspires consumer confidence, and encourages growth through attracting investment.”

PRIVATE RENTED HOUSING DISPUTE RESOLUTION

Background

Formal resolution of civil disputes between landlords and tenants in the private rented sector is centred around the sheriff court. As outlined in the Policy Memorandum, the sheriff court deals with disputes relating to repossessions, e.g. where the landlord seeks to evict the tenant on grounds including rent arrears or anti-social behaviour, and also a range of non-eviction cases, including:

- cases related to housing-specific legislation such as applications to permit contracting out of the repairing standard (section 18 of the 2006 Act)⁴ and applications for sheriffs to draw up tenancy agreements where landlords fail to provide these (the 1988 Act section 30(2)); and
- cases aimed at enforcing compliance with contractual obligations or seeking damages for breach of contract

Four main civil procedures exist at the sheriff court:

- **small claims** – a simplified and less formal procedure which can be used where the value of the claim is up to and including £3000. It has recently been used as part of a [campaign by Shelter to reclaim letting agent fees](#)
- **summary cause** – a relatively informal procedure used where the value of the claim is between £3000 and £5000. In addition, it must normally also be used in eviction actions (including those in relation to assured and short assured tenancies) as these involve the “recovery of possession of heritable property” (i.e. as required by section 35(1)(c), Sheriff Courts Scotland Act 1971)
- **summary applications** – used in relation to certain statutory appeals and, as regards housing, includes actions by tenants in relation to repair problems that are a “nuisance” and Scottish secure tenancies under the 2001 Act
- **ordinary cause** – a more complex and formal procedure used where the value of the claim is over £5000 and in certain other specified cases, for example in relation to interdicts (i.e. an action aimed at stopping someone from doing something)

Therefore, the type of procedure used depends on the value of the claim and the nature of the case. The small claims procedure is designed for use by individuals without legal representation. Individuals can also represent themselves in the other procedures and, as of April 2013, lay representation is also possible ([Act of Sederunt \(Sheriff Court Rules\) \(Lay Representation\) 2013](#)). However, in many instances the complexity of the process makes legal representation advisable. Civil legal aid (both in terms of advice and assistance and representation in court) can be available for housing cases under the standard criteria for eligibility as applied by the Scottish Legal Aid Board (SLAB).⁵

⁴ For an application to be granted, both landlord and tenant must consent and the sheriff must be satisfied that this approach is reasonable

⁵ All applications for civil legal aid must meet three tests – financial eligibility; probable cause (i.e. does the applicant have a legal basis for a case) and reasonableness (i.e. is it reasonable that legal aid should be

According to the Policy Memorandum (para. 112), it is estimated that the sheriff courts handle around 500 PRS eviction cases per year (this is in contrast to 13,971 social sector cases in 2011-12, which resulted in 1824 local authority and registered social landlord tenancies ending) (Shelter (Scotland) 2013, table 1).

The sheriff court also deals with regulatory appeals by landlords against local authority decisions to refuse landlord registrations or to remove landlords from the compulsory landlord register (Part 8 of the 2004 Act); as well as appeals in relation to local authority decisions regarding HMO licences (Part 5 of the 2006 Act). It also has jurisdiction in relation to certain criminal offences, for example illegal evictions carried out by landlords (Section 22 of the 1984 Act) and landlords who are acting in an unregistered capacity (Section 93 of the 2004 Act).

The above role of the sheriff court is limited to non-agricultural/non-crofting tenancies. Disputes in relation to agricultural tenancies generally fall within the jurisdiction of the [Land Court](#) in Edinburgh, while – depending on the nature of the matter - issues surrounding crofting-tenancies generally fall under the jurisdiction of the [Land Court](#) or the [Crofting Commission](#).

Although the sheriff court handles the bulk of formal disputes in the PRS, there is a tribunal, [the Private Rented Housing Panel](#) (PRHP), which has jurisdiction in relation to:

- disputes regarding the repairing standard; and
- reviewing decisions on fair rents in relation to regulated tenancies and the setting of market rents for short assured tenancies and/or statutory assured tenancies⁶

The PRHP was initially created as the Rent Assessment Panel by the 1984 Act. The 2006 Act conferred additional functions and changed the name to PRHP. The PRHP's jurisdiction was extended again on 1 October 2012 by the Property Factors (Scotland) Act 2011 to hear disputes between property factors and homeowners. When hearing these cases the panel is known as the Homeowner Housing Panel (HOHP). According to the Policy Memorandum, the PRHP currently handles around 250 cases a year (para. 115).

General debate

The question as to whether courts are the correct forum for housing disputes is a longstanding one, which is part of a wider debate on the best way to improve civil justice in Scotland (i.e. whether tribunals/alternative forms of dispute resolution are better placed for resolving certain disputes than courts). In 2004 the Chartered Institute of Housing (CIH) commissioned a report (A Housing Tribunal for Scotland) (CIH Scotland 2004) which argued for the setting up of a housing tribunal and identified certain problems with the use of the courts to solve housing disputes, including:

- lack of specialism, reflecting the fact that the sheriff court is a generalist court
- lack of consistency between the decisions of different sheriffs on the same matters
- the adversarial nature and the relative formality of the main court procedures (in relation to eviction this would include formal pleadings and oral evidence taken under oath)
- the potential for court procedures to be slow

granted in the circumstances). For more information see SLAB's guidance "[Civil Legal Aid – information for applicants](#)" (Scottish Legal Aid Board 2011)

⁶ For more information on the rent-setting powers of the PRHP see:

<http://www.prhpscotland.gov.uk/prhp/470.26.125.html> and for other general information the latest [Annual Report of the PRHP for 2011](#) (Private Rented Housing Panel 2011)

- the potential costs of bringing cases in the sheriff court

In contrast, the 2009 [Scottish Civil Court Review](#) (Gill Review) (Lord Gill 2009), which was an in-depth review of civil court processes, took the view that, although there were certain shortcomings in the existing system, there was not a sufficiently strong case for the transfer of housing cases to a tribunal. One of the main arguments was that court processes were needed due to the seriousness of some housing issues – in particular eviction. The review also argued that there would be “very significant costs” involved in setting up a housing tribunal (Chapter 5, para. 141). Instead, the review recommended improved court procedures and increased judicial specialisation as a potential solution.

As noted in the Policy Memorandum, the Gill Review’s conclusions on a new housing tribunal were not shared by [the Civil Justice Advisory Group](#) (Lord Coulsfield 2011), chaired by Lord Coulsfield, or the Scottish Committee of the Administrative Justice and Tribunals Council, both of which recommended the transfer of housing cases to a specialist housing panel (Policy Memorandum, para. 128) In particular, the Civil Justice Advisory Group explained that they are, “not convinced by the argument that the issues at stake in housing cases are of such importance that they require to be dealt with by a court”, referring to other tribunals, such as immigration tribunals, which also take decisions which may have “life-threatening consequences” (page 65).

Scottish Government Consultation

Against this background, the Scottish Government published a specific [consultation](#) in 2013 (Scottish Government 2013h) regarding housing dispute resolution, including the possible introduction of a new tribunal. This consultation identified certain issues with the current system (many of which overlap with those mentioned in the CIH’s 2004 report), including:

- the adversarial nature of court procedures, which can cause attitudes to harden, thus making it more difficult to resolve disputes
- lack of access to alternative methods of dispute resolution, for example mediation
- the length of time which it can take for cases to come to court and the fact that cases can be subject to frequent delays
- the fact that most sheriff court procedures assume that the parties will have legal representation, which is uncommon among tenants,⁷ thus placing them at a disadvantage
- potential lack of experience of some sheriffs as regards housing law
- lack of consistency between the decisions of different sheriffs, which can lead to unpredictable court decisions

The document therefore proposed three options for change which could potentially apply to all rented housing disputes (i.e. both within the PRS **and** the social sector):

- option 1 - actively promoting the use of early preventative action and mediation in resolving housing disputes

⁷ The Gill review indicates that, “there is evidence to suggest that, in rent arrears cases at least, the defender is more often than not unrepresented, and more often than not faces a legally represented opponent” (Lord Gill 2009, Chapter 5, para. 148)

- option 2 - creating a Housing Panel as a stage before court to which disputes could be referred if attempts by the parties to resolve the problem had failed and which could make enforceable interim decisions which could be dealt with in court if not complied with. Under this option, it would still be for the court, not the panel, to end tenancies and evict tenants
- option 3 - creating a Housing Panel replacing the court as the main forum for resolving housing disputes, including ending tenancies and the eviction of tenants

Various parties responded to the consultation, including local authorities, housing associations, and bodies representing landlords/letting agents and tenants. Their individual responses can be found here:

<http://www.scotland.gov.uk/Publications/2013/05/1129/downloads> (Scottish Government 2013i). In particular, the Lord President, Lord Gill, who was responsible for the Gill Review, has [reaffirmed](#) in his response that he is not in favour of a new housing tribunal.

THE BILL - TRANSFER OF SHERIFF'S JURISDICTION TO FIRST TIER TRIBUNAL (SECTIONS 17-21)

Sections 17-21 of the Bill provide for the transfer of the sheriff's existing jurisdiction to deal with civil matters relating to private rented housing to the First-tier Tribunal

The Policy Memorandum builds on the various consultations and responses mentioned above, indicating that there is, "a widespread view that the current dispute resolution system is not working effectively" and referring to similar problems to those mentioned above (para. 123). According to the Scottish Government, there is, therefore, a case for a new housing tribunal (i.e. option 3 of the consultation) for the PRS, noting that this, "would provide more efficient, accessible and specialist access to justice for both landlords and tenants" (Policy Memorandum, para.130).

Importantly, although the Scottish Government's consultation considered both the PRS and social sectors, the new tribunal will **only** deal with PRS cases and not those from the social sector. The Scottish Government's reasoning for not bringing social sector cases into the new tribunal can be found at paragraph 154 of the Policy Memorandum. Reasons include: the mixed response regarding a tribunal in the [consultation](#), the relative lack of regulation and access to justice in the PRS compared to the social sector, the resource implications of transferring all rented housing cases from the courts and the fact that a PRS tribunal could act as a model for a broader housing tribunal. As regards this last point, the Policy Memorandum notes that,

"A PRS tribunal ... could also serve as an example for any future consideration of the status of social sector cases. Proposals for court reform (which are also due to be taken forward in separate legislation) and increased use of mediation will provide the opportunity to improve outcomes for social sector cases while they remain with the courts. A specialist PRS tribunal which can competently handle eviction cases and efficiently manage other cases could provide important data, and perhaps a platform, for other types of cases to be transferred to a tribunal should it be required." (para. 131)

According to the Policy Memorandum (para. 137), the following matters which currently fall under the civil jurisdiction of the sheriff court (i.e. excluding criminal cases) would be transferred to the new tribunal:

- **repossession cases** involving actions to evict tenants who have regulated tenancies, assured tenancies and short assured tenancies⁸
- **non-repossession cases** under housing legislation, including:
 - certain cases about rent under the 1984 Act (i.e. in parts IV and V of this Act)
 - applications for compensation where landlords seek repossession on false pretences (1984 Act, section 21)
 - applications for a sheriff to draw up a tenancy agreement if the landlord fails to provide one (1988 Act, section 30(2))
 - applications for damages for unlawful eviction (1988 Act, section 36)⁹
 - applications to contract out of the repairing standard (2006 Act, section 18)¹⁰
 - challenges to refusals by landlords to allow adaptation for disabled tenants or for the purposes of energy efficiency (2006 Act, sections 52 and 64(6))¹¹
 - cases related to the recovery of letting agent premiums (as indicated above, at the moment these are normally dealt with under the small claims procedure)
- **disputes concerning compliance with tenancy agreements** – i.e. breaches of contract (including actions to recover tenancy deposits)
- **landlord registration cases** – i.e. challenges by landlords under the 2004 Act in relation to:
 - refusals to grant landlord registration; and
 - notices suspending payment of rent served by local authorities (this is a penalty which local authorities can use as regards unregistered landlords)¹²

The Policy Memorandum notes that these cases have been chosen to ensure that the majority of civil sheriff court cases are transferred to the new tribunal (para. 142). However, the Bill does not transfer HMO cases to the new tribunal and instead provides a power which would allow the Scottish Ministers to do this by regulations at a later date (section 21). This approach was apparently taken because the transfer of these cases was not formally consulted on. According to the Policy Memorandum, further consultation is needed on whether transferring HMO cases is desirable (para. 143). It is also worth noting that the Bill envisages that ASBO-related matters will remain with the courts, although antisocial behaviour could be a ground for bringing an eviction case to the tribunal.

The provisions in the Bill allow for the proposed PRS tribunal to become part of the new First-tier Tribunal (FTT) which will be set up by the Tribunals (Scotland) Bill (Tribunals Bill), introduced in the Scottish Parliament on 8 May 2013 and which passed Stage 1 on 7 November 2013. The Tribunals Bill aims to set up a new framework for devolved tribunals in Scotland with the tribunals in the FTT hearing cases in first instance and appeals normally being made to a new Upper Tribunal (UT). It is intended that the FTT will, over time, incorporate various existing tribunal jurisdictions including the PRHP/HOHP.

⁸ See section 17 of the Bill

⁹ I.e. where the landlord evicts a tenants without first gaining a court order for possession; or by, for example, changing the locks when the tenant is away from the property; or threatening the tenant

¹⁰ See section 18 of the Bill

¹¹ See section 19 of the Bill

¹² See section 20 of the Bill

Administrative support for devolved tribunals will be provided by the Scottish Tribunals Service (STS) – part of the Scottish Government. For more details see the [SPICe Briefing on the Tribunals \(Scotland\) Bill](#) (Evans 2013).

In line with the general approach in the Tribunals Bill, the details of how the new PRS tribunal will operate, and its procedures, will largely depend on secondary legislation. The Policy Memorandum (paras 144–151 and 160) does, however, provide an overview of what it calls the tribunal’s “operating principles”, i.e.:

- **chamber** structure– i.e. the desirability for the new PRS tribunal to be in a ‘housing’ chamber with the PRHP/HOHP
- **staffing** – the aim is to appoint legal members **and** specialist housing members to the tribunal (apparently to ensure that the tribunal has sufficient expertise to deal with both housing specific and more general legal matters (source: personal communication with the Scottish Government). Under the current provisions of the Tribunals Bill, tribunal members would not, however, be employed on a full-time salaried basis (see the [Justice Committee’s Stage 1 Report on the Tribunals \(Scotland\) Bill, paras 114–118](#)) (Scottish Parliament Justice Committee 2013)
- **procedures** – procedures should be designed to be accessible and understandable and not generally to require legal representation
- **powers** – these should be equivalent to the current powers of the sheriff, including the power to order the eviction of tenants
- **fees** – it would be possible under the Tribunals Bill to charge fees, however the Policy Memorandum notes that, “the decision whether to charge fees would involve balancing the requirement to recover a percentage of operating costs against the need to ensure access to justice...” It also indicates that there would have to be an exemption policy for those unable to pay
- **legal representation/legal aid** – the intention is that “legal representation will not become the norm”. However, the Policy Memorandum notes that some parties with protected characteristics (for example, disabled persons¹³) may need support. In addition, the Policy Memorandum notes that the Scottish Government is working with SLAB to assess how best to provide support. This may be delivered in the form of “assistance by way of representation” (ABWOR) - i.e. a form of legal advice and assistance which would allow a lawyer to represent a client. ABWOR is currently provided in relation to some other tribunals¹⁴

The Financial Memorandum indicates that the costs of the proposed tribunal would be as follows (page 42, Table 2 and paras 103–127):

- one-off set-up costs would be between £89,000 and £131,000
- continuing annual running costs would be between £584,000 and £880,000
- there would be a loss of up to £49,000 of fee income to the Scottish Court Service per annum

¹³ This example was provided in a personal communication with the Scottish Government

¹⁴ There are specific legal aid rules for tribunals. In particular no financial eligibility test applies as regards the Mental Health Tribunal Scotland. Whereas, for example, applicants for legal aid for Employment Tribunals and Additional Support Need Tribunals for Scotland, have to satisfy an additional criterion to be granted ABWOR, i.e. that “the case is too complex to allow the applicant to present it to a minimum standard of effectiveness in person”. ABWOR is not available for proceedings before PRHP/HOHP. (Scottish Legal Aid Board 2013)

- there would be one-off recruitment costs for the Judicial Appointments Board for Scotland associated with its role in making appointments to the tribunal estimated at between £4,000 and £11,000

According to the Financial Memorandum, it is estimated that the commencement of the proposed tribunal is likely to be no earlier than 2016 (para. 106).

Consultation Responses – Housing Tribunal

Based on the consultation responses mentioned above, various general issues will potentially be relevant to Stage 1 of the Bill, including:

- the way in which PRS cases are currently dealt with in the sheriff court, specifically in relation to: court procedures (in particular as regards repossessions); (lack of) legal representation of tenants vis-à-vis landlords; speed of processes; costs of court actions; and knowledge and experience of housing law amongst sheriffs and other legal advisers
- the scope for the new tribunal to improve on any shortcomings in the current system, for example in relation to: speed of processes/efficiency of decision-making, access to justice, improved procedures; and specialisation in relation to housing law
- the potential for improved court processes and structures to provide equivalent improvements to the proposed PRS tribunal (e.g. through judicial specialisation in housing matters and simplified procedures as recommended by the Gill Review)
- the scope of any legal aid rules and the possible impact that these might have on access to justice at the tribunal (i.e. based on the assumption that, unlike tenants, many landlords may still have access to legal advice when preparing for cases before the tribunal)
- the likely policy on the charging of fees at the proposed tribunal and any impact this may have on access to justice
- whether the likely cost projections for the proposed tribunal are realistic, in particular in the light of other general changes likely to be made to the court process as a result of the Courts Reform (Scotland) Bill
- the likely staffing of the proposed tribunal given that its proposed jurisdiction is a wide one covering both contractual law and various specific aspects of housing law
- the rationale behind apparently retaining the PRHP as a distinct entity within the FTT's housing chamber rather than absorbing the rent assessment and repairing standard work of the PRHP into the jurisdiction of the proposed PRS tribunal

THE BILL - PRIVATE LANDLORD REGISTRATION (SECTION 22)

Section 22 of the Bill proposes a relatively minor change to the private landlord registration scheme. It provides for the introduction of a 12-month period for local authorities to make a determination on private landlord registration application. If an application has not been determined within the 12-month period, authorisation would have deemed to have been granted automatically by the local authority. This brings the private landlord registration scheme into line with other schemes, such as the HMO licensing scheme.

THE BILL - ENFORCEMENT OF REPAIRING STANDARD (SECTION 23)

As described above the private rented housing panel (PRHP) considers disputes over the repairing standard. At the moment tenants are responsible for making an application to the PRHP for a determination on the repairing standard. However, as the Policy Memorandum (para. 191) indicates, there is anecdotal evidence that some tenants are unwilling to take action to enforce the repairing standard, due to concerns that this may have a negative impact on the tenant/landlord relationship and could put the tenancy at risk.

Section 23 of the Bill makes provision to expand access to the PRHP by enabling third party applications by local authorities (or a person specified by order by the Scottish Ministers) to enforce the repairing standard.

By taking this approach, the Scottish Government aims to minimise the risk of the landlord taking action to remove the tenant by giving notice to quit or threatening eviction. The Policy Memorandum (para. 199) indicates that it has had discussions with key stakeholders on the proposals and there was broad support for the proposal, particularly from Glasgow City Council. COSLA was generally supportive of discretionary powers that did not impose any additional mandatory duties on local authorities.

STAGE 2 AMENDMENT - ENHANCED ENFORCEMENT AREAS

The Scottish Government has indicated its intentions to bring forward provisions at Stage 2 to provide additional discretionary powers for local authorities that would enable them to target enforcement action at an area characterised by poor conditions in the private rented sector. A local authority would apply to the Scottish Ministers for additional enforcement powers for a specified geographic area, to be designated an enhanced enforcement area.

The policy objective is to ensure that local authorities have a range of effective tools available to them to tackle poor standards in the private rented sector (Policy Memorandum, para. 17). This provision could potentially assist Glasgow City Council, for example, who are working towards improving private rented housing in the Govanhill area of the city.

PART 4 – LETTING AGENTS

BACKGROUND

As the private rented sector in Scotland has expanded so has the letting agent industry. It is not exactly clear how many letting agents operate in Scotland although the Policy Memorandum (para. 209) suggests there are an estimated 750 providers operating in Scotland, managing around 150,000 lettings a year, which equates to 50% of all annual lettings in the private rented sector.

The types of services offered by letting agents include the marketing of properties, introducing tenants to landlords, arranging tenant references and tenancy deposit scheme membership. Some letting agents offer full management services including; rent collection and arrears management, arranging electrical and gas safety inspections and handing routine repairs and maintenance. Letting agents services are provided by a range of businesses including letting agents, solicitors, estate agents and accommodation agencies.

In many cases, letting agents provide a high quality service, however, there is evidence of poor practice in the sector. In November 2012, the consumer organisation Which? published research into the consumer experience of the lettings market, *Renting Roulette*, which identified the following problems:

- **Tenants disempowered and dissatisfied:** three quarters of tenants (73%) search for a property not the agent, yet lettings agents are ranked second from the bottom in our comparison of markets and one in five tenants told us they are dissatisfied with their agent.
- **Unexpected and unfair fees:** we found less than a third of tenants (29%) said agents provided information about fees before they asked, 41% of tenants thought upfront fees were unfair and none of the 32 lettings agents we looked at had information on tenant fees on their website.
- **Widespread bad practice:** we found evidence of agents using aggressive sales tactics, poor customer service, missing appointments and misleading tenants through out-of-date advertisements.
- **Tenants and landlords losing money:** both tenants and landlords were found to have lost money through agents not passing on rent, unfairly holding deposits or failing to put deposits into protection schemes, as they are required to do by law. (Which? 2012)

Similar issues were raised in the Office of Fair Trading's (OFT) *Lettings Market* report (2013) which used an analysis of Consumer Direct complaints (the majority of which related to England).

In light of such reports there have been calls for regulation of the sector from various organisations, including from sector bodies such as the Association of Residential Letting Agents (ARLA) and the Royal Institute of Chartered Surveyors (RICS). The issue of the regulation of letting agents was also briefly raised during parliamentary consideration of the Private Rented Housing (Scotland) Bill in 2010 (Local Government and Communities Committee 2010).

Current regulatory framework

There is currently no overarching statutory regulation of private sector letting agents, although letting agents are subject to general consumer protection law. The private landlord registration scheme requires the details of the agent appointed to act on the landlord's behalf to be included in the landlord registration application. Letting agents are not required to register separately, but they can choose to do so if they wish.

A number of relevant professional organisations such: ARLA; the RICS; the National Association of Estate Agents and the Property Ombudsman provide members with a Code of Practice to encourage responsible business practice. Some organisations provide routes for redress for customers. The [Property Ombudsman](#), for example, provides a free and independent service for dealing with unresolved disputes between letting agents (who have joined the Property Ombudsman) and consumers. The Ombudsman's role is to resolve disputes and, where appropriate, make an award of financial compensation or other action, for example, obtain an apology. Landlord Accreditation Scotland is a Scottish Government supported voluntary scheme which aims to improve standards in the private rented sector.

Not all letting agents will chose to join a professional body or follow good practice. A Shelter (Scotland) paper arguing for further regulation of letting agents said:

“Despite the fact that good practice standards for the sector are available, letting agents are not required to follow them. Evidence suggests tenants are not discriminating in favour of agents who belong to such schemes; instead they make their choices based on the property offered. Less than one in five tenants have checked whether their agent is a member of a professional body and nearly two-thirds do not know if their agent is a member. In short, while there are a number of bodies and schemes in operation, in reality adherence to these standards is voluntary and there is very weak enforcement and no recourse for redress under these schemes if something goes wrong” Shelter (Scotland) 2013

Growing interest in the role of letting agents and the need to maintain standards has led to the recent establishment of two specific Scottish bodies representing their interests; the [Council of Letting Agents](#) and the [LetScotland](#).

Debate about the need for further regulation of letting agents has been UK wide. Some organisations have suggested letting agents should be regulated in a similar way to estate agents. The consumer organisation Which?, for example, has argued that the current legislative situation is inconsistent with the property sales market. Under the Estate Agents Act 1979, estate agents are required to be signed up to a redress scheme, follow a code of practice and can be banned from operating as an estate agent because of bad practice (Which? 2013).

The approach currently being taken to the regulation of letting agents in England is different. The UK Government has said that it does not intend to introduce regulation of the sector in England, pointing instead to the existing range of powers under consumer protection legislation. However, the *Enterprise and Regulatory Reform Act 2013* enables the Government to require agents in England to sign up to a redress scheme and provides for complaints against members of the scheme to be investigated and determined by an independent person (Wilson 2013a).

OFT has also recently issued draft guidance to clarify how consumer protection legislation might apply at each step of the lettings process, from when lettings professionals first advertise their services, to the interactions they have with tenants prior to moving into a property, to when a tenancy agreement comes to an end (Office of Fair Trading 2013).

Scottish Government Consultation

The Scottish Government’s consultation on a strategy for the private rented sector (2012) sought views on whether further regulation of letting agents in Scotland was required. It gave examples of the format such regulation could take, including:

- expansion of landlord registration to include all agents;
- a separate system for agents similar to that proposed for property factors due for implementation in October 2012; and/or a legal obligation that all agents must be a member of a recognised professional body

An analysis of responses has been published (Scottish Government 2012h) and individual responses to the consultation have been published here:

<http://www.scotland.gov.uk/Publications/2013/09/1158/downloads> (Scottish Government 2012i) Following the consultation, and further discussion with stakeholders, the Government decided on the second option as a basis for regulating letting agents.

THE BILL- LETTING AGENTS (SECTIONS 26-52)

Part 4 of the Bill provides for the registration of letting agents. The two main policy objectives of this part are firstly, “to promote high standards of service and levels of professionalism across the country” and secondly, “to provide landlords and tenants with easy access to a mechanism that will help to resolve disputes where these arise” (Policy Memorandum, para. 20). A brief overview of the proposals is given below, full details are provided in the Explanatory Notes:

Registration

- Scottish Ministers are required to create and maintain a national register of letting agents
- Letting agents applying for registration, or renewing their registration, must provide specified information in their application
- Scottish Ministers may determine a fee to be paid for registration
- Scottish Ministers would decide whether the applicant met a “fit and proper person” test before approving the application
- Letting agents would need to re-register after 3 years, failing which the Scottish Ministers would remove the letting agent from the register
- Scottish Ministers could remove a letting agent from the register if they consider that the agent no longer meets the fit and proper person test
- A person may appeal to the First Tier Tribunal (FTT) against a decision by the Scottish Ministers to refuse to enter that person in the register or to remove that person from the register

Duties of Registered Letting Agents

- Scottish Ministers must give each registered letting agent a number and each registered letting agent must take all reasonable steps to ensure that the number is included in the documents sent to landlords and tenants or other advert/ communication materials etc.
- Registered letting agents must notify the Scottish Ministers in writing if any of the information in the application has become inaccurate due to a change in circumstances

Code of Practice

- Scottish Ministers would have powers to create a Code of Practice which sets out the standards of practice which are required of persons who carry out letting agency work. Before finalising the code, the Scottish Ministers must carry out consultation on a draft of it.

Consequences of Refusal or Removal

- Where a person has been refused registration, or had their registration revoked, Scottish Ministers must publicise this fact by noting it in the register
- Where a person has been removed from the register or has been refused entry to the register they cannot recover any costs relating to carrying out letting agency work (after the relevant appeal period has expired)
- Scottish Ministers must publish a notice of the agent’s refusal or removal and the fact that no costs can be recoverable.

Dispute Resolution

- A tenant or landlord would be able to apply to the First Tier Tribunal (FTT) to determine whether there has been a breach of the Code of Practice. The FTT may reject the application if the letting agent has not been allowed a reasonable opportunity to rectify the matter.
- If the FTT considers that the code has been breached they must apply a letting agent enforcement order which will set out the steps they consider the letting agent needs to take to rectify the failure.
- If the FTT considers that the letting agent has not complied within the specified timescale and enforcement order, and the letting agent does not have a reasonable excuse, the FTT must notify the Scottish Ministers. This would allow the Scottish Ministers to take the matter into account for registration considerations.

Offences

It would be an offence for a letting agent:

- to provide false information or knowingly fail to provide the required information
- to not inform the Scottish Ministers of any change of circumstance without a reasonable excuse
- to carry out letting agents activities if unregistered
- to use a number purporting to be a letting agent registration number without being a registered letting agent
- to fail to comply with a letting agent enforcement order.

The provisions in the Bill are based largely on the system of regulation operating for property factors, introduced by the Property Factors (Scotland) Act 2011, which has been in place since October 2012. There has been no nationally published evaluation of the scheme to assess how effective it is in meeting its objectives of protecting homeowners by providing minimum standards for property factors. One of the potential benefits of basing the scheme for letting agents on an existing model is that the government will have gained experience in how to set up and administer the scheme. There is already an established IT system for the registration of property factors which can be adapted for letting agents. In this respect the Scottish Government consider that there would be cost savings in terms of IT system development (Financial Memorandum, para 188).

The proposals include a duty on Scottish Ministers to include in the register notification of a failure to register someone or of someone being removed. Therefore, if someone searches on the register they will be able to find out if the letting agent has been refused registration or removed. This is an improvement on the property factors scheme, as that, only gives Scottish Ministers a duty to notify the public more generally of a property factors application being refused entry to the register or removal from the register.

In terms of the impact of the provisions on letting agents, the Financial Memorandum (para. 219) suggests that the fee for registration could be around £250 per letting agent business (assuming a fee structure similar to the property factors scheme is in place). This estimate does not include any potential training costs or costs to alter business practice that a letting agent may have to undertake in order to comply with a code of practice.

The Scottish Government's consultation on the private rented sector strategy sought views on whether further regulation of letting agents would be required. A total of 82 responses were received, 66 from organisations and 16 from individuals. Overall, "The majority of respondents were of the opinion that the letting agent industry should be subject to some form of regulation. For example, one individual respondent noted that the lack of regulation was a "... *worrying aberration which undermines the sector as a credible alternative to home ownership*" (Scottish Government 2012h).

There were various views provided on the type of regulatory regime that should be in place. Some respondents suggested expanding the landlord registration scheme to include letting agents, while other industry bodies called for an obligation that agents must be a member of a recognised trade or professional body. The Royal Institute of Chartered Surveyors Scotland, for example, cited their recent Residential Policy document (May 2012) to encourage the UK Government to reform the Estate Agents Act 1979 to bring letting/managing agents within scope in terms of the need to have Client Money Protection, Professional Indemnity Insurance and clear redress mechanisms. The Association of Residential Letting Agents was in favour of a legal obligation that all letting agents are a member of a professional body and stated a preference for "*mandatory minimum standards which are a) enforceable b) transparent and c) clearly defined.*" (Scottish Government 2012h).

The Scottish Government's reasons for rejecting the other options for regulation that were set out in the consultation paper are given in the Policy Memorandum (paras 217 – 220). In summary, the expansion of the landlord registration scheme was rejected on the basis that it would result in significant additional financial and resources constraints being placed on local authorities. The option of creating a legal obligation for letting agents to join a professional or trade body was rejected because it would amount to self-regulation by the industry, with approved trade bodies controlling letting agents' entry to and exit from the market. This approach would also be likely to place the most significant financial burden on letting agents who would need to undertake accreditation and training before being considered for membership of a professional trade body.

PART 5 - MOBILE HOMES WITH PERMANENT RESIDENTS, SITE LICENSING

Part 5 of the Bill makes provisions to update the licensing regime for residential mobile homes sites. This section provides some background before considering the Bill's proposals in more detail.

BACKGROUND

Residential mobile homes, also known as "park homes", are used by their owners all year round as their permanent home. Mobile home parks are increasingly popular with elderly residents and many mobile home sites market themselves as retirement communities. People living in park homes rent the land their mobile home stands on from the site (park) owner for a pitch fee. The rights and obligations of the site owner and the mobile home owner will be determined by the terms of a written agreement between them. Schedule 1 to the Mobile Homes Act 1983 sets out the rights of mobile homes residents by way of a list of contractual terms that it implies into all agreements (Part 1 of the Schedule) and a

list of contractual terms that a court may order to be implied into agreements (Part 2 of the Schedule).

Research by Consumer Focus (2013), identified 92 mobile home sites in Scotland, with around 3,314 mobile homes, spread across 22 local authority areas. The majority of sites comprise fewer than 50 residential units, and there are almost no very large sites (those with 100 or more units). Scotland's park home sites are concentrated mainly in Perth and Kinross, Dumfries and Galloway, Fife, Angus, Argyll and Bute and Aberdeen. Between them they account for more than half of all the mobile home sites in Scotland.

The same research involved interviews with mobile home site residents. Sixty one percent of residents stated that they were satisfied with the site they lived on. However, 29% expressed dissatisfaction and 73% reported at least one problem on their site in the last five years. Problems experienced on site included maintenance, security and safety standards. Some respondents reported problems with their site owner or manager's behaviour, including intimidation, or damage to property.

Current Site Licensing Regime

Before land can be used as a caravan site the owner has to obtain a licence from the local authority in which the site is situated. The current site licensing regime is governed by the Caravan and Control of Development Act 1960 (the 1960 Act) and applies to privately-owned residential mobile home sites, and holiday mobile home sites. It also applies to privately-owned Gypsy/Traveller sites but not to local authority Gypsy/Traveller sites.

Section 1 of the 1960 Act makes it clear that land may not be used as a caravan site unless the owner holds a site licence. Section 3 of the 1960 Act provides that a licence can be granted by a local authority only if the applicant for the licence has planning permission for the use of the land as a caravan site. The local authority can request further information from the applicant, as it might reasonably require, and is not obliged to issue a licence until that information has been received.

In comparison to other licensing regimes, the provisions in the 1960 Act are relatively basic. There is no power for local authorities to consider the suitability of an applicant to hold a licence and the only basis upon which the licensing authority can refuse an application for a licence (where the applicant has provided them with all the information required and where the relevant planning permission is in place), is if the applicant has had a site licence, granted under the 1960 Act, revoked in the preceding three years. Licence terms are effectively unlimited and the Act does not permit local authorities to charge a licencing fee.

Local authorities can attach conditions to site licences but, although they can enter and inspect sites, they have very limited powers to enforce compliance with those conditions. These limited powers have been identified as a source of frustration for local authorities who have park homes in their area (Consumer Focus 2013).

Other developments

Over the past few years the Scottish Government, with the assistance of a [Residential Mobile Home Stakeholder Working Group](#), has been considering measures to improve standards and protections for permanent mobile home residents. Other changes that have been made include, since 1 September 2013, changes to the implied terms in the written agreements between residents and owners (as a results of the Mobile Homes Act 1983

(Amendment of Schedule 1) (Scotland) Order 2013 (SSI 2013/219). In addition, the Scottish Government will be issuing new Model Standards, under the 1960 Act, which cover issues such as site layout and onsite facilities.

The current, and previous UK Government, has also developed proposals to address problems within the mobile home industry in England and Wales, some of which are similar to the approach taken in Scotland. The Mobile Homes Act 2013 makes various changes to mobile home legislation in England including changes to the site licensing regime which will come into force from April 2014 (Wilson 2013b). In Wales, the [Mobile Homes \(Wales\) Act 2013](#) was recently passed by the National Assembly in Wales. This contains changes to the mobile home site licensing regime.

Scottish Government Consultation

The issue of site licensing was previously consulted on as part of the private rented housing bill in 2010 (Scottish Government 2010). However, in light of the degree of complexity involved in considering legislative change to the licensing regime, it was agreed that it was necessary to examine the options for change in more detail before progressing primary legislation.

A further consultation paper with more detailed proposals, [Licensing of Caravan Sites in Scotland](#), (Scottish Government 2012j) was issued in 2012 with 129 responses received. An analysis of consultation responses has been published (Craigforth Consultancy and Research 2012) and individual responses to the consultation can be viewed here: <http://www.scotland.gov.uk/Publications/2012/10/3857> (Scottish Government 2012k)

THE BILL - MOBILE HOME SITES WITH PERMANENT RESIDENTS (SECTIONS 53-71)

Sections 53-71 of the Bill contain provisions to amend the mobile home licencing provisions set out in the 1960 Act for sites with permanent residents. The intention is to create a robust licensing system that reflects modern practice and gives local authorities the tools needed to ensure mobile home sites meet acceptable standards, and that licences can be managed and revoked as required. The proposals will not apply to holiday sites (which was an option that was consulted on).

The main features of the proposed revised licensing regime are (see Explanatory Notes for full details):

- introduction of statutory minimum application criteria (to be set by Ministers in regulations), which would require all applicants for relevant permanent site licences to provide the same basic information
- requirement for site owners to satisfy a 'fit and proper person' test, details of which are set out in the Bill
- provision for local authorities to charge a licence fee. The fee level will be set by each local authority, but the Bill allows Ministers to make regulations specifying matters to be taken into account in determining the fee and/or to set a maximum fee. The Financial Memorandum estimates that a 3 year fee of around £600 would cover the likely costs involved (para 244)
- requirement to renew licences every 3 years
- it would be an offence for someone to use the land as a permanent residential park home site without a licence. On conviction the maximum fine would be £50,000
- increased enforcement powers for local authorities to take action where there has

been a breach of site licence conditions.

The proposed enforcement powers include powers for a local authority to:

- issue an improvement notice on a site owner, to require them to carry out work to comply with a licence condition. It would be an offence for a licence holder to fail to take the steps set out in an improvement notice within the specified period. The fine for conviction of this offence would be £10,000
- issue a penalty notice, which would suspend pitch fee payments, and the commission a resident pays to the site owner on the sale of their mobile home, if the site owner failed to comply with an improvement notice or if the site did not have a licence
- undertake emergency works on sites in defined circumstances, including risk of serious harm to the health and safety of anyone on the land, and recover the costs from site owners
- ask a sheriff to appoint an interim manager to take over the running of the site in specific circumstances, such as when a site licence is revoked, or a local authority has refused to renew a licence
- revoke a site licence in certain circumstances
- recover the costs of enforcement action from the site owner involved (para 225 FM)

The Bill also proposes, at section 59, that licence applicants or proposed licence transferees have a right of appeal to the sheriff against certain decisions, such as refusal of the local authority to issue or revoke a site licence.

Consultation Responses – Mobile Home Sites with Permanent Residents, Site Licensing

The analysis of consultation responses found that:

- “Those respondents who approached the proposals from the perspective of mobile home residents were generally supportive of the proposed changes, and often expressed clear support for an enhanced licensing and inspection regime.
- Respondents who approached the proposals from the perspective of the mobile home industry disagreed with some of the suggested changes. They often suggested that the proposed regime would impose additional administrative and financial burdens on reputable site owners, but would be unlikely to tackle the problems created by a small number of less scrupulous owners.
- Local authority respondents were supportive of the need for change and of the requirement for an enhanced licensing regime. Local authority respondents were also generally in agreement with most or all of the proposals as put forward. However, some did express reservations about certain aspects of the proposals, and were looking for them to be strengthened” (Craigforth Consultancy and Research 2012)

Fit and Proper Person Test

The Policy Memorandum (para 245) justifies the introduction of a “fit and proper person” test for site owners on the basis that, “The current site licensing regime does not include any assessment of the person who will run the site. Given the continuing relationship that residents have with that individual, (such as the provision of services and payment of pitch fees), the Scottish Government considers that this is a significant failing of the existing legislation. The introduction of a fit and proper person test would address this. For the first time the licence system would take into account whether the person who will be running the site is an appropriate person to do so.”

The [British Holiday Homes and Parks Association](#), for example, expressed some concern at the proposals. Their response seemed supportive of the principle of licencing but their support was based on the solution being practical and sufficient to deter the rogue operators. Their response stated, “ we would be concerned that, the proposed safeguards notwithstanding, rogue park operators are likely to find routes to evade a ‘fit and proper’ test; not least because we understand many to have complex family and business structures which can be intensely and notoriously difficult to penetrate”. They suggested a national system for personal licensing of individual park owners and responsibility for individual site licensing to remain with local authorities.

Some consultation respondents referred to the UK Government’s view that there was no need to introduce to ‘fit and proper person’ test for mobile home park owners as part of the revised mobile home licencing regime in England. The UK Government believed that a “fit and proper” scheme could be bureaucratic, and would impose costs on all operators (Department for Communities and Local Government 2012). However, the Mobile Homes Act 2013 does contains provisions (section 8) that would permit the Secretary of State to introduce a ‘fit and proper person’ test for mobile home owners, if necessary, following a review of the effectiveness of the legislation.

Duration of Site Licences

The Bill (section 56) provides that site licences would need to be renewed every three years. This was an issue that divided respondents to the consultation. Many respondents agreed with the proposal that a licence should have to be renewed every 3 years. Many of These respondents noted this change would bring caravan site licensing into line with other licencing regimes. On the other hand, a number of respondents expressed considerable concerns about any fixed period being applied to licences. Many of these respondents were site owners who suggested that a fixed period licence could undermine the viability of park businesses (Craigforth Consultancy and Research 2012). Section 56(2) of the Bill would give Scottish Ministers the power to alter the duration of site licences, by order subject to the affirmative procedure.

Enforcement

In relation to enforcement issues, the analysis of consultation responses found a clear consensus change from the current situation was required (Craigforth Consultancy and Research 2012). One issue that may concern park home site residents, and owners, is what happens to the running of the site in specific circumstances, such as when a site license is revoked, or a local authority has refused to renew a licence. In these circumstances, section 66 of the Bill would give local authorities the power to apply to the Sheriff to appoint an interim manager for a site. Section 66(5) gives the Scottish Ministers the power to make regulations relating to the appointment of an interim manager which may cover, for example, the powers of an interim manager, the qualifications the manager must hold, and the actions the interim manager must carry out. Although the appointment of an interim manager would be a last resort, the detail of these regulations is likely to be of interest to owners and residents of the affected park homes.

The approach taken to enforcement in the Bill is guided by the principle that “the polluter pays” i.e. it is the site owners who do not comply with the legislation or with the conditions of their licence who should bear the costs of action by local authorities to enforce compliance. The Policy Memorandum (para. 270) notes that, “COSLA had not taken a formal position on the proposals, but through discussions the Scottish Government is

aware that it favours proposals that allow for maximum local flexibility and be cost neutral for local authorities. The Scottish Government considers that its proposals reflect this.”

PART 6- PRIVATE HOUSING CONDITIONS

Part 6 of the Bill contains provisions that would amend local authority powers to enforce repairs and maintenance in private homes. The provisions relate to the Tenements (Scotland) Act 2004 (the “2004 Act”) and the Housing (Scotland) Act 2006 (the “2006 Act”). The following section gives some brief background to these Acts before considering the Bill’s provisions.

BACKGROUND

The Tenements (Scotland) Act 2004

The 2004 Act created ‘the Tenement Management Scheme’ (TMS) which provides default rules for the management and maintenance of ‘tenements’¹⁵ which apply to the extent that the relevant title deeds are silent or unclear on those issues. A key feature of the TMS is that it empowers owners in a block of flats to act together by simple majority to instruct repairs and maintenance works.

There are difficulties in how the TMS works in practice. For example, although a majority decision binds all flat owners, one or more flat owners may still be unable or unwilling to pay or cannot be traced. Section 50 of the 2006 Act offers assistance where money has been collected in advance from the owners and placed in a specific bank account known as a ‘maintenance account’ in anticipation of meeting such future repair and maintenance costs. In such circumstances, a local authority is empowered to step in and pay the missing share or shares into the maintenance account, thus allowing the work to proceed.

The Housing (Scotland) Act 2006

The 2006 Act revised the system that governed local authorities’ duties and powers in relation to private sector house conditions. A key policy aim behind the Act was to encourage home-owners to take greater responsibility for the repair and maintenance of their homes.

Under Part 1 (chapters 5 and 6) of the 2006 Act local authorities have a range of powers to enforce repairs to residential properties. The main types of notice which can be served are described in more detail below. A general point to note is that there are several applicable statutory standards in the context of such notices and various other statutory definitions, making this a complex part of the 2006 Act.

Work notices

A ‘work notice’ is an order from the council to carry out repairs to an individual’s house. An individual may be sent a work notice by the council in circumstances including if his or her house is ‘sub-standard’, in order to bring it up to, or keep it in, a ‘reasonable state of repair’ (section 30). In turn, a house is sub-standard if it fails, at a minimum, to meet the ‘[tolerable standard](#)’¹⁶ (section 68). A house is also ‘sub-standard’ if it is in ‘a state of serious

¹⁵ ‘Tenement’ is defined widely enough in section 26 of the 2004 Act to include not just tenements in the traditional sense of the word but also modern blocks of flats and flats in houses which have been subdivided.

¹⁶ For further information on what constitutes the tolerable standard see the Scottish Government guidance (2009b) on the topic : <http://www.scotland.gov.uk/Publications/2009/03/25154751/0>

disrepair' or is in need of repair and if nothing is done to repair it, is likely to deteriorate rapidly into a state of serious disrepair or damage any other premises (section 68).

Maintenance orders and plans

'Maintenance orders' can be served on an owner or owners where a) the local authority believes their home has not been, or is unlikely to be, maintained to a reasonable standard; or b) that any benefit arising from work carried out as a result of a work notice, or a 'repairing standard enforcement order', has been reduced or lost because of a lack of maintenance (section 42). A 'repairing standard enforcement order' is a notice which can be served on a private sector landlord requiring them to carry out work to ensure a property meets the [Repairing Standard](#) (section 24).

Maintenance orders require an owner to draw up a 'maintenance plan', or can involve contributing to a joint plan with other owners in the case of a tenement building, stating how the affected property will be maintained in a 'reasonable standard' over a time period of up to five years (sections 43–45).

Local authorities' powers to carry out work and recover costs

If an individual owner fails to comply with the work notice or maintenance order within the required time period, the local authority can undertake the work itself and recover the costs of doing so from the defaulting owner (sections 35 and 49). Local authorities can also impose 'repayment charges' to recover the costs incurred through carrying out works associated with owners defaulting on such notices and orders (sections 35, 49, 59(1), 172–174). A repayment charge is a method of debt recovery allowing a local authority, for minimal cost, to burden the legal title of a property with the sums owed, which are repayable in thirty annual instalments (sections 172–174).

Scottish Government consultation

The Scottish Government issued the consultation document, [Homes that Don't cost the Earth in 2012](#) (2012l) Amongst other issues, it consulted on the possibility of making provision for local authorities to be able to step in and pay missing shares associated with decisions made under the TMS, and decisions made under the relevant title deeds, even where no maintenance account has been established, to overcome the problem as outlined above. It also consulted on changes to the 2006 Act.

THE BILL - TENEMENT MANAGEMENT SCHEME : MISSING SHARES (SECTION 72)

Section 72 of the Bill makes provision to allow local authorities to step in where an owner is unwilling or unable to pay or cannot be found or identified. It also makes provision for local authorities to use repayment charges to recover the costs of paying missing shares.

This proposal received majority support (73%) from those answering the relevant consultation question. However, some notes of caution were sounded. For example, it was suggested by some that this proposal ran counter to the ethos of the 2006 Act, which was to refocus responsibility for carrying out repairs on owners. Some respondents also argued that section 50 of the 2006 Act (maintenance accounts) meant the proposed power already existed (Liz Shiel Associates 2013).

The most common concern however related to recovery of costs by local authorities, with respondents suggesting that local authorities would need to be able to register a 'repayment charge' in respect of a property where they had paid a missing share (Liz Shiel

Associates 2013). As noted above, the Bill does contain provisions for a 'repayment charge' to be made.

THE BILL - CHANGES TO WORK NOTICES, MAINTENANCE ORDERS AND REPAYMENT CHARGES (SECTIONS 73–76)

The Bill makes several minor changes to the powers associated with work notices and maintenance orders and plans as set out in the 2006 Act, described above. In summary:

- section 73 of the Bill creates an additional ground on which a work notice can be issued, i.e. where work is needed to improve safety or security
- section 74 of the Bill makes provision for an additional ground on which a maintenance order can be served, i.e. that a work notice has been served and no certificate has been issued to confirm that the work required to be carried out by the work notice has been completed¹⁷
- section 75(1) of the Bill provides for approving, devising, varying or revoking of maintenance plans by councils to be matters requiring registration in a council's building standards register (section 75(3)), as opposed to the present requirement of registration in one of the two national property registers maintained by the [Registers of Scotland](#) (2006 Act, sections 46, 47 and 61)
- section 75(2) of the Bill also includes a provision empowering local authorities to revoke a maintenance plan where a property factor has been appointed to manage or maintain the premises to which the plan relates. In relation to this section, it is probably worth noting that the approach of some property factors to the buildings they maintain and manage has been a matter of some controversy in recent years, although a new regulatory regime now exists for property factors contained in the 2011 Act (which came into force on 1 October 2012)¹⁸
- section 76 of the Bill amends the 2006 Act to allow a repayment charge to be imposed on the non-residential parts of a building which includes housing, for example, the shops on the ground floor of a tenement building

OTHER ISSUES - EXTENDING THE POWERS TO REQUIRE IMPROVEMENTS TO PROPERTIES

At present, a local authority can require an owner to repair or maintain his or her property but it cannot require him or her to improve it. In [Homes that don't cost the earth](#), the Scottish Government consulted on whether this should change (Scottish Government 2012) highlighting, in particular, the requirement on social landlords in mixed tenure blocks to bring properties up to the [Scottish Housing Quality Standard](#) (SHQS) by 2015.

¹⁷ It should be noted that para 275 (bullet point 2) of the Policy Memorandum contains an error. That bullet point suggests that this part of the Bill will also amend the 2006 Act to allow a maintenance order to be issued where a previous maintenance order has been issued. In fact, this change was considered by the Scottish Government but not preceded with (Scottish Government personal communication, Dec 2013)

¹⁸ The 2011 Act does not deal with the appointment and dismissal of property factors and does not encompass disputes about the cost of services. This means that homeowners still need to rely on the complex provisions of the Title Conditions (Scotland) Act 2003 in those instances. For some criticisms of the operation of the provisions of the 2003 Act in practice see the report of the Justice Committee on the topic, along with the Scottish Government's response:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/59247.aspx>

Social landlords currently face difficulties in this regard where agreement cannot be reached with private owners, sometimes in relation to substantial works associated with energy efficiency (Scottish Government 2012I).

The majority of respondents, 62%, answering the relevant consultation question supported the proposal. However, most did so with some caveat or qualification. Key concerns focused on shortages of staff and council resources and a dislike of owner-occupiers and private landlords incurring costs in a difficult financial climate (Liz Sheil Associates 2013). Ultimately, such powers were not included in the Bill.

PART 7 - MISCELLANEOUS

Part 7 of the Bill contains four miscellaneous provisions, two of which are explained below.

THE BILL - RIGHT TO REDEEM A SECURITY AFTER 20 YEARS (SECTION 77)

Section 77 makes provision to amend section 11 of the Land Tenure (Scotland) Act 1974 ("the 1974 Act"). Section 11 of the 1974 Act relates to 'standard securities', i.e. registered deeds used in respect of loans secured over property in Scotland. Section 11 of the 1974 Act permits debtors to 'redeem' standard securities (i.e. have them discharged), by repaying the remaining amount owed, plus any reasonable interest or charges, after 20 years (regardless of any longer contractual period entered into with the creditor).

However, whilst section 11 was underpinned by good policy reasons in the 1970s,¹⁹ there is now a difficulty which was not foreseen at that time. This relates to the interaction between section 11 and the various shared equity schemes offered by the Scottish Government.

Under such shared equity schemes, an individual pays a majority share of the purchase price and the Scottish Government (sometimes jointly with a private house builder) pays the rest. The home is owned outright by that individual but the Scottish Government (and the private house builder where applicable) holds a standard security over the proportion of it which it has funded. When the individual later sells the home the Government (and the private house builder where this applies) are meant to receive the value *at the time of sale* of the percentage equity stake they have funded. Yet section 11 allows homeowners to redeem standard securities at year 20 with reference to *the original value* rather than the current property value. This potentially exposes the Government (and any private house builder) to a financial risk if, at the twenty year point, the property hasn't been sold or bought outright by the party concerned.

With the shared equity schemes offered by the Scottish Government under the [Low-cost Initiative for First-time Buyers](#) (LIFT), the approach the Scottish Government has taken is to put a 'break clause' in the shared equity agreement for the parties (i.e. an opportunity to end the agreement) at year 19. This circumvents the effect of section 11, whilst still giving the parties the opportunity to enter into a new agreement and standard security if required at this stage.

¹⁹ The policy objective of the 1974 Act was to create opportunities to eliminate existing 'feu duties', i.e. ongoing periodical payments associated with land, payable by the owner to the feudal superior, and to prevent new feu duties (or other types of periodical payment) being created. Section 11 prevents the equivalent of feu duties being created in perpetuity through the use of standard securities, which would have circumvented the policy intention of the 1974 Act.

The intention was to use the same approach for the [Help to Buy \(Scotland\) Scheme](#) launched in September 2013, a new shared equity scheme which offers buyers an equity loan of up to 20% of the purchase price of a new built property (the value of the property must be £400,000 or less). However, the Scottish Government did not appreciate until very recently the full impact of the changes associated with the [Mortgage Market Review](#), conducted by the then Financial Services Authority²⁰ in the wake of the near collapse of the global financial system. Because of the new Mortgage Market Review (MMR) rules, due to come into force in April 2014, the [Council of Mortgage Lenders](#) (the trade association for the residential mortgage lending industry) and some of its members, were unwilling to participate in the Help to Buy (Scotland) scheme if the break clause in the relevant agreements remained. It is thought the effect of the MMR rules on the [Low-cost Initiative for First-time Buyers](#) raises similar issues (Policy Memorandum, para 293).

The problems have arisen because, under the MMR rules, lenders will be responsible for checking that the borrower can afford the mortgage. For shared equity schemes, this requires a lender providing a first mortgage for a property to take account of the effect of the shared equity loan on the affordability of the first loan. Lenders were concerned that the possibility of the shared equity loan being repaid at year 19 (when the lenders' first loan is still outstanding) constitutes an element of risk to them and therefore they would have to take it into account when undertaking an affordability assessment for the first mortgage. Lenders said that they would not be willing to participate in the Help to Buy (Scotland) scheme unless the break clause at year 19 was removed.

In order to allow the [Help to Buy \(Scotland\) Scheme](#) to go ahead,²¹ the break clause in the shared equity agreement (which could be triggered at year 19 if the owner has not tranced up to own 100% of the home or if they have not sold it) was removed. This potentially exposes Scottish Ministers to the financial risks of the '20 year security rule' i.e. that borrowers would be able to redeem their loan come year 20 at its original value, rather than the current property value.

Section 77 of the Bill seeks to provide a permanent solution to the problem. It allows Scottish Ministers (by order subject to the negative procedure) to disapply the right to redeem a standard security in certain circumstances. It is intended that this power will be used in future in relation to shared equity schemes to prevent home buyers benefiting from such schemes from redeeming the shared equity stake at its original value after 20 years (Explanatory Notes, para 153; Policy Memorandum, paras 289–290 and 294).

This aspect of the Bill was not formally consulted on, as the Scottish Government only became aware of the views of the Council of Mortgage Lenders and lenders shortly before the launch of the [Help to Buy \(Scotland\) Scheme](#) in September 2013 (Policy Memorandum, para 296). However, the Policy Memorandum (at para 296) suggests that the proposal received strong support from stakeholders including the [Council of Mortgage Lenders](#) in an informal consultation process.

THE BILL - SCOTTISH HOUSING REGULATOR: TRANSFER OF ASSETS FOLLOWING INQUIRIES (SECTION 79)

The Scottish Housing Regulator (SHR) has powers to direct a transfer of RSLs' assets under section 67 of the 2010 Act. However, before it does so, it must consult and have

²⁰ The Financial Services Authority (which regulated financial services in the UK) was abolished on 1 April 2013 and replaced by two successor organisations, one of which was the [Financial Conduct Authority](#).

²¹ The Scottish Government removed the break clause from the draft shared equity agreement for the scheme (see Policy Memorandum, para 294).

regard to the views of tenants and secured creditors that hold securities over houses of RSLs (under section 67(4)).

Section 79 of the Bill would insert a new subsection (4A) to section 67 of the 2010 Act with the effect of creating a narrow exception to this duty to consult. The exception would apply in circumstances where the RSL was in financial jeopardy and vulnerable to steps being taken towards insolvency, winding up etc. (Explanatory Notes, para 157). In these circumstances, the need for SHR to direct a transfer of assets would be urgent and therefore would leave no time for consultation. There have been several recent cases of RSLs being in financial jeopardy, in light of the challenging financial climate, and this provision would allow the SHR to take urgent action in the future if similar cases arise.

Section 79 of the Bill would also repeal the SHR's duty (at section 67(6)(a) of the 2010 Act), when it is directing transfer of the assets of a RSL, to always obtain an independent valuation of the assets to be transferred and to direct the transfer at a price that it considers the assets would fetch on the open market. The SHR could still use its general powers under the 2010 Act to obtain, and act upon, a valuation if it wished to do so.

The Policy Memorandum indicates that the Scottish Government consulted with the SHR about amending its functions under s67 of the 2010 Act and it also discussed the proposal with representatives of tenants, lenders, RSLs and other stakeholders (para 313), although it does not specify what the outcome of that consultation was.

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RELATED BRIEFINGS

[SB 11-31 Housing: Subject Profile](#), 18 May 2011

[SB 12-46 Allocation of Social Rented Housing \(updated\)](#), 4 July 2012

[SB 13-49 Tribunals \(Scotland\) Bill](#), 29 August 2013

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