

## **LEGAL SERVICES AGENCY**

### **WRITTEN SUBMISSION**

The general view of the solicitors commenting on the Bill is that we have grave concerns concerning the balance of rights and powers adopted particularly to those accused, or guilty of, anti-social conduct or behaviour.

Very generally, we appreciate that it is important for neighbours, the community and, in the long, term, those guilty of anti-social behaviour, that that behaviour be controlled and the individuals and families concerned be rehabilitated.

However the route to that end entails a balancing of the rights and interests of all concerned including those who have committed, or are accused of, anti-social behaviour, their partners and children.

All are entitled to somewhere to live and should not be pushed into a homeless underclass. Where are they to go?

Whilst the allocation of housing and eviction, or the threat thereof, play a part in the control and ultimate cessation of anti-social behaviour they must be a last resort. Eviction followed by, in effect, removal of any further housing options for tenants and their families is a draconian step that will impact most on the youngest who of course will have been entirely innocent of any fault.

Your Committee will be fully aware, of course, that many of those who behave in an anti-social manner do so because of either highly stressed circumstances, mental disorder, learning difficulties or other difficulties. Many are motivated to change and do so. Whilst others are suffering an exacerbation in their mental ill health and require additional care to manage behavioural symptoms arising from the disorder. There can also be issues of neighbours who are acting in a discriminatory way towards those with mental disorder or learning difficulties.

We can hardly overstate the adverse impact mental health and addition problems can have on families, including children: for that to be exacerbated by eviction followed by the removal of further housing options is harsh indeed.

Some of the issues arising in the Bill to which these general comments are directed include the following (the numbers relate to the section numbers of the Bill).

Section 5 repeals earlier provisions concerning the allocation of housing and seeks now to permit social landlords to take into account the age of an applicant

age 16 or over. As the proposed amendments comments, this does not alter the requirements to avoid unlawful discrimination on the grounds of age.

We are not comfortable with this provision and think that it will be difficult, in practice, for RSL's to manage lawfully and clearly. If the problem aimed at related to maturity and the ability to sustain a tenancy or needs that may arise as a result of mental or physical frailty or disability these factors should be highlighted rather than attempting to use age as a proxy

Section 7 (2) permits RSL's to impose a requirement that an application for housing must have remained in force for a minimum period before the applicant is eligible for the allocation of housing. We are not advised as to the period concerned: at the very least there should be a maximum time (3months?).

In any event, we have difficulty understanding why those in housing need should have to wait before they are even considered for housing as a matter of policy. In permitting RSL's to desist from housing tenants and their families with difficulties, policy makers do have to follow on by indicating their views as to precisely where such citizens (at fault though they may be on occasion) should live, whether temporarily or permanently. There is plainly already a major crisis in the provision of temporary accommodation.

We note that the proposed amendments state that a RSL may not impose a requirement (a minimum period of time)" if the landlord ... is a local authority and has a duty to an applicant" (a duty to secure accommodation where the applicant is homeless).

In passing it should, of course, be noted that local authorities are under limited duties to homeless persons if it can be said they are "intentionally homeless" unless, of course, they suffer from a mental disorder in which other duties come into play.

Given that so much housing is now, of course, owned and let by RSL's, the protection given by this subsection to homeless persons is very limited. The protection should be extended to provide that it applies not only to local authorities but also to RSL's.

The proposed change goes on to provide that RSL's must have regard, in imposing a qualifying period for the allocation of housing, to any Guidance issued by Scottish Ministers on the maximum period preceding the application which should be considered in relation to a variety of circumstances (see below), including where the applicant has (been alleged) to have acted in an anti-social manner or pursued a course of conduct amounting to harassment.

The judgement as to whether the circumstances relating to anti-social behaviour apply or not, seems to be entirely in the hands of the RSL concerned and could

be open to a variety of interpretations. We are not happy with the high level of discretion given.

Other grounds for the removal of eligibility for housing for undefined periods of time include “abandonment” by the tenant or joint tenant of a former tenancy. The new provisions include even a joint tenants interest having been terminated by the abandonment procedure – this could mean a couple separate, one leaves and then cannot access public sector housing for a period of time simply because they haven’t informed the landlord that they have left. Recovery of possession through the abandonment procedure can occur owing to mental health problems, hospitalisation, imprisonment, a chaotic lifestyle or a range of difficulties: as well as, simply a mistake by the landlord concerned.

Whilst an applicant for housing may appeal by Summary Application to the Sheriff against a requirement that an application for housing must have remained in force for a minimum period of time before the applicant is eligible for allocation of housing, no criteria as such are given for how the Sheriff would reach his/her decision on the matter. Not even a test of “reasonableness”.

Of course, human rights “proportionality” would apply: we would however very much prefer that it be stated that the RSL’s decision on the requirement be subject to a test of statutory “reasonableness”.

Such a statutory test would inform the policy of the RSL as well as give guidance as to the forms of argument to be expected as part of a summary application.

It should be noted that it would appear that quite tough procedural requirements would exist for such a Summary Application. The Court action would for instance, probably be required to be raised within 14 days of the decision complained of.

We would suggest that the timelimit for such an application to the Court be extended to a minimum of two months.

From our experience in dealing with “homelessness” cases we have found the Review procedure that is provided for, in terms of that legislation useful, (a Review by a more senior, independent

officer of the local authority) and would suggest that there might be much to be said for introducing such a procedure in these cases as well as an application to the Court.

We would also like RSL’s to be required to formally intimate by First Class and First Class Recorded Delivery any such decision which should include not only the decision, the reasons for the decision as well as the facts founded upon by the decision maker, as well as details of the Review and Appeal’s process.

Section 8 deals with the creation of a Short Scottish Secured Tenancy (SSST's).

The Section develops the principles upon which a SSST can be created by, amongst others, permitting a landlord to serve a conversion notice on grounds that the tenant, a person residing or lodging with, or a subtenant of the tenant, or a person visiting the house has, within the period of three years preceding the date of service committed a range of anti-social conduct and behaviour.

We are concerned that the notice may be served on the basis of quite limited contact with the tenant (by visitors) and the premises and, that within a period of 3 years. This period is far too long and it may make it impossible for tenants to dispute a claim given that the landlord may have records but that the tenant may not have any records, or not even remember any incidents. The period should be reduced to a period of one year at the most.

The conduct upon which the service of a Notice creating the SSST can be based, is vague involving acting in an anti-social manner or pursuing a course of conduct. The change of a secure tenancy to a much more insecure SSST is a serious step concerning a tenant and his/her family's home. The criteria upon which such a step is to be based should be as clear as possible with some indication in the statute requiring that the behaviour be of some significant objective seriousness.

We would also prefer that it be required that the landlord in deciding to serve the notice creating a SSST have regard to the overall "reasonableness" of the step.

Section 12 relates to recovery of possession of the SSST. We consider this step to be a major one given that as a result of it the tenant and his/her family may be evicted with considerable difficulty thereafter in obtaining accommodation elsewhere.

Section 12 provides that a ground for recovery of possession/seeking eviction from a SSST be, amongst others that an obligation of the tenancy has been broken.

We would suggest that it be made clear that an obligation of some substance requires to have been broken.

Section 13 relates to a "tightening up" of the rights that flow from secure tenancy status. (The "Tenants Charter").

The change to the rights concerned would not appear generally to have a major impact on those in significant housing stress for whom we generally act.

However, we are concerned that the rights in relation to assignation and subletting and, in Section 14, succession all require notification that the house concerned was the applicant's only or principal home before the application concerned.

This is contrasted to showing as a matter of fact that the house concerned was the applicant's only or principal home.

We do not see how the landlord's interest would be prejudiced in any way by requiring proof as a matter of fact and or notification as opposed to merely by notification.

Section 15 concerns grounds for eviction based on anti-social behaviour from a SSST.

Paragraph 31 of the Guidance states that this (Section 15) inserts new paragraphs to the 2001 Act to remove a requirement that the court considers whether it is reasonable to make an order for eviction in cases where another court has already convicted a tenant of using the house for immoral or illegal purposes or an offence punishable by imprisonment, committed in or in the locality of the house.

The Guidance goes on to state that the tenant would go on to retain a right to challenge the court action.

It should be noted that where there is no defence of "reasonableness", the grounds to challenge a court action are limited to disputing whether the acts founded upon did, or did not, take place.

The additional test of "reasonableness" allows the court to take into account the seriousness of the facts as proven, the impact of the eviction on the tenant and his/her family as well as the benefit (if any) to the landlord, the neighbours and the community.

In general, the statutes relating to eviction provide for a requirement of reasonableness and, in any event, in some situations human rights "proportionality" will import such a requirement as a matter of law and principle anyway.

Insofar as Parliament chooses to change this area of law we would urge that a requirement of reasonableness be retained. We are reasonably confident that if Parliament were not to choose to do so, the Court would, as a consequence of human rights proportionality, in effect have to reinstate such a requirement to some degree.

We refer to *Orlic v Croatia* [2011] HLR 44 at paragraph 65:

“in this connection the court reiterates that any person at risk of an interference with his right to home should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under art. 8 of the Convention, notwithstanding that, under domestic law, he or she has no right to occupy a flat (see *muttatis mutandis McCann v United Kingdom* ay [50]).

Reliance on human rights proportionality is however not a substitute for the full assessment of reasonableness which entails looking at the circumstances of landlord and tenant as a whole and provides the court with an opportunity to look at all the facts.

Part 3 provides for certain recovery of possession/eviction actions currently raised through the Sheriff Court to be taken to the Private Rented Housing Panel.

This is a comparatively modest step and we do not as such have significant concerns about this currently given that the numbers involved are small and the grounds for disputing recovery of possession in the private sector are generally much more limited than in the social rented sector. We would however wish it to be made emphatically clear that whilst we are making no objection to the proposal, we should not be taken to in any way support a proposal, if it were made, for eviction actions in the public and socially rented sector to be taken out of the courts.

As regards the proposal in the Bill our main concern is that currently Legal Aid is not available for the Tribunal. (Private Rented Housing Panel). Where eviction, and all the technicalities of private rented sector law is concerned there will be many tenants who currently receive Legal Aid in the Courts who would not do so through the Panel system. An absence of Legal Aidp will infringe their Article 6 Rights and we would propose that some form of Legal Aid be made available for those threatened with eviction in cases before the PRHP (this is of course as usual subject to tests on the grounds of reasonableness and financial circumstances).

### Summary

We are very pleased to have had the opportunity to have made written submission followed by verbal submissions albeit at a comparatively late stage in this Bill.

We would have much preferred to have had the opportunity to take part in the initial discussions upon which the Bill is based and have no doubt that Parliament would have ended up being better briefed on the range of views of relevant had that taken place.

Nonetheless, of course, we remain appreciative of the time provided to us for us to articulate our views.

**Legal Services Agency**  
**16 January 2014**