

Private Housing (Tenancies) (Scotland) Bill

Written submission to the Infrastructure and Capital investment Committee

Govan Law Centre

Introduction

Govan Law Centre (GLC) welcomes the opportunity to submit written evidence to the Committee at Stage 1 of the *Private Housing (Tenancies) Scotland Bill*. We provide prevention of homelessness services across Glasgow.¹ Over the last few years we have observed an increasing number of private tenants seeking legal advice and representation across Glasgow, which is consistent with the sector almost doubling in size in the last twelve years.²

Part of the rapid growth in the PRS is related to an increase in buy-to-let mortgage lending, which has increased by over 40% since 2008 in the UK. While banks tightened their mortgage lending criteria after the financial crisis, and the Financial Conduct Authority introduced its Mortgage Market Review rules³ on responsible lending – this has not applied to the buy-to-let market. Likewise the EU's Mortgage Credit Directive has left this market largely untouched.⁴

The Bank of England's Financial Policy Committee recently expressed caution over the potential volatility of this market: "*Buy-to-let mortgage lending has the potential to amplify the housing and credit cycles, though the extent of the amplification is hard to judge because the market has only recently grown to significant levels*".⁵

As a matter of principle and economic prudence, GLC does not believe an ever-increasing PRS is capable of meeting Scotland's housing need. The sector falls short of being fit for purpose at present. We support UNISON Scotland's proposals for encouraging pension funds to invest in building good quality affordable housing for rent.⁶ There is a danger in considering this bill in isolation of the need for wider strategic housing policy in Scotland.

The case for change

Earlier this year GLC was awarded funding from the *Big Lottery in Scotland* to undertake original research into the experience of tenants in the PRS in Glasgow. Our '*Powerless*' report⁷, revealed that tenants often had very low expectations and poor value for rent was commonplace. Tenants often tolerated housing conditions that fell short of the statutory repairing standard. While private tenants had a number of important legal rights they were reluctant to take these up for fear of their tenancy

¹ For further details of our work see: <http://govanlc.blogspot.co.uk/p/about-glc.html>

² <http://www.gov.scot/Publications/2015/08/3720/0>

³ <http://www.fca.org.uk/firms/firm-types/mortgage-brokers-and-home-finance-lenders/mortgage-market-review>

⁴ <http://www.fca.org.uk/mcd>

⁵ See page 5 et seq., <http://www.bankofengland.co.uk/publications/Documents/news/2015/022.pdf>

⁶ http://www.unison-scotland.org.uk/housing/FundingAndBuildingTheHomesScotlandNeeds_Mar2013.pdf

⁷ "*Powerless: no expectations, choice or security*" (Govan Law Centre, October 2015) <http://www.govanlc.com/powerless.pdf>

being terminated. We believe the draft bill is a fantastic opportunity to address the systemic weaknesses in Scotland's PRS.

Security of tenure and eviction

So many of the problems within Scotland's PRS ultimately flow from the lack of security of tenure. The phenomenon of 'revenge evictions' where a tenancy is contractually terminated because a tenant stands up for his or her legal rights flows from the absence of security of tenure. This problem goes to the heart of the imbalance in power between tenants and landlords.

The Policy Memorandum⁸ notes that the current '*no-fault*' eviction ground has been excluded from the bill's new Private Residential Tenancy (PRT). The Memorandum explains, "*the Scottish Government considers that tenants should only be asked to leave their homes for a good reason*". The no-fault ground is a mandatory route to eviction. We welcome its removal, but note the Scottish Government has replaced it with considerably more mandatory grounds in schedule 3 of the bill.

The bill makes provision for 16 grounds of eviction all of which are mandatory except three, which contain a very restricted requirement to consider reasonableness.⁹ The mandatory grounds are so wide that they are almost akin to a '*menu*' from which a landlord could simply choose to evict a tenant; and the First Tier Tribunal would have no discretion but to grant an order for ejection.

For example:

- Ground 1 allows mandatory eviction if the landlord wishes to sell;
- Ground 3 permits the mandatory removal of a tenant if the landlord wants to refurbish the property; and
- Ground 4 allows a landlord to evict by choosing to put a member of their family (or their partner's family) into the property.

We believe these '*future intention*' mandatory grounds are ripe for exploitation by landlords and will be abused in practice. To put simply, a landlord need only set out the intention to refurbish, sell or move in a family member to obtain a mandatory eviction order. Such '*choice*' grounds mean that a tenant under the bill would never have any security of tenure in practice. How would a tribunal inquire into the candour of such future intent? The wrongful termination provisions (in sections 47-49 of the bill) provide cold comfort of modest damages (the equivalent of up to three months rent) – assuming an evicted tenant would (a) be in a position to prove this and (b) be in a position to pursue the matter. We do not believe these grounds are workable in practice.

We note that ground 1 undermines the principles of the Leases Act 1449 (an Act of the old Scottish Parliament which is still in force¹⁰). The 1449 Act means that when property is sold in Scotland, the buyer purchases it with the residential tenancy in

⁸[http://www.scottish.parliament.uk/S4_Bills/Private%20Housing%20\(Tenancies\)%20\(Scotland\)%20Bill/SPBill79PMS042015.pdf](http://www.scottish.parliament.uk/S4_Bills/Private%20Housing%20(Tenancies)%20(Scotland)%20Bill/SPBill79PMS042015.pdf) at paragraph 32.

⁹ Ground 2 contains a drafting error: paragraph 2(3)(b) refers to 'sub-paragraph (2)(c)' when it should be a reference to 'sub-paragraph (2)(d)'. The current Housing (Scotland) Act 1988 contains 9 discretionary grounds and 8 mandatory grounds (albeit ground 8 is now potentially discretionary).

¹⁰ <http://www.legislation.gov.uk/aosp/1449/6/paragraph/p1>

place (coining the term ‘sitting tenant’). We recommend the deletion of grounds 3 and 4. Ground 1 needs to be rethought if the Scottish Government’s intention of creating some security of tenure is to have any real substance.

Ground 13 creates a mandatory ground for antisocial behaviour and we can see no reason why it should not be subject to a reasonableness test to prevent eviction for minor incidents or where there are mitigating circumstances. Likewise there should be a proper reasonableness test for all rent arrears eviction grounds. Ground 14 makes it a mandatory ground for eviction if a landlord is not registered – why should the tenant be punished for the landlord’s failure?

Finally, the Memorandum asserts at paragraph 29, that the PRT is “*simplified and modernised*”. However, the bill effectively creates two types of tenancy with an ‘initial period’ tenancy and a PRT; it is far from simplified in terms of procedure and structure. Furthermore, the law with respect to PRS tenancies is now found across a range of statutes including the Rent (Scotland) Act 1984, Housing (Scotland) Act 1988, Private Rented Housing (Scotland) Act 2011, the Housing (Scotland) Act 2014 and now the bill. There is a case for consolidation.¹¹

Pre-action requirements

We are surprised the bill contains no enabling measures for pre-action requirements to help prevent avoidable evictions and homelessness. The Scottish Parliament has introduced pre-action requirements for both social tenants and homeowners.¹² Why not for private tenants? We would argue that the failure to do so unfairly discriminates against PRS tenants; as private tenants should not have less protection than homeowners or tenants of social landlords – particularly so given the changed role and landscape of the PRS in Scotland.

Transition to Private Rented Tenancies (PRT)

We would query why Part 2 of schedule 5 of the bill should rely upon transitions to the new PRT regime by agreement between landlord and tenant? The Scottish Government’s objectives would be more efficiently achieved by creating a “conversion date”, for example, as was used for Scottish secure tenancies.¹³

Consequential provisions and unlawful premiums

We would suggest a similar provision to section 27¹⁴ of the Housing (Scotland) Act 1988 is inserted into schedule 4 of the bill to apply the relevant provisions of the Rent (Scotland) Act 1984 to PRT.¹⁵

Rent variation

We note that Chapter 2 of Part 4 of the bill where a rent officer can set a fair open market rent is only available upon a rent increase in terms of section 20. This would exclude tenants who already paying unfair and excessive market rents. It would be

¹¹ A good recent example is the Consumer Rights Act 2015:

<http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted>

¹² <http://legislation.data.gov.uk/ssi/2012/127/made/data.html>;

<http://www.legislation.gov.uk/ssi/2010/317/introduction/made>

¹³ See: <http://www.legislation.gov.uk/ssi/2002/318/introduction/made>

¹⁴ <http://www.legislation.gov.uk/ukpga/1988/43/section/27>

¹⁵ <http://www.legislation.gov.uk/ukpga/1984/58/section/82> et. seq.,

logical to given tenants access to this mechanism where there was a *prima facie* case that they were paying above the market rent.

The First Tier Tribunal

At present PRS tenants have access to civil legal aid for sheriff court eviction proceedings (on the usual tests of financial eligibility, *probabilis causa litigandi* and reasonableness¹⁶). There should be an equivalent provision before the First Tier Tribunal and this could be dealt with in schedule 4 of the bill (amending the relevant Scottish legal aid enactments) in order for proceedings to be compliant with the Human Rights Act 1998.

Measures not in the bill

We would refer the Committee to our 'Powerless' report and the policy recommendations at page 25.¹⁷ We believe there are major problems in Scotland with private landlords harassing tenants, engaging in unlawful evictions, and ignoring the law on Tenancy Deposit schemes. We believe the current system of local registration of private landlords is incapable of tackling wider strategic issues which require Scotland wide co-ordination and enforcement.

We also believe that the Scottish Government should consider supporting the creation of structures to enable private tenants to have their own voice and engage directly in the policy making process – such as the successful Regional Networks for tenants of social landlords.

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¹⁶ <http://www.slab.org.uk/providers/handbooks/>

¹⁷ <http://www.govanlc.com/powerless.pdf>