

Private Housing (Tenancies) (Scotland) Bill

Written submission to the Infrastructure and Capital investment Committee

The Law Society of Scotland

Introduction

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The Property and Land Law Reform Sub-committee of the Law Society of Scotland (the committee) welcomes the opportunity to respond to the Scottish Parliament's Infrastructure and Capital Investment Committee call for evidence and has the following comments to make on the Private Housing (Tenancy) (Scotland) Bill introduced by Alex Neil on 7 October 2015. The committee has the following general comments to make forward:

General Comments

Section 6 Regulations under section 5

We are of the view that Section 6(1)(b) lacks clarity and might be easier to follow if it was clearer that the reference to the tenancy terms in the sub-section were references to the terms in Schedule 2, as outlined in Section 6(1)(a) above. For instance, does this mean that the Scottish Ministers don't need to include Schedule 2 terms, if the Schedule 2 terms already apply to the tenancies affected. It appears to be a provision to avoid duplication. However, if any of the schedule 2 terms don't apply then, under Section 6(1)(a) the regulations, in order to be valid, it must include the schedule 2 terms to fill the gap.

In relation to Schedule 2, we are of the opinion that there is no requirement on the rent officer to issue an order within any particular timescale.

There is no right on the part of the landowner to appeal against a failure on the part of the rent officer to issue an order.

At a practical level, we would recommend that target periods for determination of rent by rent officers are set out and monitored within the Rent Registration Service. Given the obligation to make a balancing payment is a single sum, it could create difficulties for a tenant if, after a prolonged period, a rent determination is made that results in a large additional payment.

Section 27 Determination of open market rent

In relation to, with regard to the calculation of the new rental by either the rent officer of the First Tier Tribunal:

(i) There is an assumption of a willing landlord, but no willing tenant. We would have expected both landlord and tenant to be assumed to be willing parties, to reflect the operation of a normal market valuation. Given the terms of section 27(3)(a) is the intention to assume that the rental is related to the existing tenant?

(ii) The hypothetical lease assumes a lease being granted on the rent review date. The assumption of a new letting would mean that the tenant was assumed to benefit from the minimum period for a Private Tenancy.

Section 31(2) Limits on power to designate a zone

In our view, Section 31(2) would not allow a landlord to seek a rental increase which related to an improvement to the wider environment within which the let property was located: for example the upgrading of a garden or an open space available for use by tenants, but not actually let to the tenants.

Section 33 Procedure for designating a zone: consultation and information

At Section 33, covering Rent Zones, we are of the view that although the Scottish Ministers have a duty to consult before implementing a rent zone it's not clear who they will consult with, for example, one landlord or several, one tenant or several, an estate agent, Shelter etc., or in what form that consultation should take place. It would be helpful to see a duty here on the Ministers to show that they have gathered "substantial" evidence of the need for a rent zone. At the moment all they need to do is share the response of their consultation. Given the impact a rent zone will have, we are of the opinion that it would be fairer if the Ministers are required to show how they have carried out a serious consultation and that only overwhelming evidence justifies the zone.

Section 37 (1) Qualification of sub-tenant protection

Section 37 (1) refers to the mid-landlord as the "landlord". Section 37(2) then refers to "landlord". In the subsection (2) references to "landlord", we are of the view that it needs to be references to the head landlord not to be the mid-landlord; Section 37 has to be clarified here. For instance, is it intended to provide protection to a sub-tenant, even where the head lease could not be a private residential tenancy?

In Section 44 Restriction on applying during the notice period

In relation to landlords, if the grounds for eviction are non-payment of rent for 3 or more consecutive months, and if they are faced with a further period of either 28 or 84 days dependent on whether Section 44(3) applies before they can apply to recover possession of their property, then the aggregate period of non-payment of

rental, in our view, could create a disproportionate financial burden where the 84 day period applies.

Section 49(3)(b) Wrongful-termination order

At Section 49(3)(b) in respect of wrongful-termination orders, the penalty is three months' rent, which may not be a large amount, and may not cover the cost of applying to the FTT, in the first place. The tenant may wish to see this being much higher – possibly 12 months if the tenant has occupied the property for a year or more. However, landlords, may take advantage of this position by terminating the tenancy for example, by marketing the property and then simply change their mind.

Section 52(5), Meaning of notice to leave and stated eviction ground

In relation to Section 52(5), it is noted that Section 40 requires that a tenant receives the notice, and Section 52(5) refers to an assumption as to when it is received. As drafted, this assumption would be rebuttable. It raises the question: how is a landlord to serve notice on a tenant who cannot be traced, or to prove to the Tribunal that the notice was received?

Schedule 1: Tenancies Which Cannot Be Private Residential Tenancies

If private providers of student accommodation do not fall within the exclusion from private residential tenancies, then:

- (i) there is a possibility of a creation of a two tier market, with Universities etc. being in a stronger position than private owners;
- (ii) this may make the construction of University Residences by private operators less feasible.
- (iii) gives students more control over termination: possible using it as leverage by extending a tenancy into the next university term, and preventing a fresh intake of students from obtaining accommodation.

Paragraphs 7(2) and 9 provide for a continuing test for the exclusion of a tenancy from being a private residential tenancy: "...from the time it was granted....". This would appear to mean that, whether or not a tenancy had become a private residential tenancy would depend upon facts about occupation, where those facts may become hard to establish. This, in our view creates uncertainty.

The test for exclusion under paragraph 7 (requiring both of subsections 2 and 3 to apply) is relatively narrow, and we would recommend that the test is applied once at the outset of the lease. On that basis, the nature of the lease is fixed at the point in time at which the landlord and the tenant choose to enter into the lease, and the nature of the tenancy agreement is not then altered due to facts that are unrelated to the tenant's occupation.

In Schedule 3 at Paragraph 2(2)(d), the inclusion of this sub-paragraph, but not the inclusion of an equivalent sub paragraph in Paragraph 1, is anomalous.

We are of the view that Paragraph 2(3): the reference to sub-paragraph (2)(c) should be to (2)(d).

At Paragraph 9(1), we would expect the reference to "tenant's home" to be a reference to the "tenant's only or principal home" for consistency and clarity.

**Alexa Miller, Law Reform
The Law Society of Scotland
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