

THE LAW SOCIETY
WRITTEN SUBMISSION

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

General Comments

This is a very significant Bill which covers a number of items. Part 1 relates to the right to buy; Part 2 relates to social housing; Part 3 relates to private rented housing; Part 4 relates to the regulation of letting agents; Part 5 relates to mobile home sites with permanent residents; Part 6 relates to private housing conditions and Part 7 is a miscellaneous Part dealing with various aspects of housing law.

Part 1 – Right to buy

Section 1, Abolition of the right to buy

The abolition of the right to buy is a policy decision of the Government on which the Society has no view. However the exercise of that right over the years since 1980 has reduced the availability of good quality affordable housing in the public sector. It is important for Government to encourage the public and private sectors to build sufficient houses so that people can have access to good quality affordable homes.

Section 2, Amendment of right to buy provisions

The Society has no comments to make.

Part 2 – Social housing

Sections 3 – 7 deal with the allocation of social housing. The provisions appear to be reasonable and will achieve their objective.

Sections 8 – 12 deal with short Scottish secure tenancy in the context of anti-social behaviour.

These provisions seem reasonable and will attain the objective set out.

Sections 13 – 16 deal with the Scottish secure tenancy in connection with assignation, sub-let, joint tenancy, succession, grounds for eviction (where there is anti-social behaviour) and recovery of possessions. These provisions seem reasonable and will attain their objective.

Part 3 – Private rented housing

Sections 17 – 21 deal with the transfer of the sheriff's jurisdiction to the first tier tribunal. The Society approves of this change.

Sections 22 – 25 deal with landlord registration and the time limit for determining applications and the enforcement of the repairing standard.

The Society approves of these provisions.

Part 4 – Letting agents

Part 4 creates a register of letting agents and requires letting agents to register operating as a letting agent without registration is a criminal offence. Letting agency work means things done by a person in the course of that person's business in response to relevant instructions which are:-

- (a) carried out with a view to a landlord who is a relevant person entering into or seeking to enter into a lease or occupancy arrangement by virtue of which an unconnected person may use the landlords house as a dwelling; or
- (b) for the purpose of repairing, maintaining, improving, insuring or otherwise managing a house which is or is to be subject to a lease or arrangement mentioned in paragraph (a).

Section 26 requires Scottish Ministers to establish and maintain a register of letting agents.

The Society supports the regulation of letting agents. This will be of assistance to landlords and tenants alike.

However the Society is of the view that it is inappropriate for solicitors who act as letting agents to be subject to an additional registration process governed by Scottish Ministers and that Scottish solicitors should be exempt from this scheme. The reasons for the exemption are:-

- 1) The legal profession must be independent of Government.
- 2) Solicitors in Scotland are regulated by the Law Society of Scotland and subject to stringent rules of admission and detailed practice rules covering professional ethics and conduct and many other aspects of practice. Those practice rules require the approval of the Lord President.
- 3) Solicitors are subject to an independent, statutory complaints body, the Scottish Legal Complaints Commission.
- 4) Under the Solicitors (Scotland) Act 1980, the Law Society of Scotland maintains a wide set of public protections including the Master Policy for professional indemnity and the Scottish Solicitors Guarantee Fund which provides compensation in the event of dishonesty.

- 5) Creation of the scheme of regulation for letting agents which would include solicitors would duplicate some aspects of regulation and add cost and expense to solicitor businesses.

The Private Landlords and Letting and Managing Agents (Regulation) Bill, which is a private members bill in the House of Commons creates the letting agent regulation system by amending the Estate Agents Act 1979. That Act does not apply to solicitors in England and Wales.

Section 27 sets out the details of the application process for registration.

Section 28 makes it an offence for a person who makes an application to provide false information.

Section 29 provides that Scottish Ministers must determine an application and must enter the applicant in the register if they are satisfied that the applicant is a fit and proper person to carry out letting agency work.

Section 30 provides the considerations which Scottish Ministers must have regard to in determining whether a person is a fit and proper person to become a registered letting agent. It is material to this consideration if the person has been convicted of an offence involving fraud or other dishonesty, violence, drugs, firearms or is a sexual offence or has practiced unlawful discrimination on the grounds of any of the protected characteristics in the Equality Act 2010 or has contravened any provision of:-

- (a) The law relating to housing;
- (b) Landlord and tenant law; or
- (c) The law relating to debt

Material information also relates to compliance with the letting agent code of practice, compliance with any other letting code or failure to comply with a duty to use a letting agent registration number or contravention of any letting agent enforcement order or failure to pay any costs in connection with an application to the first tier tribunal.

The definition of a “fit and proper” person in the context of section 30 is limited to certain defined characteristics. It is unclear what is meant by any contravention in relation to the “law relating to debt” or the “law relating to housing”. These expressions need further definition. Does ‘person’ in this section only relate to a ‘natural person’?

The section does not include contravention of professional rules or removal from the roll of a professional body of which the applicant for registration as a letting agent may have been a member and it also fails to take into account ‘associations’ which the applicant may have.

Furthermore, there is no requirement for the person who wishes to become a registered letting agent to have training or qualifications in letting property, nor to have in place any client protections. It is difficult to envisage how this

system will actually protect prospective landlords or tenants (except in a very basic way) or enhance the services of letting agents.

Section 31 relates to the criminal record certificate of a fit and proper person.

Section 32 requires Scottish Ministers to allocate a letting agent registration number to each registered letting agent. This number must be included in any document sent to a landlord, tenant, prospective landlord or prospective tenant during the course of the agent's work; any property advertisement or any other document or communication specified by Scottish Ministers.

Section 33 imposes of registered letting agents a duty to inform Scottish Ministers of any information provided by the agent should it become inaccurate. It is an offence to fail to comply with this obligation.

Section 34 requires Scottish Ministers to remove a registered letting agent from the Register if the agent has not made an application for renewal at the expiry of three year's registration.

Section 35 provides Scottish Ministers with the power to remove a registered letting agent from the register if they are satisfied that the person is no longer a fit and proper person to carry out letting agency work. Scottish Ministers are required to provide notice to the individual who is subject to the revocation order. Scottish Ministers must consider any representations before making the determination.

There is no provision for making oral representation or for the agent to be represented in connection with the making of representations.

Section 36 – appeals

A person may appeal to the First tier Tribunal against the decision by Scottish Ministers under Section 29 to refuse to enter that person's name on the Register or to renew a registration or under Section 30 to remove the person from the Register.

Section 37 requires Scottish Ministers to note a refusal to enter a person in the Register or renew an entry on the Register. It also requires Scottish Ministers to note a removal on the Register.

Section 38 provides that where a person has been refused entry to the Register, or has been removed from the Register, no costs incurred by that person in respect of letting agency work are recoverable and no fees may be charged.

There does not appear to be a sanction for seeking to recover expenses or fees in these circumstances.

Section 39 provides that it is an offence to operate as a letting agent without registration.

Section 40 provides that it is an offence for using a registration number where the person is not registered.

Section 41 provides Scottish Ministers with discretion to make by regulations a code of practice which provides the standard of practice of persons who carry out letting agency work.

Solicitors are already subject to a code of standards as part of The Law Society of Scotland Practice Rules 2011. It is inappropriate for Scottish Ministers to set a code of practice for solicitors.

Section 42 prohibits contracting out of the letting code of practice or to impose any penalty disability or obligation in the event of a person enforcing compliance by the letting agency with such a duty.

Section 43 provides that a tenant or landlord may apply to the First-tier Tribunal for a determination that a letting agent has failed to comply with the letting agent code of practice.

Section 44 provides for the First-tier Tribunal to vary or revoke enforcement orders.

Section 45 provides that if a letting agent fails to comply with an enforcement order from the First-tier Tribunal, it may notify Scottish Ministers of that failure.

Section 46 provides that it is an offence for a letting agent who, without reasonable excuse fails to comply with a letting agent enforcement order.

Section 47 provides for transfer of jurisdiction of actions involving letting agents.

Section 48 provides for offences by bodies corporate.

Section 49 allows Scottish Ministers to delegate any of their functions relating to the Register to such persons as they consider appropriate.

This provision requires further thought. The qualifications and training of the delegate, the method of appointment and removal and the powers which the delegate will exercise should be stated on the face of the Bill.

Section 50 amends the 2004 Act in respect of landlord registration where an agent is a registered letting agent.

Section 51 provides the definition of letting agency which means “things done by a person in the course of that person’s business in response to relevant instructions which are carried out with a view to a landlord who is a relevant person entering into or seeking to enter into a lease or occupancy arrangement by virtue of which an unconnected person may use the landlord’s house as:-

- (a) a dwelling; or
- (b) for the purpose of repairing, maintaining, improving, insuring or otherwise managing a house which is, or is to be subject to a lease or arrangement mentioned in Paragraph A.

Section 51(1)(b) is very widely drafted and could include a number of people in the definition of those doing 'letting agency work' who are not actually letting property.

The Private Landlords and Letting and Management Agents (Deregulation) Bill contains a definition of letting agents work as follows:-

- (a) things done by any person in the course of a business (including a business in which he is employed) pursuant to instructions received from another person (in this section referred to as "the client") who wishes to let or have the letting of an interest in land managed (for example, the collection of rents on his behalf) –
 - (i) for the purpose of, or the view to, effecting the introduction to the client of a third person who wishes to let an interest in land; or
 - (ii) after such introduction has been effected in the course of that business, for the purpose of securing the letting of the interest in land; or
 - (iii) the for the purpose of, or with a view to, managing the letting of the interest in land on behalf of the client; or
 - (iv) for the purpose of, or with a view to, block management of interests in land; and
- (b) management activities undertaken by any person in the course of a business (including a business in which he is employed) in connection with land or interests in land".

This is a more comprehensive definition which might be (with appropriate modifications) more effective than the one in the Bill.

Section 52 provides for interpretation of Part 4.

Part 5 – Mobile home sites with permanent residents

The Society has no comment to make.

Part 6 – Private housing conditions

The Secretary welcomes the Tenement Management Scheme in Section 77.

Part 7 – Miscellaneous

The Society has no comment to make.

Part 8 – General

The Society has no comment to make.

The Law Society
21 January 2014