



CONSULTATION ON PRIVATE SECTOR RESIDENTIAL TENANCIES



The Scottish Government is on a mission to overhaul and improve the country's private residential rented sector. In this article, we examine the current system and the key proposals outlined in the government's consultation.

The Scottish Government has been consulting on proposals to overhaul the private residential rented sector in Scotland. The aim is to create a "new, modernised and simplified tenancy system", and eliminate some of the difficulties in the current regime, by improving security of tenure for tenants and providing appropriate protection for landlords, lenders and investors.

The original consultation, launched in October 2014, received more than 2,500 responses. The responses were published on 24 March 2015 and the findings then formed the basis of a second consultation which closed on 10 May 2015. The consultations and report can be found at <http://www.gov.scot/Topics/Built-Environment/Housing/privaterent/government/Tenancy-Review>

Key proposals

- Replace assured tenancies and short assured tenancies with a new private tenancy.
- Modernise and simplify the right of possession.
- Remove outdated repossession grounds.
- Remove "no fault" repossession ground.
- Clarify what happens at the "ish" (or end date).
- Simplify notice procedures.
- Retain a six-month minimum lease period.
- Replace month-by-month "roll-over" arrangements.
- Introduce a new model tenancy agreement.

The current tenancy regime

There are currently two main types of residential lease in Scotland – an **assured** tenancy and a **short assured** tenancy. Most privately rented properties, which are the

tenant's main or principal home, fall into one or other of these categories. A number of tenancy types are excepted from the current regime, including holiday lets, university halls of residence, rented property where the landlord is also resident, and local authority and registered social landlord lets. The consultation suggests that these exceptions will continue under the new proposals.

In assured tenancies, the tenant has security of tenure even after the contractual period has ended. The landlord may only repossess the property if it establishes one of the 17 grounds¹ for repossession prescribed in the Housing (Scotland) Act 1988.

¹ The repossession grounds include: That the landlord requires the property for itself (or its spouse) for use as its principal home; the lender has called up the security and is exercising its right of sale; at least three months' rent is outstanding, both on the date on which the landlord notifies the tenant that they are intending to seek possession of the property, and on the date of court hearing; and the tenant has breached the terms of the lease (other than the provisions relating to payment of rent).

Although there are a multiplicity of grounds, it is not an easy task for a landlord to get a repossession order over an assured tenancy because, although some of these grounds are mandatory (i.e. if they are established, the Court must grant the repossession order), many are discretionary, meaning that it is for the Court to decide if it is reasonable for the order to be granted. Accordingly, many landlords prefer to grant short assured tenancies, to give them greater flexibility if they want to remove the tenant. In particular the landlord is entitled to have the lease terminated solely on the basis that the contractual term has come to an end: the "no-fault" ground for



repossession. This ground is not available for assured tenancies.

For a short assured tenancy to be created, the landlord must serve notice on the tenant, in the correct statutory form, before the start of the tenancy. Service of the correct notice is essential to create a short assured tenancy. If a Court Order is required at the end of a short assured tenancy (most tenants simply leave, or renew, at the end of a short assured tenancy), provided the sheriff is satisfied that the contractual term has ended, that correct notice of termination has been given, and that the lease has not renewed by tacit relocation, then the sheriff must grant the repossession order. The “no-fault” ground is the main reason landlords favour short assured tenancies, since it automatically applies at the end of the tenancy, and there is no need to establish any of the other grounds.

The proposed changes for residential tenancies in the private sector

A new type of private tenancy

A new single tenancy arrangement will replace the current system of assured and short assured tenancies with a revised and reduced list of grounds for repossession, a minimum duration and an end to the practice of “rolling-over” tenancies on a month-by-month basis once the original contractual period comes to an end. Pre-tenancy notices will be discontinued and minimum periods of notice to quit are proposed, depending on the length of the original tenancy.

A model form of tenancy agreement, containing both mandatory and discretionary clauses will be produced, and there will be a standardised period of notice prior to raising repossession proceedings, which will be heard by a new Private Rented Sector Tribunal, instead of a sheriff.

Repossession grounds

The principal change proposed is the removal of the “no-fault” ground; it will no longer be possible for a landlord to recover possession simply because the contractual term of the lease has expired. While the first consultation suggested reducing the grounds to eight, and making them all mandatory, the second consultation proposes 11 grounds in total, the following eight of which are mandatory:

- The landlord wants to sell the property.
- The mortgage lender wants to sell the property (i.e. it is a heritable creditor in possession exercising its power of sale).
- The landlord (or a member of the landlord’s family)

wants to live in the property.

- The property is to be refurbished (i.e. demolish or reconstruct the whole or a substantial part of the property, in which case the landlord is obliged to pay the tenant’s removal costs).
- A change of use of the property (i.e. from residential to non-residential, in which case the landlord is obliged to pay the tenant’s removal costs).
- Abandonment of the property.
- The tenant is no longer employed by the landlord.
- The property is required to house a full-time religious worker.

The three further grounds are:

- The tenant has failed to pay full rent over three months. This can be mandatory where the full amount outstanding equates to more than one month’s full rent (provided the arrears have not been caused by a delay in the tenant’s housing benefit) otherwise the ground is discretionary;
- The tenant has displayed anti-social behaviour (mandatory where the tenant is convicted of using the property for immoral/illegal purposes or convicted of an offence committed in the property or the locality of the property and the offence is punishable by imprisonment but otherwise discretionary); or
- The tenant has otherwise broken the tenancy agreement (this is only mandatory where one of the mandatory grounds of the new model tenancy agreement has been broken).

Unless the landlord can establish one of these grounds, there will be no mechanism, other than by agreement, by which the landlord can have the tenant removed and take back the property. Effectively, all new residential tenancies will be equivalent to assured tenancies.

Changes to duration

It is proposed that the ability to have a tenancy continuing on a month-by-month basis after the initial term will be removed. This is often a feature of short assured tenancies. Instead either a new lease will need to be put in place, or the lease will renew for the same period as the original tenancy, by tacit relocation.

A minimum duration of six months is proposed, and, while no statutory maximum duration is proposed, it should be noted that there is a statutory limit on the maximum duration for residential leases, of 20 years².

² Under Section 8 of the Land Tenure Reform (Scotland) Act 1974.



Notice periods

There will no longer be a requirement to issue a pre-tenancy notice. This was a key feature of the short assured tenancy, to ensure availability of the no-fault repossession, and distinguished it from an assured tenancy.

Standardised periods for notices to quit are proposed. Broadly, the length of notice period that the landlord requires to give the tenant will depend on how long the tenant has lived at the property: initially the proposed periods ranged from four to 16 weeks, but the latter was felt too long, particularly if the landlord was looking to sell, and given a greater risk of tenant abandonment.

The new proposal is for four weeks' notice where the tenant has been in occupation for six months or less; and 12 weeks' notice where they have occupied for more than six months. If, however, repossession is sought because of failure to pay three months' rent, or the tenant's anti-social behaviour; or some other breach by the tenant of the tenancy agreement then only 28 days' notice is required, regardless of the period of the tenant's occupation.

Tenants wishing to give notice to quit to their landlord must give a minimum of four weeks' notice if they have occupied the property for six months or less, and eight weeks' notice when they have lived in the property for more than six months.

Regardless of the ground for repossession sought, a standard four-week period is required before a landlord can raise legal proceedings.

In order to simplify the notices – regardless of whether it is the landlord or the tenant serving the notice – only one Notice to Leave needs to be served.

A model tenancy agreement

There is currently no standard form of wording for a private residential lease and many versions of tenancy agreements can be complicated and difficult to understand. Accordingly, a model form of tenancy document is proposed. This will set out certain mandatory clauses, and should include information that currently has to appear in Tenant Information Packs (which will no longer be required)³. Other discretionary clauses will be provided for the parties to use, if required, and there is to be prescribed statutory guidance which will clearly explain the terms of the tenancy agreement.

³ A Tenant Information Pack must provide details of the type of tenancy,

how to bring it to an end and grounds for repossession; information about the property, including an energy performance certificate, an inventory of contents and details of council tax; the minimum requirements for the standard of repair of the property; landlord registration and HMO information; details of the parties' main responsibilities and the tenancy deposit scheme.

Levels of rent in the private sector

The first consultation sought views from respondents on current levels of rent in the private residential sector and whether the Scottish Government should take any action on rent levels, including whether there should be any rent review conditions in the new tenancy system. The current system contains some rent setting provisions. A tenant under an assured tenancy can refer a proposed increase in rent from his landlord to a Private Rented Housing Committee (PRHC) for a determination on the rent level, and a short assured tenant can also ask a PRHC to rule on what would be a reasonable rent for the property subject to the tenancy.

Although the majority of respondents said no action should be taken to control rents or rent levels and it has been accepted that no general controls on rent will be proposed, the Scottish Government wishes to include provisions to help safeguard tenants against "unjustified and excessive increases". Therefore, there should be no more than one rent review in any 12-month period and 12 weeks' notice of the increase in rent should be given. In addition, the second consultation indicates that "hot spot areas" could potentially be regulated in the future. A local authority will be able to apply to the Scottish ministers for an affected area to be designated a "rent pressure area" provided it evidences that rents in the area were increasing excessively. If designated a rent pressure area ministers could decide to limit the rate of rent increase in that area for a limited time period.

Impact on Student Lettings

For the "direct" student letting market, it is clear that the proposals may cause an issue for landlords and investors. In the case of, for example, a city centre student accommodation asset comprising a number of rooms which are let directly to students, during term time the property may be let to students, while in the summer the property may be operated as accommodation for summer or festival lets (attracting a premium rent for that summer period).

These privately let properties do not fall within the university halls of residence exemption and so, unless one of the 11 possession grounds applied, a landlord would have no basis to remove the student tenant if he failed to vacate.



SHEPHERD+ WEDDERBURN

In our response to the second consultation, we highlighted the impact that the proposals may have on the student housing market. We have proposed that the Scottish Government consider an exception for student housing, so that students are not given security of tenure beyond the agreed lease term, where the accommodation is leased for the purpose of providing the tenant with accommodation for the whole or part of that tenant's course of study at an educational institution.

Overview

The proposals contained in the consultation would improve security of tenure for many tenants by providing a greater degree of certainty as to length of tenure, notice periods required, and the grounds on which a landlord is entitled to seek repossession.

However, for landlords, including investors, and their lenders, the proposals will remove the most popular type of arrangement – the short assured tenancy – meaning that repossession will only be available if the landlord can establish one of the grounds. It might be argued

that landlords will have greater flexibility with the new grounds for repossession such as intention to sell, or a change of use which are not currently available.

The rolling month-by-month arrangements can provide welcome flexibility for both landlords and tenants under the current regime. With the removal of this flexibility, tenants and landlords of longer term lets will need to factor in potentially longer lead-in periods for quitting or obtaining vacant possession under the new arrangements.

Market forces play a major role in setting of rent levels, and can vary depending on location, and housing demand. While it is a necessary part of any tenancy scheme to provide a forum for appeal against unreasonably high rent increases, the imposition of any form of rent control mechanism is to be discouraged, and it would be preferable for market rent levels to be influenced by open market forces.

For further information or advice on any of the issues discussed in this briefing note, please get in touch with your usual Shepherd and Wedderburn contact.

Key contacts



Hugh Smith
Partner
T +44 (0)131 473 5293
M +44 (0)771 863 7294
E hugh.smith@shepwedd.co.uk



Lynn Simpson
Assistant
T +44 (0)131 473 5173
E lynn.simpson@shepwedd.co.uk



Julia Kidd
Assistant
T +44 (0)131 473 5707
E julia.kidd@shepwedd.co.uk