

Stage 1 written evidence for the Housing (Scotland) Bill

Background

The Bill was introduced in the Scottish Parliament on 21 November 2013. The Infrastructure and Capital Investment Committee is the lead committee for Stage 1 consideration of the Bill. The Committee will consider written submissions and take oral evidence from mid-January to mid-March 2014.

Written submissions at Stage 1 must be received by **Friday 28 February**. This gives us a little time after discussion at our meeting on 29 January to pull together our submission.

Forming a Committee view

Comments have been received from Tom Mullen and Sarah O'Neill (these will be circulated with this paper for ease of reference).

On the basis of the comments received, it is proposed that the Committee restricts its comments on the Bill's provisions to relevant provisions in Part 3.

In respect of those provisions, it is proposed that the Committee form a view (including whether to comment at all) on :

- the desirability, from a user perspective, of moving housing cases from Sheriff Court to Tribunal
- a possible further move of housing cases to the new first tier tribunal in the future
- whether a difference of approach between social and private rented tenants causes disadvantage or disparity, and what issues may arise out of that
- the impact of additional, new, caseload on the PHRP, and how to assure it is ready for that
- the availability of legal aid or other forms of assistance, for all or particular types of cases that come to the tribunal
- the (possible) charging of fees (in relation to specific types of cases?)
- mediation; dispute prevention and resolution mechanisms (reference made in para 131 and 152 -155 of Policy Memorandum

Proposed timetable

To accommodate the finalising of a response to Welfare Funds (Scotland) Bill consultation paper by 14 February, it is proposed :

- a draft submission to be circulated to the Committee by 12 February
- comments to be received by 17 February
- final submission circulated by 19 February.
- submission 21 February

Tom Mullen - Comments on Housing (Scotland) Bill

Short Steer

The main points in the Bill are:

Part 1 abolishes the right to buy.

Part 2

- amends the law on preferences in allocating social housing
- provides for the use of short Scottish secure tenancies where there has been a history of antisocial behaviour and for temporary lets to homeowner and makes other changes to the short Scottish secure tenancy regime

Part 3

- transfers jurisdiction for civil cases relating to the private rented sector from the sheriff court to the First-tier Tribunal
- introduces a time limit for determining applications for landlord registration
- and allows local authorities to apply to the private rented housing panel for enforcement of the repairing standard

Part 4 provides for a registration system for letting agents.

Part 5 amends the site licensing requirements for mobile home sites with permanent residents.

Part 6 amends local authority powers to enforce repairs and maintenance in private homes.

Part 7 makes a number of miscellaneous amendments to other aspects of housing law.

I think we should concentrate on Part 3 (transfer of jurisdiction from the sheriff court to the First-tier Tribunal) and (allowing local authorities to apply to the private rented housing panel for enforcement of the repairing standard)

Paper

Part 3 of the Housing (Scotland) Bill deals with private rented housing. It makes a number of changes to the law of landlord and tenant, introduces new forms of regulation, extends the duties of local authorities and makes changes to the jurisdiction of courts and tribunals. The key changes include:

- Transfer of jurisdiction from sheriff court to the First-tier tribunal;
- further provision on landlord registration;
- permitting third party applications to enforce the repairing standard.

Part 4 introduces a scheme of registration for letting agents.

Transfer of jurisdiction from sheriff court to the First-tier tribunal

The Bill proposes that the First-tier tribunal (FTT) will take over the functions and jurisdiction of the sheriff court in a number of areas. These include:

- regulated and assured tenancies
- the repairing standard
- the right to adapt rented houses
- landlord registration
- houses in multiple occupation

Regulated and assured tenancies

S. 17 transfers the functions and jurisdiction of the sheriff in relation to actions arising from:

- regulated tenancies;
- Part VII contracts; and
- Assured tenancies.

This transfer does not include any functions or jurisdiction relating to criminal offences.

The FTT will, therefore, take over the following functions, amongst others, in relation to both regulated and assured tenancies:

- orders for possession (both regulated and assured tenancies)
- damages for unlawful eviction (both regulated and assured tenancies)
- applications to fix the terms of assured tenancies where landlords fail to give tenants a tenancy document.

The repairing standard -private sector tenancy repairs

The functions of the sheriff in relation to the repairing standard under the Housing (Scotland) Act 2006 which covers private sector tenants generally are transferred to the FTT.

The FTT will, therefore hear claims that the landlord has failed to comply with the repairing standards and will also consider applications to contract out of the repairing standard.

The right to adapt rented houses

S. 52 of the Housing (Scotland) Act 2006 allows a private sector tenant to apply to carry out any work in the house which the tenant considers necessary for the purpose of making the house suitable for the accommodation, welfare or employment of any disabled person who occupies, or intends to occupy, the house as a sole or main residence, or in respect of which an energy efficiency grant is payable. The landlord's consent is required but it must not be unreasonably withheld. The tenant has a right to appeal to the sheriff against a refusal of consent or the imposition of conditions.

S. 19 of the Bill adds a new s. 66A into the 206 Act which will transfer the right of appeal to the FTT.

Landlord registration

The FTT will take over several of the sheriff's functions under the Antisocial Behaviour etc. (Scotland) Act 2004 including hearing:

- appeals by landlords against a local authority's refusal to enter the landlord in the register (s. 92 (5), 2004 Act), and
- appeals against a local authority notice under s. 94 that no rent should be payable for the tenancy (s. 97, 2004 Act).

Houses in multiple occupation

s. 21 allows ministers by regulation to transfer to the FTT the sheriff's function of hearing appeals against local authority decisions in relation to HMOs.

New jurisdictions

The Bill introduces a number of new jurisdictions which will be conferred on the FTT rather than the sheriff:

- S. 22 introduces a new s. 85B into the 2004 Act which requires the local authority to determine an application for registration within 12 months. The period may be extended by the FTT on application by the local authority.
- Third parties will be able to apply to the PHRP for a determination that the landlord has failed to comply with the repairing standard. The permitted third parties are a local authority and any person specified in an order made by the Scottish Ministers. It is assumed that this jurisdiction will be transferred from the PHRP to the FTT.

The policy memorandum gives as examples of other possible third parties with an interest in maintaining the property in good repair, neighbours, owners of property in communal buildings and fire and rescue services

- Part 4 introduces a scheme of registration for letting agents. A person may appeal to the FTT against a decision of the Scottish Ministers to refuse registration or to remove a person from the register, and a tenant or landlord may apply to the FTT to enforce the Letting Agent Code of Practice which will be issued under s. 41.

Commentary

Impact of Transfer of Jurisdiction/New Jurisdiction

The Bill adds a range of matters to the jurisdiction of the FTT as successor to the PHRP. The most substantial addition to the jurisdiction is the transfer of actions for possession. This by itself would, on current figures, add 500 cases to the current PHRP case-load of 250. This produces a total of only 750 cases which is not especially high in absolute terms. None of the other transferred functions or the new functions are likely to be on the scale of the transfer of possession cases so the projected annual case-load would be unlikely to exceed 1,000 cases in the short term. However, although the figure is not high in absolute terms the case load is likely to more than triple which is a major adjustment to which must be added the need to consider new areas of law, e.g. recovery of possession. It is essential that the

Scottish Government and the Scottish Tribunal Service have a clear plan for managing this increase covering e.g. recruitment and training of member, provision of venues for hearings, case administration etc.

Advice and Representation

Para 147 of the Policy Memorandum states:

Tribunal procedures are designed to be accessible and understandable and do not generally require legal representation. This will also be the case in the PRS tribunal. Parties would be able to be represented if they wish but it is anticipated that this would not be the norm and the tribunal members would have the ability and expertise to ask questions and seek further information in particular cases to help parties make the best of their case. Procedures would be less formal than is currently the case in the courts.

Para 160 states:

The intention is that legal representation will not become the norm in proceedings before the Tribunal. However, it is recognised that some parties with protected characteristics may need support to participate effectively in proceedings. The Scottish Government is working with the Scottish Legal Aid Board to assess how best to provide this support. It may be delivered in the form of assistance by way of representation similar to some other tribunals.

Much of the research on tribunals has suggested that representation (not necessarily legal representation) tends to increase the prospects of success of appellants/parties. One recent study (Adler et al) did not find the same 'representation premium' as earlier studies but did find that pre-hearing advice was crucial to unrepresented applicants; those who neither received advice nor were represented had lower success rates than those who had either advice or representation.

One effect of the Bill is, therefore, likely to be to take away an existing opportunity for legal aid-funded representation in a serious matter – eviction from one's home – from a large number of persons. The Scottish Government must be satisfied that in relation to the jurisdictions to be exercised by the FTT, but especially in eviction cases, the tenant has a fair chance to defend or assert their interests. We, therefore, welcome the flexibility over the availability of legal aid funding that the Policy Memorandum suggests, but consider that para. 160 takes too narrow a view of when publicly funded representation might be available.

We also consider that there should be a clear strategy for the provision of advice and representation going beyond legal aid availability.

Tom Mullen
20 January 2014

Housing Bill - Comments from Sarah O`Neill

I think the movement of housing cases from the sheriff court to a tribunal is to be welcomed. The Civil Justice Advisory Group established by Consumer Focus Scotland and chaired by Lord Coulsfield recommended that there should be a specialist jurisdiction to deal with housing cases (recommendation 10, pages 64-66):

<http://webarchive.nationalarchives.gov.uk/20130129065030/http://www.consumerfocus.org.uk/scotland/files/2011/01/Civil-Justice-Advisory-Group-Full-Report.pdf>

This was essentially on the basis that many housing cases involved other complex issues, and that a more interventionist, specialist and less formal forum would be a better way of identifying and resolving the issues faced by users. Among other issues, many parties are not represented and few sheriffs are knowledgeable about housing law. A tribunal may also be less intimidating for users than a court- going to court can cause real fear and anxiety for defenders in housing cases, as found by Consumer Focus Scotland/SLAB research 'The Views and Experiences of Civil Sheriff Court Users' from 2009.:

<http://www.consumerfocus.org.uk/scotland/files/2010/10/Court-Users-Research-Final-Ipsos-MORI-report.pdf>

That group ,however, believed that all housing cases should be dealt with by this new forum- including cases relating to social tenancies and mortgage repossessions. This was seen as important in terms of consistency of approach, and also as being in the interests of users for the reasons stated above.

The bill only provides for private rented sector cases to go to the tribunal, however. While there is an argument that private tenants face particular disadvantage, in my experience (admittedly now quite some time ago) sheriffs does not always fully consider 'reasonableness' in social sector eviction cases as they are required to do, and most tenants are unrepresented - and as the CFS/SLAB research above found, can find court a very intimidating experience.

In terms of numbers, according to the policy memorandum for the bill, there are only around 500 PRS eviction cases before the courts each year. This means that the vast majority of housing cases will continue to be dealt with by the courts. I don't know the exact current figures, but social rented sector evictions make up the vast bulk of housing cases in the courts.

I think it is a pity that only private sector tenancies are included in the bill at this stage. While it will provide access for PRS tenants to a more specialist and less formal dispute resolution mechanism, and end the split between the courts and the prhp, it means that the vast majority of tenants in Scotland will still need to go to court. I see there is a suggestion in the policy memorandum that consideration might be given to including the social rented sector model in the future, and I that moving all social rented tenancies from the courts would have a significant effect on both the business on the court and that of the new tribunal. It is not clear how far in the future this might happen, however.

In the meantime, this has the potential to disadvantage social rented tenants, and will lead to a disparity of approach in how tenants are dealt with in the civil justice system, depending on the type of tenancy they have.

This also means that the new tribunal will be a solely party to party tribunal. There is also an argument that it would be more logical to include social rented tenancies within a tribunal-

although in many cases, the landlords are now housing associations rather than local authorities, these seem a better fit with the citizen v state view of tribunals. The CJAG report (above) also took the view that housing was a key area for the application of the principle of 'getting it right first time', which might be easier to implement in relation to social landlords rather than private ones, most of whom are individuals with one or two properties.

Fees- I see there is provision for fees to be charged- it must be ensured that these are never charged to tenants who are defending an eviction case or bringing a repairs case.

The proposal to take forward mediation alongside the tribunal is to be welcomed.

Finally I think the provision allowing local authorities to make a direct application to the prhp is to be welcomed, as the current system requires the tenant to make an application- some may be reluctant to do so, given their vulnerable situation and imbalance of power vis a vis the landlord.

I will leave the comments on the Scottish Welfare Fund to those who are more familiar with developments in that area.

Comment from John Sturrock

I have skimmed the bill headings looking for appropriate dispute prevention and resolution mechanisms. I don't see any. Is that something we should consider?