



# FACULTY OF ADVOCATES

## **Faculty of Advocates' Response to the Infrastructure and Capital Investment Committee's Call for Views on the *Private Housing (Tenancies) (Scotland) Bill***

1. The Faculty of Advocates generally has no views on issues of social policy. Its views on the Bill, as with other such consultations, therefore relate to its technical, legal aspects, and to its effect upon the administration of justice and the rule of law.
2. The Faculty is in agreement that reform of the legislation relating to the private rented housing sector is desirable. The previous regimes—the *Rent (Scotland) Act 1984* and the *Housing (Scotland) Act 1988*—imposed statutory restrictions onto an essentially common law system where variation as to particular aspects of tenancy agreements was rife. The result, in our view, was confusion and lack of clarity amongst landlords, tenants and their professional advisers, in particular in relation to security of tenure. This frequently led to eviction actions being delayed and/or dismissed on technical grounds, rather than on the substantive merits of the case. Effective access to justice was thereby impaired.
3. However, the Faculty does have some comments about aspects of the proposed Bill, which we note below.

### **Parts 1 and 2: statutory terms**

4. It appears to be the effect of section 5(2) that the statutory terms for the tenancy prescribed by the Scottish Ministers will be implied terms of the tenancy. However, sections 12 and 13 appear to envisage a procedure by which the First-tier Tribunal would redraw the terms of a tenancy agreement, because it contains terms that “purport to displace” the statutory terms. We are not clear why this procedure would be necessary, if the statutory terms have effect by virtue of the legislation. We would suggest that it would simpler to insert a provision that any contractual term which is contrary to a statutory term is of no effect.

### **Part 5: chapter 1**

5. Section 35 is a somewhat sweeping provision, to the effect that a PRT “may not be brought to an end by the landlord, the tenant, nor by any agreement between them, except in accordance with this Part”. This seems to rule out various ways in which a tenancy may terminate at common law, say by renunciation, the parties entering into

a new agreement, the operation of a break clause, total or partial destruction of the subjects, and so on.

### **Part 5: chapter 2**

6. As indicated in the Faculty's response to the *Second consultation on a new tenancy for the private rented sector* ("the second response"), we regard it as undesirable that tenants have no right to bring the tenancy to an end during the tenancy's initial period. It is a fundamental aspect of contract law that a party may rescind a contract when the other party is in material breach thereof. In our view, when the landlord is in breach of a fundamental aspect of a tenancy agreement—for example, the duty to provide vacant and undisturbed possession, or the duty to provide a property reasonably fit for human habitation—the tenant ought to be able to bring the tenancy to an end, whether or not the initial period is still running. We see no valid reason why a tenant's right to rescind a contract where a landlord is in material breach ought to be circumscribed in the manner proposed.
7. On a subsidiary note, it also seems to us to be peculiar that a tenant cannot bring their tenancy to an end effective on the last day of the initial period: as chapter 2 is currently framed, the tenancy may only be brought to an end at some point thereafter. It seems to us that, as a matter of common sense, if the initial period is the minimum duration of the tenancy, then a tenant ought not to be compelled to extend the tenancy beyond that minimum duration.

### **Part 5: chapter 3**

8. There does not appear to be any provision in the Act to the effect that, for the purposes of section 23 of the Rent (Scotland) Act 1984, which prohibits eviction without "proceedings in court", an application to the tribunal is equivalent to such proceedings.
9. In relation to the First-tier Tribunal's powers at s.41(5), and insofar as it is one of the aims of the Bill to end the uncertainty and inconsistency which have been a feature of eviction proceedings, we would question whether it is appropriate to provide the Tribunal with the power to waive time limits relating to a notice to leave "if the Tribunal considers that it is reasonable to do so". The Bill already provides for variable statutory notice periods, including shorter periods for behaviour related grounds, and where the tenant has been entitled to occupy the property for less than six months. Given this, it is not clear why it is felt necessary to give the Tribunal the power to waive the time limits endorsed by Parliament. We would suggest that, at the very least, any power to do so should be restricted to exceptional circumstances.
10. At section 43, we are concerned by the inclusion of ground 1 (landlord intends to sell) within the grounds for which eviction may be sought during the initial period. It remains our view that this ground is potentially open to abuse by landlords wishing to remove their tenants prematurely. We appreciate that the provisions relating to wrongful eviction orders have been introduced to deter this, but note that an order may only be made where the Tribunal finds that it was "misled": it seems to us that

the Tribunal may have difficulty in reaching that conclusion where a landlord demonstrates that they took elementary preliminary steps to sell the property.

11. The principle of legal certainty ought, in our view, to entitle tenants to expect a landlord to honour the initial period of a lease, provided that they are not themselves in breach of the agreement. It seems to us to be more appropriate to have a landlord, who is better able to take appropriate precautions if at risk of requiring to sell a property, run the risk of being unable to sell during the initial period (or at least having to do so for a depressed price, given that selling a property with a sitting tenant is entirely possible), rather than having a blameless tenant run the risk of homelessness. If one of the aims of the Bill is security of tenure, it seems to us that this will not be achieved by allowing landlords to sell properties from under their tenants within a comparatively short period of the tenancy commencing.
12. More generally at section 43, we noted in the second response that having different grounds for early termination of a tenancy, and for a shortened notice period (at s.44(3)(b)), introduced an unnecessary complication. We continue to see no reason why the grounds permitting both should not be the same.
13. Sections 47 to 49 provide that a “Wrongful Termination Order” (“WTO”) may be made where the FTT is satisfied that “it was misled into issuing an eviction order” or, in the case of consensual termination under section 40, if the tenant “was misled into ceasing to occupy the let property”. It is thought that the remedy may be directed at cases in which the landlord was able to secure an eviction order (or the tenant’s consent to termination) on the basis of a stated intention to do one of the things described in grounds 1, 3 or 5, when, in truth, he had no such intention. In that case, the tenant may then make an application for a WTO if the landlord does not follow through on his stated intention. However, a person may have a genuine intention to do something, which is then not carried out, due to some supervening event. How is the tenant to know if that is the case? Furthermore, sections 47 to 49 arguably offend against the principle that legal proceedings ought to achieve finality in determining a dispute. They appear to encourage the tenant to check up on the situation at the property, once she has left. Moreover, if the landlord *has* secured the eviction of a tenant from his home by deceiving the Tribunal, we would question whether three months’ rent is a sufficiently severe sanction.

#### **Part 5: chapter 4**

14. As we have understood matters previously, it was the intention of the Scottish Government to provide for a minimum initial period of six months, albeit this could be reduced where there was good reason for doing so. No such provision appears on the face of the Bill, although at section 51(3), the Scottish Ministers are empowered to make provision as to how an agreement relating to the end date may be validly made. This is clearly a significant aspect of the Bill, and we would have hoped that some provision would have been made on its face.

### Schedule 3

15. First, we regret that the proposal in the *Second consultation* to have a statement of steps in relation to ground 1 appears not to have been taken up, for the reasons we expressed in relation to section 43, and in order for a Tribunal to assess properly a landlord's claims. A statement of steps would also have been useful in relation to ground 9 (not occupying the property): as we indicated in our second response, registered social landlords using the abandonment provisions in the *Housing (Scotland) Acts* have been known to disregard signs of occupation, and we feel that the Tribunal ought to be able to scrutinise the landlord's decision making here.
16. As regards grounds 1, 3 and 5: there have been other "landlord intends" grounds in the past (such as ground 6 under the 1988 Act). The courts have tended to impose the proviso that the landlord must have both a genuine desire to carry out the action in question, and a reasonable prospect of actually bringing about the result, such that there is an intention rather than a mere aspiration. Standing the drafting of grounds 1, 3 and 5, one might question whether the issue of the practicability of the proposed intention is capable of being considered by the FTT.
17. In relation to ground 2, we reiterate the concerns we expressed in our second response that a creditor arguably has no right to serve a notice to quit on, and thereafter pursue eviction proceeding against, a sitting tenant after having taken decree against a landlord in a mortgage repossession action, as the creditor is not then in possession of the property (see *GE Money Home Lending Ltd. v Bianchet*, Sh. Pr. Kerr, 17<sup>th</sup> July 2014, unreported). The same may well be true of notices to leave. We remain of the view that amendment of the legislative provisions relating to the rights of heritable creditors is necessary for this ground to be clearly effective.
18. We welcome the qualification of ground 10 of schedule 3 so that a tenant may only be evicted for breaking a term of the tenancy where a statutory term has been materially breached, or otherwise where it is reasonable to evict. However, it remains our view that ground 13 (anti-social behaviour) requires a similar qualification. As currently drafted, behaviour would be regarded as anti-social where it causes another person annoyance. This would be satisfied, and decree for eviction granted, even if that other person has an unreasonably low threshold for becoming annoyed, either by the tenant or in general. We are not convinced it is appropriate that decree for eviction should be granted in those circumstances.
19. We have previously expressed concern about the length of time which a landlord must wait before they can seek an eviction order against a tenant who is not paying rent. Under the current proposals, a period of three months must elapse before ground 11 is fulfilled. A further month must then elapse while the notice period runs out. It seems to us a period of four months without rent is likely to be a significant burden on small businesses in particular. We note that the Policy Memorandum states that the proposal in the *Second consultation* to allow a notice to be served where a tenant was two months in arrears is to be progressed, but cannot see such a provision on the face of the Bill.