**Second consultation on a new tenancy for the private rented sector**



RESPONDENT INFORMATION FORM

**Please note:** this form **must** be returned with your response to ensure that we handle your response appropriately

**1. Name/Organisation**

**Organisation Name**

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| --- |
| Faculty of Advocates |

**Title**  **Mr [ ]  Ms [ ]  Mrs [ ]  Miss [ ]  Dr [ ]  Please tick as appropriate**

**Surname**

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| --- |
|       |

**Forename**

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**2. Postal Address**

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| --- |
| Advocates’ Library |
| Parliament House |
| Edinburgh |
| **Postcode** EH1 1RF | **Phone** 0131 226 5071 | **Email** gaynor.adam@advocates.org.uk |

**3. Permissions – I am responding as…**

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| --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  |  |  | **Individual** | **/** | **Group/Organisation** |  |  |  |
|  |  |  | *[ ]*  |  | **Please tick as appropriate** |  | *[x]*  |  |  |  |
|  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| **(a)** | Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?**Please tick as appropriate*[ ]* Yes *[ ]*  No** |  | **(c)** | The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site). |
| **(b)** | Where confidentiality is not requested, we will make your response available to the public on the following basis |  |  | Are you content for your **response** to be made available? |
|  | **Please tick ONE of the following boxes** |  |  | **Please tick as appropriate*****[x]* Yes *[ ]* No** |

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|  | Yes, make my response, name and address all available | *[ ]*  |  |  |  |  |
|  |  | **or** |  |  |  |  |
|  | Yes, make my response available, but not my name and address | *[ ]*  |  |  |  |  |
|  |  | **or** |  |  |  |  |
|  | Yes, make my response and name available, but not my address | *[ ]*  |  |  |  |  |
|  |  |  |  |  |  |  |
| **(d)** | We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Government to contact you again about this consultation exercise?**Please tick as appropriate *[x]* Yes *[ ]* No** |

**CONSULTATION ANSWER FORM**

Question 1a: Do you agree that there should be an initial tenancy period during which a tenant and landlord would be unable to give notice unless one of the specified circumstances existed?

 **(**

X

Yes No Don’t know

Please explain your answer.

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| We are generally supportive of the proposal, which is broadly in line with the position at common law that a tenancy will subsist for its contractual term unless one party has a particular legal basis (typically, a landlord’s irritancy clause) for bringing it to a premature end. However, our reading of the consultation is that a tenant would not be able to bring a tenancy to an end during the initial period under any circumstances. As the common law stands a tenant has a right (as does any party to a contract) to rescind (i.e. terminate) the contract if the other party is in material breach. In the case of a tenancy, a material breach by the landlord might be, for example, providing a property which is not reasonably fit for human habitation, or failing to give vacant or undisturbed possession of the property. As with any statutory code which provides security of tenure, the proposed new form of tenancy seeks to impose statutory controls on the landlord’s right to terminate tenancies and remove tenants. That is a necessary feature of the system. However, we do not see why statute should remove the tenant’s common law right to rescind the tenancy during the initial period where a landlord is in material breach of contract. As regards the right of the landlord to end the tenancy during the contractual term, we consider that a consistent approach would be achieved by allowing the landlord to terminate during the initial period, on the same basis as would justify a 28 day “notice to leave” irrespective of the length of the tenant’s occupation, being cases in which the ground for eviction is antisocial behaviour, breach of tenancy, or rent arrears. As regards mortgage repossession cases, we would refer to our answer to question 6 (ground 2). |

Question 1b: Do you agree that after the initial period a tenant or landlord may serve notice at any time with the relevant notice periods?

Yes No Don’t know

X

Please explain your answer.

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| Security of tenure is a policy matter for the Scottish Government rather than a legal matter for Faculty. |

Question 2: Do you agree that Notice to Quit and Notice of Proceedings should be combined into one Notice to Leave?

Yes No Don’t know

X

Please explain your answer.

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| Faculty is pleased to note that the Scottish Government has endorsed the suggestion we made in our response to the initial consultation. We remain of the view that a single notice will significantly reduce the complexity involved in recovery of possession. |

Question 3: Do you agree with the proposed notice periods a landlord should give a tenant?

Yes No Don’t know

X

Please explain your answer.

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| Security of tenure is a policy matter for the Scottish Government rather than a legal matter for Faculty. However, we would again point out that differing notice periods introduce an additional level of complexity, which is contrary to the stated policy aim of simplifying the procedure. |

Question 4a: Do you agree that a landlord may serve a Notice to Leave when a tenant has been in rent arrears for two consecutive months?

Yes No Don’t know

X

Please explain your answer.

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| The extent of arrears entitling a landlord to serve a Notice to Leave is a policy matter for the Scottish Government rather than a legal matter for Faculty. However, the proposal does ameliorate what seemed to us to be the undesirable possibility of three months’ arrears accruing before a landlord could take even the first steps towards recovering possession. |

Question 4b: Do you agree that when a tenant has reached three consecutive months of rent arrears, a landlord should be able to refer a case to the First-tier Tribunal?

Yes No Don’t know

X

Please explain your answer.

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| The extent of arrears entitling a landlord to refer a case to the First-tier Tribunal is a policy matter for the Scottish Government rather than a legal matter for Faculty. We would, though, counsel that care should be taken to ensure that landlords and tenants are aware that all that is required is that a tenant is in arrears of any amount for a period of three months, as opposed to a tenant having accrued three months of arrears, as it does seem to us that this distinction may easily be missed. |

Question 5a: Do you agree that the list of repossession grounds now covers all reasonable circumstances where a landlord may wish to recover possession?

Yes No Don’t know

X

Please explain your answer.

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| We are unaware of there being any need or demand for grounds of possession not included on the list. |

Question 5b: Do you agree that the First-tier Tribunal should have an element of discretion in grounds 6, 7 and 8?

Yes No Don’t know

X

Please explain your answer.

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| We remain of the view that excluding discretion from grounds 7 and 8, in particular, would have been inconsistent with the stated policy objective of affording tenants greater security of tenure, and are pleased to note that the Scottish Government has endorsed the approach set out in Faculty’s response to the initial consultation.  |

Question 6: From the details provided, do you agree that each of the following repossession grounds will work effectively?

Ground 1: The landlord is selling the home.

Yes No Don’t know

X

Please explain your answer.

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| First, we would make clear that we reserve our position on all grounds pending sight of the precise wording in a Bill. The following comments are made on the assumption that such wording will not raise any practical or technical difficulties.That having been said, we remain concerned that, in the absence of the “no fault” ground, this ground may be abused by landlords who simply wish to regain possession of a property. However, the ground seems to us to be a reasonable one when used in good faith, and we previously noted the difficulty in proving the assertion even if true. The requirement to provide a statement of steps taken ought to provide a greater degree of transparency to the landlord’s intentions. In order to provide a deterrent against any abuse, we would suggest that, as with grounds 3-5, tenants retain the ability to refer a case to the Tribunal and seek an award after moving out (if, for example, the landlord unjustifiably fails to market the property after they have done so). |

Ground 2: The mortgage lender is selling the home because the landlord has broken the loan’s conditions.

Yes No Don’t know

X

Please explain your answer.

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| We do not consider that this ground will work effectively. Actions under the existing ground 2 in schedule 5 of the 1988 Act are raised by lenders, not by landlords. Where the debtor/landlord is in default, the lender raises proceedings under section 24 of the Conveyancing and Feudal Reform (Scotland) Act 1970, in a mortgage repossession action. If it obtains a decree in that action, that is not a warrant for eviction of the tenant: see section 152 of the Housing (Scotland) Act 2010. Accordingly, the lender invariably raises a further eviction action under the existing ground 2 in the 1988 Act, in order to remove the tenant, and sell the property. However, there has long been doubt as to whether a lender can take over the rights of the landlord, in order to serve notices, and take the other steps required to evict a tenant. Now, the recent decision in *GE Money Home Lending Ltd. v Bianchet* (Sh. Pr. Kerr, 17th July 2014, unreported) casts doubt on whether a mortgage lender in this situation can be in “possession” of the property so as to be able to serve a notice to quit on a tenant. That decision places the efficacy of the existing system in doubt. There is a danger that the new system will replicate the same problems. By section 152 of the 2010 Act, the legislature has put beyond doubt that a lender’s decree under the 1970 is not a warrant for possession of an assured tenant, and that it must raise further proceedings. In our view, an action by a lender is significantly different from that taken by a landlord. The lenders are not landlords. We would suggest that there should be separate rules for lenders having a decree under the 1970 Act, to enable them to obtain possession and sell, whilst at the same time incorporating safeguards for tenants as to periods of notice, which are equivalent to the protection of tenants facing an action on a mandatory ground by a landlord.  |

Ground 3: The landlord or a family member of the landlord wants to move into the property as their principal home.

Yes No Don’t know

X

Please explain your answer.

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| We have similar concerns here as per ground 1. However, the threat of referral to the tribunal after the tenant has moved out will provide some deterrent against any abuse.  |

Ground 4: Refurbishment.

Yes No Don’t know

X

Please explain your answer.

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| As per ground 3. |

Ground 5: Change of business use, e.g. from home to shop (from residential to non-residential).

Yes No Don’t know

X

Please explain your answer.

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| As per ground 3. |

Ground 6: The tenant has failed to pay the full rent over three consecutive months.

Yes No Don’t know

X

Please explain your answer.

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| Whilst we appreciate that the Scottish Government has attempted to strike a balance between security of tenure and the effectiveness of a landlord’s remedies, we are concerned that the variety of timescales involved in serving notice, referral to the tribunal and distinction between the discretionary and mandatory grounds may give rise to some confusion on the part of litigants. We have noted above our misgivings about referring to the ground in such a way that a casual reader may think it is only satisfied if three months of arrears are outstanding. The relevant documentation will require to be very clear that the Tribunal still has discretion to refuse an order for recovery of possession in cases involving arrears of one month’s rent or more where there have been housing benefit difficulties. |

Ground 7: The tenant has displayed antisocial behaviour.

Yes No Don’t know

X

Please explain your answer.

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| This ground effectively adopts ground 2 (illegal purposes and criminal convictions) and ground 7 (antisocial behaviour) of schedule 1 to the 2001 Act. We note that the 2001 Act will be amended by section 14 of the Housing (Scotland) Act 2014, such that ground 2 evictions will effectively become mandatory. Therefore, the proposed private sector tenancy ground will mirror the position in relation to tenancies in the socially rented sector. We consider this to be an improvement to the previously proposed mandatory ground for all cases of antisocial behaviour. However, we are concerned that converting two separate grounds into a single “antisocial behaviour” ground may be a source of confusion. Conduct which establishes ground 2 in the 2001 Act scheme, such as a criminal conviction, is not necessarily “antisocial” as defined in ground 7. We think it preferable that there are two separate grounds, one mandatory and one discretionary, as under the amended 2001 Act scheme.  |

Ground 8: The tenant has otherwise breached the clauses of their tenancy agreement.

Yes No Don’t know

X

Please explain your answer.

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| We note that whether the clause is discretionary or mandatory will depend on which clause in a model tenancy agreement to be set out by secondary legislation is being relied upon. We are not in a position to comment substantively upon this ground without sight of the model tenancy agreement. We would also comment that, if the agreement is not promulgated before any legislation, it is hard to see how appropriate legislative scrutiny can be provided.  |

Ground 9: Abandonment.

Yes No Don’t know

X

Please explain your answer.

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| We are broadly supportive of an abandonment ground being introduced for the private sector, bringing it into line with the social rented sector, and ending a landlord’s dilemma between leaving an apparently abandoned property vacant and potentially facing proceedings for unlawful eviction. However, we are aware of occasions where landlords have chosen to disregard signs of continued residence when taking a view on abandonment, simply because a tenant was not present when they carried out their investigations. We would suggest that any landlord seeking to rely on this ground be required to satisfy specific criteria in order to establish abandonment. |

Ground 10: The property was let to the tenant because they were employed by the landlord, and the tenant is no longer employed by the landlord.

Yes No Don’t know

X

Please explain your answer.

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| We see no reason to take the view that this ground would not be effective. |

Ground 11: The property is normally needed to house a full-time religious worker of a religious denomination, and is required for this purpose.

Yes No Don’t know

X

Please explain your answer.

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| We see no reason to take the view that this ground would not be effective. |

Question 7a: Do you agree that rent reviews should take place no more than once a year?

Yes No Don’t know

X

Please explain your answer.

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| Whilst the question of whether rent reviews are appropriate is a policy issue for the Scottish Government rather than a legal issue for Faculty, if such reviews were to be implemented, then the principles of certainty and finality would seem to us to be adequately satisfied by a frequency of at least a year. |

Question 7b: Do you agree that a tenant should receive 12 weeks’ notice in advance of a change in the rent?

Yes No Don’t know

X

Please explain your answer.

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| This seems to us to be an adequate period. |

Question 7c: Do you agree that tenants should be able to refer what they regard as unreasonable rent increases for adjudication?

Yes No Don’t know

X

Please explain your answer.

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| Any right to rent review is a policy issue for the Scottish Government rather than a legal issue for Faculty |

Question 7d: Do you think there is a role for the additional regulation of area-based rent limits?

Yes No Don’t know

X

Please explain your answer, setting out what you view as the advantages and disadvantages of such an approach.

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| This is a policy issue for the Scottish Government rather than a legal issue for Faculty. |

Question 7e: If we were to legislate for this proposal, what types of evidence should local authorities have to present to Ministers when applying to designate an area as a ‘rent pressure area’?

Please explain your answer.

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| It would not seem to us to be appropriate to be prescriptive as to types of evidence which ought to be presented to Ministers. |

Question 8: Do you have any comments on the partial Equality Impact Assessment?

Please explain your answer.

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| No. |

Question 9: Do you have any comments on the partial Business and Regulatory Impact Assessment?

Please explain your answer.

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| No. |