

Dear Sir/Madam

**Infrastructure and Capital Investment Committee
Private Housing (Tenancies) (Scotland) Bill
Call for views**

I refer to the call for views on the Private Housing (Tenancies) (Scotland) Bill of 9th October.

I am writing to you on behalf of Legal Services Agency Ltd. We are very pleased to give you an indication of our views and most appreciate the opportunity so given.

Summary

Legal Services Agency Ltd is a charity tackling the unmet legal needs of any form of disadvantage.

We, in general, support the objectives of the Bill. That is, to provide greater security to tenants in the Private Rented Sector (PRS) and to provide greater opportunities for issues to be resolved through the Tribunal, as well as additional provisions such as more opportunities for control of rents and the provision of a model tenancy agreement.

Our concerns are, however, threefold:

- Concern 1. Firstly, the recovery of possession/eviction grounds are heavily weighed against tenants and will have the effect of hugely weakening the primary objective of the Bill (greater security of tenure) for many tenants in general and, in particular, tenants who are particularly vulnerable or of unscrupulous landlords.
- Concern 2. The provisions in particular for penalising landlords who mislead both tenant and, potentially, the Tribunal as to the reasons for eviction are far too weak.
- Concern 3. We are concerned to ensure that full access to legal advice, assistance and representation and other supporting evidence that can be obtained with the assistance of legal aid, such as medical and other reports, by the provision of full Legal Aid for Tribunal hearings is provided.

Submission in more detail

Before detailing LSA's views, it is probably worthwhile giving background about us. Of course more information is available through our website. Alternatively we have a full suite of service leaflets. For copies please contact ElizabethStewart@lsa.org.uk

In summary, LSA is a community controlled law centre. We are a charity. Our vision is to tackle the unmet legal needs of those in disadvantage. This we have done for over 25 years. One of our main areas of operation has always been in the housing field in general and, in particular, in preventing homelessness. We provide high quality, high volume advice, assistance and representation in a wide range of housing disputes. We trailblazed training in housing law in general and, in particular, with regard to the Short Assured Tenancy regime. This included the drafting of a model tenancy agreement as well as a leaflet for tenants which was in print for many years. LSA has taken up cases with regard to a range of issues including disrepair, rent deposits, tenancy technicalities and harassment of tenants.

LSA provides a free advice desk at both the landlord and tenant eviction and mortgage repossession courts at Glasgow Sheriff Court: we intend making similar provision for the Tribunal in the event that it has jurisdiction for PRS eviction actions as proposed by the Bill. LSA also intends engaging in training, provision of information and consciousness raising of the new arrangements assuming they ultimately become law.

Concern 1: Schedule 3 Eviction Grounds

In order to provide security, as well as to comply with human rights principles, including respects for the rights and interests of all concerned, it is crucial to get the balance of the rights of landlords and tenants correct. In the absence of this, the objective of the Bill, to provide security, will not be achieved. Furthermore, in the absence of a correct balance, tenants will be reluctant to pursue other related remedies such as to prevent harassment or to implement landlord repair obligations. Plainly tenants who are vulnerable to eviction will not feel confident in asserting rights against an unscrupulous or “difficult” landlord.

The eviction grounds are set out in Schedule 3. There are 16 grounds, 12 grounds are stated to be mandatory¹, which, to quote the Explanatory Notes, means that:

“If the Tribunal is satisfied that the grounds exist they must issue an eviction order”

The effect of this is, on the face of it (without the application of human rights principles), to remove any discretion that the Tribunal may have in the granting of an eviction order in most cases.

Thus the Tribunal generally will have no alternative but to order the draconian remedy of eviction if the facts upon which the grounds are based are established.

The fact the remedy is so draconian means that desperate and vulnerable tenants may need to raise at Tribunal arguments as to whether the Act is human rights compliant in the first place. Surely our human rights commitment should be set out in statute and not just assumed that vulnerable tenants’ advisers will be able to or have to raise human rights challenges in every case. Leaving the statute in a state that such issues will be raised is not in the interests of anybody as it will result in complex litigation. Why not avoid it by making sure the Tribunal has to consider reasonableness in the same way the courts do in other areas?

Some of the mandatory grounds, if the facts are established and neither tenant nor Tribunal misled, may not be objectionable as they may provide a fair balance between the rights of landlord and tenant. Grounds 1, 3, 4 and 5 all relate to steps that the landlord “intends to do” which are thought to justify eviction of the tenant. As Adrian Stalker, Advocate, in a recent article in SCOLAG (Issue 457 November 2015), comments “one might question whether the issue of the practicability of the proposed intention is capable of being considered by the First Tier Tribunal”. What arises from this is the desirability of an amendment to the grounds here to make it clear that the notion of intention requires 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”. (op cit). If the Bill is tightened up in that regard and adequate provision of Legal Aid made to ensure that tenants have good legal advice, assistance and representation to ensure that cases are brought to the Tribunal to test

such “intentions” by landlords, it may be thought that these proposed grounds represent an adequate balance.

However, other mandatory grounds are more problematic. For instance, Ground 10 provides that it is an eviction ground that the tenant has failed to comply with an obligation under the tenancy and there is no discretion if the tenant has “materially failed to comply with the statutory terms of the tenancy”. We are not told what these are: in terms of s.5 they may be introduced by S.I. S.5 gives no guidance as to what they may contain.²

On the face of it, this ground is very broad and provides no opportunity for the Tribunal to require and supervise appropriate compliance with such a ground if it has been breached. This is very much a “pig in a poke”.

It contrasts with a breach of “any other term of the tenancy” where the Tribunal does have discretion.

In our view, all such breaches should be subject to “reasonableness”.

Rent arrears are likely to be one of the most common issues that will require consideration by the Tribunal in connection with eviction actions. The approach taken by the Bill is harsh indeed. The approach is far harsher than any other comparable regime. For instance, in mortgage arrears’ cases the court always has discretion.

In terms of Ground 11, the Tribunal has no discretion but to order eviction if the tenant has been continuously in arrears of rent for three or more consecutive months and the amount of those arrears is equal to, or greater than, one month’s rent. Assuming the Tribunal is satisfied that the tenant being in arrears of rent over the period is not wholly or partly as a consequence of benefit difficulties, then the Tribunal has no discretion and must order eviction. No excuse accepted: ever!

There are a number of issues. Firstly, the Tribunal has no discretion even if the amount of rent arrears is only one day more than a month and even if the tenant, for instance, is able to pay the arrears in its entirety almost immediately. As Adrian Stalker comments on this ground, “this means that eviction could be mandatory where the tenant was never in arrears for more than one month’s rent and has paid the arrears in full by the time the First Tier Tribunal hearing takes place”.

More generally, it is our view that the absence of any discretion on the part of the Tribunal to grant the order is simply too harsh. Many tenants (including with families) may be in arrears of rent for well in excess of one month on occasion but be in a position to repay the arrears within a reasonable period of time. Surely this is something that the Tribunal should be in a position to consider? Of course, the tenant’s situation needs to be weighed up against the circumstances of the landlord. A landlord with substantial funds, able to bear arrears for a few months, may not, in effect, be prejudiced at all. Of course this may not be true for all landlords: that, however, is precisely the purpose of giving a Tribunal powers to consider reasonableness.

Whilst the Tribunal can refuse to make an order if the arrears are wholly or partly as a consequence of a delay or failure in the payment of a “relevant benefit”, however there is ambiguity: does it offer protection to tenants who have not made a claim or delay on part of

the tenant i.e. a tenant with serious mental health problems may have not applied or responded to a request for information leading to no housing benefit/local housing allowance payment. The whole point of these issues are there may be a lot of delays but in many cases the landlord may well ultimately get the amount owing. This supports our view there ought to be a reasonableness test and assessment of all the particular facts and circumstances. Furthermore, quality legal representation and advice will benefit all parties by resolving such issues. Eviction and homelessness should be a last resort. The difference quality advice and representation can make is clear in LSA's experience. Difficulties get resolved and homes are retained.

Objections have been made to the power of the Tribunal to consider reasonableness: most of those objections appear to be based on a distrust of external scrutiny or doubts as to the robustness of Tribunal procedure. In our view, these objections are ill founded. In particular, the granting of legal aid for advice, assistance and representation of tenants at Tribunals will assist in ensuring the thoroughness of any scrutiny.

It is our view that all rent arrears' grounds should be subject to the Tribunal's power to consider reasonableness.

If that view does not find favour, at the very least the amount of rent arrears which would result in the exclusion of the consideration of reasonableness (and thus be mandatory) should be increased to a minimum of a total of six months' rent arrears outstanding not only at the issuing of the notice but also at the time of the hearing.

The prejudicial approach to tenants of this portion of the Bill is highlighted by the fact that the rent arrears ground (11) also has a discretionary "sub-ground" for eviction where there have simply been arrears for at least three consecutive months, irrespective of the amount. The policy one would infer from this provision is that eviction should be threatened even for minimal arrears and indeed might, on occasion, be granted and that the Tribunal is only to be trusted with consideration of reasonableness where the level of arrears are minimal. The lack of confidence the drafters of the Bill appear to have in the Tribunal appears marked. This lack of confidence is, in our view, not justified.

Concern 2: Wrongful termination by eviction order

Section 47 provides for control by compensation should an eviction order be wrongfully made if the Tribunal or tenant finds out it was misled into issuing the order by the former landlord.

It is certainly generally helpful to have a statutory structure to control such behaviour by a landlord. The grounds for eviction are plainly open to, in effect, fraudulent activities particularly those relating to proposals by the landlord to sell, move in a relative and so forth.

There may be circumstances where a genuine intention cannot be carried out for reasons outwith the former landlord's control. However, when it has been established that the landlord has negligently or deliberately misled a tenant and/or Tribunal in order to obtain vacant possession, a sanction is indeed required. In the absence of an effective sanction, security can, in practice, be removed by unscrupulous landlords at will.

Our problem, very simply, is that the powers of the Tribunal to compensate the former tenant for such abuse are far too weak. In terms of Section 49, a wrongful tenant termination order is an amount “not exceeding three months’ rent”.

In many circumstances this would not even pay for a tenant’s removal costs far less the add on costs such as being required to stay in a hotel, store personal effects, move to more expensive accommodation or, indeed, be homeless or possibly even roofless. The effect of being wrongfully evicted during children’s exam periods, family illness or bereavement are even more disastrous. There already exist statutory provisions for wrongful eviction by landlords in the private rented sector which carry criminal penalties (Rent (Scotland) Act 1984) and it would be illogical if both statutory provisions did not offer the same protection.

The sanction against misleading the tenant and/or Tribunal should be substantial so as to make it clear that the sanction will always mean it is never worth the landlord’s while to take the risk. In many circumstances, a sanction of merely three months’ rent will be a minimal amount and render it worth the landlord’s while to be required to make full payment. In addition, presumably the burden of proof will be on the tenant to prove they or the Tribunal have been misled, which may incur time, effort and possibly expense, which should be properly compensated.

For instance, if the landlord has been made a significantly greater offer by another potential tenant it may be no more than a matter of months for such an unscrupulous landlord to recoup the sums involved in the penalty.

If the tenant has pressed the landlord to undertake repairs or statutorily required improvements, it may be worth the landlord’s while to remove the tenant in order to obtain a more compliant or vulnerable tenant less able to assert his/her rights. The sanction of three months’ rent payment to the former tenant may well have a minimal effect.

Given that the Tribunal could easily weigh up each case appropriately, we would suggest that the wrongful termination order be at least up to a minimum of one year’s rent. As Adrian Stalker (op cit) comments “if the landlord has secured the eviction of a tenant from his home by deceiving the First Tier Tribunal, one might wonder whether three months’ rent is a sufficiently severe sanction”. It is not.

Concern 3: Legal Aid

It is absolutely crucial that full provision of Legal Aid be made available for all disputed legal matters where a party’s fundamental rights and obligations are involved. This includes virtually everything that the Tribunal will consider in connection with the Private Rented Sector (PRS). The requirement to provide full Legal Aid for all aspects of Tribunal disputes is particularly high in the case of potential eviction or related matters. This means legal aid for representation and not solely advice and assistance.

The philosophy behind the Bill will only be achieved if full Legal Aid is available for the Tribunal.

Legal Aid is necessary not only to provide for actual representation but investigation advising written submissions, the marshalling of evidence and legal research.

Concluding comments

It may be objected that in proposing a greater discretion to the Tribunal in a number of areas, we are opening up new areas for argument. It should, however, be noted that the question of reasonableness in eviction actions has been used by the courts across the UK for many years and is well understood. In other tenancy regimes the notion has been more fully defined than in this Bill. This would remain an option. One thing is, however, for sure: if the eviction grounds are left as they are, vulnerable families will be evicted as a consequence of modest levels of rent arrears. As a consequence, the overall policy objectives of the Bill will not be achieved. The PRS will not become a secure way of providing housing for Scotland's people.

We do very much hope to have an opportunity to give evidence on these points and thank you for your time and bother in considering our views.

I am obliged for your kind attention.

Paul Brown

¹ Although, in effect, all the grounds have a mandatory component.

² The explanatory documents do not give any more information.