CIH Scotland Response to: Second Consultation on a New Tenancy for the Private Sector

Date 08 May 2015

Submitted by email to: PRSTenancies@scotland.gsi.gov.uk

‘Shaping Housing and Community Agendas’
1. Introduction

The Chartered Institute of Housing (CIH) is the independent voice for housing and the home of professional standards. Our goal is simple – to provide housing professionals with the advice, support and knowledge they need to be brilliant. CIH is a registered charity and not-for-profit organisation. This means that the money we make is put back into the organisation and funds the activities we carry out to support the housing sector. We have a diverse and growing membership of more than 22,000 people who work in both the public and private sectors, in 20 countries on five continents across the world. Further information is available at: www.cih.org

CIH contact: Ashley Campbell
Policy and Practice Officer
ashley.campbell@cih.org

2. General Comments

2.1 We welcome the opportunity to contribute to a second consultation on the development of a new tenancy regime for the private rented sector (PRS) in Scotland. As stated in our response to the original consultation, we support the need for changes to the current system in order to provide better security for those wishing to settle into a long term home in the PRS. We also highlighted the need to ensure that the new system did not place an undue burden on landlords or present a risk to businesses and future investment in the sector. It is important that the new system that is implemented following this consultation process strikes the right balance between the needs of tenants and landlords.

2.2 With these key outcomes in mind, we support the Scottish Government’s decision to remove the ‘no fault’ clause from the new model tenancy. However, we will repeat our position outlined in our previous response: removal of the ‘no fault’ clause must be underpinned by a robust and efficient system of repossession that will ensure landlords can recover their property when the tenant is at fault or when the home needs to be sold or used for another purpose. This condition requires that the new First Tier Tribunal (the Tribunal) is working effectively and is able to deal quickly with the volume of cases redirected from the Sheriff Court.

2.3 Our comments on the specific questions raised in the consultation paper are detailed below.
3. Consultation Questions

Q 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?

Yes.

As outlined in our response to the previous consultation, we agree that an initial letting period of six months should be set as standard which will ensure some degree of security for tenants and stability for landlords given the knowledge that their property will be tenanted for at least six months.

However, we also recognise that many people appreciate the flexibility that the PRS can offer, especially those who may only be staying in an area temporarily, such as those on short term contracts for work or students planning to leave the area at the end of a study term. Therefore, we agree that the tenant should be able to request a shorter initial tenancy period. Likewise, those requiring more long term accommodation should be able to agree a longer initial letting period with agreement from both parties.

We agree that landlords should be able to begin proceedings to recover their property at any time during the initial tenancy period if the mortgage lender intends to sell the property. We also agree that recovery of a property could proceed during this time if the tenant was at fault (under grounds 6, 7, 8 or 9 subject to discretion in certain areas).

Q 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.

The initial letting period should reflect the needs of the tenant by allowing this period to be tailored to a shorter or longer stay as required. This agreed period will also allow landlords to plan their business based on a minimum period of rental income. At the end of this agreed period, the tenant should be able to give notice to the landlord. The landlord could also begin proceedings for possession at any time based on one of the proposed grounds for possession.

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

Yes.
Issuing a single notice should simplify the system making it easier for both tenants and landlords to understand their rights and responsibilities when moving out of a private rented tenancy or looking to regain possession of a rented home. With this in mind, we welcome the commitment to further consultation on the content of the new Notice to Leave.

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

We agree with the proposal that the length of notice should be linked to the length of time the tenant has been living in the home and the proposed notice periods seem sensible.

Q 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?

We recognise the importance of landlords being able to take swift action when one of their tenants falls into rent arrears. However, it is likely that as the PRS continues to grow and provide an alternative option to social housing, increasing numbers of vulnerable people may end up living in the PRS and we must ensure that these people have access to the support they need to sustain their tenancies whenever possible. Again, a balance must be struck between the needs of the landlord and of the tenant.

We welcome the proposal that a Notice to Leave being issued on the basis of rent arrears should include information on sources of financial assistance to help the tenant address underlying issues. It is also sensible that a Notice to Leave being issued when the tenant has failed to pay the amount due for two months will act as a warning or prompt for tenants to be able to take action to resolve their situation before reaching the stage of Tribunal proceedings.

However, we do have some concern with the ability of some tenants to access financial advice or assistance. Some tenants may have difficulty in understanding the Notice to Leave and the information being offered because of literacy issues or a language barrier. It is therefore essential that the Notice to Leave is written in plain English and is available in a format that can be understood by the tenant. Other tenants may have difficulty in accessing suitable advice because of their geographical location, access to the internet or telephone. It is not clear how the Scottish Government can ensure equal access to advice and support for all those who might need it.

We also have concerns that it may be difficult for some tenants to pay the full amount due within the next month. In this respect, we welcome the fact that a degree of flexibility for the Tribunal has been introduced to this ground for eviction although we do have some concerns regarding this ground for possession (see question 6).
Q 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.

Again, we welcome the fact that a degree of discretion has been proposed for the Tribunal when dealing with rent arrears cases although we do have some concerns regarding this ground for possession (see question 6).

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

Yes.

In our response to the previous consultation we suggested that an additional ground for possession should be included where a property has been abandoned. We are satisfied that with the inclusion of this clause, all reasonable circumstances for repossession will be covered.

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

Yes.

In our response to the previous consultation we argued that some of the grounds for possession would require a degree of discretion, particularly cases involving antisocial behaviour which can be difficult to define and to evidence.

We therefore welcome the introduction of discretionary elements to grounds 6, 7 and 8 but stress the need for the development of detailed guidance. This will help to ensure that tenants and landlords are aware of the circumstances that could lead to possession, the type of evidence that would be required to build a successful case and that decision making is as consistent as possible while still allowing for discretion.

In addition, we support the proposal that a tenant may appeal to the Tribunal if they feel that a landlord has not followed through on a cited repossession ground. However, this would again be subject to the development of detailed guidance outlining the circumstances under which an appeal can be brought to the Tribunal and the type of evidence that would be required.

It should also be made clear that action could not be taken against a landlord who failed to follow through on a cited repossession ground as a result of a change of circumstances or matters beyond their control. The proposed penalty of three months’ rent could amount to a significant sum in certain cases and landlords must be reassured that action will be fair and proportional.
Q 6: From the details provided, do you agree that each of the following repossession grounds will work effectively?

**General Comments**

We remain concerned with the lack of detail regarding the evidence that will be required by a landlord wishing to recover their property or by a tenant who believes that the landlord has not acted on the cited ground for possession. While we welcome the commitment from the Scottish Government to carry out further consultation on guidance and the content of the new tenancy, it is difficult to make comprehensive comments without these details.

**Ground 1: The landlord is selling the home.**

This ground should be relatively easy to evidence and we agree with the proposal that a tenant should have the right to appeal if they feel that a landlord has not made a genuine effort to sell the home.

However, some scenarios that should be considered in the development of guidance:
- What constitutes a ‘genuine’ effort to sell?
- Will the Tribunal consider whether the home has been marketed at a suitable or realistic price?

**Re-letting a Home within 6 Months of Possession**

While we would not argue against the proposal to give first refusal to the original tenant if the landlord fails to sell the home in question and has to re-let it, it is unclear whether many tenants would accept this offer having undergone the inconvenience and expense of being forced to move out.

We would also point out that in some cases, the landlord may not be able to contact the tenant in question. If a legal requirement for landlords to contact previous tenants is included, guidance would have to specify reasonable steps that should be taken in this circumstance and a time limit for the former tenant to respond in order that the landlord can market the home if the original tenant does not move back in.

With regards to the suggested penalty of up to three months’ rent, we would again point out that this could amount to a significant sum in certain cases. We would welcome details on how the Tribunal would come to a decision on the amount to be awarded. For example, would this be linked to the actual costs incurred by the tenant?

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

We agree that this ground should work effectively and should be relatively easy to evidence.
Ground 3: The landlord or a family member of the landlord wants to move into the property as their principal home.

We agree that this should be a mandatory ground for possession but repeat some of the issues raised under ground 1:

- How likely is it that a tenant who has had to move out of a property will want or be able to afford to move back again?
- A landlord may be unable to contact a former tenant if they are re-letting their property within 6 months.
- We would welcome some indication of how decisions regarding compensation for a former tenant will be made and whether the amount granted will be connected to costs incurred by the tenant.

Ground 4: Refurbishment.

We agree that there should be a ground for possession where the landlord needs to carry out extensive refurbishment which would not be able to be carried out while the tenant was still living in the home. However, it would be helpful for accompanying guidance to illustrate under what circumstances this ground is likely to be used. In our experience it seems more likely that a landlord would wait until their current tenant vacated the property before carrying out extensive refurbishment except in emergency situations such as flood or fire damage.

It is unclear why the landlord would be responsible for the tenants’ removal expenses under this ground, but not under other grounds where the tenant will likely face the same costs as a result their landlords’ actions, e.g. grounds 1 and 3. We would welcome clarification on the reasoning behind this proposal.

It is also unclear what the removal expenses are intended to cover. We would assume that this ground could only be used in circumstances where the landlord intends to re-let the property after carrying out the refurbishment, otherwise possession would be sought under one of the other grounds, e.g. landlord or family member needs to move in or change of use. This raises the question of whether the landlord would be expected to cover the cost of alternative accommodation during the refurbishment period with the expectation that the tenant would be able to move back in once work has been carried out.

We are concerned that a requirement for landlords to cover removal costs could discourage landlords from carrying out improvements to their properties which could have an impact on the Scottish Government’s aims to create a better quality PRS. There is a risk that additional costs could have an impact on a landlords’ ability or desire to meet REEPS or future targets set by the Scottish Government.

With regards to compensation for tenants who are not satisfied that the landlord has carried out the specified works, we would again welcome details on how the amount would be calculated. In addition, if a landlord has already been required to cover removal costs, will this be taken into account when awarding compensation?
Ground 5: Change of business use, e.g. from home to shop (from residential to non-residential).

We agree that this ground should work effectively and should be relatively easy to evidence. But again, it is unclear why this ground should require the landlord to cover removal costs for the tenant when other grounds would not trigger these costs to be paid.

As above, if a landlord has been required to cover removal costs and the tenant then seeks and is awarded compensation for having moved out, will the amount already paid be taken into account when the amount of compensation due is being calculated?

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

We welcome the introduction of an element of discretion to this ground for repossession. As mentioned previously (see question 4) while we understand the need for landlords to recover a property where the tenant is in arrears, we also must ensure that vulnerable tenants are supported to maintain their home whenever possible.

With this in mind, we would like to see a more robust statement regarding arrears resulting from housing benefit delays. The consultation currently states that these cases may result in possession and we assume that the Tribunal would ordinarily rule in favour of the tenant in these cases. However, we would like the wording to state that possession will not be granted in cases where the rent arrears have arisen in full or in part due to housing benefit delays. This is especially important during the current climate of rapid and extensive changes to the way that housing benefit is administered. Specifically with relation to Universal Credit, findings from pathfinder areas suggest that delays in rent could become more common as a result of administrative changes and tenants and landlords both becoming used to different payment methods.

Ground 7: The tenant has displayed antisocial behaviour.

We welcome the introduction of a discretionary element to this ground. Obviously the nature of antisocial behaviour means that it is difficult to define and to evidence.

We do have some concerns with how a landlord will be expected to gather evidence of antisocial behaviour and how resource intensive and time consuming this might be. There is a risk that action may not be taken against a tenant in cases lacking a criminal conviction where the decision would be at the discretion of the Tribunal if it is not felt that the outcome will be successful.
There is obviously a need for clear and detailed guidance outlining the types of evidence that would be required to be presented to the Tribunal in order to manage expectations of actions that can be taken against antisocial tenants and to help landlords build successful cases where they do decide to seek possession.

Ideally we would like to see more support for private landlords to deal proactively with tenants who are behaving in an antisocial manner. Simply evicting an antisocial tenant does not solve any underlying issues or prevent similar behaviour from disrupting other communities.

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

Again, we are pleased to see that discretion will be applied to certain aspects of the new tenancy. However, it is difficult to comment on whether this ground will work well in practice without any detail on what will be included in the new tenancy.

There must be a clear distinction between breaches of elements deemed to be more serious which could result in grounds for possession and those elements which are included in the tenancy but would not constitute a mandatory ground for possession. For example, many current tenancies specify that tenants may not hang pictures on the walls. This should not be a ground for possession.

**Ground 9**: Abandonment.

We agree with the introduction of this proposed ground and feel that it should work well in practice.

**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.

We agree with the inclusion of this ground for possession and are aware that this issue has been raised by colleagues working in the private sector. It should work well in practice with the assumption that details of the connection between the accommodation and employment is clearly set out in the employment contract. We assume that the same notice periods would apply under this circumstance.

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

We agree with the inclusion of this ground for possession and are aware that some organisations were concerned that without the inclusion of such a ground, homes that could currently be let on a short term basis when no religious worker was residing there would be left empty.
While we have given support for the removal of pre-tenancy notices, we feel that under circumstances where a home that is usually used to house a full-time religious worker is let to someone else during an interim period, the tenant must be informed by some means of the nature of the tenancy and that it may be required, subject to the relevant notice period, to house a religious worker.

Q 7a-7c: Regarding the introduction of rent regulation across the entire PRS

As stated in our response to the first consultation, we do not rule out support for some form of rent regulation which could help tenants and landlords to plan for rent increases within their personal or business budget. In considering the options for rent regulation it is important to achieve a balance between maintaining affordability for tenants and ensuring that the sector remains attractive to current landlords and potential investors.

It is also essential at this time and going forward, as more people make their home in the PRS, that landlords generate enough income to invest in repairs and maintenance to ensure that people have a warm, secure home to live in. We also need to encourage more investment in energy efficiency measures to reduce fuel poverty and reduce the amount of income being spent on heating homes.

We feel that the proposal to limit the frequency of rent increases is sensible and allowing initial rents to be set by tenants and landlords in the open market strikes a good balance between the needs for affordability and predictability for tenants and the need to generate fair income for landlords.

We agree that the landlord should have to give 12 weeks notice of any rent increase and that the tenant should be able to appeal to the Tribunal if they feel the increase is unreasonable. Private tenants do of course already have the option of appealing to the Private Rented Housing Panel (PRHP) if they feel their rent is being increased unreasonably and there would be no reason not to transfer this right to the new Tribunal.

However, as I believe others may also point out, the wording of the proposal limits the landlord to carrying out no more than one rent review in any 12 month period. We believe that landlords should be free to review the rents charged for their properties more frequently if desired but be limited to one rent increase in any 12 month period.

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

We accept that the proposals for limiting the number of rent increases may help to introduce a level of stability for tenants and the fact that the proposals do not suggest a cap on the amount of rent that can be charged should go some way to reassure landlords and investors that the sector remains a viable business option. However, it is difficult to be able to comment on the suggestion for further regulation to be introduced in 'hot-spot' areas without more detailed information on the financial implications of such a policy.
Before further discussion of this issue, we would welcome a more detailed proposal from the Scottish Government setting out:

- How rent increases would be capped – would increases be linked to inflation, average income in the area or a proposal put forward by the local authority when requesting local regulation?
- Financial modelling setting out the potential impact on landlords of the proposed method for capping rent increases.

**Q 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’?

We would not like to see this proposal taken forward without further consultation based on robust evidence as outlined above.

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

We agree that there will be no negative impact on equality groups as a result of introducing a new tenancy regime. The proposals should increase security of tenure which will benefit many tenants living in the PRS.

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

We have some concerns regarding the lack of detail of the financial impacts of the changes proposed in this consultation.

There does not seem to be as yet, any indication of the cost of taking a case to the Tribunal. This is concerning given that the removal of the ‘no fault’ clause is likely to result in a significant increase in the volume of cases requiring a decision. We assume that where the landlord is seeking possession, the case would only have to be referred to the Tribunal if it was contested by the tenant but this is not made clear.

In the absence of any figures provided in the consultation document, we have carried out a quick calculation below showing that a significant volume of cases could potentially be directed to the Tribunal.

The consultation states that 8 out of 10 tenancies are ended by the tenant with 2 out of 10 being ended by the landlord. The Scotland’s People Annual Report published in August 2014\(^1\) indicated that the average stay in the PRS is around 3 years. There are approximately 263,000 households living in the PRS in Scotland\(^2\). Assuming an average turnover of 3 years, 88,000 tenancies would end each year.

---

\(^1\) Scotland’s People Annual Report 2014, Table 3.5: http://www.gov.scot/Publications/2014/08/7973/3

\(^2\) Scotland’s Census 2011: http://www.scotlandscensus.gov.uk/ods-analyser/jsf/tableView/crosstabTableView.xhtml
Using the figure of 2 in 10, landlords could potentially be ending 17,600 tenancies each year.

We understand that it is highly unlikely that this volume of cases would be taken to the Tribunal. Indeed, it is impossible that this volume of cases could be dealt with but we wanted to illustrate the fact that there is still a great deal of uncertainty surrounding how the Tribunal will work in practice. We would like to repeat that if the new tenancy regime is to work well, the tribunal needs to be running quickly and efficiently and be resourced to deal with whatever volume of cases need to be heard.

We also note that the BRIA states that a post implementation review will take place within 10 years of the introduction of the legislation. A 10 year timescale seems excessive and we would prefer a commitment for review at an earlier date, perhaps 3-5 years after the introduction of a new PRS tenancy.