

**Briefing paper**



# **Housing dispute resolution - improving access and quality**

**A briefing paper from CIH Scotland**

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## **The Chartered Institute of Housing**

The Chartered Institute of Housing (CIH) is the professional body for people involved in housing and communities. We are a registered charity and not-for-profit organisation. We have a diverse and growing membership of over 22,000 people worldwide, with over 2,500 in Scotland. Our members work in both the public and private sectors. We exist to maximise the contribution that housing professionals make to the wellbeing of communities. We also represent the interests of our members in the development of strategic and national housing policy and aim to be the first point of contact for anyone involved or interested in housing.

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## **Summary**

### **Introduction**

This section explores the rationale for revisiting the 2004 CIH Scotland paper *A Housing Tribunal for Scotland: Improving rented housing dispute resolution* and provides an overview of the contents.

### **Existing systems**

This section looks at the existing forums available for housing dispute resolution, picking up on the key features of each and the areas of housing law they are used for.

### **The momentum for change**

This section provides a broad overview of the various reviews and reports that have been produced in the recent past which have examined the need for reform in the legal system generally and also in housing cases.

### **Why does the system need to change?**

This section reviews the drivers for change, looking at those features of the existing legal system that receive the most criticism, alongside the Scottish Government policy direction that suggests change is required.

### **What could a housing tribunal look like?**

This final section provides an overview of the CIH Scotland view of the features of a housing tribunal in Scotland, including the type of cases it would hear and how it would operate.

### **Appendix**

The appendix provides a summary of examples of housing tribunals operating in other countries.

## Introduction

The Chartered Institute of Housing Scotland has long considered the existing system for resolving housing disputes across all tenures to be unsatisfactory for all parties involved. This issue was explored in a study commissioned by CIH Scotland in 2004 (O'Carroll & Scott. *A housing tribunal for Scotland: Improving rented housing dispute resolution*). The conclusions of the report's authors, Suzie Scott and Derek O'Carroll, crystallised the CIH Scotland position that the development of a specialist 'housing tribunal' was the preferred option.

But it was recognised that despite the overwhelming support from many quarters to at the very least see changes to the existing system of redress, there was little will to pursue such a course of action. The then Scottish Executive was not persuaded that a housing tribunal was the best way to improve access to justice, nor indeed that the court system itself was the main obstacle to be overcome.

The premise which led to the CIH Scotland report is still highly relevant. Housing practitioners are frustrated with the existing Scottish court system, citing costly delays, inconsistent decisions by sheriffs and an overly formal system which deters defendants from attending hearings. In more recent years a series of changes to the legislative framework around housing disputes, a review of the civil justice system, evolving housing policy and new methods of dealing with particular private rented sector disputes, alongside the increasing pressure on the civil courts, have created a perfect storm in which the status quo is no longer a viable option. In addition, the Scottish Government<sup>1</sup> has indicated its willingness to support alternatives to the way in which housing disputes are dealt with and intends to produce a consultation on these in the near future.

This new environment has encouraged CIH Scotland to revisit its earlier study and examine this against the changes that have taken place since 2004. The original study set out to examine the prevailing legal system and assess how satisfactorily it dealt with a range of housing issues from the perspective of both tenants and landlords, and to explore alternative mechanisms for dealing with housing actions. It explored the existing reports in both England and Scotland which had examined the idea of specialist housing tribunals; this included the recommendation by the UK Parliament's Scottish Affairs Committee that a specialist court or tribunal for all housing cases might be an option worth considering.

This briefing picks up on the key messages from the 2004 report and subsequent CIH Scotland papers, highlighting relevant changes since the report that provide further support for the concept of a housing tribunal for Scotland. The briefing is intended to provoke discussion ahead of and during the Scottish Government consultation and to stimulate fresh interest in the concept of a housing tribunal for Scotland. As with the original document, this

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<sup>1</sup> <http://www.scotland.gov.uk/Resource/0039/00391609.pdf>

report draws on existing research and data and concentrates on residential property.

## Existing systems for redress in housing cases

There are a number of existing ways for housing litigants to exercise their rights when a dispute occurs. These routes have tended to grow organically and are a mixture of courts and tribunals, with by far the greatest forum for cases being the sheriff court. This court also houses a range of other legal disputes, both civil and criminal, and as a consequence it is uncommon for sheriffs to specialise in housing matters. Litigants are either represented by legally qualified representatives or are unrepresented. Whilst approved lay persons are now allowed in court in Scotland to provide support and guidance (also known as a 'McKenzie friend'), the process of approval and the discretion of the sheriff means that they are not routinely used. Legal aid may be available for qualified representation (subject to the usual tests).

Accessing the sheriff court is complex and formal, with a number of options open to housing cases:

- **Small claims procedure** – this is usually used for recovery of debts of less than £3000 but it may also be used to seek orders for compensation up to that figure. This procedure is relatively informal
- **Summary cause procedure** – this is used for cases of value between £3000 and £5000 and for those cases too complex to be a small claims procedure. Eviction actions fall under this category. It is a more formal procedure than small claims and the legal costs associated can be high. The losing party, i.e. the tenant in eviction cases, will normally carry the brunt of these. However, there is a strong expectation that the sheriff will facilitate agreement between the parties in the first instance
- **Summary application procedure** – this can be a relatively formal procedure which includes applications under the Housing (Scotland) Act 2001 and under the Environmental Protection Act 1990 (statutory nuisance). Awarding of expenses is at the discretion of the sheriff, but they can be very high
- **Ordinary cause procedure** – this is a very formal, adversarial procedure and is used for cases with a value in excess of £5000 and for complex cases, such as establishing a right to reside or mortgage default.

This variety of forums can lead to a number of actions being required to be raised in order to resolve different aspects of the one situation.

Appeals of decisions are usually to the sheriff principal, beyond which some cases may also have a further higher court to appeal to. Judicial review is an option available in certain cases and this option is also available for reviewing decisions made by statutory decision makers, such as local authorities in their homelessness function. A judicial review is not an appeal as such, and the grounds for bringing a case are procedural, such as a decision maker 'misdirecting' itself, acting outside its powers or taking into account something

it should not have. The decision made via judicial review can result in a decision being overturned and being sent back to be looked at again by the decision maker.

Other routes for housing disputes are available outside the sheriff court system. This area has developed in the recent past:

- **Lands Tribunal** – this has a number of roles, including some which touch upon rented housing. It considers disputes on the tenants' right to purchase (right to buy) and compensation through compulsory purchase. It is presided over by three members - a president and two part time specialists, and is intended to be informal and reduce delays. Appeals can be taken to the Court of Session. There is a fee payable for making an application to the tribunal
- **Private Rented Housing Panel (PRHP)** – this began life as the Rent Assessment Committee and the name changed, along with the role, in September 2007. Its role has expanded from a tribunal that assessed fair and market rents to one which now also considers failures to comply with the repairing standard in the private rented sector. The panel is formed of one president and two part time specialists, and offers an in-house mediation service. If a landlord fails to comply with an enforcement order, the PRHP has the power to issue a rent relief order, reducing the rent payable by 90%. Appeals can be taken to the Court of Session. There is no cost for making an application to the PRHP
- **Homeowner Housing Panel (HOHP)** – this is a further expansion of the PRHP and is the new forum for breaches of the Property Factors (Scotland) Act 2011. The panel has the power to issue Property Factor Enforcement Orders. A failure to comply with these is a criminal offence, and may lead to de-registration. As with the PRHP, there is a strong drive to encourage mediation to resolve disputes and no compulsion for legal representation. Appeals can be taken to the sheriff court. There is no cost for making an application to the HOHP.

The legislation framing housing, and the housing actions that take place following a dispute, can be complex and difficult to understand. The multitude of forums these cases can be heard in, with their differing procedures and processes, make the position even more challenging. Whilst some of the forums are intended to encourage unrepresented litigants, such as the HOHP, others are much less amenable to this approach. Those which are more adversarial, such as the sheriff court actions, lend themselves less to this approach.

Cases which are heard in the sheriff court are not routinely reported on, whereas cases which are heard within the various tribunal models *are*.

## The momentum for change

A growing body of research and reports across the UK has considered the position of housing cases within the existing dispute resolution structures, often as part of a broader review of the whole legal system.

In 1996, the Scottish Affairs Committee, a select committee of the House of Commons, published a report following its enquiry into anti-social behaviour. Whilst it did not support the creation of a tribunal system for anti-social behaviour and neighbour disputes, it did suggest that specialist courts or tribunals with responsibility for all housing cases 'may have something to commend it'<sup>2</sup>. The 1996 Lord Woolf report '*Access to Justice*'<sup>3</sup>, in reference to the English system, proposed wide-ranging reforms in court procedures and accepted that specialist housing law judges would be helpful. The subsequent reforms included a less adversarial culture and pre-action protocols.

Further to this, in 2001, the '*Legatt Report*' was published, which was a wide ranging review of the English tribunal system. It concluded that a number of general principles should apply to a tribunal system:

- Participation is important, particularly in disputes between individuals and statutory bodies. Users should be able to prepare and present their own cases, with suitable assistance
- Tribunals allow decisions to be made by a panel of people with a range of qualifications and expertise
- Tribunals can be particularly effective in dealing with the decisions of statutory and regulatory authorities. There is a strong case for creating a right of appeal to a tribunal rather than leaving judicial review as the remedy.

It also concluded that certain features were common to all satisfactory tribunal arrangements:

- The tribunal must be independent
- There must be a single over-arching structure giving access to all tribunals
- Tribunals must be accessible and understandable
- Legal representation should generally not be required

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<sup>2</sup> Scottish Affairs Committee (1996) First Report: Housing and Anti-social Behaviour, Vol. 1, London: The Stationery Office.

<sup>3</sup> <http://webarchive.nationalarchives.gov.uk/http://www.dca.gov.uk/civil/final/sec4b.htm>



- Coherence: all tribunals should be brought together in a coherent system within one organisation with internal sub-divisions (including land and valuation)
- There should be a clear and consistent route of appeal
- Tribunal members should be appointed for a minimum of five to seven years
- Tribunals should ensure, as far as possible, that each case is dealt with economically, proportionately, in a timely manner and fairly.

Whilst the law is different between England and Scotland, these principles could apply equally to the Scottish system.

In 2003, recommendations were made by the Housing Improvement Task Force<sup>4</sup> (a body set up by the Scottish Executive to 'address the significant problems of housing quality in the private sector'). Following this the jurisdiction of the Rent Assessment Committee (RAC) was expanded to cover complaints by private tenants about the failure of private landlords to carry out repairs and, in 2007, was renamed the Private Rented Housing Panel.

Following the publication of an issues paper, the Scottish Government's public law team completed a report entitled, '*Housing: Proportionate Dispute Resolution*'<sup>5</sup> in 2008. This examined the responses to the issues paper within the remit to have:

"extended beyond legal questions, and raised the broader issues of how housing problems arise, how they are related to other problems, and how they might be dealt with better".

It touched upon the role of courts and tribunals and proposed that a better co-ordinated and more coherent system of housing dispute resolution mechanisms was required, which included mediation, ombudsmen and managerial techniques and the use of a court or tribunal which would be a specialist adjudicatory body.

Around the same time, '*Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland*'<sup>6</sup> was published. This referred to the O'Carroll and Scott paper calling for the development of a Housing Tribunal, alongside the potential setting up of other specialist tribunals. *The Civil Courts review*<sup>7</sup> (also known as the Gill review) brought together much of what appeared in the civil justice report and the responses received from the earlier consultation

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<sup>4</sup> <http://www.scotland.gov.uk/Publications/2003/03/16686/19494>

<sup>5</sup> [http://lawcommission.justice.gov.uk/docs/lc309\\_Housing\\_Proportionate\\_Dispute\\_Resolution.pdf](http://lawcommission.justice.gov.uk/docs/lc309_Housing_Proportionate_Dispute_Resolution.pdf)

<sup>6</sup> <http://www.scotland.gov.uk/Publications/2007/02/09110006/0>

<sup>7</sup> <http://www.scotcourts.gov.uk/civilcourtsreview/>

exercise. In its response to the consultation, CIH Scotland reiterated<sup>8</sup> its drive to see a specialist housing forum:

“In *Modern Laws for a Modern Scotland*<sup>9</sup> the Scottish Executive laid out the guiding principles for the reform of civil justice as “proportionality and value for money”. The CIH strongly believes the way to enable housing matters to be dealt with in a system which offers a proportionate, efficient and cost effective service is to remove housing disputes from a court setting and place them within the realm of a tribunal.”

Lord Gill recognised in his review that some specialisation was required for housing cases. He acknowledged the complexities many litigants face when accessing justice on these matters, but pulled back from the concept of a Housing Tribunal saying, “We are not convinced that there is a sufficiently strong case for the transfer of responsibility for housing cases out of the court system....” citing, amongst other matters, the concerns some had expressed about the hearing of eviction cases outside the court system.

CIH Scotland disagreed with this reasoning, arguing that losing a home was similarly significant to the loss of employment, but that the employment tribunal was the recognised route for resolving such cases. This view was supported and expanded on by the report<sup>10</sup> of the Civil Advisory Justice Group in January 2011, which referenced the role immigration tribunals have and the life changing consequences of their decisions. The group concluded that:

“We therefore think the proposal that there should be a specialist jurisdiction to deal with housing cases has substantial appeal and that there would be value in reconsidering this issue. We believe this would simplify the current system, as well as improve consistency in approach to housing issues. While the exact modelling of how this might work in practice requires further consideration, we think there would be benefits in all housing cases being brought together to be dealt with by a single specialist housing forum.”

There has also been a growing drive to stimulate reforms in the way tribunals operate, most recently the Scottish Committee of the Administrative Justice and Tribunals Council discussion paper ‘*Options for Tribunal Reform in Scotland*’<sup>11</sup>, the Scottish Government consultation on its proposals for a new

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<sup>8</sup><http://www.cih.org/resources/PDF/Scotland%20Policy%20Pdfs/Civil%20Courts/Civil%20Courts%20Review%20-%20added%20to%20website%2015.10.12.pdf>

<sup>9</sup> Scottish Executive. *Modern Laws for a Modern Scotland*. 2007.  
<http://www.scotland.gov.uk/Resource/Doc/165338/0045028.pdf>

<sup>10</sup> <http://www.consumerfocus.org.uk/scotland/files/2011/01/Civil-Justice-Advisory-Group-Full-Report.pdf>

<sup>11</sup> <http://ajtc.justice.gov.uk/docs/tribunal-reform-scotland-discussion-paper.pdf>

tribunal system in Scotland<sup>12</sup> and the subsequent consultation report<sup>13</sup>. The discussion paper recognised the shortcomings raised in the Leggatt review and accepted that they were likely to apply to Scotland. It presented a number of suggestions on how a new, more unified tribunal system would operate.

The Scottish Government consultation, which was part of a wider 'Making Justice work' programme launched in 2011, identified an integrated system of tribunals with an efficient administration as being key to improving the services the tribunals deliver, creating a unified structure with the particular needs of tribunal users at the centre. The Scottish Government's aim was for a system that would be flexible enough to adapt and integrate new tribunals within it, making specific reference to "...future developments such as proposals that will emerge in the planned Scottish Government consultation on a new housing tribunal system."

The report following the consultation was published at the end of August 2012 and showed an overall welcome for the proposals, including that to introduce a two-tier system which would allow cases for review or appeal to be heard within an upper tier tribunal. In addition the report suggested that where mediation was not an existing option, it should be extended, where appropriate, to other jurisdictions within the system.

Housing cases are now clearly included in this escalating drive for broad reform of the existing court and tribunal systems, with the Scottish Government using its consultation on a strategy for the private rented sector<sup>14</sup> to pose the question:

"What more can be done to provide better access to justice for tenants, landlords and local authorities pursuing housing related cases?"

It goes on to describe its intention to consult on the feasibility of "creating of a new housing panel model to adjudicate on disputes arising between landlord and tenant."

A number of respondents to the consultation welcomed seeing a potential housing tribunal to deal with disputes between landlord and tenant, with the subsequent report<sup>15</sup> citing "the desire to establish some form of specialised housing court or tribunal" as achieving a high level of support from respondents.

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<sup>12</sup> <http://www.scotland.gov.uk/Publications/2012/03/8967>

<sup>13</sup> <http://www.scotland.gov.uk/Publications/2012/08/1747/2>

<sup>14</sup> <http://www.scotland.gov.uk/Resource/0039/00391609.pdf>

<sup>15</sup> <http://www.scotland.gov.uk/Resource/0040/00404522.pdf>

## **Why does the existing system need to change?**

The cost of inefficient and inaccessible housing dispute resolution has a far reaching impact in both an individual and societal sense, through the consequences of homelessness, poor housing and abandoned tenancies, etc. Much of the reasoning for taking housing cases out of a court setting and placing them in a tribunal setting has been rehearsed in this paper and elsewhere and there tends to be broad agreement amongst practitioners that the existing system needs to be changed. However, there is merit in revisiting these arguments and casting an eye over recent developments.

### ***Inefficient***

There is no doubt in the minds of those lawyers and others that sit for hours on end waiting for a case to call, that the existing system is deeply inefficient. All cases on a particular day are called for the same time, with only guess work and experience able to provide an indicator of when an individual case may be heard. Much of this decision will be based on the priority which individual sheriffs afford housing cases, as compared with all other cases - and in particular criminal cases - that are being heard that day. It is not unusual for there to be several cases before a sheriff in one sitting, which leads to cases being regularly 'continued' (delayed). The reliance on qualified representation leads to both expense and, when Legal Aid is sought, delay as the process of applying and being assessed against the criteria is carried out.

### ***Costly***

Actions in the sheriff court are also costly for the landlord and those not entitled to legal aid. In 1999 it was found that complex eviction cases resulted in costs of up to £7500 per case, and around £3500 being the norm<sup>16</sup>. It would be reasonable to assume that costs have risen since this time. The cost of legal action and potential court costs can discourage individuals from seeking legal redress. In addition, the landlord wishing to bring a case can face the potential of the cost of action being greater than the benefit of taking the action.

This creates barriers to justice. Landlords in the private sector, particularly those smaller portfolio or 'accidental' landlords, may be reluctant to take proper action when they have a dispute with their tenant, with the potential for harassment and illegal eviction by less scrupulous landlords. In other words, the development of a housing tribunal should present a landlord with a more accessible and cost effective way to take action against a tenant, but in doing so could also be a tool to improve the overall standards in the sector by discouraging bad practice.

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<sup>16</sup> *A Housing Tribunal for Scotland?* Chartered Institute of Housing Scotland, 2004.

## ***Inconsistent***

Inconsistency in decision making is a critical part of the argument for moving cases from the sheriff court into a specialist arena. Individual sheriffs are under no obligation to adopt the positions reached by other sheriffs who have dealt with similar cases and whilst some will, this is by no means certain. The earlier O'Carroll and Scott study showed that individual sheriffs would often be consistent in their own decisions, but that there were inconsistencies between sheriffs within the same sheriffdom as well as between one sheriffdom and another. This makes it difficult to build up a body of case law which supports the legal framework and enables both parties in dispute to have a sense of whether a case has merit or not.

Even where there are clear parameters that bind the sheriff, there can often be disparity. As reported in the Shelter briefing '*Eviction of children and families: the impact and the alternatives*,<sup>17</sup> despite there being an absolute duty on sheriffs to consider the reasonableness of a decision to evict, in cases that are unrepresented or where the tenant is not in attendance, there is a wide variation in whether this test is applied or not. This perceived 'rubber stamping' of eviction actions does little to change the view some tenants have that there is no point in attending a hearing because the sheriff will always agree with the landlord.

This inconsistency in approach can be blamed in some part on the lack of specialism within the sheriff court. Sheriffs are not provided with specialist training and as so many other types of cases are heard in the one court, it is not surprising that applying a consistent approach in housing cases is challenging.

## ***Inaccessible***

The court system can be confusing and inaccessible to all but those with a high degree of knowledge. Navigating around the Scottish Court Service website<sup>18</sup> provides a flavour of just how complex the system is. The range of forums for particular actions is baffling and relies on specialist advisers guiding litigants through the processes. This has distinct resource implications in both the demand for specialist advisers and the cost of the use of paid advisers.

It is not only the complex procedures that require expertise. The adversarial nature of sheriff courts also means that it is not a comfortable arena for most lay people to make their case and it is unlikely tenants would choose to use the sheriff court to resolve a particular problem. The very nature of the adversarial approach is that it relies upon two sides making a case, as

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<sup>17</sup> [http://scotland.shelter.org.uk/professional\\_resources/policy\\_library/policy\\_library\\_folder/eviction\\_of\\_children\\_and\\_families\\_the\\_impact\\_and\\_the\\_alternatives](http://scotland.shelter.org.uk/professional_resources/policy_library/policy_library_folder/eviction_of_children_and_families_the_impact_and_the_alternatives)

<sup>18</sup> <http://www.scotcourts.gov.uk/introduction.asp>

opposed to a decision maker determining the law. Where one side is unrepresented or less informed, they are already at an acute disadvantage.

This inaccessibility and formality extends to the clothing the sheriff wears (wig and gown) and the layout of the court itself, which is required to be suitable for all areas of court business, including criminal. Inaccessibility leads to undefended eviction cases which have resulted in what has been described as the “relentless conveyor belt of mind numbing awfulness”<sup>19</sup> of undefended eviction cases.

### ***Confusion of forums***

As has been described earlier in this paper, there are several forums in existence that are used for different housing cases. Whilst the majority of housing actions take place in the sheriff court, others can happen elsewhere, such as the Lands Tribunal or PRHP. Each forum has its own rules and procedures and in the sheriff court there are the four potential procedures that may be used. It is not uncommon for two or more actions to be commenced at the same time but in different places or with different procedures. This results in a perplexing mix which both landlords and tenants can sometimes struggle to fathom out.

### ***Policy direction***

A significant number of changes or developments in policy direction that have either already taken place or are in the pipeline suggest the current reliance on the courts for dealing with housing disputes is outdated and inappropriate. The environment which landlords and tenants across all tenures operate in has undergone significant change:

- The implementation of some aspects of the Housing (Scotland) Act 2003; namely increasing the rights of homeless households, removing the local authority’s power to assess priority need. What this means is that more people have particular rights. However, the individual’s ability to appeal negative decisions relating to those rights is currently extremely limited, whether it be, for example, an intentionality decision or a decision on reasonableness of an offer of accommodation. Judicial review is only an option when challenging decisions made by public bodies, which, by their current definition, does not include housing associations. Rights, without access to justice, have limited value
- The Scottish Government focus on the Housing Options agenda and homelessness prevention, which is the pragmatic complement to the Housing (Scotland) Act 2003, to ensure where possible homelessness is prevented and that appropriate alternatives to social housing are offered to those in housing need. This includes empowering tenants to avoid eviction; access to a more affordable, less intimidating arena in which to do this would support this agenda

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<sup>19</sup> Smith R. Eviction – first port of call, or last resort? Cited in Paths to Justice. SCOLAG. 2007

- Introduction of Pre-action Requirements (PARs) which compel social landlords to evidence the activities they have undertaken prior to seeking eviction. For the PARs to have real value it is important that they are not just another set of papers to ‘rubber stamp’, but there is a risk that the already overburdened, non specialist sheriff courts would inadvertently do just that
- The introduction of the Scottish Social Housing Charter, which has at its heart tenants and other customers, and the regulatory regime which now takes a proportionate and risk based approach, leaving landlords with a greater responsibility to self assess and monitor performance. Whilst the Regulator is quite clear that it intends to remain robust within its new, more proportionate approach, its resources are much reduced. It could be argued that, as a consequence, social tenants need improved access to justice so they can more easily challenge poor practice
- In 2010 the *Christie report*<sup>20</sup> was commissioned to examine the future delivery of public services. It concluded that:

“Unless Scotland embraces a radical, new, collaborative culture throughout our public services, both budgets and provision will buckle under the strain.”

In addition, Christie supported the principle of spend to save. This principle can be reflected in the development of a Housing Tribunal. Whilst there is bound to be cost in taking radical action and placing all housing cases in a tribunal setting, the savings through better access to justice and more consistent, holistic and expert decision making would be felt right across the spectrum of services that support those after they have become homeless or who live in poor quality rented housing, etc.

- There will be very significant impacts of welfare reform on the relationship between social landlord and tenant in the near future, with the potential need for a greater level of scrutiny than can be currently applied to rent arrears cases: how landlords manage arrears exacerbated by the bedroom tax, for example. The careful analysis and balance required to deal with arrears would be best carried out by specialists who understand the whole housing agenda, particularly if it is not to cause a reverse in the current trend of reducing social housing evictions
- The expansion of the model of the PRHP to the creation of the Homeowner Housing Panel (HOHP) demonstrates that the PRHP has the capacity to grow and adapt to new functions. Disputes arising from the Property Factors (Scotland) Act 2011 will be determined by this

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<sup>20</sup> <http://www.scotland.gov.uk/Resource/Doc/352649/0118638.pdf>

panel, but the members of both the PRHP and the HOHP are drawn from the same pool, which provides the capacity for shared learning and the germ of a specialist housing dispute resolution arena

- Specific areas of the law on the private rented sector have been amended and a number are either in place or are imminent. These have aimed to provide tenants with better protection - for example in the introduction of the Tenancy Deposit Scheme (TDS), which compels landlords to protect deposits in an approved scheme. The scheme does operate with independent adjudication, but where the tenant disagrees with this the only existing route is, as before, the sheriff court. Indeed, where a landlord fails to comply with the TDS the tenant has no recourse other than court action. Equally, where the damage to the property outweighs the value of the deposit held, the landlord can only seek this using the courts
- ‘*Shaping Scotland’s Court Services*’ is a consultation<sup>21</sup> currently looking at proposals for a new court structure. Much of it is focused on reducing the number of courts and, by default, reducing access to justice even further for housing cases. Whilst the consultation period does not close until the end of the year it is not difficult to see the direction of travel it is likely to take.

We are also at a turning point in relation to allocations and some areas of social housing management, with the recent consultation *Affordable Rented Housing: Creating flexibility for landlords and better outcomes for communities*<sup>22</sup>. This consultation received general support from both tenants and landlords and amongst other things, offered landlords the power to demote Scottish Secure Tenancies to Short Scottish Secure Tenancies (SSST) or to allocate SSSTs in more circumstances than is currently the case.

Whilst we are yet to see which of the proposals will make their way onto the statute book, changes seem very likely, given the level of Scottish Government support. When these changes take place, and as landlords and tenants become familiar with the new landscape, there is bound to be dispute. Reliance on the courts to manage these disputes is unrealistic. Far better that they are tested in an environment that is easy to access and understand and that has the level of knowledge and experience required to do so.

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<sup>21</sup> <http://www.scotcourts.gov.uk/consultations/docs/CourtStructures/ShapingScotlandsCourtServices.pdf>

<sup>22</sup> <http://www.scotland.gov.uk/Publications/2012/02/9972>



## What could a housing tribunal look like?

A housing tribunal could provide a more accessible forum for housing cases than is currently the situation through the courts. There would be no requirement for legally qualified representation and the setting would be less formal, with an inquisitorial as opposed to adversarial approach. Just as in the PRHP, a housing tribunal would comprise a specialist and legally qualified chair, with experienced and knowledgeable panel members, and without formal wigs and gowns.

There would be opportunity to resolve cases before a hearing, with mediation built in to the process, and the Chair would be able to consider cases before the hearing, removing the need for preliminary hearings and thus speeding the process up. It would have the power to make legally binding decisions which could be challenged in the second tier tribunal (assuming the recommendations following the '*Options for Tribunal Reform*' paper are followed).

Its jurisdiction would be over a wide range of housing issues, covering both the social and private rented sectors, including anti-social behaviour cases where eviction, interdicts and ASBOs are sought. There are a number of models within the existing tribunal system, some more formal than others. It is possible that a housing tribunal would capture the most effective elements of those that work well. For example, the 'whole view' approach of the Children's Panel, with some emulation of the rules of procedure in employment tribunals and the PRHP, with conciliation and mediation built into the model. Some discussion would need to be had on determining what, if any, cost is realistic for accessing the housing tribunal. Currently, whilst access to both the PRHP and the HOHP is free, application to the Lands Tribunal is not.

The tribunal would not only be taking on cases that have existing avenues of legal redress. It would also capture those existing rights which have no appeal forum, or only have the option to seek a judicial review. The lack of reported case law suggests that judicial review is not an option taken by many. Yet it is impossible that every decision made has been made correctly. This lack of testing and, therefore, of case law does little to promote service and practice improvements and, it could be argued, leads to apathy by landlords and local authority homelessness functions. It could be argued that a right without a remedy is no right at all.

Clearly, there will be a need for primary legislation to create rights of appeal where none currently are defined to allow them to be heard in a housing tribunal. For example, the types of appeals that could be heard include:

- Local authority homelessness decisions
- Refusal of a social landlord to allow an applicant to access a housing register

- Failure of a social landlord to consult on proposed rent rises or on any other matter
- Failure to consent to an application for subletting and assignation in the private rented sector
- The awarding of a short Scottish Secure Tenancy
- Failure to consent to applications for subletting and assignation in Scottish secure and short Scottish secure tenancies
- Refusal of request to create a joint tenancy in the social rented sector
- Appeal against the conversion to a short Scottish secure tenancy for social rented tenants
- Appeals against the right to succeed a tenancy
- Appeals against unlawful eviction.

This is a far from comprehensive list, but serves to illustrate that there are numerous situations that currently exist where the tenant, or prospective tenant, has little or no recourse to challenge a decision. Equally, the cost of taking action against a tenant can be prohibitive and off-putting for private landlords, who may choose to use the automatic ending of a Short Assured Tenancy on its end or 'ish' date rather than use the court to seek compensation for damages, because the existing system is expensive and formal.

Landlords would be able to use the housing tribunal for cases that would have previously been heard in the courts, such as:

- Actions to deal with anti-social behaviour, including eviction, interdict and interim interdict, anti-social behaviour orders
- Actions, including evictions, to deal with rent arrears.

These changes would require primary legislation, in particular to introduce the rights of appeal for the various rights within the Housing (Scotland) Acts 1987 and 2001 (as described above). This could be dealt with through the proposed Housing Bill, which is due some time during 2013.

The tribunal will need to have sufficient power to make legally binding decisions and orders, with breaches of orders becoming criminal offences, and the power to compel witnesses and others to attend a hearing. In recognising that law reform would be required for this to happen, and that it would be a costly exercise, it is important to also acknowledge that there is a need to do *something*: in CIH Scotland's opinion the status quo is not an option.

CIH Scotland believes it would be far better to spend resources developing a forum that fits with the way in which housing cases work, than to make small and ineffective changes to the existing systems. The potential savings to the public purse alluded to earlier may be difficult to quantify in detail, but even on a basic level a tribunal would cost less to run, because tribunal chairs are paid less than sheriffs and less formal procedures are less expensive. When the more efficient way in which tribunals operate is factored in, with one case per slot and few delays, it is not difficult to see cost savings here too, in terms of both time and money, where legal representation is used. This same efficiency would apply to appeals tribunals, where waiting time is minimised.

As legally qualified representation is not required in a tribunal setting it would be possible for specialist advisers, trained to a recognised standard (such as the type III National Standards in Information and Advice<sup>23</sup>) to offer representation. We recognise, though, that a balance needs to be struck and that many cases will still require legally qualified specialist representation to offer the litigant a better prospect of success (legal aid should be available for this).

Much has changed since CIH Scotland first mooted the suggestion that a housing tribunal would help create more equitable access to justice. We now have tribunals, such as the PRHP, that specialise in housing cases, with backroom staff and procedures in place, so the door to a wider housing tribunal is already ajar. The precedent of change from a narrower tribunal to a wider one has already been set: employment tribunals have changed from dealing solely with employment law to also examining contractual obligations.

CIH Scotland is convinced that managing housing dispute cases through a tribunal model is the most effective way of safeguarding consumer and landlord rights. It would modernise access to justice, and would be in keeping with the agenda to protect homeless households and provide a comprehensive housing options approach. At the same time it would support the Scottish Government in achieving its national outcome of delivering public services that are “high quality, continually improving, efficient and responsive to local people’s needs.”

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<sup>23</sup>[http://scotland.shelter.org.uk/professional\\_resources/training\\_and\\_conferences/training/about\\_our\\_courses/Elearning/information\\_-and- advice\\_standards\\_training\\_formerly\\_homepoint](http://scotland.shelter.org.uk/professional_resources/training_and_conferences/training/about_our_courses/Elearning/information_-and- advice_standards_training_formerly_homepoint)

## **Appendix**

### **Housing tribunals in other countries**

These are offered by way of example, rather than suggesting Scotland emulates directly any of the models. But there is ample opportunity to examine what has worked elsewhere and ensure that the model developed in Scotland is one that is fit for Scotland's housing cases.

#### **Ireland**

The Private Residential Tenancies Board (PRTB) was set up to provide a dispute resolution service for landlords and tenants and is also responsible for tenancy registration (under the Residential Tenancies Act 2004), which all landlords must register with. It operates as a resource by providing policy advice, guidelines and information on the private rented sector in Ireland. It applies to most tenancies within the private rented sector (excluding some, such as holiday lets, business lettings, holiday lets etc.)

It provides a confidential dispute resolution service which can be initiated by any party affected, e.g. the tenant, landlord, neighbour. (This is not available to unregistered landlords though). The service covers disputes about deposits, lease terms, termination of tenancies, rent arrears, market rents, complaints by neighbours, breaches of statutory obligations by either landlord or tenant and any other matters related to the tenancy. It should not be necessary to have legal representation when taking a case to the PRTB.

It provides a two stage process, the first of which being mediation or adjudication, depending on which the parties prefer. If they are unhappy with the decision at stage one they can appeal within 21 days to the second stage, which is the hearing by a three person tenancy tribunal. There is an initial fee to the tribunal by whoever initiates the action.

#### **Western Cape, South Africa**

Formed in 2001, the Rental Housing Tribunal provides free services to tenants and landlords throughout the Province of the Western Cape. Hearings and mediations are held as close as possible to the point of complaint. The Tribunal consists of five members (including a chair and vice chairperson), who have expertise in property management, housing development and consumer matters relating to rental housing. The Tribunal seeks to harmonise relationships between landlords and tenants in the rental housing sector, resolve disputes that arise due to unfair practices, inform landlords and tenants about their rights and obligations and make recommendations to relevant stakeholders.

Complaints can be lodged by tenant or landlord and will be followed by a preliminary investigation which may involve a visit to the property. If the complaint relates to a relevant dispute, the Tribunal will try to resolve the matter with informal/formal mediation. If the parties are unable to reach an

agreement, the case will be referred for a ruling at a formal hearing. Failure to comply with a tribunal ruling will constitute an offence and is liable, on conviction, to a fine or imprisonment not exceeding two years, or both.

### **Ontario, Canada**

The Landlord and Tenant Board's role is to provide information about the *Residential Tenancies Act* (RTA) and to resolve disputes between most residential landlords and tenants. It forms part of a newly designated social justice tribunals cluster. The mandate of the tribunals in the cluster is to provide all Ontarians with timely access to specialized, expert and effective dispute resolution in a wide range of matters that profoundly affect their everyday lives. The Landlord and Tenant Board resolves disputes between landlords and tenants according to the rights and responsibilities of each, including rent increases, evictions and privacy issues, information on landlord and tenant matters that relate to residential tenancies

### **Australia**

The Residential Tenancies Tribunal is an independent judicial body that has authority to make legally binding decisions in disputes between agents/landlords and tenants. A hearing can be the tenant, agent, landlord, rooming house resident, rooming house proprietor. Other people who are affected by a tenant's behaviour – e.g. neighbour, can also request a hearing by completing an application to the Residential Tenancies Tribunal for unacceptable conduct. A fee is paid by post, although there are exemptions for full time students or those with a concession card. Some cases are listed for a conciliation conference which enables the parties to discuss their issues and attempt to resolve the dispute without a formal hearing.

Hearings are heard by a tribunal member who makes the final decision after hearing from all parties involved and rely on the evidence provided. Hearings may be held in country courthouses, by video conference, by telephone or at the Residential Tenancies Tribunal in Adelaide. Hearings are informal and are open to the public. Decisions are legally binding.  
the agreement into a legally binding order.

### **New Zealand**

A landlord or a tenant wishing to make an application to the Tenancy Tribunal will be charged a small fee. The hearing is public and generally parties represent themselves. This differs if there is some special reason for allowing a lawyer to be present. These are where the dispute is for more than \$6,000, the other side agrees or the Tribunal allows it, if one party has a lawyer representing them, the other party may also be represented by a lawyer. It may also be agreed to have a lawyer if the nature and complexity of the issue involved recommends it or there is any significant disparity between the parties affecting their ability to represent their case.

In the hearing a tenancy adjudicator listens to each person, hears any witnesses and evidence either side wants considered, and then makes a

decision according to the Residential Tenancies Act. The adjudicator produces their decision as a Tribunal order which is a decision that both sides have to obey. The Tenancy Tribunal can award compensation or order work to be done up to a value of \$50,000.

A variety of orders that can be made, but the most common are possession orders, monetary orders and work orders, payment of exemplary damages (this is something like a fine) for legal breaches such as not paying the bond to Department of Building and Housing, seizing a tenant's goods or denying legal access, payment of compensation for loss of goods or loss of use through poor repair, alternative orders, which can say what will happen if the order is not complied with (for example, an order for the return of goods can require monetary payment if the goods are not returned).