

Understanding the Private Housing (Tenancies) (Scotland) Act 2016
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There are ground-breaking and significant changes coming into force as at 1 December 2017 effecting the Scottish private rental sector, which will completely transform the current private tenancies which dominate the sector just now. The Private Housing (Tenancies) (Scotland) Act 2016 was passed by the Scottish Parliament on 17 March 2016 and received Royal Assent on 22 April 2016. The Act creates the new private residential tenancy which will replace the current assured and short assured tenancies. It is essential to understand how these changes will affect residential tenancies and the procedures and processes involved once the tenancy is in place.

So why did we need The Private Housing (Tenancies) (Scotland) Act 2016

The main purpose of this legislation was to overhaul the old tenancy system and bring it forward to improve security for tenants with appropriate safeguards for landlords, lenders and investors. The new tenancy which starts from 1 December 2017 will be known as a Private Residential Tenancy, however, until then short assured tenancies can be used. No new short assured tenancies can be granted after 1 December 2017. The changes will also improve standards across the regulating sector by registering letting agents and landlords and licensing houses in multiple housing occupation (MHO). There will also move into providing support with dispute resolution and rent pressure zones will be introduced.

The 2016 Act aims to covers provisions regarding private residential tenancy, the way information regarding tenancies is provided by the landlord to tenant, rent, improvements to the let property and termination. It is therefore a wide-reaching piece of legislation and one which will be important for landlords and tenants to be aware of. The ground-breaking changes will also affect litigation procedure as Sheriff Courts no longer be dealing with civil cases relating to the private rented sector as a Summary Cause Action. There will be no fees associated with application to the First-tier Tribunal as opposed to those required by Sheriff Courts. The already existing First-tier Tribunal for Scotland (Housing and Property Chamber) will start hearing more private rented sector cases from December

2017, including the new letting agents' procedures, transfer of jurisdiction from the Sheriff Courts and new private tenancies.

So how this will translate in practice as of 1 December 2017?

A very important distinction will need to be made that the property is let to an individual ("the tenant") as a separate dwelling and the property occupied by the tenant is his only or principal home. Any tenancies that does not come under that schedule, will not be defined as Private Residential Tenancies. The landlord will have a duty to provide a written lease to the tenant and any other documentation referring to the terms of the tenancy within 28 days of the date of signing the lease. The landlord will be prohibited in charging the so- called costs associated with drawing up tenancy agreement or any other information relating to the latter. In the event where the landlord fails to provide the lease or the terms are unlawful, the First-tier Tribunal will have the power to draw up the terms of the private residential property and /or the landlord has no reasonable excuse for failing to perform the duty, the First-tier Tribunal has the power to implement sanctions on the landlord by ordering him to pay to the tenant 3 months rent, if the failure by the landlord is not to provide one item of information, or 6 months rent, if the failure by the landlord is not to provide one item of the information and a written lease.

Additional protections to tenants

The Act will also provide additional protection to the tenants against excessive rent increases, where rent could only be increases once in a 12 months period. No premiums or advance payments are to be made in relation to a private residential tenancy. The Tribunal will also need to grant leave to the landlord to carry out diligence in respect of the rent due by the tenant or a former tenant. The landlord will be able to increase the rent payable under the tenancy by giving the "rent increase notice" at least three months prior to the review of the rental payments. The tenant will then have 21 days to make a referral to the rent officer for, who can make an order which must record the amount of the rent that is fairly attributed to the provision of services unless the amount is negligible.

If the rent officer issues a provisional order, the landlord or the tenant may ask the rent officer to reconsider the proposed amounts and such request may not be made more than 14 days after the provisional order is issued. The rent officer will have then re-make the order for the purpose of correcting any error in the original order. Where the rent officer has made an order in relation to the rent, the landlord or the tenant may appeal against the order to the First-tier Tribunal no later than

14 days from the date when the order was granted or re-made. The First-tier Tribunal will have the power to set the rent payable under the tenancy. If the rent has been changed by an order of the First-tier Tribunal and if the new rent is less than the old rent, the landlord is liable to pay the tenant the difference and the amount that would have been payable in rent during the same period had the new rent been the rent payable from the originally proposed effective date. In the event the new rent is more than the old rent on the date the order is made, the tenant becomes liable to pay the landlord the difference and the amount that would have been payable in rent between the originally proposed date and the actual effective date had the new rent been the rent payable from the originally proposed effective date.

Introduction of local rent caps for Rent Pressure Areas or Rent Pressure Zones.

Local authorities will be able to apply to the Scottish Ministers to designate all or part of the area as a Rent Pressure Zone. That is when the rent increases on existing tenancies would be restricted in line with an inflation linked formula. The Scottish Ministers must then consult landlord and tenants in the designated area before making the decision as to whether to designate. However, the rent pressure zone does not prohibit the negotiation of the initial rent under the tenancy. Any cap set by the Scottish Ministers will be at least consumer price index plus 1%, for example if CPI is 1.6%, the minimum cap set by Ministers would be 2.6%. Also, for the properties within a rent pressure zone, landlords will be able to apply to a rent officer for an additional amount of rent to reflect any improvements made to the let property. But these improvements will not include: any repairs or maintenance, decorative work and any work done which was entirely or partly paid for by the tenant.

The previous provision of the Act regarding ownership of the property and the landlord's interest in it, will remain the same. Whereas, when ownership of a property let under a private residential tenancy is transferred, the landlord's interest under the tenancy transfers with it.

Terminating the Tenancy under the 2016 Act

The new tenancy will be an open-ended tenancy, which means that the landlord will no longer be able to request the tenant to vacate the property simply because the term has ended. A tenant will have an option to bring a private residential tenancy to an end by giving the landlord notice per the terms of their agreement or in the event of lack of such agreement, the period of 28 days after the expiry of the initial term.

The landlord will have two options to terminate the tenancy by either consensual termination with the tenant or by obtaining an eviction order. Consensual termination seems much simpler procedure as the tenant would have received a notice to leave from the landlord and he simply vacates the property. A tenancy comes to an end on the day specified in the notice to leave or on the day the tenant ceases to occupy the property. The less preferred option by landlord but often necessary, is to apply to the First-tier Tribunal for an eviction order.

There will be no fees for bringing such action and only complex cases, which will fail reaching its conclusion by the First-tier Tribunal, will be referred back to Sheriff Court for determination. In the event the tenant fails to vacate the property, the landlord can make an application to the First-tier Tribunal to issue an eviction order against the tenant and if one of the grounds in Schedule 3 applies. Such application can be made by the landlord after the expiry of the relevant period as stated in the notice:

- If the tenant has occupied the property for less than 6 months, the notice period is 28 days. If the tenant has occupied the property for over 6 months and there is no breach of lease of behaviour, the notice period is 84 days
- If the eviction is due to the tenant's breach of the lease or behaviour, the notice period is also 28 days
- The landlord will still need to notify the local authority of their intention to seek an eviction order from the First-tier Tribunal
- In the event the tenant refuses to vacate the property after the eviction date and the case becomes complex, the case can then proceed to the Sheriff Court

There will also be separate provisions on restrictions on applying 6 months after the notice period expires, or on applying without notifying local authority, wrongful termination by eviction order and wrongful termination without eviction order.

If the tenancy was brought to an end by an eviction order from the First-tier Tribunal and it has been found that the Tribunal was misled into issuing such order, then the Tribunal can issue a wrongful-termination order. The landlord then can be liable to pay the tenant compensation of up to six months of rent. If the tenant vacated the property without an eviction order, an application can be made to the First-tier Tribunal for a wrongful-termination order in the circumstances that it is believed the tenant was misled into ceasing occupation. If the wrongful-termination is issued the Tribunal must notify the local council (where the landlord is registered) and that order will be raised in a landlord's re-registration process.

The tenancy will also be brought to an end in case of the death of tenant. If the sole tenant under the tenancy dies and nobody inherits the tenancy and there is no qualifying successor (partner, direct family member or carer) and succession rights apply in that order. The qualifying successor must have been living in the property as their main home for at least 12 months before the death of the joint tenant and the tenant ought to have notified the landlord in writing of the bereaved tenant's occupation. The direct family member must be at least 16 years of age at the time of the tenant's death and that the direct family member has been occupying the let property for at least 12 months as the family member's only or principal home at the time of tenant's death. Carer's entitlement to inherit, the carer needs to be at least 16 years of age at the time of the tenant's death, is occupying the property as the principal home and has done so for at least 12 months ending with the tenant's death.

The First Tier Tribunal

In the event the case proceeds to the First-tier Tribunal, the onus is on the landlord to prove the grounds that apply; some grounds are mandatory, and some are discretionary in these circumstances. Any lawfully granted sub-tenancies will be terminated by a landlord ("the superior landlord") to anyone who holds a tenancy directly or indirectly from the superior landlord's tenant. The actual notice to leave by landlord must meet the following criteria: it must be in writing, must specify the day on which the landlord under the tenancy will become entitled to make an application for an eviction order to the First-tier Tribunal, it must state the eviction grounds on which the landlord proposes to seek an eviction order in the event the tenant does not vacate the let property, before the end of the date as stated by the notice to leave, such notice to leave also needs to fulfil any other requirements prescribed by the Scottish Ministers regulations.

The First-tier Tribunal's jurisdiction in relation to civil proceedings arises from where the tenancy property is located. The Tribunal will have the exact competence and jurisdiction a sheriff would have to determine the matter. The Tribunal will also have a duty to report any unregistered landlords to the local authority if suspicion arise that the landlord under the tenancy is not registered. Any existing cases raised at the Sheriff Court will continue until conclusion, unless the pursuer wishes to sist action and raise a completely fresh action at the Tribunal.

Patrick Harvie, a Glasgow MSP and co-convenor of the Scottish Green Party said in March 2016 for the Scottish Housing News that the new legislation was merely the first step towards rent controls and stronger rights for tenants. He also said the passage of the Bill marked a "great day" for Scotland's tenants but highlighted that Scotland's private rented sector was still behind some of the other European countries. He said: "Until today, the private rented sector in Scotland has been practically a

free for all, with few rights for tenants and rents rising to totally unaffordable levels in places like Glasgow, Aberdeen and the Highlands". He made it clear in his interview that there is an urgent need of proper system of nationwide rent controls implemented and regulation that make it possible for tenants to stay in the properties they rent for as long as they need to, even once the property is sold.

According to Shelter Scotland, the private rented sector in Scotland has doubled over the last ten years and is now home to more than 330,000 households and 85,000 alone are with children. This means that private rental sector needed a major overhaul to provide the families with security and peace of mind. The abolition of "no fault" eviction and secure tenancy will help families to assimilate with the community and stay in their homes for as long as they need.

Be aware and prepare

These are the upcoming changes in the private rent sector which for us professionals acting for tenants or advising landlords need to be acutely aware of. Landlords need to make sure their leases and procedures are in line with the legislation. Tenants also need to be aware of the requirements and both parties be clear as to their rights and responsibilities – and the penalties for any breach. Those involved in this growing sector need to understand and update their procedures to ensure they don't fall foul of the guidelines and changes which the legislation is now bringing.

If you have any queries on this Act and what it means for you or your business, please contact us on 0141 423 6999.