The Private Rented Housing (Scotland) Bill seeks to amend the private landlord registration scheme and the Houses in Multiple Occupation licensing scheme. The Bill would also introduce a new statutory overcrowding notice that local authorities could use to address overcrowding in their areas. Finally, the Bill seeks to amend the legislation relating to the private sector tenancy regime and related matters. It is proposed to clarify what pre-tenancy charges would be allowed and to require private landlords to provide a tenancy information pack at the start of a tenancy.

This briefing provides background to the Bill, details of the Bill’s provisions and information on responses to the consultation on the Bill.
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EXECUTIVE SUMMARY

The principal policy objectives of the Bill are “...to improve standards of service for consumers in private rented housing and enable continued sustainable growth in the sector”. The proposals build on a number of reviews and consultations concerning private rented sector (PRS) housing over the last few years. The Bill also contains (in an amended form) some PRS provisions that were in the 2010 Housing (Scotland) Bill as introduced. The Government intends to remove those provisions from the Housing (Scotland) Bill at Stage 3 (scheduled for 3/11/2010).

Following Stage 1 proceedings of the Housing (Scotland) Bill, and in response to the Local Government and Communities Committee Stage 1 Report, the Government has considered where further measures could be taken to address the issue of “rogue landlords” in the Bill. However, this change in emphasis was not entirely welcomed by the Private Rented Sector Strategy Group which has been working with the Government on the development of the Bill.

Part 1 of the Bill proposes changes to the system of private landlord registration. The proposals include tightening up the fit and proper person test, increasing the maximum penalty and introducing disqualification orders for unregistered landlords. There are also proposals to increase the amount of information that can be made available to the public and local authorities about private landlords. The aim of these proposals is to improve protection to tenants and to assist local authorities in their enforcement activities. In general, these proposals were relatively uncontroversial amongst consultees. An on-going debate over the landlord registration scheme is the extent to which it is actually a light touch approach to regulation and one that does not overburden landlords and local authorities and whether it is effective at improving standards in the sector.

Changes to the system of HMO Licensing are due to come into force with implementation of Part 5 of the Housing (Scotland) Act 2006 in August 2011. Part 2 of the Bill proposes amendments to Part 5 of the 2006 Act. Proposals include allowing Ministers to specify additional categories of accommodation that would be considered HMOs and allowing local authorities to refuse to consider an application for an HMO licence if it considers that any requisite planning permission has not been obtained. Both these provisions were in the Housing (Scotland) Bill and were supported by the Local Government and Communities Committee.

A new overcrowding statutory notice is proposed under Part 3 of the Bill. This would allow local authorities to take action where privately rented overcrowded properties are having an adverse effect on the health or wellbeing of anyone or an adverse effect on the amenity of the house or its locality. While this proposal was welcomed amongst consultees, a key concern raised was that any use of the power should not adversely affect the tenants living in the properties.

Finally, the Bill proposes a number of miscellaneous provisions in Part 4 of the Bill. These include a requirement for the introduction of a tenancy information pack to be provided by landlords at the start of a tenancy. The aim of this is to increase knowledge amongst tenants and landlords of their rights and responsibilities. The Bill also proposes to clarify that only certain charges, as specified by Ministers, can be made in connection with the grant, renewal or continuation of a tenancy. Again these proposals were generally welcomed by consultees. Landlords would also be given the right to apply to the Private Rented Housing Panel for assistance to exercise the right of entry to a property in relation to the Repairing Standard.
BACKGROUND

The Private Rented Housing (Scotland) Bill (the “Bill”) was introduced in the Parliament on 4 October 2010 by Nicola Sturgeon MSP. It was accompanied by a Policy Memorandum and Explanatory Notes. Its principal policy objectives are “…to improve standards of service for consumers in private rented housing and enable continued sustainable growth in the sector”. It aims to achieve this by “…measures to strengthen the regulation of the private rented sector; improve the working of the private sector tenancy regime and related matters; address more effectively the problems caused by rogue landlords; and deal with the worst effects of overcrowding” (Policy Memorandum para 2).

These proposals have been developed in the context of an increased policy focus on the private rented sector (PRS) over the last few years, which is summarised in Table 1 below. More recently, particular issues about the quality of some PRS housing in the Govanhill area of Glasgow have influenced the development of the overcrowding proposals.

The Housing (Scotland) Bill (the Housing Bill) which was introduced in the Parliament in January 2010 also contained provisions relating to PRS housing. The Government’s intention was to take forward some relatively straightforward proposals as quickly as possible, while more complex measures were developed with the PRS Strategy Group. However, the Local Government and Communities Committee (the Committee), in its Stage 1 report on the Bill (Scottish Parliament Local Government and Communities Committee 2010), was critical of the Government’s approach to having PRS provisions in both bills and indicated that it would have been “preferable” for all provisions relating to PRS housing to be in one bill (para 17). Therefore, the Government has replicated (with some amendments) the Housing Bill’s PRS provisions in the current bill and intends to remove the PRS provisions from the Housing Bill at Stage 3.

The Committee’s report also expressed a desire that local authorities were given adequate powers to help tackle issues of “rogue landlords”. Following the report the Government has proposed additional measures aimed at addressing some of the Committee’s concerns. However, the PRS Strategy Group, which has been working with the Government to develop the Bill has “…expressed some concern about the change in emphasis to the Bill” and that:

“Generally, landlord representatives considered that some of the proposals would create an additional burden for landlords and that the issue of rogue landlords who deliberately avoid registration would not be addressed. Local authority representatives were concerned that the measures may have the effect of diverting resources from enforcement activity” (Policy Memorandum para 68).

A full evaluation of the private landlord registration scheme is currently being carried out by the Government. It is anticipated that this will be completed by March 2011. The Policy Memorandum notes that this, and further consideration by the PRS Strategy Group, may result in further measures being brought forward (para 19). It is not clear yet whether this would involve further legislative change.

The consultation paper on the Bill (Scottish Government 2010a) also included proposals concerning mobile homes legislation and changes to the 20 year rules relation to long leases and heritable securities. The proposals on mobile homes will not be taken forward in a bill this parliamentary session. Instead, the Government intends to introduce secondary legislation to update the implied terms between residents and site owners in their written agreements. Other issues will be considered further before taking forward primary legislation. Proposed changes to the 20 year rules were included as a Stage 2 amendment to the Housing Bill. Table 1 summarises the main policy developments of the last few years influencing the Bill’s proposals.
### Table 1: Timeline of Private Rented Sector Policy Developments

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Anti-Social Behaviour etc (Scotland) Act 2004</strong></td>
<td>Set out provisions for the private landlord registration scheme, which came into force in April 2006.</td>
</tr>
<tr>
<td><strong>Housing (Scotland) Act 2006</strong></td>
<td>Restated and amended/extended provisions relating to HMO licensing which are currently found in an Order made under the Civic Government (Scotland) Act 1982. The provisions are due to come into force on 31 August 2011.</td>
</tr>
<tr>
<td><strong>July 2008</strong></td>
<td>A Good Practice Review of the private landlord registration scheme, undertaken by Arneil Johnstone, on behalf of the Government was published (Scottish Government 2008a). It included recommendations on legislative change which Arneil Johnstone considered further.</td>
</tr>
<tr>
<td><strong>July 2008</strong></td>
<td>The Government consulted on changes to secondary legislation regarding the private landlord registration scheme (Scottish Government 2008b).</td>
</tr>
<tr>
<td><strong>February 2009</strong></td>
<td>Changes made to secondary legislation regarding the private landlord registration scheme came into force. The changes mainly related to the fee and discount structure and were designed to simplify the application process.</td>
</tr>
<tr>
<td><strong>March 2009</strong></td>
<td>The Government published the results of the review of the PRS (Scottish Government 2009a). It found that tenant satisfaction levels with the sector were high. The key concerns of many tenants and landlords included dealing with tenancy deposits and repairs, regaining possession of properties and knowledge of rights and responsibilities.</td>
</tr>
<tr>
<td><strong>July 2009</strong></td>
<td>The Government consulted on private sector housing issues that could be included in the Housing (Scotland) Bill (Scottish Government 2009b).</td>
</tr>
<tr>
<td><strong>October 2009</strong></td>
<td>The Government established the Scottish Private Rented Sector Strategy Group which consists of key stakeholders. Its remit is to “advise the Scottish Government on how it can support tenants, landlords and others to grow a professional, high quality private rented sector equipped to provide sustainable housing solutions for Scotland in the 21st century”.</td>
</tr>
<tr>
<td><strong>13 January 2010</strong></td>
<td>The Housing (Scotland) Bill was introduced to Parliament. It included provisions relating to PRS housing.</td>
</tr>
<tr>
<td><strong>15 January 2009</strong></td>
<td>The Scottish Private Rented Sector Strategy Group’s recommendations were published (Scottish Government 2010b).</td>
</tr>
<tr>
<td><strong>8 March 2010</strong></td>
<td>The Government consulted on proposals for a private sector housing bill (Scottish Government 2010a).</td>
</tr>
<tr>
<td><strong>8 June 2010</strong></td>
<td>The Local Government and Communities Stage 1 Report on the Housing (Scotland) Bill indicated that it would have been “preferable” that provisions relating to the PRS were in one bill (Scottish Parliament Local Government and Communities Committee 2010).</td>
</tr>
<tr>
<td><strong>28 June 2010</strong></td>
<td>The analysis of responses to the private sector housing bill consultation was published (Scottish Government 2010c).</td>
</tr>
<tr>
<td><strong>27 September 2010</strong></td>
<td>A full review of the private landlord registration system was commenced by the Government. It is due to be completed in Spring 2011.</td>
</tr>
</tbody>
</table>
THE BILL’S PROPOSALS

The Bill is in 5 parts and contains 35 sections.

PART 1: REGISTRATION OF PRIVATE LANDLORDS

BACKGROUND

The private landlord registration scheme has been in place since April 2006. It was established by Part 8 of the Antisocial Behaviour etc. (Scotland) Act 2004 (the 2004 Act) with the aim of improving standards in PRS. It requires all landlords to register themselves, and the properties they own, with the relevant local authority. Local authorities assess applications for registration through a “fit and proper person test”. They also maintain a register of landlords in their area. As at 31 March 2010 there were 155,272 registrations approved and 213,188 properties approved. Around another 7,000 registrations and 9,900 properties were awaiting a decision (Scottish Government 2010d). It is not entirely clear how many landlords or properties in the sector remain unregistered.

If a landlord lets a property without being registered this may result in prosecution and a £5,000 fine. A rent penalty notice can also be served on the landlord by the local authority (this means no rent is payable on the property). If a registered landlord or their agent is found to be no longer a fit and proper person then they can be removed from the register.

The scheme was originally intended to be a “light touch approach” to regulation and one that should not overburden landlords or local authorities. The Government’s review of the PRS found that found that the majority of landlords accepted the principle that standards should be raised in the sector and that risks to tenants should be minimised, but they were also highly critical of specific schemes such as landlord registration and HMO licensing. A number of landlords also had concerns that the registration process was cumbersome and bureaucratic for landlords yet had no impact on driving out irresponsible landlords (Scottish Government 2009).

There have also been some concerns raised about enforcement of the private landlord registration scheme and how enforcement practice varies amongst local authorities. Local authorities have highlighted problems of identifying unregistered landlords and the cost and court attitudes to criminal prosecution for breaches of the legislation (Scottish Parliament Local Government and Communities Committee 2010). As at May 2010 no landlords had been prosecuted for failure to register under the private landlord registration scheme. However, up to 31 March 2010 local authorities had applied over 1,300 late application fees linked to registration, and issued over 1,200 rent penalty notices to unregistered landlords (Scottish Parliament 2010).
THE FIT AND PROPER PERSON TEST

Currently, under s85 of the 2004 Act and associated regulations, an applicant has to declare any offences committed in relation to fraud or other dishonesty, violence, drugs, discrimination or contravention of housing law, and court or tribunal judgements under discrimination legislation. Local authorities must take any offences declared into account when assessing the application. While a local authority may seek other information from the applicant in regard to other offences, it has no power to require this information.

Section 1 of the Bill proposes to expand the list of offences to be declared by an applicant for landlord registration to include firearms offences and sexual offences. Section 1 of the Bill would also amend section 85 the 2004 Act by specifying certain examples of information that a local authority may take into account when making a decision about whether an applicant is fit and proper. This could include, for example, whether an anti-social behaviour order has been served on the landlord or tenant, or whether a landlord had breached the Repairing Standard. The Policy Memorandum indicates that the matters that a local authority may take into account “…should be considered as a matter of good practice” and that including them on the face of the Bill, “…will support stronger links between the fit and proper person test and the quality and management of accommodation” (para 31).

Section 2 of the Bill proposes to insert section 85A into the 2004 Act and would give a local authority a power to require the landlord to provide a criminal record certificate, if it deems this is necessary, when applying the fit and proper person test. The local authority would need to have reasonable grounds for requesting the certificate. If an applicant fails to provide this he or she would not be placed on the register. A registered landlord who failed to provide the certificate, within a reasonable timescale as requested by the local authority, could be removed from the register. The PRS Strategy group considered that requiring criminal record certificates on a mandatory or routine basis would cause difficulties in terms of regulatory impact on the PRS and would prove unproductive in the vast majority of cases (Scottish Government 2010b).

Responses to the Government’s consultation on the Bill were generally supportive of the proposals to extend the list of offences that applicants have to declare for registration. Some of the concerns raised included the need for greater involvement from the police and courts to help local authorities to judge the extent to which previous convictions impact on whether someone could be deemed fit and proper (Scottish Government 2010c).

The Bill’s proposal to specify examples of other factors a local authority could take into account when determining an application were not originally consulted on but were added after Stage 1 of the 2010 Housing Bill. The Government canvassed the views of the PRS Strategy Group on the proposals. The Policy Memorandum notes that views were mixed, especially on the examples of outstanding anti-social behaviour orders and non-payment of communal repairs (para 69).

In relation to the proposals to give local authorities the power to require a criminal record certificate a majority of those that responded to the consultation were in favour of this proposal. But, there was also some opposition to the proposals with concerns focused on the potential introduction of a ‘blanket approach’ by local authorities and the extent to which such an approach is at odds with the ‘light touch’ spirit which was intended at the introduction of registration (Scottish Government 2010c).

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FEE FOR APPOINTMENT OF AGENTS

Section 4 of the Bill proposes to introduce a new subsection (2A) into section 88 of the 2004 Act which would allow a local authority to charge a registered landlord a fee when the landlord notifies the local authority of an appointment of an agent. No fee would be payable if the fit and proper person test has already been carried out on the agent. Section 4 would also enable Ministers to make regulations to set the level of fees, and how fees would be calculated. This provision is in the Housing Bill as introduced (at section 133). The Committee were supportive of this provision and noted that it responded to an omission in the original legislation whereby a landlord was charged for registering an agent at the initial time of registration but not if the agent is registered later (Scottish Parliament Local Government and Communities Committee 2010).

Section 4 of the Bill contains an additional provision that was not in the Housing Bill. This provides that it would be an offence if a landlord did not notify a local authority that they had appointed an agent or provided false information. The penalty is a fine on summary conviction not exceeding 3 on the standard scale. The Policy Memorandum explains that this provision would bring the situation in line with landlords at the point of registration (para 35).

LANDLORD REGISTRATION NUMBERS

When landlords register with their local authority they are given a landlord registration number. Section 3 of the Bill would amend section 84 of the 2004 Act to give registration numbers a statutory basis and local authorities would be required to provide landlords with their registration number when advising them that their registration has been completed.

REQUIRING LANDLORD REGISTRATION NUMBERS IN ADVERTISEMENTS OF PROPERTIES TO LET

Section 6 of the Bill would insert a new provision into the 2004 Act which would require all written advertisements for properties to let to include the landlord registration number or, in the case of landlords whose application is yet to be determined, the phrase “landlord registration pending”. The aim of this proposal is to help local authorities to identify unregistered properties and to help tenants chose a suitable property.

If a registered landlord does not include their registration number in an advert then they could be removed from the register, but the local authority could offer the opportunity to rectify the situation first. An unregistered landlord could be prosecuted for the existing offence of letting a property without being registered. But the Policy Memorandum notes that where a landlord is not registered, and is capable of meeting the fit and proper person test, the local authority will be “...expected to work with them to achieve registration in the first instance in order to prevent the loss of accommodation to the sector” (para 42).

Section 6 of the Bill would exclude advertisements on a “notice board at or near the house concerned”. The Policy Memorandum states that reusable “To Let” boards are exempt from the proposals due to “concerns raised over costs to landlords” (para 41).

In response to the consultation on the Bill, there was support for this proposal, although private rented sector bodies were less supportive. There were some practical concerns expressed about the proposals, for example, the Scottish Association of Landlords (SAL) indicated that “…many properties are jointly owned which would imply that often an advert would need to include two or three registration numbers which would, in effect, at least double the size of existing press adverts and the resultant cost to landlords” (Scottish Government 2010c). The
Financial Memorandum suggests that only a small percentage of landlords may face increased costs for advertising in the press (where that is based on line or word count) as the majority of properties are advertised by an agent on-line.

The Scottish Rural Property and Business Association (2010) suggested that the majority of properties being let by unregistered landlords “...will be done so through word of mouth or other informal routes, and therefore believes that the introduction of this requirement would actually do little to detect unregistered landlords.” On the issue of the exemption from “To Let” boards views were mixed. Those that supported the proposal generally did so for practical reasons, for example, “To Let” boards are often produced en masse and reused many times. On the other hand there were some concerns that unregistered landlords would purposefully advertise their properties on “To Let” Boards in order to evade the registration system. The City of Edinburgh Council (2010) suggested that, “‘To Let’ boards will be seen by many more members of the public than those who are actively seeking accommodation and looking at adverts. It will also help officers identify non registered landlords”.

The consultation paper on the Bill sought views on whether failure to comply with these requirements should be an offence. Views were mixed on this point. As explained above, there is a possible sanction for a registered landlord – removal from the register.

**ADDITIONAL INFORMATION ON THE REGISTER**

Section 5 of the Bill proposes to make changes to the information that is available to the public about landlord registration. In particular, information would be made available on whether an application in relation to a property has been received but not yet decided and whether a landlord has been refused registration or has been de-registered because of a failure to meet the legal requirements. The aim of these provisions is to allow tenants to make more informed choices about where to live.

This provision also appears in Section 134 of the Housing (Scotland) Bill, as introduced. The Committee’s Stage 1 Report was supportive of these provisions indicating that it would “...help to ensure that landlords fulfil their obligations under the legislation. In particular, it will assist in addressing the problem of "rogue" landlords who have, to date, been able to act with relative impunity despite the existing legislation. These provisions will provide transparent information on landlords and agents who are not fit and proper to act as landlords, which will be available to other local authorities that may have a concern about a landlord or agent” (para 90).

**LOCAL AUTHORITY POWER TO OBTAIN INFORMATION**

Section 9 of the Bill would give local authorities the power to obtain information to enable, or assist, it to carry out its functions in relation to the registration of landlords. The local authority would be able to serve a notice on specified people to require them to provide information on the nature of their interest in the house, specify information about other people who have an interest in the house or other people that the local authority may reasonably request.

Again, this provision appears in the Housing (Scotland) Bill, as introduced (section 136). It is also a similar provision to that contained in the Housing (Scotland) Act 2006 for the purposes of HMO licensing. The Bill proposes to extend the original provision by giving local authorities powers to require a letting agent to provide information in relation to any house in the area in relation to which the agent acts, including the address of the house and the name and address of the owner. The Policy Memorandum notes that “...this could be of particular use in areas where unscrupulous agents act on behalf of rogue or unregistered landlords” (para 51). In either
case failure to provide information or to provide false or misleading information would be liable to a fine of up to level 2 on the standard sale (£500).

During Stage 1 proceedings the Committee heard some concern about the provision as it appeared in the Housing Bill because of a potential to place the tenant in a vulnerable position with unscrupulous landlords. The Committee, in its Stage 1 report concluded that it has “reservations” about this proposal and questioned, “…how a local authority official will be able to ascertain which tenants may be colluding with a landlord and which may be fearful of the landlord ending the tenancy” (para 194). The Government intends to address this concern through statutory guidance (see later).

Responses to consultation on the bill were generally supportive of the proposals to allow local authorities to obtain information from letting agents. Letting agents or their representatives were generally supportive, as long as any information requests were compliant with the Data Protection Act. There was a range of views about appropriate penalties for failing to comply with a request from the local authority (Scottish Government 2010c).

**PENALTY FOR ACTING AS AN UNREGISTERED LANDLORD**

Section 7 of the Bill proposes to increase the maximum fine for letting, or attempting to let, a property without being registered to £50,000. The current maximum fine is £5,000. The Housing Bill proposed to increase the maximum fine to £20,000. At Stage 1 the Committee heard some evidence to suggest that an increased fine would act as a deterrent. But other evidence suggested that the level of fine would make no difference if the legislation was not enforced in first place. The Committee, in its Stage 1 Report, supported this provision arguing that, “…an increased fine will help to act as a deterrent to landlords who operate without registering” but also that “...the Scottish Government should prioritise the work being conducted by the Private Rented Sector Strategy Group on how criminal court procedures can be improved to ensure that unregistered landlords are prosecuted (para 192)”. The maximum fine of £50,000 is the same proposed for HMO licensing offences (see below). The Government believes that a substantially higher fine level may act as more of a deterrent and “...emphasising the gravity of the offence may encourage courts to impose higher fines than they would otherwise have done” (Policy Memorandum para 46). A further increase in the maximum fine was one of the changes made after Stage 1 of the Housing Bill. The Government asked the PRS Group for their views on the proposal. The Policy Memorandum notes that the majority of stakeholders “…were of the opinion that the proposed level was disproportionate to other criminal activities and would not be effective. There was however some support for the proposal as a deterrent (para 71)".

**DISQUALIFICATION ORDERS FOR UNREGISTERED LANDLORDS**

Where a court convicts a person as acting as an unregistered landlord, section 8 of the Bill proposes to give the court the power to make a disqualification order banning a person from acting as a landlord in any local authority area for up to 5 years. A similar power is given to a court by the 2006 Act in relation to HMO licensing offences. This is another of the proposals that was introduced after Stage 1 of the Housing Bill. The Policy Memorandum indicates that, “...whilst some stakeholders saw the proposal to disqualify unregistered landlords for up to five years as disproportionate to the offence committed, there was agreement that the potential five year ban could act as an effective deterrent” (para 77). The Government has stressed that the disqualification order and the maximum fine are “...maximum penalties which is expected that the courts would apply only to the most unscrupulous criminal landlords with lower penalties an
option as circumstances dictate” (Policy Memorandum para 72). In most instances the Government would support local authorities working with landlords to improve practice.

PRIVATE RENTED HOUSING PANEL: INFORMATION TO BE GIVEN TO A LOCAL AUTHORITY

Section 11 of the Bill proposes that the Private Rented Housing Panel would be required to pass onto the relevant local authority details about the landlord and the property, where the PRHP considers a dispute in relation to a landlord’s obligations to meet the Repairing Standard. The Private Rented Housing Panel (PRHP) was established under the 2006 Act. The aim of this provision is to assist local authorities in identifying unregistered landlords.

The consultation paper on the Bill was more specific and proposed that the PRHP pass on the registration number of any cases it received in relation to breach of the Repairing Standard. Responses to the consultation did indicate a broad consensus that local authorities and the PRHP should be encouraged to communicate with each other to help raise standards in the private rented sector (Scottish Government 2010c).

GUIDANCE

Section 10 of the Bill would amend the 2004 Act by introducing a new section which requires local authorities to have regard to any guidance issued by Scottish Ministers when carrying out their functions in respect of landlord registration, including the use of the power to require information in relation to tenants.

PART 2: AMENDMENT OF PART 5 OF HOUSING SCOTLAND ACT 2006 (HMO LICENSING)

HMO LICENSING

The current system of HMO licensing was established by the Civic Government (Scotland) Act 1982 (Licensing of Houses in Multiple Occupation) Order 2000. A licence is required for all residential accommodation where three or more people live who are not all members of one family or of one or other of two families. The accommodation must be their only, or main, home. Local authorities are responsible for assessing applications for HMO licenses. To be licensed the owner must be a fit and proper person, the property must be well managed and the property must meet physical standards. Since the introduction of the scheme the number of licences has increased year on year. The most recent figures show about 11,900 HMO licences were in force at 31 March 2010, 4.5% more than the previous year. Three quarters of the licences are in force in just four local authority areas - Aberdeen, Edinburgh, Dundee and Glasgow (Scottish Government 2010e).

Part 5 of the 2006 Act, which will come into force from 31 August 2011, will revoke the current legislative arrangements. The 2006 Act restates, amends and extends the current provisions. The Housing Bill also contained provisions relating to HMOs (at section 141) which have been replicated in this Bill. The Government intends to remove the provision from the Housing Bill at Stage 3.
During Stage 1 proceedings of the Housing Bill the Committee heard evidence about some difficulties relating to the enforcement of the HMO licensing regime and the impact that high concentrations of HMOs can have on certain communities. The Minister for Housing and Communities, Alex Neil MSP, indicated that implementation of the HMO provisions in the 2006 Act would give local authorities additional enforcement powers to use (see paras 203-230 of the Committee Stage 1 report on HMO issues). Table 2 provides a summary of some of the main changes that will be made by the 2006 Act from 31 August 2011.

Table 2: Summary of some of the main changes that will be made to HMO licensing as a result of implementation of the Housing (Scotland) Act 2006

<table>
<thead>
<tr>
<th>Change</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>The test of whether a landlord is a “fit and proper person” will be</td>
<td>aligned with the test for landlord registration as set out in the 2004 Act.</td>
</tr>
<tr>
<td>Ministers will have a power, by order, to prescribe mandatory</td>
<td>conditions for HMOs.</td>
</tr>
<tr>
<td>Ministers will have a power, by order, to direct the manner by which</td>
<td>fees are determined by all authorities or by particular authorities.</td>
</tr>
<tr>
<td>Local authorities will have a power to require HMO landlords to</td>
<td>undertake certain works to their properties (through HMO amenity orders).</td>
</tr>
<tr>
<td>Local authorities will be able to issue a temporary exemption order,</td>
<td>which will allow the owner of an HMO that does not have a licence to take</td>
</tr>
<tr>
<td>Local authorities will be able to suspend rent payments to landlords</td>
<td>steps to stop it from being an HMO, for example, by reducing the occupancy</td>
</tr>
<tr>
<td>The maximum fine for letting an unlicensed property or acting as an</td>
<td>rate. The local authority will be able to specify steps the landlord must</td>
</tr>
<tr>
<td>ADDITIONAL CATEGORIES OF HMO</td>
<td>take to ensure the safety or security of occupiers in the meantime.</td>
</tr>
</tbody>
</table>

Section 13(1) of the Bill proposes to amend the 2006 Act in relation to the licensing of HMOs. It would allow Ministers to define, in secondary legislation, additional categories of accommodation that would be classed as an HMO. The accommodation may be specified with reference to the type of accommodation (including types not in buildings) or the manner of its occupation. Ministers would need to consult with stakeholders before using this power.

The intention behind this provision is to address concerns that some landlords are avoiding HMO licensing because occupants, (or because landlords are claiming that occupants) live in the property for a short time and have their principal accommodation elsewhere. The Government suggests that this is of particular concern when migrant workers are living in sub-standard accommodation (Policy Memorandum para 78).

This proposal appears in the Housing Bill, as introduced, at section 141(1). The Committee’s Stage 1 Report was supportive of the proposals and considered, “…that this will help reduce the grounds on which landlords avoid HMO licensing and protect groups such as migrant workers. It will also support local authorities in enforcement” (para 227).
BREACH OF PLANNING CONTROL

Section 13(2) of the Bill would give local authorities a discretionary power to refuse to consider an application for an HMO licence if it considers that the requisite planning permission has not been obtained. This proposal originally featured in the Housing Bill at s141(2) and the Committee, in its Stage 1 Report (para 229), was supportive of this proposal.

The Policy Memorandum explains that HMOs operating without planning permission can, “…adversely affect neighbours and their owners have an unfair advantage as compared to landlords who comply with planning requirements” (para 81). Most respondents to the consultation agreed that planning permission (where required) should be a requirement for granting a licence for a HMO. Many respondents believed that this should be a mandatory rather than discretionary power to ensure a consistent approach was taken across Scotland (Scottish Government 2009c). However, the Bill adopts a discretionary approach. The Government considers that a mandatory approach would have placed an “…undue stress on local authority planning departments (including local authorities that do not have a problem with HMOs and planning) which would have to had to process thousands of applications each year, and caused unnecessary delay and expense to the many of HMO owners (evidently the majority who do not require planning permission” (Policy Memorandum para 99).

PENALTIES

Section 14 of the Bill proposes to increase the maximum penalty for certain offences in relation to HMO licensing. The maximum fine is currently £5,000 and this will rise to £20,000 when the 2006 Act comes into force. Section 14 would amend the 2006 Act to increase the maximum fine to £50,000, which is the same maximum fine the Bill proposes for offences in relation to private landlord registration. The Government believes that higher maximum penalties will act as a deterrent and encourage courts to impose higher fines.

One of the issues that arose during Stage 1 of the Housing Bill was whether local authorities should be able to keep the fines from HMO and private landlord registration offences to fund their enforcement work. The Policy Memorandum indicates that the Government considered whether offences should be dealt with by civil penalties which would allow the local authority to retain the money, but this idea was discounted for several reasons. One reason given is that “…civil penalties are used for issues that are straightforward and rarely contested such as parking tickets, whereas HMO offences are far less straightforward” (para 100).

REASONS FOR DECISIONS

Section 15 of the Bill proposes to amend s158 (12) (a) of the 2006 Act to clarify that a statement of reasons need only be provided when this is requested by any person who receives the decision. A recipient of a notice of decisions would have 14 days from receipt of the notice to request reasons for the decision.

Under the current HMO licensing regime local authorities must provide reasons for decisions on HMO licensing within 10 days of it being requested by an applicant or objector. The Policy Memorandum notes that local authorities have advised that they are seldom asked to provide a statement of reasons (para 89). However, some local authorities have raised concerns that s158 (12) (a) of the 2006 Act would require them to provide a statement of reasons whether they have been requested or not. The Bill therefore proposes to clarify the situation. There was no formal consultation on this proposal but this amendment arose from engagement with local authority stakeholders.
GUIDANCE

Section 16 of the Bill proposes to amend section 163(1) of the 2006 Act to enable the Scottish Ministers to give guidance, to which a local authority must have regard, over the use of the information gathering powers contained in section 186. Section 186 of the 2006 Act allows a local authority to require certain people to provide information relating to the land or premises to help it carry out its functions under HMO licensing. Any person who is required to provide such information and fails to do so, or knowingly or recklessly provides false or misleading information, is guilty of an offence with a fine on summary conviction not exceeding level 2 on the standard scale.

The Policy Memorandum indicates that, “…This will include the use of the section to obtain information from tenants in HMOs and guidance could set out how a local authority will be expected to take account of the circumstances of a tenant” (para 94). This Government considers that this addresses a recommendation of the Local Government and Communities Committee’s Stage 1 report on the Housing (Scotland) Bill, which reflects concerns expressed to the Committee by some stakeholders.

OTHER PROPOSALS NOT IN THE BILL

There were other proposals regarding HMOs that were consulted on but do not feature in the Bill. One proposal was to allow tenants and local authorities to claim back rent paid in an unlicensed HMO. A further proposal was that failure by the landlord of a property to provide information when required would lead to the presumption that a property is an HMO.

PART 3: OVERCROWDING STATUTORY NOTICES

Part 3 of the Bill makes proposals to assist local authorities tackle problems of overcrowding in the PRS. The Scottish Government’s review of the PRS identified that there were problems with overcrowding in some parts of the PRS. In some cases there are problems of overcrowding among migrant workers where landlords exploit their workers. In other cases overcrowding is due to the tenants bringing in additional occupants (Scottish Government 2009a). In particular, issues of overcrowding in the PRS have been raised in the Govanhill area of Glasgow. Here, there have been accusations that gangmaster agencies and “slum landlords” are exploiting migrant workers from Eastern Europe and housing them in overcrowded accommodation. This has a detrimental effect on the migrant workers, the local community and the quality of the accommodation (Scottish Parliament Petitions Committee 2010).

The consultation paper on the Bill outlined existing legislative provisions regarding overcrowding (Scottish Government 2010). The HMO licensing system allows local authorities to address overcrowding by specifying the maximum number of occupants permitted in a licensed HMO, although the Policy Memorandum also notes that it can be difficult for a local authority to identify that the dwelling is an HMO if the occupants claim to be members of the same family (para 112). Breaching the maximum number of occupants permitted is a criminal offence.

More generally the provisions of Part VII of the Housing (Scotland) Act 1987, relate to overcrowding in all housing tenures. Part VII provides the legal definition of overcrowding (sections 135 to 137). A house is regarded as overcrowded if it fails either of two tests. The room standard (section 136) is based on which and how many people have to share a room. The space standard (section137) is based on the total number of people occupying a house relative to the number and size of the rooms). According to the Policy Memorandum, “… the enforcement provisions in Part VII were only ever brought into effect in two localities and are
now inoperable and archaic. The Review recognised that there are currently very limited means for local authorities to take action to address overcrowding in properties that are not HMOs..." (para 116 ).

Section 17 of the Bill seeks to address these concerns and proposes to give local authorities the power to serve an overcrowding statutory notice on the landlord of a house which is overcrowded (in terms of section 135 of the 1987 Act), where the local authority considers that the overcrowding is having “an adverse effect on the health or wellbeing of any person” or “an adverse effect on the amenity of the house or its locality.” The notice would set out the steps to be taken by the landlord to ensure that the house is no longer overcrowded, any other conditions considered appropriate by the local authority and the period in which this action must be taken.

Under section 18 the local authority would be able to provide advice and assistance to the occupants of a house in relation to which an overcrowding statutory notice has been served, as it considers appropriate.

- Other proposed features relating to the overcrowding notice, as specified in Part 3 of the Bill, are:
  - The notice may be in force for between one and five years. During that period, after the overcrowding has ended, the landlord must not cause the house to become overcrowded again and must take reasonable steps to prevent that happening.
  - The notice may not require the landlord to breach any statutory or contractual obligations
  - Failure to comply with a notice will be an offence subject to a fine not exceeding level 3 (currently £1,000).
  - Reasonable excuse would be a defence. This could apply, for example where the overcrowding is caused by the occupants and the landlord lacks legal powers to comply.
  - Scottish Ministers would be able to prescribe by order the form of an overcrowding statutory notice, other information to be included in the notice, persons who must be given a copy of the notice by the local authority
  - Local authorities would have to have regard to any guidance issued by Ministers relating to notices.
  - A person who has been served with an overcrowding notice may make representations to the local authority concerning the notice within 7 days of it being served. The local authority must consider the representations and respond by confirming the notice, varying it or revoking it.
  - A landlord may appeal against an overcrowding statutory notice by summary application to the sheriff.
  - The local authority may vary or revoke the notice at any time.

There was relatively strong support for the proposal to give local authorities the power to serve an overcrowding notice in the consultation, although around 30% of those who supported the proposal qualified their support. Those who supported the proposal typically reflected a view that additional enforcement powers were required to tackle significant overcrowding issues in some areas. Some respondents, for example, Shelter Scotland, Edinburgh Cyrenians and the Govan Law Centre had concerns regarding the potential impact of overcrowding notices on
tenants. It was suggested that proposals could simply result in displacing these groups elsewhere in the private rented sector, or worse lead to homelessness and breaking up of family groups (Scottish Government 2010c).

The Policy Memorandum notes the concerns raised and explains, “...the statutory guidance that will be issued on the use of notices, including taking tenants’ views and the effect of action into account, combined with the local authority’s power to provide appropriate information and advice to occupants and sensitive setting of the time limit for compliance, will help counter those difficulties and reduce the risk of homelessness” (para 127).

Some landlords were concerned that a landlord could be penalised where overcrowding had occurred due to actions by the tenant of which the landlord has no knowledge. The Policy Memorandum suggests that the provisions that would give landlords the ability to use “reasonable excuse” are relevant here (para 126).

There were other proposals in the consultation paper that would have allowed local authorities to require private landlords in a specified locality to issue a statement of the number of people permitted in a house. These have not been taken forward in the Bill.

**PART 4: MISCELLANEOUS**

Part 4 of the Bill contains provisions which aim to clarify rights and responsibilities for tenants, landlords, and agents in the PRS. There is also a proposal to allow landlords to seek assistance from the Private Rented Housing Panel to exercise the right of entry in relation to the Repairing Standard.

**PREMIUMS**

Section 28 of the Bill seeks to clarify the situation regarding pre-tenancy charges made by landlord or by letting agents.

The Government’s review of the PRS noted that that there are concerns about a lack of clarity regarding charges made to tenants to set up a tenancy by agents or landlords. Under section 82 of the Rent (Scotland) Act 1984 (c.58) it is an offence to require any premium as a condition of the grant or continuance of a tenancy (this also applies to assured tenancies as the provisions have been imported into the Housing (Scotland) Act 1988 in respect of assured tenancies). According to section 90 of the 1984 Act, a premium includes any fine or other like sum and "any other pecuniary consideration" in addition to rent. The present penalty for requiring or receiving an illegal premium is a fine not exceeding level 3 on the standard scale, with the court having the option of ordering the repayment of the premium to the person by whom it was paid. However, the review of the found evidence that there was confusion as to how these provisions should be interpreted (Scottish Government 2009a).

The Policy Memorandum states that, “…Some agents interpret the law as meaning that it is illegal only for a letting agent to charge a fee specifically to grant the tenancy, whereas others take the view that any fee (other than rent or a refundable tenancy deposit) charged by an agent is illegal. Many agents charge an administration fee to cover overheads, costs of background checks and references, etc. Good practice sets out that other administration charges must reflect actual costs incurred. However, it seems that some agents are charging tenants unjustifiably large administration fees” (para 135).
The Bill therefore aims to clarify the position. Section 28 of the Bill would amend section 82 of the 1984 Act to make it clear that all charges in connection with the grant, renewal or continuance of a tenancy are illegal (apart from rent and a deposit). It would insert a new section 89A into the 1984 Act which would give Ministers powers to outline in secondary legislation charges that will be allowed in connection with the grant, renewal or continuance of a protected tenancy (and also an assured tenancy). The regulations would be able to specify categories of payment that are not to be treated as premiums in terms of section 82 and to set a maximum limit to the amount of any such payment that could be charged. Ministers would need to consult before making any regulations.

Respondents to the consultation on the bill were supportive of this proposal. Edinburgh University Students Association was aware of students who have been asked for very large administration fees and in some cases have been required to pay immediately. Shelter Scotland pointed out that for those on low incomes, up-front fees can be prohibitive and may mean they are unable to take on a tenancy. ARLA did not agree with the proposal, noting that when done properly there is a lot of work involved in arranging a tenancy and suggested that it would be reasonable for the tenant to contribute to the cost (Scottish Government 2010c).

The consultation asked for views on charges that should be exempt from the prohibition. Suggestions included reasonable credit or tenancy reference check charges. As explained above Ministers would be able to specify, by order, further details of types of charges that would be permitted and could set maximum levels for charges.

**TENANT INFORMATION PACK**

Section 29 of the Bill proposes that private landlords would be required to provide tenants with specified documents (a tenant information pack) at the start of the tenancy. Ministers would be given powers to specify, by order, the documents that must be provided. The Government envisages that the tenant information pack could include, for example, the tenancy agreement, details on rights and responsibilities of landlords and tenants (including the repairing standard) and permitted occupancy levels (Policy Memorandum para 14). Failure to supply these documents, without reasonable excuse, would be an offence attracting a fine not exceeding level 2.

The aim of this provision is to help inform tenants and landlords of their rights and responsibilities. One of the key issues arising out of the review of the PRS review was a lack of awareness amongst tenants and landlords of their rights and responsibilities.

In response to the consultation on the Bill there was “strong support” for the introduction of a tenant information pack. Some respondents indicated that this kind of pack was already provided as a matter of good practice. Other respondents, for example, the Association of Residential Letting Agents and East Renfrewshire Council were concerned that the provision of the pack should not become too onerous or prescriptive (Scottish Government 2010c).

Consumer Focus Scotland argued that the pack should not simply be “..a conglomeration of all the different documents that are currently provided to tenants when they rent a property from a private landlord. A new approach is needed, to ensure that tenants are given the information that they require in a format that is clear, straightforward and easy to digest” (Consumer Focus Scotland 2010).

The Financial Memorandum estimates that the cost of these packs would be minimal given that landlords and agents already have to supply the some of the documents that are likely to be included, and additional material will be available free from the Scottish Government (para 99).
A more detailed business regulatory impact assessment will be produced with the order making power specifying the details of the information and documents are to be used.

The consultation on the Bill also sought views on whether there was scope for merging documents that need to be issued at the start of a Short Assured Tenancy into one form. These proposals have not been taken forward.

**CLARIFICATION OF NOTICES**

Section 30 of the Bill seeks to clarify matters relating to notices required for the termination of a short assured tenancy.

Section 19 of the Housing (Scotland) 1998 Act (the 1998 Act) states that a sheriff will not consider proceedings to gain possession of a house let as an assured tenancy, unless the landlord has served a notice of proceedings. Section 33 of the Act relates to recovery of possession in respect of short assured tenancies which have come to the end of their contractual agreement. However, the review of the PRS identified uncertainty as to whether the requirement of section 19 also applied to section 33 of the Act. Section 30 of the Bill would clarify that sections 18 and 19 of the 1988 Act do not apply to proceedings under section 33. Therefore, a notice of proceedings does not have to be served on short assured tenancies that have come to the end of their contractual agreement.

**LANDLORD APPLICATIONS TO THE PRIVATE RENTED HOUSING PANEL**

Section 31 of the Bill proposes to amend the 2006 Act to enable a landlord to apply to the Private Rented Housing Panel (PRHP) for assistance to enter the property in relation to the Repairing Standard.

The 2006 Act requires landlords to ensure that the property they let meets the Repairing Standard. The Act also gives landlords a statutory right of entry to check whether the property meets the requirements of the Repairing Standard and to carry out work to meet these requirements. However, if a tenant refuses to grant access the landlord may seek a court order requiring the tenant to get access, but this course of action can be time consuming.

Under Section 31 of the Bill an application to the PRHP by a landlord would be considered by a single member of the Panel. Ministers would be given a power to make regulations to specify further detail about the making or deciding of applications, which could include a power to prescribe a fee for an application to the PRHP. Section 31 also sets out details of the arrangements that the panel member would have to make and the procedure that must be followed to gain a suitable time for access. If a tenant still refuses access or does not respond, the panel member would be able to obtain a warrant to enforce entry.

The consultation analysis revealed support for the proposals. However, a number of respondents also argued that there was a need to balance the rights of landlords with the rights of tenants and landlords should be required to take clear and sufficient steps to contact the tenant and gain access before approaching the PRHP. Other views expressed included one by the Govan Law Centre that was unconvinced that the proposed system would be any easier than obtaining a court order (Scottish Government 2010c).

The Government has estimated that up to 150 landlords a year may apply to the PRHP. The cost of an application has been estimated to be around £200 per case which could be paid for by the landlord through a fee (Financial Memorandum para 100). Landlords did not support the view that the additional work should be funded through landlord fees when it was the tenant that
was being uncooperative. One the other hand, the Government argues that the fee would be “… lower than full court action and the process is likely to be speedier thus preventing further material damage to the property which could be costly in the long run” (Policy Memorandum para 168).
SOURCES


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