

SPICe Briefing

Private Housing (Tenancies) (Scotland) Bill

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The Private Housing (Tenancies) (Scotland) Bill is a government bill that was introduced in the Scottish Parliament on 7 October 2015. The Bill seeks to introduce a new tenancy for the private rented sector in Scotland to supersede the short assured tenancy and assured tenancy created under the Housing (Scotland) Act 1988.

The Scottish Government expects that the Bill will improve security of tenure for tenants and provide appropriate safeguards for landlords, lenders and investors, thus contributing to the Scottish Government's vision for the private rented sector.

This briefing discusses the background to the Bill and the main provisions in the Bill. SPICe Briefing 15-66 [Private Rents](#) provides an overview of rent statistics and further information about the debate on whether rent control provisions are needed.



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EXECUTIVE SUMMARY

Most private tenancies in Scotland are short assured tenancies created under the Housing (Scotland) Act 1988 (the Act also provides for assured tenancies). The Private Housing (Tenancies) Scotland Bill seeks to create a new private residential tenancy to supersede the tenancies provided for by the Housing (Scotland) Act 1988. It is expected that most new tenancies from late 2017 would be private residential tenancies.

The overall aim of the Bill is to improve security of tenure for tenants, while providing appropriate safeguards for landlords, lenders and investors. The main features of the proposed private residential tenancy are:

- It will be an open-ended tenancy. Landlords will be able to recover possession of their property using one of the specified grounds for repossession. This represents a change from the current short assured tenancy where landlords can seek repossession at the end of the tenancy term without having to give a reason - commonly referred to as the “no-fault ground for repossession.
- The initial term of the tenancy must be for a minimum six month period, although a shorter or longer period can be agreed between the tenant and the landlord.
- During the initial term the tenancy cannot be ended by the tenant, when agreed by the landlord, and the landlord can only end the tenancy using certain specified grounds.
- The grounds under which a tenant can be evicted are updated. There are 16 proposed eviction grounds, some of which do not feature in the current framework.
- If the tenant does not leave the property after being given notice by the landlord, the landlord will have to seek repossession through the First Tier Tribunal (‘the Tribunal’). The Tribunal will decide on the merits of each case.
- A tenant will have recourse to the Tribunal if they believe their tenancy has been wrongfully terminated.
- Streamlined and less complex notice procedures to end the tenancy are proposed.
- Landlords will only be able to increase rents once in every 12 month period and only with three months’ notice. If a tenant considers that any proposed rent increase would take their rent beyond rents charged for comparable properties in the area, they will have the ability to refer the increase for adjudication to a Rent Officer at Rent Service Scotland

- A local authority will be able to apply to Scottish Ministers to approve a rent pressure zone covering all or part of its area. This would limit rent increases for sitting tenants in that area for up to five years. Within a rent pressure zone landlords would still be able to increase their rents by a minimum of CPI +1%.

Annex A provides a table comparing the current short assured tenancy framework and the Bill's proposals.

In response to the two Scottish Government consultations preceding the introduction of the Bill, many stakeholders were supportive of the proposals to simplify and modernise the existing tenancy framework.

While the majority of respondents to the first consultation supported the removal of the 'no-fault' ground for repossession, the majority of landlords and letting agents were against it. They argued that this would limit landlords' flexibility and reduce investment in private rented housing. On the other hand, those supporting the proposal agreed that it would provide tenants with greater security of tenure.

The eviction grounds proposed under the new regime increased from eight grounds in the first consultation, to eleven in the second consultation with sixteen grounds appearing in the Bill as introduced.

Initially all the grounds for eviction were mandatory, meaning that if the circumstances associated with the ground existed, the Tribunal had to grant an eviction order. However, as the proposals developed through consultation, a discretionary element was added to a number of the grounds. This would mean that even if the circumstances justifying the use of the ground existed, the Tribunal would have discretion not to grant an eviction order. Four grounds in the Bill have this discretionary element.

A number of the eviction grounds attracted strong support or at least majority support from those responding to the second consultation. However, there were other grounds where respondents had mixed views as to their workability in practice. The ground associated with rent arrears was particularly contentious with 60% of the respondents to the second consultation disagreeing that it would work effectively. Some of the respondents' concerns associated with this ground have been addressed in the Bill as introduced.

The proposal to allow local controls on rents was another contentious issue. Again, landlords and industry bodies were concerned that these measures could harm investor confidence and drive landlords out of the market. The Living Rent Campaign, which has been campaigning for rent controls, has argued that the measures in the Bill regarding rent pressure zones do not go far enough. Their concern is that the proposals only apply to sitting tenants and the limits on rent increases do not relate to any kind of housing quality measure.

INTRODUCTION AND OVERVIEW

On 7 October 2015, the Scottish Government introduced the [Private Housing \(Tenancies\) \(Scotland\) Bill](#) in the Scottish Parliament. It is accompanied by a [Policy Memorandum](#) (PM), [Explanatory Notes](#) (EN) and a Financial Memorandum (FM).

The Scottish Government's vision is for a private rented sector,

“...that provides good quality homes and high management standards, inspires consumer confidence and encourages growth by attracting increased investment” (PM, para 10).

The Scottish Government considers that the Bill's proposals will contribute to realising that vision:

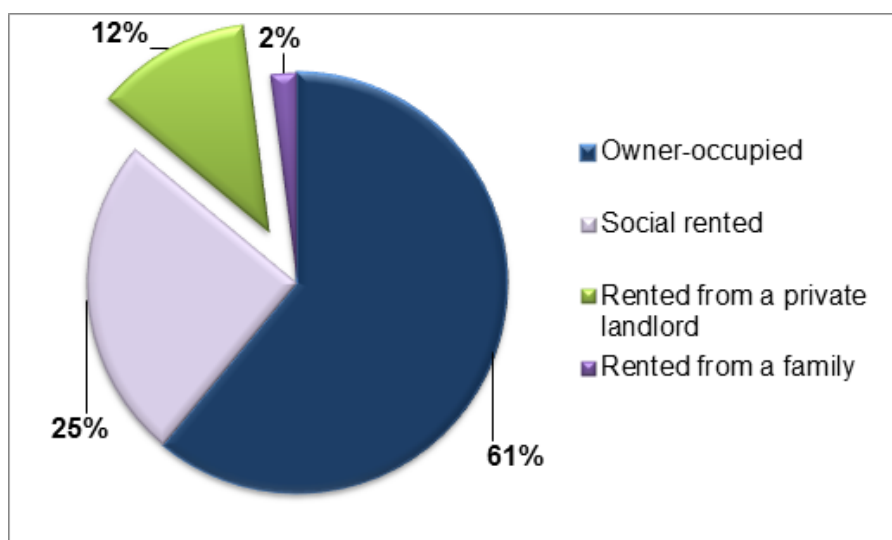
“...by introducing a new private residential tenancy for the private rented sector which will improve security of tenure for tenants and provide appropriate safeguards for landlords, lenders and investors”. (PM, para 11)

The next section of the briefing provides some context to the Bill's proposals and an overview of the current tenancy framework. This is followed by a discussion about one of the more contentious areas of the Bill – the removal of the ‘no-fault ground’ for repossession. The Bill's provisions are then discussed in detail.

CONTEXT

In 2014, there were around 330,000 households in the private rented sector (PRS), around 290,000 of which were rented from a private landlord and 40,000 rented from family and friends (Scottish Government 2015a). As Figure 1 shows, around 14% of households in Scotland live in private rented accommodation. Since 2001, the PRS has more than doubled in size, while the proportion of owner-occupied housing has declined slightly. This may have been caused partly by the economic downturn and the difficulty potential home owners have subsequently experienced in securing a mortgage (Scottish Government 2015b).

Figure 1: Scottish Households by Tenure, 2014



Source: Scottish Household Survey 2014, Table 3.1 (Scottish Government 2015a)

Younger households in Scotland are now more likely to live in the PRS than in any other tenure. The 2014 Scottish Household Survey reported that the percentage of households with a 16 to 34 year old highest income householder that live in the private rented sector has increased substantially from 13% in 1999 to 41% in 2014. This is now the most common tenure for these households. Private renting households are more likely to be single adults (32%) or households with two adults (29%) compared with other tenures. Just over a fifth of households in the PRS are families – a proportion that has been growing in recent years (Scottish Government 2015a).

There are an estimated 146,000 landlords in the sector – with the majority owning only one or two rental properties – and around 700 letting agents who manage many of the PRS properties (FM para 12).

SCOTTISH GOVERNMENT POLICY

The current and previous Scottish Governments have introduced legislation with the aim of improving the condition and management standards within the PRS, for example, the introduction of the private landlord registration scheme in 2006,¹ and the Repairing Standard in 2007.² In 2013, the Scottish Government published their strategy for the PRS [A Place to Stay, A Place to Call Home](#) (Scottish Government 2013) which set out an agenda aimed at improving management standards and quality of service for tenants and prospective tenants, as well as enabling growth and investment in the sector

Most recently, provisions in the Housing (Scotland) Act 2014 will introduce a system for regulating letting agents. The Act also provides for the transfer of the jurisdiction for private rented civil cases, including cases relating to repossession, from the Sheriff Court to the First Tier Tribunal ('the Tribunal') which will be created under the Tribunals (Scotland) Act 2014. The Scottish Government envisages that the Tribunal's main benefits will be specialism, consistency and accessibility, improving access to justice for both tenants and landlords in the PRS (PM para 43). The Tribunal is expected to begin operating in September 2016 with the transfer-in of the Private Rented Housing Panel and Home Owner Housing Panel followed by cases relating to assured tenancies in December 2016 (FM para 33).

REVIEW OF THE PRIVATE TENANCY REGIME

To take forward an action in the PRS strategy, the Scottish Government set up the [Private Rented Sector Tenancy Review Group](#). The group's purpose was to examine how suitable and effective the current private rented tenancy regime was and to consider whether changes in the law were needed. The tenancies considered were the assured tenancies and short assured tenancies (SATs) created under the Housing (Scotland) Act 1988 (the 1988 Act).

The review group produced a [report](#) for Scottish Ministers on 9 May 2014 (Scottish Government 2014a). In their report, the review group challenged research that suggested that landlords and tenants thought the current system works reasonably well. They suggested:

“The SAT may just work because that is all there is. But it is also instrumental in creating the architecture and thus the operational characteristics of the

¹ Under provisions in the Antisocial Behaviour etc (Scotland) Act 2004

² Under provisions in the Housing (Scotland) Act 2006

current PRS market as well as the associated support services and its overall financial underpinning. The real problem is that so few people fully understand the contractual terms they may or may not have signed up to, and that fact alone surely makes the lynch-pin of private renting a somewhat peculiar instrument on which to base a business". (Scottish Government 2014a)

The group also found evidence that most people, whether landlords or tenants, found tenancy legal arrangements and the associated paperwork and processes unduly complex. Their report had one main recommendation that Ministers accepted:

'...that the current tenancy for the Private Rented Sector, the Short Assured Tenancy and the Assured Tenancy, be replaced by a new private tenancy that covers all future PRS lets'.

CONSULTATION ON A NEW TENANCY FOR THE PRIVATE SECTOR

The PM (paras 20 to 28) outlines details of the consultation process on the Bill. Following the Tenancy Review Group's report, the Scottish Government issued a consultation paper on proposals for a new tenancy system in October 2014 (Scottish Government 2014b). A second consultation paper containing further details on some proposals was issued in March 2015 (Scottish Government 2015c). An analysis of responses to the first and second consultation have also been published (Robertson 2015(a) and (b)).

A particularly high number of responses, 7,869, were received to the second consultation reflecting responses gathered by a number of campaign groups. In particular

- Living Rent Campaign: A total of 2,491 respondents supported the campaign
- Scottish Association of Landlords Campaigns: A total of 3,280 respondents made a submission related to the Scottish Association of Landlords
- PRS4Scotland Campaign: A total of 1,553 respondents were signatories to an e-petition organised by PRS4Scotland.
- Letting Agent Campaign: A total of 25 respondents submitted a response identical to that of a letting agency. These responses came from different branches of that organisation.

Individual responses to the first consultation can be viewed here:

<http://www.gov.scot/Publications/2015/01/8970>, while individual responses to the second consultation can be viewed here:

<http://www.gov.scot/Publications/2015/06/4125>

THE EXISTING TENANCY REGIME

OVERVIEW

At present, most commonly encountered types of tenancy in the private residential sector are the assured tenancy and the short assured tenancy ('SAT'). These have been available since 2 January 1989, by virtue of the 1988 Act.

There are still some subsisting tenancies created before this date from the old regime which preceded the 1988 Act.³ In addition, some types of private residential tenancies, when created after 2 January 1989, can never be assured tenancies or SATs (1988 Act, schedule 4). These include tenancies for a low rent⁴ or tenancies where the landlord is also resident on the premises (1988 Act, schedule 4, paras 2 and 9).

It is the assured tenancy and the SAT which Part 1 of the Bill seeks to replace with a single private residential tenancy for all future lets.⁵

SHORT ASSURED TENANCIES (SATS)

In practice, the vast majority of tenancies today are SATs. A key feature of this type of tenancy is that, providing the correct procedures are followed by the landlord, the landlord has a right to recover possession of the property at the end of the tenancy without a reason being given. This is known as the 'no-fault' ground of possession.

In this regard, the SAT can be contrasted with the assured tenancy where the tenant has the right to stay in the property indefinitely, unless the landlord can establish before the court one of the grounds for recovery of possession (see further below at p 12).

Requirements for a SAT

For a SAT to exist a formal notice, (a Form AT5), must be served on the prospective tenant prior to the start of the tenancy and the tenancy must have an initial duration ('term') of not less than six months (1988 Act, section 32).

The length of a SAT in practice

Although it is common for the initial duration of a SAT to be six months, in practice, despite its name, a SAT can last for much longer, sometimes years. The Scottish Household Survey has revealed that 44% of people living in private rented housing had been at their current address for less than a year, while 16% had been living at the same address for more than five years (Scottish Government 2015b).

There are a number of ways this can come about. Sometimes a longer initial duration for the lease is chosen. Sometimes the lease makes express provision for renewal of the lease after the initial duration stated in the lease. For example, the tenancy agreement might say "the property is let for a period of six months and then monthly thereafter".

However, even if the lease is silent on duration, if no notice is given by either party at the end of the initial period stated in the lease, the lease continues automatically by virtue of the legal doctrine of 'tacit relocation' (i.e. silent renewal). If the initial period of the lease was less than one year, the extension is for the same period, for example, a

³ These were allowed to remain subject to the system which preceded the 1988 Act by virtue of schedule 4, para 1 of the 1988 Act.

⁴ These are tenancies where no rent is payable or where the rent is less than £6 a week (or the equivalent rent if there is a different payment period).

⁵ Schedule 1 of the Bill also contains a list of tenancies which can never be private residential tenancies.

six month lease has a six month extension. If the initial period stated in the lease was one year (or more) renewal is for one year (McAllister (2002), para 9.14).⁶

The right to recover possession

To exercise the right to recover possession at the end of the tenancy, the landlord must serve a notice stating that he or she requires possession of the property (usually referred to as a 'section 33 notice'). This must be given two months prior to the expiry of the term of the lease (or such longer period as is stated in the tenancy agreement) (1988 Act, section 33(2)).

If the tenant does not leave voluntarily in circumstances where the landlord is entitled to exercise his or her absolute right to recover possession, the landlord must apply to the court for an order for recovery of possession of the property (1988 Act, section 33). This court order will be enforced by sheriff officers if necessary.

On the other hand, the tenant can raise a court action for damages if a landlord unlawfully deprives him or her of the occupation of the let property (1988 Act, section 36). This extends to the situation where the landlord sends the tenant a notice which the landlord knows to be invalid and the tenant acts on that notice.⁷

Preventing tacit relocation from operating

For the court to grant an order for the recovery of possession one of the key requirements is that tacit relocation (silent renewal) has not operated (1988 Act, section 33(1)(b)).

Accordingly, if the landlord wants to prevent tacit relocation operating at the end of the initial period stated in the lease (and exercise the right to recover possession) he or she must also serve a separate 'notice to quit' at least 40 days prior to the expiry of the contractual term.^{8 9}

The need to serve multiple notices was criticised by the Private Rented Sector Tenancy Review Group (Scottish Government 2014). In contrast, the Bill makes provision for a 'single notice to leave' (section 40)(see further below at p 20).

Ending the SAT in other circumstances

As a lease is a contract, in practice the landlord and the tenant can bring the SAT to an end before the end of the initial term of the lease where this is expressly provided for in the lease (via a 'break clause'¹⁰).

⁶The doctrine of tacit relocation is part of the common law, i.e. part of the body of law created by the decisions of judges in individual cases. However, its application in relation to SATs was preserved by section 52 of the 1988 Act.

⁷ Section 22 of the Rent (Scotland) Act 1984 also makes it a criminal offence for a landlord to unlawfully deprive the residential occupier of occupation of the let property (or attempt to do so). This provision also extends to the situation where the landlord sends the tenant a notice which the landlord knows to be invalid.

⁸ Different rules apply depending on the length of the lease, with leases more than four months having a notice period of at least 40 days. All SATs have an initial term of at least six months, hence the 40 day rule.

⁹ In practice the section 33 notice and the 'notice to quit' could be served together, provided the minimum notice periods associated with each are complied with.

¹⁰ Break clauses can exist in favour of the tenant, in favour of the landlord or in favour of both parties.

A popular misconception is that the tenant can also bring a SAT to an end early (before the end of the initial contractual term) simply by giving notice to the landlord. However, this is not the case (Robson 2012, para 11-40). On the other hand, the tenant can terminate the lease ('rescind' it) at any point, if the landlord is guilty of a material breach of contract.¹¹

A landlord also cannot exercise the automatic right to recover possession during the initial term of the lease. However, there are prescribed statutory grounds for recovery of possession contained in schedule 5 of the 1988 Act. A number of these can be used by the landlord in relation to SATs during the initial term of the lease to recover possession of the property, where the lease provides for this (1988 Act, section 18(6(c))). For example, one such ground is that the tenant is three months in arrears with rent (1988 Act, schedule 5, ground 8).¹² These prescribed grounds require the landlord to apply to the court for the relevant court order.

ASSURED TENANCIES

If a tenancy started after 2 January 1989, and the tenant lives in the property as their main home and they were not given an AT5 form stating that it was to be a short assured tenancy then it is likely to be an assured tenancy.

As discussed above, assured tenancies are relatively unusual in practice, compared to SATs.

Greater security of tenure for tenants

An assured tenancy provides greater security of tenure for the tenant than a SAT as landlords cannot use the 'no-fault' ground of possession.

The lease associated with an assured tenancy may or may not state how long the tenancy is to last. However, if a time period is stated, then, during this period (plus any extension of that contract attributable to tacit relocation) the tenancy is referred to as a 'contractual tenancy'. Once the landlord serves a 'notice to quit' the tenancy converts to a 'statutory tenancy' which has an unlimited duration.

Seventeen grounds for recovery of possession of the property

For the landlord to recover possession of a property which is subject to a statutory tenancy he or she must apply to the court for a court order requiring the tenant to leave, based on one (or more) of the 17 grounds of possession contained in schedule 5 to the 1988 Act.

A mixture of mandatory and discretionary grounds

Eight of the grounds contained in schedule 5 are referred to as 'mandatory'. This means that if the existence of the relevant circumstances associated with the grounds is proved by the landlord, the court must grant the court order for recovery of possession.

¹¹ This is a common law right. On the other hand, the right is removed for landlords by section 18 of the 1988 Act which requires the lease to be terminated under one of the available grounds contained in schedule 5 of the 1988 Act.

¹² Note that during the initial contractual term of the lease the full range of grounds found in schedule 5 of the 1988 Act is not available to the landlord.

On the other hand, the nine remaining grounds contained in schedule 5 are referred to as ‘discretionary’, meaning that, even if the landlord proves the relevant circumstances exist, the court will only grant an order for the recovery of possession if it considers it is reasonable to do so.

Examples of mandatory and discretionary grounds

The mandatory grounds include that the landlord needs the property for his or her own home (ground 1); the landlord is intending to do major work to the property (ground 6) and, as already mentioned, the tenant has three months’ rent arrears (ground 8).

The discretionary grounds include persistent delay in paying rent (ground 11); some unpaid rent (ground 12) and a breach of another term of the tenancy agreement (ground 13).

A comparison with the social housing sector

The mixture of mandatory and discretionary grounds can be contrasted with the ‘Scottish Secure Tenancy’ in the social housing sector, where, for each ground of recovery of possession, the court is only to make an order for possession if it is reasonable to do so (Housing (Scotland) Act 2001 (asp 10), schedule 2).

The overlap with the grounds of possession in the Bill

Another key point to note is that a number of the grounds associated with assured tenancies have their equivalent in the evictions grounds provided for in the Bill for the new private residential tenancy (on the new grounds, see pp 20–21 below).

NO-FAULT GROUND FOR REPOSSESSION

The following section provides a discussion of the one of the more contentious proposals – that the new private residential tenancy will not provide landlords with a no-fault ground for repossession.

As explained above, SATs can be ended through the no-fault ground for repossession. This is not provided for in the Bill. Rather, the Bill proposes that to end the tenancy the landlord would need to use one of the specified grounds for repossession (these are considered in more detail below). In the first consultation paper, the Scottish Government set out the reasoning behind this approach:

“An important policy matter is to tackle the growing demand for private rented housing from a range of household types. This range includes people who will continue to want flexibility from the sector and those who want to settle in the sector longer-term.

Tenants should feel secure in their homes. We think security can be undermined by landlords’ freedom to ask tenants to leave without reason. We want tenants to be confident about asking their landlord to do necessary repairs without fear of being asked to leave at the end of the lease period”.
(Scottish Government (2014a))

In response to the first consultation, the majority of respondents (81%) agreed that a no-fault ground should be excluded from the new tenancy system. However, the majority of non-campaign respondents (79%) disagreed (Robertson 2015a).

Those supporting the proposal that the no-fault ground should be excluded included respondents to the Living Rent campaign and a number of local authorities, campaign body, tenant group and union respondents. There was a suggestion that longer-term tenancies will allow people to put down roots and will support the development of stable, balanced communities. There was also a common view that the potential for a tenancy to be ended for no reason leaves some tenants unable or reluctant to assert their rights (Robertson 2015a).

As Citizens Advice Scotland (2015) indicated in their consultation response:

“We have seen from our evidence how the no-fault ground has been used by landlords in the past in unfair circumstances. These have included ending a lease due to a request for improvements or repairs made to a property. It is a wide held concern by tenants that they cannot enforce their rights out of concern that they will be evicted from their homes.”

On the other hand, many letting agent, landlord and industry body respondents have been opposed to the removal of the no-fault ground. Respondents to the first consultation suggested that the proposals may impact on a landlord’s willingness to let properties because of a perceived risk of more secure tenancies. As the Scottish Land and Estates response (2015) said:

“Our members have reported that should the tenancy proceed as per the consultation document they would be re-assessing their property portfolios. Some members will look to sell properties which will perhaps remove them from the rental market and will almost certainly remove them from the affordable rented market. In light of the risks and also an upsurge in the popularity of agri-tourism, some properties will be used as holiday cottages rather than longer lets. This not only removes the risk associated with secure tenants but is also favourable in terms of capital taxation and can attract a higher monthly income.”

Some respondents also outlined their lack of confidence in being able to regain possession other than the no-fault route (Robertson 2015a).

In the second consultation paper, the Scottish Government reaffirmed its commitment to proceeding with the proposals on the basis of improving tenants’ security of tenure. But to reassure landlords that this would be balanced with proper safeguards they proposed increasing the numbers of grounds for possession from 8 to 11, to ensure that landlords could recover their property in all reasonable circumstances (the specific grounds are covered in detail below).

Concern has also been raised about the situation where landlords routinely issue with tenancies with fixed end dates, for example, landlords that let to students (Lettingweb 2015). This issue has particularly been highlighted in relation to Edinburgh, where many landlords let their properties to students for academic the year then use the accommodation over the summer period for festival/short term lets. As the proposed tenancy would have no fixed end date landlords would only know they were getting their property back when the student gives notice – which under the Bill’s proposals is at least eight weeks. Currently, many landlords would start to advertise their property more than eight weeks in advance, on the assumption that existing tenants would leave when

the current tenancy expires. Many students expect to secure lets in March /April for the academic year starting in September (Montgomery 2015).

In the FM (para 65), the Scottish Government recognises that landlords in the student rental market may need to adjust their approach to managing their property as there may be a shorter “window” for advertising and letting property in the student market. However, they argue:

“ Effective engagement with tenants can help mitigate this, for example by agreeing the date at which the tenant intends to leave in advance of formal notice being given” (FM, para 65).

Furthermore, it argues that only a small proportion of lets may continue beyond the expected end date as students are unlikely to want to pay for the accommodation unless they were planning to stay on over the summer (FM, para 67).

The Scottish Government does recognise that the tenancy “...may result in some reduction in the flexibility that a landlord currently has in return for strengthening the security of tenure for the tenant”(FM Para 73). However, ultimately, the Scottish Government argues that the new tenancy will not significantly affect the most important driver for investment in the private rented sector, the rate of return on investment. As it argues:

“Landlords will still be able to charge market rents (except if a rent pressure zone has been designated) they will be able to recover possession if the tenant fails to pay rent or if they wish to realise their capital investment by selling the property (or in the case of individual landlords, if they require the house for themselves or their families). Lenders will still be able to recover possession in the event of the landlord defaulting on the mortgage, so the availability of finance should continue with the introduction of the new tenancy...” (FM para 73).

THE BILL – DETAIL

This section of the briefing looks at the individual provisions of the Bill in greater detail, compares the proposals to the current tenancy framework and considers the view of stakeholders on the proposals.

The provisions are grouped as much as possible in common themes. Note this grouping does not match exactly the sequence of the provisions in the Bill. Furthermore, this section does not attempt to cover every detail of the Bill. The Explanatory Notes should be consulted for the more technical and minor provisions in the Bill.

THE PRIVATE RESIDENTIAL TENANCY AND TENANCY TERMS

Part 1 of the Bill (ss 1-4) provides the conditions which must be met for the creation of private residential tenancy while Part 2 (ss5-7) covers the terms of the tenancy.

THE CURRENT POSITION

The previous section provided an overview of the existing tenancy framework. Schedule 4 of the 1988 Act sets out a list of tenancies which cannot be assured tenancies, for

example, tenancies of agricultural land and tenancies where there is a resident landlord. The 1988 Act does not provide for a model tenancy agreement.

THE BILL'S PROVISIONS

Section 1(1) of the Bill provides the three conditions where a tenancy is a private residential tenancy.

Schedule 1 to the Bill outlines the types of tenancies that cannot be private residential tenancies. These include tenancies where the rent is less than £6 a week, shops, student accommodation provided by a university or other educational institutions, a holiday let and accommodation where the landlord is resident from the outset and throughout the tenancy. The exclusions appear broadly similar to those excluded from the assured tenancy regime.

Section 5 of the Bill provides Scottish Ministers with powers to make regulations that prescribe the statutory terms of every tenancy agreement. Regulations made under section 5 cannot be made unless they include the provisions outlined in Schedule 2, which lists the terms of every private residential tenancy.

The specified terms of the tenancy agreement would form part of a model tenancy agreement issued by the Scottish Government which would also include discretionary clauses and a statutory guidance note that would summarise the meaning of the clauses in plain English (PM para 41). The Scottish Government propose a model tenancy agreement is a way of promoting good practice and ensuring tenants and landlords were aware of their rights and responsibilities.

THE SCOTTISH GOVERNMENT'S CONSULTATION

The Scottish Government did not consult on the detail of the tenancy terms. The introduction of a model tenancy agreement was proposed in the first consultation paper. The majority of respondents (79%) agreed with the introduction of a model tenancy agreement (Robertson 2015 (a)).

TENANCY INFORMATION

Part 3 of the Bill (ss8-15) concerns landlords' duties to provide information to tenants and the Tribunal's powers where landlords do not comply with their duties.

THE CURRENT POSITION

Landlords using an assured tenancy have to provide the tenant with a written tenancy document and weekly rent book.¹³

Since 1 May 2013, landlords have had to provide new tenants with an assured tenancy of a SAT with a "[tenant information pack](#)" at the beginning of a tenancy. The pack provides tenants with a summary of relevant legislation and was introduced with the aim of increasing the knowledge of rights and responsibilities amongst landlords and

¹³ s30 Housing (Scotland) Act 1988

tenants.¹⁴ Failure to provide the pack is an offence with a maximum fine of level 2 (currently £500).

THE BILL'S PROVISIONS

Duty to provide written terms of the tenancy

Section 8 of the Bill proposes that a landlord must set out in writing all the terms of the tenancy and provide the tenant with a written tenancy agreement no later than the day on which the private residential tenancy commences. Section 8 of the Bill also makes further provision for tenancies that convert to a private residential tenancy after the date on which the tenancy has started, for example, a holiday let.

Duty to provide specified information

In addition to providing the tenant with a written tenancy agreement, Section 9 of the Bill also provides that the Scottish Ministers may, by regulation, require a landlord to provide the tenant with specified information. The landlord would be prohibited from charging a tenant for the provision of the tenancy document or any other required documentation.

Before making regulations under section 9, Ministers must consult persons representing the interests of tenant and landlords. Scottish Ministers may also specify in regulations how this duty must be fulfilled (s10). This equivalent to the current tenant information pack provisions.

First Tier Tribunal Powers

The Bill (ss12-15) provides the Tribunal with powers where the landlord has failed to comply with their duties to provide a tenancy agreement and specified information.

Power to Draw up Tenancy Terms

Where a landlord fails to supply the written tenancy agreement to the tenant, the tenant can refer a case to the Tribunal (s12(1)). Before doing so, the tenant must give a landlord 28 days' notice of his or her intention to do so (s15(1)).

A tenant or landlord can also refer a case to the Tribunal where they consider that the tenancy agreement appears to displace a statutory term of the tenancy in a way that is not permitted under the regulations (12(2)).

In these circumstances, the Tribunal has the power to draw up a tenancy agreement which accurately reflects the terms of the tenancy or if there are already written terms of the tenancy, declare the tenancy terms accurate. Any document drawn up by the Tribunal will constitute all the tenancy terms (s13).

¹⁴These provisions were introduced by the Private Rented Housing (Scotland) Act 2011 with by section 33 of the Private Rented Housing (Scotland) Act 2011 by inserting new section 30A and 30B into the 1988 Act. Under section 30B Ministers have powers to prescribe the information and documents to be provided in the pack by order. Ministers have used these powers to make the [Tenant Information Packs \(Assured Tenancies\) \(Scotland\) Order 2013](#).

Power to Impose Sanctions

Section 14 of the Bill also proposes that on application by the tenant, the Tribunal can make an order against a landlord who has failed to provide the tenant with the required information under sections 8 and 9. Before referring a case to the Tribunal under this section, a tenant must give a landlord 28 days' notice of his or her intention to do so (s15(1)).

An order made by the Tribunal could require the landlord to pay the tenant up to a maximum of three months' rent (s14(2)). The order could only be made if, at the time the Tribunal considers the application, the landlord has still not provided the information and there is no reasonable excuse for failing to provide the information (s14 (1(b) c)).

As explained above, failure to provide a tenant information pack is currently an offence with a maximum fine of £500. Thus, the Bill proposes a different approach – there is no criminal offence and the landlord would have to compensate the tenant with a potentially higher amount than the current £500 fine (assuming the Tribunal makes the relevant order). If the average 2 bed rent in Scotland is around £600 per month (Scottish Government 2014c) then the maximum payment that the Tribunal could order to be made in this case would be around £1,800.

THE SCOTTISH GOVERNMENT'S CONSULTATION

The detail of the above provisions did not form part of the Scottish Government's consultation process.

TERMINATION OF THE TENANCY

Part 5 of the Bill (ss33-50) provides for how a private residential tenancy can be terminated by the tenant and the landlord. Section 35 of the Bill proposes that a landlord and tenant can only bring a private residential tenancy to an end in accordance with this Part of the Bill (s35). Section 36 and 37 provide lawful sub-tenants with protection from eviction in certain circumstances.

TERMINATION OF THE TENANCY BY THE TENANT

Sections 38-39 of the Bill provide for how a tenant can end the tenancy.

THE CURRENT POSITION

As referred to earlier in the briefing, before the initial term of the lease ends, the tenant can bring a SAT or assured tenancy to an end where this is expressly provided for in the lease (via a 'break clause'¹⁵).

For both a SAT and an assured tenancy the tenant can also terminate the lease ('rescind' it) before the end of the initial term, if the landlord is guilty of a material breach of contract.

¹⁵ Break clauses can exist in favour of the tenant, in favour of the landlord or in favour of both parties.

At the end of the initial term, if the tenant wants to leave a SAT or assured tenancy, he or she must give his or her landlord notice of the period required in the lease. By law the tenant is required to give a minimum period of 28 days' notice, or 40 days' notice if the lease is for more than four months. As SATs always have an initial term of at least six months, the minimum notice required is 40 days.

The FM (para 38) estimates that, under current arrangements, tenants end around 90% of tenancies, compared with 10% ended by landlords. The Scottish Government envisages that this pattern of tenancy turnover will continue under the new tenancy, with the majority of tenancies ended by tenants.

THE BILL'S PROVISIONS

Sections 38 and 39 of the Bill propose that a tenant can end the tenancy by writing to the landlord to advise them of the date the tenancy will end. Two minimum notice periods are proposed depending on the length of the tenancy (s39(4)):

- 28 days (4 weeks) if the tenant has been entitled to occupy the property for six months or less
- 56 days (8 weeks) where the tenant has been entitled to occupy the property for more than six months.

Thus, the proposed minimum notice period for a tenant to end a tenancy of more than six months (56 days) is 16 days more than the current minimum notice period for SATs of 40 days. The proposed minimum notice period of 8 weeks is also shorter than the 12 week notice period that landlords would have to give tenants to end the tenancy (see below for further discussion on the procedures for landlords to end the tenancy).

As explained earlier, the Bill proposes that, unless otherwise agreed, the initial tenancy period will be six months. During the initial tenancy period the tenant cannot end the tenancy. But section 39(2) would enable a landlord and tenant to waive the tenant's inability to end the tenancy during the initial period, if it was agreed in writing.

A landlord and tenant also have the flexibility to agree a different minimum notice period from that specified above (s39(3)). This must be done in writing and cannot be agreed before the tenancy became a private residential tenancy (s39(5)). This flexibility to agree different notice periods is not proposed when the landlord is seeking to end the tenancy (see below for further details).

Assuming the minimum notice periods specified by the Bill apply, if the initial period of the tenancy is six months, the tenant could end the tenancy the day after six months has ended, provided the tenant has given 28 days' notice. Or, once the initial period has ended, the tenant could end the tenancy the day after the relevant notice period of 56 days ends.

THE SCOTTISH GOVERNMENT'S CONSULTATION

The Scottish Government's first consultation paper sought views on the above notice periods. A small majority of respondents (57%) agreed with the proposed timescales. Those who agreed with the proposal tended to suggest that the approach seemed reasonable, fair and as striking a good balance between the interests of landlords and tenants (Robertson 2015a).

Many of those disagreeing with the proposal suggested that notice periods should be the same for both landlords and tenants. In the second consultation paper, the Scottish Government proposed that landlords should have to give 12 weeks' notice to tenants (see below). In response to arguments suggesting that the notice periods should be the same for tenants and landlords the Scottish Government argued that:

“...12 weeks is too long for a tenant giving notice to a landlord as they could be subject to unforeseen circumstances that affects their ability to stay in the property, e.g. the need to move for work or education, relationship breakdown etc. Further, a 12-week notice period could reduce the sector's flexibility, including a tenant's ability to take up other accommodation (Scottish Government 2015c)”

The majority of respondents (86%) disagreed with there being an initial tenancy period during which tenants and landlords would be unable to give notice unless certain specified circumstances existed. Those disagreeing included those supporting the Living Rent petition. However, the majority of standard respondents (77%) and those supporting the Scottish Association of Landlords response and the letting agent campaigns agreed (Robertson 2015b).

Those disagreeing tended to feel that tenants should be able to serve notice at any time (Robertson 2015 b). As Fife Frontline Homelessness Services (2015) said:

“The tenant should be able to terminate if the landlord has breached the agreement, for example if the property is in a poor state of repair and the landlord is not addressing this.

Similarly, the Faculty of Advocates (2015) said:

“As with any statutory code which provides security of tenure, the proposed new form of tenancy seeks to impose statutory controls on the landlord's right to terminate tenancies and remove tenants. That is a necessary feature of the system. However, we do not see why statute should remove the tenant's common law right to rescind the tenancy during the initial period where a landlord is in material breach of contract.”

As outlined above, the Bill provides that tenant could end the tenancy during the initial period but the landlord would have to agree to this in writing.

TERMINATION OF THE TENANCY AT THE LANDLORD'S INSTIGATION: EVICTION BY COURT ORDER

THE CURRENT POSITION

With the most common type of tenancy, a SAT, the landlord has the absolute right to recover possession at the end of the tenancy, providing the correct procedures are followed.

For an assured tenancy, the landlord must seek to recover possession under one of the 17 grounds for recovery of possession contained in schedule 5 of the 1988 Act. As already discussed, some of these grounds are 'mandatory', some are 'discretionary'. This distinction refers to whether a court can decline to grant an order for recovery of

possession, even when the court decides that relevant circumstances associated with the ground in question do exist.

THE BILL'S PROVISIONS

Chapter 3 of Part 5 of the Bill, along with schedule 3 of the Bill, provide for how the landlord can seek to bring the tenancy to an end.

The tenant leaves after receiving a notice (section 40)

Section 40 of the Bill provides that a tenancy comes to an end if the tenant receives a 'notice to leave' from the landlord and the tenant ceases to occupy the property in question. Under section 52 of the Bill a notice to leave must be in writing; it must specify the day on which the landlord expects to be entitled to make an application for an eviction order to the First-tier Tribunal; and it must state the eviction ground which the landlord intends to use before the Tribunal (in the event the tenant does not vacate the property).

The landlord obtains an eviction order (section 41)

Section 41 of the Bill addresses the situation where the tenant does not leave after receiving a notice under section 40. It empowers the First-tier Tribunal to issue an eviction order against the tenant if, on the application of the landlord, the Tribunal finds that one of the eviction grounds contained in schedule 3 applies.

There are sixteen grounds for eviction contained in schedule 3 of the Bill, compared to the seventeen grounds for recovery of possession contained in schedule 5 of the 1988 Act (which applies to assured tenancies and SATs).

The grounds have been grouped into four broad headings in the Bill. The groupings, along with the grounds falling under each heading, are set out in the table below:

Where the let property has been acquired for another purpose (Schedule 3, Part 1)	Where there has been a change in the tenant's status (Schedule 3, Part 2)	The tenant's conduct (Schedule 3, Part 3)	Legal impediment to the tenancy continuing (Schedule 3, Part 4)
Ground 1: the landlord intends to sell	Ground 7: the tenant is no longer an employee of the landlord	Ground 9: the tenant is not occupying the let property	Ground 14: the landlord has ceased to be registered
Ground 2: the property is to be sold by the lender	Ground 8: the property is purpose built student accommodation and the tenant is not a student ¹⁶	Ground 10: the tenant has breached a (non-rent related) term of the tenancy agreement	Ground 15: the landlord's HMO licence has been revoked

¹⁶ This ground is aimed at purpose built (or converted) student accommodation provided by the private sector. Student accommodation provided by universities and other educational institutions cannot be private residential tenancies so ground 8 is not directed at that type of accommodation.

Ground 3: the landlord intends to refurbish		Ground 11: the tenant has been in arrears over a three month period	Ground 16: the landlord has been issued with a statutory overcrowding notice
Ground 4: the landlord or family member intends to live in the property		Ground 12: the tenant has a relevant criminal conviction	
Ground 5: the landlord intends to use the property for a non-residential purpose		Ground 13: the tenant has engaged in relevant anti-social behaviour	
Ground 6: the property is required for a religious purpose			

Grounds that can be used during the initial period (section 43)

Section 43 of the Bill limits the grounds which can be used by the landlord during the initial period of the lease to five out of the sixteen grounds as follows:

- a lender intends to sell the let property;
- the tenant has failed to comply with an obligation under the tenancy;
- the tenant has been in rent arrears for three or more consecutive months;
- the tenant has a relevant criminal conviction; or
- the tenant has engaged in relevant anti-social behaviour.

The grounds which can be used during the initial period of the lease by the landlord for assured tenancies and SATs under the 1988 Act are also restricted, although not to the same extent as in the Bill.

COMPARISONS WITH THE 1988 ACT

As already noted, a number of the eviction grounds in schedule 3 have equivalents in schedule 5 of the 1988 Act.

However, in practice, it is envisaged that, because of the absence of the ‘no-fault’ ground of possession available under a SAT, the new grounds would be used by landlords to a much greater extent than those contained in schedule 5 have been. When considering how fit for purpose the new grounds are, this should be borne in mind.

Note that, whilst there is an overlap between the grounds in the 1988 Act and the grounds in the Bill, a number of grounds in the 1988 Act do not appear in the Bill. Some of the differences are explored in more detail below.

TRENDS IN THE POLICY DEVELOPMENT

An increase in the number of grounds

A key feature of the policy development associated with this part of the Bill is that the number of grounds increased over time. The first consultation proposed eight grounds, the second consultation proposed eleven, compared to the sixteen grounds in the Bill as introduced.

A shift towards more grounds with discretionary element

Another key feature of the policy development in this area is a shift towards including discretionary elements in the eviction grounds. In the first consultation all eight proposed grounds were mandatory.

In the second consultation, three of the grounds acquired a discretionary element. In the Bill as introduced four grounds have a discretionary element associated with them (grounds 2, 10, 11 and 13).

THE SCOTTISH GOVERNMENT'S CONSULTATION

In both the first and the second consultation, the Scottish Government consulted on a number of issues associated with the proposed eviction grounds.

The need for additional eviction grounds

In both consultations a significant majority of respondents (60% in the first consultation; 71% in the second consultation) did not think the list of grounds consulted on was complete and other grounds should be added.

In both instances a key driver for disagreement appeared to be the exclusion of the no-fault ground (discussed earlier in this briefing) (Robertson 2015a, p 37; Robertson 2015b, p 31).

Additional mandatory eviction grounds suggested by the respondents to the consultations and adopted by the Scottish Government are:

- **ground 6:** the property is required for a religious purpose, e.g. for the employee of a religious body (Robertson 2015a, p 37; Robertson 2015b, p 62);
- **ground 7:** the tenant no longer an employee of a landlord (Robertson 2015a, p 37);
- **ground 9:** the tenant is no longer occupying the property (Robertson 2015a, p 37); and
- **ground 16:** the landlord has received a statutory overcrowding notice (Robertson 2015b, p 33).

For grounds 6 and 7, there are equivalent grounds in the 1988 Act (although the equivalent of ground 7 is discretionary not mandatory).¹⁷ There are no equivalents of grounds 9 and 16.¹⁸

Additional eviction grounds not adopted (or only partially adopted) by the Scottish Government

Some other additional eviction grounds suggested by respondents were not adopted by the Scottish Government. These include:

- a ground based on the property being required for a holiday let (Robertson 2015a, p 37). There is an equivalent (mandatory) ground (ground 3) in the 1988 Act; and
- additional grounds relating to rent arrears, comparable to those in the 1988 Act (Robertson 2015a, p 37). This topic is explored in more detail at pp 26–27 below.

A popular suggestion in the responses to the second consultation was that a ground should be included relating to the recovery of properties being let to the student market (Robertson 2015b, p 33).

Ground 8 of the Bill (added after the second consultation) is a mandatory ground which covers the situation where the let property is student accommodation and the tenant is no longer a student. As student accommodation provided by the educational institutions themselves is outwith the scope of the regime (schedule 1, para 5), this ground is quite narrow. It is focused on purpose-built (or converted) student accommodation provided by the private sector.

However, a popular suggestion by respondents to the second consultation was that the ground should cover the (much larger market) of all private sector rentals to students. It was also argued that the ground should not be restricted to the situation where the tenant is no longer a student (Robertson 2015b, p 33). For example, as discussed above at p 14 an Edinburgh landlord might wish to recover a property from students at the end of the academic year for the purpose of letting it on a short term basis during the Edinburgh Festival. These suggestions have not been included in the Bill.

The balance between mandatory and discretionary grounds

The first consultation: eight mandatory grounds

All eight eviction grounds in the first consultation were mandatory. A majority of respondents (78%) to the first consultation agreed with this approach (Robertson 2015a, p 30).

However, the majority of advice and campaign groups responding did not agree. The principal concern of those dissenting was that it would represent “a serious weakening of the rights of tenants in Scotland’s private rented sector” (Robertson 2015a, p 29). Other concerns included a fear of eviction for relatively minor, technical breaches of the tenancy agreement (Robertson 2015a, p 29).

¹⁷ Grounds 5 and 17.

¹⁸ Ground 7 in the 1988 Act, which is a mandatory ground, covers the specific situation where the tenant has died.

The second consultation: three grounds with an element of discretion

In the second consultation, adopting specific suggestions from some respondents, the Scottish Government introduced an element of discretion in relation to three grounds – three months' rent arrears (ground 11); a (non-rent related) breach of the tenancy agreement (ground 10) and anti-social behaviour (ground 13).

A majority of respondents (68%) to the second consultation disagreed that these grounds should have a discretionary element. Those who disagreed most frequently noted their disappointment that the grounds were no longer entirely mandatory, particularly given the abolition of the 'no-fault' ground (Robertson 2015a, p 34). Further specific points made included that the landlord should not be expected to, and may not be able to cope with, loss of rental income caused by delays in processing housing benefit, i.e. a discretionary element of the rent arrears ground (Robertson 2015a, p 34).

Those who agreed with the proposal most often noted the importance of the Tribunal being able to exercise discretion. The next most frequently made point was that discretion should apply to some, if not all, of the other proposed grounds (Robertson 2015a, p 34).

The Bill as introduced

Note that, in a development from the second consultation, the Bill has introduced an element of discretion to ground 2. This ground covers the situation where the property is to be sold by a lender.¹⁹

Eviction grounds which received strong support or majority support on consultation

The second consultation asked respondents to consider each of the proposed eviction grounds in turn and asked whether they agreed each of the grounds would work effectively. (In the analysis below, it should be borne in mind that eleven grounds appeared in the second consultation, as opposed to the sixteen grounds which now feature in the Bill).²⁰

Grounds which received strong support or majority support from respondents on consultation were (Robertson 2015b, pp 40, 54, 56, 58 and 60):

- **ground 2:** the property is to be sold by the lender;
- **ground 6:** the property is required for a religious purpose, e.g. for the employee of a religious body;
- **ground 7:** the tenant no longer an employee of a landlord;
- **ground 9:** the tenant is no longer occupying the property; and
- **ground 10:** the tenant has breached the tenancy agreement.

¹⁹ The ground is discretionary where the landlord did not make the tenant aware that there was an outstanding mortgage and so ground 2 might apply. It is mandatory in other circumstances.

²⁰ The increase in the number of grounds is attributable to the inclusion in the Bill of grounds 14, 15 and 16 (legal impediments to the tenancy continuing) and ground 8 (lets of purpose built student accommodation). Additionally, the ground covering anti-social behaviour and certain types of criminal behaviour was separated into two grounds (grounds 12 and 13).

Note that, as discussed above, ground 2 did not have any element of discretion when consulted on (but now does).

Other grounds appearing in the Bill were more controversial (e.g. ground 11 – rent arrears over a three month period) and these are explored in more detail at pp 26–27 below.

Eviction grounds which attracted mixed views on consultation

There are four mandatory grounds in the Bill, which relate to the landlord requiring the let property for another purpose and which attracted mixed views²¹ in responses to the second consultation:

- **ground 1:** the landlord intends to sell the property within three months of the tenant ceasing to occupy it (a mandatory ground);
- **ground 3:** the landlord intends to carry out “significantly disruptive” works to the let property (a mandatory ground);
- **ground 4:** the landlord or a member of landlord’s family intends to live in the let property for at least three months (a mandatory ground);
- **ground 5:** the landlord intends to use the let property for a purpose other than providing a person with a home (a mandatory ground);
- **grounds 12:** the tenant has a relevant criminal conviction (a mandatory ground); and
- **ground 13:** the tenant has engaged in relevant anti-social behaviour (a discretionary ground)²²

Some common themes emerged in the responses. When grounds 1 and 3 were consulted on, the landlord was required to offer the tenant another tenancy in some circumstances (e.g. if the property ultimately wasn’t sold). Similarly, when grounds 4 and 5 were consulted on, the landlord was required to pay the tenant’s reasonable moving expenses. Respondents criticised the workability of these aspects of the proposals (Robertson 2015b, p 37, 42, 44 and 46). They have not been included in the Bill.

For ground 1 (sale) respondents also noted that in some cases the property could be sold as an investment property not requiring vacant possession. In a similar vein, some respondents suggested that the Tribunal should be able to exercise its discretion in relation to grounds 3, 4 and 5 (Robertson 2015b, pp 39, 42, 46 and 48).

In respect of grounds 12 and 13, some respondents wanted all types of behaviour (including criminal behaviour) to attract the discretion of the Tribunal. Others wanted

²¹ On consultation, views on grounds 1, 3 and 4 were evenly divided, with no clear majority in agreement or disagreement as to whether the ground in question would work effectively. For ground 5 a very small majority thought it would work effectively (Robertson 2015b, pp 37, 42, 44, 46).

²² Ground 6 of the 1988 Act is the equivalent ground to ground 3 in the Bill. Ground 1 of the 1988 Act is the equivalent ground to ground 4 in the Bill (although it only applies to landlords and to their spouses or civil partners). There are no equivalents to grounds 1 and 5 of the Bill in the 1988 Act. There is a single (discretionary) ground in the 1988 Act (ground 15) equivalent to grounds 12 and 13 in the Bill.

some forms of anti-social behaviour (not involving a relevant criminal conviction) to be covered by a mandatory ground for eviction (Robertson 2015b, p 52).

Some respondents doubting the workability of this part of the Bill emphasised the need for the relevant definitions to be clear and watertight, as they said anti-social behaviour was difficult to prove in practice (Robertson 2015b, p 52).

Rent arrears over a three month period (ground 11)

Ground 11

Under ground 11 in the Bill a tenant can be evicted where he or she has been in rent arrears for three or more consecutive months. The Tribunal has discretion as to whether to evict where these arrears are “wholly or partly” a consequence of a delay in or failure in the payment of a relevant benefit, including housing benefit. The Tribunal also has discretion where the amount owed is less than one months’ full rent. Otherwise, ground 11 is a mandatory ground.

A comparison with the 1988 Act

Ground 11 has no direct equivalent in the 1988 Act. As discussed above, the 1988 Act has a ground where at least three months’ rent is due. The 1988 Act also has two additional discretionary grounds relating to rent arrears (a ground relating to persistent delay in paying rent and a ground requiring some rent to be unpaid).²³

Controversy on consultation

Other than the removal of the ‘no-fault’ ground of possession, ground 11 was the most controversial aspect of the proposals relating to eviction grounds. 60% of the respondents to the second consultation did not agree that it would work effectively (Robertson 2015b, p 49).

The landlord’s perspective

A common theme from the landlord’s perspective was that the ground would not address or prevent persistent arrears which are less than one month’s rent (Robertson 2015b, p 49).

Still from the landlord’s perspective, the view was frequently expressed that the ground could operate effectively if the Notice to Leave could be issued as soon as the second month’s rent falls due, with referral to the Tribunal possible as soon as the third month’s rent falls due (Robertson 2015b, p 49). This is now possible under the ground as it appears in the Bill (by virtue of section 44).²⁴ (For more on the notice periods the landlord is required to give, see pp 28–29 below).

²³ Ground 8 in the 1988 Act is the equivalent ground to ground 11 as it appears in the Bill. Grounds 11 and 12 in the 1988 Act are the discretionary grounds relating to rent.

²⁴ See also para 59 of the Policy Memorandum of the Bill for a good explanation of how the Scottish Government envisages the notice period under this ground would work in practice.

The tenant's perspective

Others who disagreed with ground 11 did so for very different reasons – namely that there should be no arrears-related circumstances under which it would be mandatory to evict the tenant (Robertson 2015b, p 49).

In its written submission on the Bill to the Parliament's [Infrastructure and Capital Investment Committee](#), Shelter Scotland commented:

“The rent arrears ground could lead to disproportionate outcomes for tenants by enabling landlords to secure a mandatory eviction where tenants have one months’ rent arrears, but are unable to pay this off over a three month period. For a landlord to secure a mandatory eviction Shelter Scotland believes this should be increased to at least three months’ rent arrears.” (pp 2–3)

TERMINATION OF THE TENANCY AT THE LANDLORD’S INSTIGATION: NOTICE PERIODS

THE CURRENT POSITION

To bring a SAT or an assured tenancy to an end, the landlord is currently required to serve two different types of notice. In the first place, he or she must serve a notice related to the recovery of possession – a ‘section 33 notice’ for a SAT (which does not have a statutorily prescribed form) and an AT6 for an assured tenancy (the content of which is prescribed by secondary legislation) (1988 Act, sections 19 and 33).

In both instances, the landlord must also serve a ‘notice to quit’ which prevents tacit relocation (silent renewal of the lease) from operating.

As discussed earlier in the briefing, the section 33 notice under a SAT must be served two months prior to the expiry of the term of the lease (or such longer period as is stated in the tenancy agreement) (1988 Act, section 33(2)).

For assured tenancies the notice period associated with the AT6 depends on which ground for recovery of possession is being used. Some grounds require two months’ notice; some only require two weeks’ notice. The court can also dispense with the requirement to give notice altogether where it considers it reasonable to do so (1988 Act, section 19).

For notices to quit relating to both SATs and assured tenancies, the relevant notice period depends on the length of the lease. For all leases of more than four months (with all SATs falling into this category) the period is 40 days.²⁵

THE BILL’S PROVISIONS

As already discussed, the Bill requires a single ‘notice to leave’ to be served by the landlord (section 40). The notice periods associated with this notice depend on the length of the tenancy (section 44):

²⁵ For all leases of four months or less, the period of notice is one third of the duration of the let. This is subject to a statutory minimum of twenty eight days (Rent (Scotland) Act 1984, section 112).

- 28 days (4 weeks) if the tenant has been entitled to occupy the property for six months or less; and
- 84 days (12 weeks) where the tenant has been entitled to occupy the property for more than six months.

Where circumstances associated with certain eviction grounds exist, the landlord can regain possession by giving the tenant 28 days' notice, irrespective of how long the tenant has lived in the property. These circumstances are, as follows, where the tenant (1988 Act, section 44):

- has engaged in relevant anti-social behaviour;
- has a relevant conviction;
- has breached his or her tenancy agreement;
- is not occupying the property as his or her home; or
- that the tenant has been in rent arrears for three or more consecutive months.

THE SCOTTISH GOVERNMENT'S CONSULTATION

The notice periods the landlord is required to give is another policy area which has evolved on consultation, with four notice periods being proposed in the first consultation, linked to how long the tenant has lived in the property. Respondents were relatively evenly divided on what was proposed, with a small majority supporting the proposed approach (Robertson 2015a, p 26).

In the second consultation, the Scottish Government consulted on the version of the notice periods which now appear in the Bill. In the Policy Memorandum, the Scottish Government discusses the responses to the consultation and its approach in the Bill as follows:

“The clear majority of respondents to the second consultation disagreed with the revised notice periods. Views were many and varied and the most frequently made suggestions were: a minimum of 12 weeks' notice for tenants in all circumstances, three notice periods with eight weeks' notice required where a tenant has lived in the property over six months and up to two years; and reducing the maximum noticed period to eight weeks. The Scottish Government considers that the notice periods outlined in the second consultation strike an appropriate balance between landlords and tenants and have retained these” (Policy Memorandum to the Bill, para 52)

From the responses to the first and second consultation majority support for the accelerated notice periods can be identified in all but one set of circumstances outlined in the Bill.²⁶ When the possibility of an accelerated notice period for rent arrears was specifically consulted in the second consultation a majority of respondents (86%) disagreed with it (Robertson 2015b, p 25). On the other hand, the Scottish Government

²⁶ In the first consultation, the majority of respondents (67%) agreed that landlords should be able to recover possession of their property if the tenant has displayed antisocial behaviour (a ground which included a relevant criminal conviction at that stage) or breached their tenancy agreement (Robertson 2015a, para 37). In the second consultation, there was no specific question on the notice period associated with the abandonment ground. However, there was strong support for the workability of the abandonment ground, which had been explained with reference to a four week notice period in the second consultation (Scottish Government 2015, p 28; Robertson 2015, p 56).

(Policy Memorandum to the Bill, para 60) points out that there was majority support for this proposal, when responses from the Living Rent Campaign are excluded.

WRONGFUL TERMINATION

The Bill (ss47-49) proposes that a tenant will have recourse to the Tribunal if they believe their tenancy has been wrongfully terminated.

THE CURRENT POSITION

Section 36 of the 1988 Act says that a “residential occupier” (which includes a tenant under a SAT or assured tenancy) can apply to the court for damages relating to an unlawful eviction.

This right extends to the situation where the tenant gives up occupation of premises because to the landlord attempted to deprive him or her of occupation (Robson 2012, para 14-16), for example, by service of a notice which has no basis in law.

The amount of damages which can be awarded is fixed at the difference between the amount which the landlord would get for his or her property on the open market with the tenant in possession, compared to the amount which he or she would get it without the tenant in possession (1988 Act, section 37). The maximum award which SPICe is aware of in this context is £33,000 (Robson 2012, para 14-19²⁷).

Section 22 of the Rent (Scotland) Act 1984 (c 58) also makes it a criminal offence for any person to unlawfully deprive a residential occupier of the occupation of the premises, or attempt to do so. Again the relevant provision is broad enough to cover situations where the landlord tries to get to the tenant to give up occupation of the premises (Robson 2012, para 14-10), for example, by service of a notice with no legal basis.

THE BILL’S PROVISIONS

The Bill proposes that tenants can apply to the FTT for a wrongful termination order in two sets of circumstances:

Where the tenancy has been ended by eviction order: and the tenant is not satisfied that the landlord genuinely wanted to recover possession of the property under one of the specified repossession grounds, so that the Tribunal has been misled into issuing an eviction order. (s47)

Where the tenancy has been brought to an end as result of the tenant leaving following receipt of a notice to leave: and the tenant considers that they were misled into leaving the property by the landlord. (s48)

A wrongful termination order made by the FTT would require the landlord to pay the tenant up to three months’ rent. This is the same sanction as that where the landlord fails to provide the tenant with the required information under section 8 and 9 of the Bill (see above). Where a case involves joint landlords, the FTT can make the wrongful-termination order against all, some or only one of the landlords (s49).

²⁷ Robson (2012, para 14-19) refers to the case of *Scott v Thomson* 2003 SLT 99.

No reference is made to these proposals in the Policy Memorandum and the Bill documents do not provide any further detail about how these provisions may work in practice, for example, whether there are any timescales in which a tenant can apply to the Tribunal for a wrongful termination order to be made.

The proposals regarding a tenant's ability to question their landlord's motivation for repossession first appeared in the Scottish Government's second consultation paper and were particularly highlighted in relation to certain grounds for repossession. The consultation paper gave the example of a tenant being served with a notice to leave because the landlord wishes to sell the property. However, six weeks after leaving the property, the former tenant notices that the same property is re-advertised for let. In such a case the former tenant could refer a case to the Tribunal and it would be for the Tribunal to decide whether there were reasonable grounds for the landlord's action.

The second consultation paper outlined the Scottish Government's intention to produce guidance for the Tribunal outlining the forms of evidence that may be presented to help it decide whether or not the specified ground is met (Scottish Government 2015c).

THE SCOTTISH GOVERNMENT'S CONSULTATION

As noted above the broad proposal regarding wrongful termination was made in the second consultation paper. The consultation paper did not specifically ask whether respondents agreed or disagreed with the proposal. Rather, respondents were asked to comment on each of the proposed grounds for repossession, some of which included the proposal that tenants should be able to refer the matter to the Tribunal if they were not satisfied with the landlord's reasons for repossessing the property.

For example, in response to proposed ground that the landlord wants the property for themselves or a family member, the analysis of consultation responses notes that, "Another frequently raised issue by those who disagreed was the possibility of tenants making unreasonable referrals to the First-tier Tribunal and that this could lead to very considerable hardship for some landlords" (Robertson 2015b).

On the other hand, Homeless Action Scotland's response highlighted their overall concern that in relation to breaches of the proposed new tenancy, too much onus is placed on the tenant to instigate action. As a result, they argued, it is unlikely that cases will be pursued. They argued that third parties (such as local authorities) should also be empowered also to raise actions. They also suggested that, compensation should be more punitive, for example, the damages paid to the tenant would be based on the sum of any financial benefit the landlord could make from selling the property without a tenant as opposed to selling it with a tenant *in situ*.

RENT

Part 4 of the Bill provides for restrictions in relation to rent and other charges and Rent Pressure Zones. SPICe briefing [Private Rents](#) (Berry and Berthier 2015) provides background information on sources of private rent statistics, an overview of data on private rents and the debate about whether some form of rent control should be introduced in Scotland.

RENT INCREASES

THE CURRENT POSITION

Landlords using a SAT will agree their rent with the tenant and that will remain the rent for the fixed term of the let. Otherwise landlords can propose to increase the rent when they renew the tenancy agreement at the end of the fixed term of the let. As some respondents to the Scottish Government's consultation noted, in practice, many landlords review the rent charged on a yearly basis or when the tenancy ends.

Landlords using an assured tenancy agreement cannot increase the rent during the contractual period²⁸ unless the tenancy agreement contains a rent review clause that determines how and when rent may be increased²⁹ or it is agreed between the tenant and landlord.

When the tenancy is operating as a statutory assured tenancy (when the contract has been brought to an end) the landlord may serve a notice on the tenant proposing a new rent and the date the increase will take effect.³⁰ If the term of the tenancy was originally for six months or more, then six months' notice is required before the new rent can take effect. If the length of the tenancy was for less than six months, the period of notice will be the duration of the tenancy, though not less than one month.³¹ This procedure can only be used once every 12 months.³²

THE BILL'S PROVISIONS

Sections 17-29 of the Bill make provisions regarding rent increases. These provisions are summarised below:

- The rent for a tenancy cannot be increased more than once in any 12 month period (s17)
- Landlords can increase the rent by giving the tenant a 'rent increase-notice' (s19(1)). The notice must set out the new rent, the day on which the increase is to take effect and any other requirements prescribed by Scottish Ministers in regulations (s19(2))
- Landlords must give tenants at least 12 weeks' notice of a change in the rent or whatever longer period has been agreed between the landlord and the tenant (s19(4)). The PM (para 72) notes that the 12 week period will "...provide tenants with sufficient notice to help them plan their finances"
- A landlord and tenant can, by agreement, change what is in the rent-increase notice provided that this does not make the date that the increase will be payable fall less than three months after the date the tenant was given the notice. (s19 (5)). For example, this would allow the parties to agree to a lower rent than in the notice

²⁸ (s24(1), 1988 Act)

²⁹ s24(5b) 1988 Act

³⁰ s24(1).1988 Act

³¹ (s24(2) 1988 Act).

³² s24(4) 1988 Act).

THE SCOTTISH GOVERNMENT'S CONSULTATION

The above proposals formed part of the second consultation paper. Almost all respondents (99%) agreed that rent reviews should take place no more than once in any 12 month period.

Just under three quarters of respondents (72%) also agreed that a tenant should receive 12 weeks' notice in advance of a change in rent. Comments made by those supporting the proposals included that they are sensible and reasonable and would give tenants time to budget for any changes. Comments made by those who disagreed tended to suggest that the 12-week period is too long: the most frequently suggested alternative was that eight weeks' notice be required (Robertson 2015b).

CHALLENGING A RENT INCREASE

THE CURRENT POSITION

In certain circumstances, the Private Rented Housing Panel has a role in setting market rents.

Tenants with a SAT can apply to the Private Rented Housing Panel to seek to have a Private Rented Housing Committee make a determination of their rent.³³ The Committee will only set a rent if they consider that there are enough similar houses in the area let on assured tenancies to draw comparisons and that the rent is significantly higher than the other rents in the area.³⁴ If the Committee does set a rent, it will be the maximum rent that can be charged for at least 12 months from the date on which it comes into effect.³⁵

If a tenant with a "statutory" assured tenancy is dissatisfied with a new proposed rent, they can apply to the Private Rented Housing Panel to ask a Private Rented Housing Committee to set a market rent (as long as the tenancy agreement does not specify how rents will be increased).³⁶

In practice, these provisions are rarely used. Only 30 referrals were made to the Rent Assessment Committee in 2013: 21 were regulated tenancy cases; 5 were assured tenancy cases and 4 were SAT cases (Private Rented Housing Panel 2015). As landlords can end a SAT at the end of the term relatively easily, through the "no-fault" ground of possession, the landlord could choose to end the tenancy rather than reduce the amount of rent. Thus, tenants may just decide to move tenancy rather than apply to the Panel.

THE BILL'S PROVISIONS

The Bill proposes a two-tier mechanism for tenants to challenge any proposed rent increase. In the second consultation paper on the proposals the Scottish Government said, "...we need to protect tenants against the possibility of unscrupulous landlords using large and unjustified rent increases to force them from their home when otherwise they are complying with their tenancy agreement" (Scottish Government 2015c).

³³ Section 34(1) of the Housing (Scotland) Act 1988

³⁴ Section 34(3) of the 1988 Act

³⁵ Section 34(4)(c)

³⁶ under 24(3) of the 1988 Act

If a tenant considers that any proposed rent increase would take their rent beyond rents charged for comparable properties in the area, they can refer the increase for adjudication to a rent officer at Rent Service Scotland. The application to the rent officer must be made within 21 days of receiving a rent-increase notice (s20).

The rent officer would have the power to determine, in an order, the “open market rent” for the property, which could mean the rent is varied upwards or downwards. A provisional order which specified the amount of rent to be paid (including any services costs) would be issued by the rent officer. The landlord or tenant could ask the rent officer to reconsider the proposed amount within 14 days after the provisional order is issued (s22).

Where a rent officer has made an order, a landlord or tenant can appeal to the Tribunal within 14 days of the rent officer’s decision (s23). The Tribunal would have the power to vary the rent upwards or downwards. Section 25 of the Bill provides that the Tribunal’s decision is final and there is no further course of appeal to the Upper Tier Tribunal, although the Tribunal can review its order and correct any minor errors.

Section 27 sets out how a rent officer and the Tribunal should determine the open market rent of a property. In making the determination any improvements made by the tenant which they were not obliged to make will be disregarded (s27 (3(b))).

Rent officers and the Tribunal must make information available on the rents they have taken into account in setting open market rents and the rents they have determined. Scottish Ministers have the power to specify in regulations the information to be made available, the manner in which it is to be provided and set fees which may be charged for supplying that information (s29).

The Scottish Government’s second consultation paper had proposed that tenants would be able to refer unreasonable rents for adjudication straight to the Tribunal. However, the Bill now proposes an initial role for rent officers from Rent Service Scotland. Rent officers already have a role in setting rent levels for regulated tenancies and setting housing benefit for certain groups of tenants.

In terms of the impact on Rent Service Scotland, the FM estimates, based on its existing workload and the Private Rented Tenancies Board in the Republic of Ireland (which performs similar functions) that around 1,650 rent adjudication referrals could be made each year (FM, Para 26). This appears relatively high given the low number of tenants referring their rent to the Private Rented Housing Panel. However, under the proposed new tenancy, landlords cannot use the no fault ground for repossession and end the tenancy as easily as is possible now. Therefore, tenants may be more inclined to challenge any excessive rent increase.

As is the case with PRHP now, the rent officer and Tribunal would have the power to set a rent which may be lower or higher than the landlord is proposing. Tenants would therefore need to consider if it would be in their best interests to apply to the rent officer. This highlights the importance of information being available on market rents in the area to allow tenants to decide whether to apply to the rent officer.

THE SCOTTISH GOVERNMENT'S CONSULTATION

Most respondents to the second consultation (97%) were supportive of the proposal to allow tenants to refer unreasonable rent increases for adjudication.

The most frequently made comment was that tenants should have the right to refer unfair rent levels and increases to a tribunal, where rents should be assessed on factors such as size, quality and location but not on market levels. An alternative, and also frequently stated view, was that the First-tier Tribunal should be required to determine a market rent, as opposed to any form of 'capped,' rent (Robertson 2015b). As noted above, rents referred for adjudication would be set at market rent levels.

RENT PRESSURE ZONES

Chapter 3 of the Bill (ss30-34) provides for rent pressure zones which would allow action to limit rent increases for sitting tenants in defined areas, up to a five year period.

THE CURRENT POSITION AND BACKGROUND

Existing legislation does not provide for any form of rent pressure zone. As the accompanying SPICe briefing [Private Rents](#) notes there has been recent debate throughout Great Britain on whether rent controls are needed.

One of the key points to note is that there is a geographically varied pattern of private rental values and variable increases. Scottish Government data indicates that for the 12 months to end September 2014, the average rent for a two bedroom property in Scotland was £596 a month. This ranged from £442 in the Dumfries and Galloway area to £898 in the Aberdeen and Aberdeenshire area (Scottish Government 2014c).

Over the four year period, from September 2010 to September 2014, the average rent for two-bedroom properties increased by 40% in Aberdeen and Aberdeenshire, substantially above the cumulative increase in the Consumer Price Index of 11.7% over the same period. On the other hand, rents fell in Argyll and Bute by 2% and by 3% in West Dunbartonshire over the same period (Scottish Government 2014 c).

Rent levels are closely linked to local economies. More recent data from City lets suggests rent levels in Aberdeen have fallen by 6.7% over the last year, reflecting the downturn in the oil industry (Citylets 2015).

In its second consultation paper, taking into account their published statistics, the Scottish Government sets out its intention not to introduce general rent controls:

“Heavy-handed regulation of rents, while seeking to tackle the issue in the short term, could jeopardise efforts to improve affordability through increasing supply by discouraging much-needed investment. Moreover, capping rents at below-market levels could increase demand on other parts of the PRS, putting an upward pressure on rents in that area. In the longer term, that would make it harder for people to find homes to rent in areas where they want to live and work” (Scottish Government 2015c)

But given the relatively high increases in rents in certain areas, the Government sought views on whether there was a need to introduce limits on the levels of rent increases for sitting tenants in “hot-spot” areas.

THE BILL'S PROVISIONS

The Bill proposes that a local authority may make an application to Scottish Ministers requesting that all, or part of, the authority's area be designated as a "rent pressure zone" (s30). This would mean that landlords in the rent pressure zone could not increase rents for sitting tenants by more than a specified percentage.

A local authority would have to satisfy Ministers that, "...rent increases for sitting tenants in the area to be designated were: rising excessively; causing hardship to sitting tenants in the area (e.g. measures of affordability poverty etc.) and having a detrimental effect on the broader housing system (e.g. through increased demand on social housing, or an increase in homelessness)" (PM, para 79).

In order to designate a rent pressure zone, Ministers would be required to lay regulations before Parliament, subject to affirmative procedure (the supporting evidence for designating the zone would also have to be supplied). Before laying such regulations Ministers would have to consult with those representing the interests of tenants and landlords within the proposed rent pressure zone (s33 (2)).

The regulations would set out the maximum percentage by which rents could be increased in the designated area. The Bill refers to this figure as "N" (s30 (2)(b)). Section 31 of the Bill provides that a rent increase notice cannot increase the rent payable by more than the formula, $CPI + 1\% + N$. In other words, rents must be allowed to increase by $CPI + 1\%$ ³⁷. For each rent pressure zone Scottish Ministers would decide how much more than this rent increases would be limited by. A rent pressure zone would not affect the landlord's rights to charge the tenant for improvements reasonably made to the let property (s31(2)).

If the landlord tried to increase the rent above the specified percentage then the tenant would not have to pay the rent above the specified increase. They would not be in breach of the lease through withholding the difference. This suggests there would need to be adequate publicity throughout the rent pressure zone to ensure that tenants and landlords were aware of the measures in place.

THE SCOTTISH GOVERNMENT'S CONSULTATION

In response to the first consultation paper's general question about whether the Scottish Government should take any form of action on rents, around 3 out of 4 respondents favoured the Scottish Government taking some form of action, including the 1,908 signatories to Campaign 3 (the Living Rent campaign) (Robertson 2015a).

However, the majority of non-campaign respondents did not think the Scottish Government should take any action with regard to rent levels in the PRS. Many private landlord representative groups disagreed with any form of Government rent control arguing that this could negatively impact on the supply of private rented housing (Robertson 2015a).

The second consultation sought views on whether there was a role of regulation of rents in localised "hot-spot" areas. The majority of respondents (70% of those answering) did not see a role for additional regulation. This view was particularly expressed by the

³⁷ Scottish Ministers would have the power to bring forward regulations to change references to the CPI to another price index (s34).

industry body, landlord, legal body, letting agent, 'other' and individual respondents (Robertson 2015b). As the Scottish Association of Landlord's response (2015) noted:

“Any form of rent regulation, even within a local area, has the potential to seriously disrupt the operation of the market and have a number of unintended consequences including reduced investment/supply, increases to market rents, reduced tenant mobility and deterioration in property condition.”

However, the majority of advice service, campaign body, local authority, tenant group and union respondents did see a role for additional regulation. The [Living Rent Campaign](#) argues that the Scottish Government needs to bring rents under control. They noted that in other countries there are laws limiting how much landlords can charge, and argued that this approach should be pursued in Scotland (Robertson 2015b)

In total, seventeen responses local authorities responded to the second consultation, sixteen of which were submitted in time to be included in the analysis of responses. Most local authorities generally supported the proposal, although one disagreed and a number said they did not know. Most local authorities saw possible benefits and saw value in being able to introduce targeted measures to tackle particular unaffordability problems in clearly defined areas. Some local authorities could identify possible problems, for example there were concerns about the impact on the level of supply in those areas if landlords divert investment into “non-capped” areas (Robertson 2015b).

The City of Edinburgh Council (2015), for example, proposed a different approach:

“The suggested evidence requirements would mean regulation would only be implemented after the effects of high rent increases had been felt by tenants. A more targeted approach to high rent increases may be preferable. This could include automatic referral of rent increases over a certain level to the tribunal, or the automatic referral of properties that do not meet the repairing standard. Further support from the Scottish Government in ensuring new supply of all housing tenures would be preferable to the use of area-based rent limits, and would provide a more long term and sustainable solution to excessive housing costs”.

Comments were also made suggesting that there was a lack of sufficient, reliable data to evidence the case for capping rent increases. For example, as Rettie and Co (2015) said, “... Given the difficulties in local authorities monitoring rents in their areas, this is completely unworkable and would probably lead to significant market distortions, damaging for tenants and landlords.”

Comment on the Bill's proposals

The Living Rent Campaign has argued that the Bill should go further, and should address rent levels for new tenants and link rent control measures to housing quality standards.

“We are worried that the provisions for rent controls as outlined here are not strong enough. If we want to step back from the brink of the crisis of affordability in private rented housing, then it is vital that these regulations bring rents down for both sitting and new tenants.

We have also long argued for rent controls to be linked to the quality of housing, in order to tackle slum conditions that are all too common across Scotland, and we will continue to argue for this". (Living Rent Campaign [online](#))

It has also been argued that the proposals in the Bill could lead to unintended consequences. For example, it has been suggested that if rents are capped in an area this could be seen as a licence for landlords who would not normally increase their rents, to raise them to the level of the cap. Also, new lets are not subject to any cap, so if a landlord is in a rent pressure area, or an area that it likely to be designated as one, it is perhaps likely that they will seek to impose as high a rent as possible at the outset, given their inability to remove tenants and to raise rents beyond the cap (Chambers 2015).

Impact of the Proposals

As the FM notes, the impact of any potential future designation of a RPZ will depend on future rental trends in that area and the exact way in which the rent increase cap is specified. Bearing this in mind, the FM illustrates the potential impact by applying different rent increase levels to historic data.

Using the example of the Aberdeen City and Shire Broad Rental Market Area over the four-year period from 2011 to 2014 the impact of a hypothetical rent increase cap (i.e. the total loss to the landlord, or, alternatively, the benefit to the tenant, expressed as a percentage of total market rent payable over this period) would have varied between 8% for an increase cap of CPI plus 1%, and 5% for a cap of CPI plus 5%. These figures relate to a situation where the same tenant remains in the property. If the tenant moves, the landlord will not be restricted in the rent they can charge so the cap would not initially affect them.

In response to arguments that a rent increase cap may deter investment in private rented housing, the Scottish Government argues that the design of the rent increase cap will help to mitigate such concerns:

"...the main risk to their expected costs from buoyant housing market conditions will be an increase in land prices, and perhaps construction costs, during the development phases. However, once land acquisition and construction is complete, if it has proved more costly than the investor initially expected due to an unexpectedly buoyant local housing market, the investor will be able to recoup these costs by setting a higher initial rent, since the rental increase cap will not apply to initial rents. Once the property has been built, and so the land acquisition and construction costs have already been incurred, the operating costs faced by investors (such as management, maintenance and financing costs) are much less affected by local housing market conditions. The investor will also be able to increase rents at least in line with inflation plus 1%. Therefore the primary impact of a rent increase cap will be a redistribution from landlords to tenants." (FM, para 77).

ANNEX 1: COMPARISON BETWEEN TENANCIES CREATED UNDER THE HOUSING (SCOTLAND) ACT 1988 AND THE PROPOSED PRIVATE RESIDENTIAL TENANCY

Subject	Current provisions	Bill's proposals
Tenancy Framework	Assured and short assured tenancies created under the Housing (Scotland) Act 1988	A single Scottish Private Residential Tenancy (SPRT)
Length of tenancy	The minimum Short Assured Tenancy duration is six months. There is no minimum for an assured tenancy.	The initial tenancy period will be for six months. A tenant will be able to request a tenancy agreement shorter than six months to meet their personal circumstances, e.g. a seasonal or travelling worker. Tenants and landlords may also agree a longer initial tenancy period.
Tenancy roll-over arrangements	Tenancies can roll over on a monthly basis after the initial lease period expires if this is provided for in the lease. A lease may also be extended by tacit relocation (silent renewal).	After the initial tenancy period, the tenancy will continue indefinitely until it is ended by the tenant or landlord.
Ending a tenancy	Under a Short Assured Tenancy, landlords can reclaim their property simply because the fixed term has ended (subject to notice periods and providing the appropriate procedures are followed). This is known as the 'no-fault' ground for repossession. If the tenancy ends, and the tenant does not leave the property, the landlord has to obtain a court order to evict the tenant.	A landlord will not be able to reclaim their property simply because the fixed term has ended. The landlord will need to use a specified eviction ground. If the tenant does not leave the property after being given notice by the landlord, the landlord will need to apply to the First Tier Tribunal to evict the tenant.
Grounds for repossession	There are 17 grounds under which a landlord may seek eviction. About half of these are mandatory i.e. the court must give a possession order if the ground is proved. The rest are discretionary. All need a Sheriff court order.	There are 16 grounds for repossession under which a landlord may seek eviction. Twelve grounds are mandatory which means that if the Tribunal is satisfied that the ground exists, they must issue an eviction order. The ground relating to antisocial behaviour is discretionary. The remaining three grounds (breach of tenancy agreement, rent arrears and property to be sold by mortgage lender) have both a mandatory and discretionary

		<p>element.</p> <p>For the discretionary grounds, if the Tribunal is satisfied that the ground exists, it will still have discretion on whether to issue an eviction order.</p> <p>During the initial tenancy period of six months (or shorter or longer period as agreed) the landlord can only give notice to end the tenancy in five specific circumstances:</p> <ul style="list-style-type: none"> • The tenant has rent arrears for three or more consecutive months • The tenant has engaged in relevant anti-social behaviour • The tenancy has breached the tenancy agreement • The tenant has a relevant criminal conviction • The lender intends to sell the property
<p>Notices – Landlords</p>	<p>Landlords must give tenants Notice to Quit of the period stated in the lease. This is subject to a minimum required period of 28 days or 40 days, depending on the length of the lease.</p> <p>A Notice of Proceedings is the length of notice required before a landlord can take legal proceedings. It is either two weeks or two months, depending on the ground being used.</p>	<p>A single Notice to Leave will replace the Notice of Proceedings and Notice to Quit. It will set out the reason why the landlord wants the tenancy to end and will also notify the tenant that a case can be referred to the FTT for eviction proceedings if they do not leave the property.</p> <p>Landlords will have to give tenants the following notice to leave:</p> <ul style="list-style-type: none"> • Six months or less in the property = 28 days notice (4 weeks) • Over six months = 84 days notice (12 weeks)
<p>Landlords - Shorter Notice periods in certain circumstances</p>	<p>No current provisions.</p>	<p>In certain circumstances the landlord can give the tenant 28 days to leave regardless of how long the tenant has lived in the property. The circumstances are:</p> <ul style="list-style-type: none"> • The tenant has engaged in antisocial behaviour • The tenant has a relevant conviction <p>If the tenant still remains in the property once the notice period has lapsed decisions on whether the ground exist would be a matter for the FTT.</p> <ul style="list-style-type: none"> • The tenant has rent arrears over three months. The landlord can send the tenant a notice, when they have failed to pay rent over two consecutive months, telling them that if they fail to

		pay the rent by the end of the third consecutive month, a referral could be made to the FTT straight away.
Notices – Tenants	Tenants must give landlords Notice to Quit of the period stated in the lease. This is subject to a minimum notice period of 28 or 40 days, depending on the length of the lease.	Tenants will be have to give landlords the following minimum notice to end the tenancy (unless the landlord agrees otherwise): <ul style="list-style-type: none"> • Six months or less in the property = four weeks' notice. • Over six months in the property = eight weeks' notice. Check For the first six months of the tenancy a tenant will be unable to give notice, unless otherwise agreed in writing between the tenant and landlord.
Pre-tenancy notices	Landlords must give advance notice to tenants if they intend to use some of the repossession grounds.	Pre-tenancy notices will not be required.
Rent Reviews	Short assured tenants will agree their rent with the tenant and that remains the rent for the fixed period. Landlords can propose a new rent when they renew the tenancy agreement.	Rent reviews should take place no more than once in any 12 month period Landlords must give tenants at least 12 weeks notice of any change in rent.
Rent Increases	Short assured tenants can apply to the Private Rented Housing Panel to ask a Private Rented Housing Committee to make a determination on their rent. The committee can set a market rent for a property where they consider that there are enough similar houses in the area let on assured tenancies to draw comparisons and that the rent is significantly higher than other rents in the area. Assured tenants can also make applications to the Private Rented Housing Panel, in certain circumstances. There are no provisions for rent pressure zones.	If a tenant thinks any proposed rent increase would take their rent beyond rents charged for comparable properties in the area, they will have the ability to refer the increase for adjudication to a rent officer at Rent Service Scotland. The rent officer would have to the power to determine, in an order, an “open-market” rent. Appeals against Rent Officer decisions can be made to the FTT. Where rents for sitting tenants are rising excessively, local authorities may apply to Scottish Ministers to have an area to be designated as a “rent pressure zone”. This would mean landlords could not increase rents for sitting tenants above a specified % set by Ministers. Rents would be allowed to increase by at least CPI+1%. Scottish Ministers would have to bring forward regulations (subject to affirmative procedure) to designate a rent pressure zone.

Model tenancy agreement	No prescribed tenancy agreement.	A model tenancy agreement will be introduced. This will contain mandatory and discretionary clauses and a statutory guidance note.
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