

PRIVATE RENTED HOUSING (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Private Rented Housing (Scotland) Bill introduced in the Scottish Parliament on 4 October 2010. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament's Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 54-EN.

POLICY OBJECTIVES OF THE BILL

2. The principal policy objectives of this Bill are to improve standards of service for consumers in private rented housing and enable continued sustainable growth in the sector. This will be achieved by measures to: strengthen the regulation of the private rented sector; improve the working of the private sector tenancy regime and related matters; address more effectively the problems caused by rogue landlords; and deal with the worst effects of overcrowding. Achieving these objectives will contribute to the Government's productivity and solidarity purpose targets and towards achievement of the strategic objective to create a Safer and Stronger Scotland – helping local communities to flourish, becoming stronger, safer, healthier places to live, offering improved opportunities and a better quality of life. It will support delivery of the following national outcomes:

- We live in well-designed, sustainable places where we are able to access the amenities and services we need.
- We tackle the significant inequalities in Scottish society - by safeguarding and improving the supply, quality and access to housing.
- We will live our lives safe from crime, disorder and danger.
- We have strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others.

3. The Bill will achieve its policy objectives as described below.

Landlord registration

4. Changes to the landlord registration system have been introduced with a view to supporting and assisting local authorities in exercising their landlord registration functions under the Antisocial Behaviour etc. (Scotland) Act 2004. The landlord registration provisions in the

Bill will, in particular, offer additional support to local authorities to help them deal with landlords who are not committed to the highest standards of service for tenants, are unregistered or who are providing substandard accommodation.

Licensing of houses in multiple occupation (HMOs)

5. The Bill improves the effectiveness of HMO licensing by increasing maximum fines and improving local authority capacity by removing the need for an automatic statement of reasons for HMO licensing decisions. The Bill will also give Scottish Ministers a power to designate by order specified categories of accommodation as licensable HMOs, and will give local authorities a discretionary power to refuse to consider an application for an HMO licence if they consider that use as an HMO would be a breach of planning control.

Overcrowding, the private sector tenancy regime and related matters

6. The Bill will give a local authority power to address problems of overcrowding in the private rented sector by serving an overcrowding statutory notice on the landlord of a privately rented house where overcrowding is linked to an adverse effect on the health or wellbeing of the occupants, neighbours or others or on the amenity of the locality. The Bill clarifies rights and responsibilities for tenants, landlords and agents in the private rented housing sector. It also allows landlords to seek from the Private Rented Housing Panel assistance to exercise the right of entry in relation to the Repairing Standard.

BACKGROUND

7. The provisions of this Bill are designed to be complementary with the Scottish Government's overall strategic approach to housing, and should be seen as part of an overall package of measures to meet housing need and improve standards of housing.

8. The Scottish Government believes that the private rented sector has a key role to play within the range of Scottish housing options. The sector provides flexibility and choice to a varied range of tenants including homeless people, and supports a higher level of labour mobility than other housing. As was explained in the recent discussion document, *Housing: Fresh Thinking, New Ideas*¹, the Government wants to see the role of the sector strengthened as likely future cuts in public spending will make the private rented sector even more important in meeting housing need.

9. In March 2009 the Scottish Government published its *Review of the Private Rented Sector*², which includes externally commissioned research and analysis and a range of analytical work carried out internally. The review also set out the policy implications arising from this extensive evidence on the sector. Among other findings, the Review identified the key problems and concerns of many tenants and landlords covering such areas as dealing with repairs, enforcement of standards, regaining possession of properties and knowledge of rights and responsibilities.

¹ *Housing: Fresh Thinking, New Ideas* July 2010 - <http://www.scotland.gov.uk/Resource/Doc/316337/0100688.pdf>

² Scottish Government PRS Review March 2009 – <http://www.scotland.gov.uk/Topics/Built-Environment/Housing/PrivateRenting/prsreview>

10. In order to help take forward the issues raised in the Review, Ministers established the Scottish Private Rented Sector (PRS) Strategy Group in October 2009. The Group has an independent chairperson and consists of a range of leading organisations with expertise in the sector, covering the interests of tenants, landlords, agents, local authorities and voluntary groups. The remit of the Group is to advise the Scottish Government on how it can support tenants, landlords and others to grow a professional, high quality private rented sector equipped to provide sustainable housing solutions for Scotland in the 21st century.

11. In the first phase of its work, the PRS Strategy Group considered a range of proposals for primary legislation that arose from the review or were put forward by a number of stakeholders. Its recommendations to Ministers on the proposals that should be the subject of consultation with a view to inclusion in a possible Private Housing Bill were published in January 2010, following agreement by all members of the Group³.

12. A public consultation on these proposals followed and the majority of the measures in the Bill arose from this process. These relate to changes that could: help the landlord registration system to operate more effectively; improve the enforcement of the house in multiple occupation (HMO) licensing system; address overcrowding in the sector; and amend laws relating to aspects of the tenancy regime and related matters in order to facilitate the exercise of some landlord rights, clarify processes and improve tenants' knowledge of their rights and responsibilities.

13. The Housing (Scotland) Bill introduced on 13 January 2010 included some measures on the regulation of the private rented sector. The intention was to take forward some relatively straightforward proposals as quickly as possible, while more complex measures were developed in discussion with the PRS Strategy Group. However, the Local Government and Communities Committee expressed the view in its Stage 1 report that it would be better, since a further bill dealing with the private rented sector was proposed by the Scottish Government, to have all the private rented sector provisions in one bill. The Private Rented Housing (Scotland) Bill therefore incorporates the four provisions on landlord registration (with amendments) and the two on HMO licensing that were included in the previous Bill.

14. Additionally, during Stage 1 evidence and the Stage 1 debate on the Housing (Scotland) Bill on 23 June 2010, stakeholders and MSPs pointed to the continuing problems with unregistered rogue landlords and agents and called for further action to be taken to deal with them. It has become increasingly clear that a minority of rogue private landlords in Scotland are providing very poor levels of service to their tenants and letting out accommodation which is in an unacceptable condition. This contributes to serious social problems, damages the cohesion of communities in some localities, and can have wider repercussions for neighbouring areas.

15. Rogue landlords and unscrupulous agents who act on their behalf bring the reputation of the private rented sector into disrepute and undermine the work done by the many good landlords in the sector who provide good quality, flexible housing. They create misery amongst tenants who often are afraid to challenge bad practice for fear of bullying, harassment or eviction. Scottish Ministers are determined to take effective action to address these problems and their

³ Scottish PRS Strategy Group – consultation recommendations report - <http://www.scotland.gov.uk/Publications/2010/01/15111047/0>

causes, and to ensure that local authorities have the powers that they need to tackle the problem, protect vulnerable tenants such as migrant workers, and address antisocial behaviour.

16. The measures consulted on and included in the Bill will considerably strengthen the regulation of the private rented sector and, in response to the concern over the impact of rogue landlords and agents, Ministers decided that the Bill should include additional measures to strengthen the enforcement of HMO licensing and landlord registration further and introduce tougher penalties.

17. Thus, the Bill's provisions will give landlords, agents and local authorities greater confidence in administering and managing homes in the private rented sector. For those landlords who are not committed to the highest standards of service for tenants, the provisions in the Bill will make it clear that the Scottish Government will not tolerate poor standards of service and enforcement in the sector.

18. As outlined above, Ministers are keen that the Bill addresses the problems caused by rogue landlords who let substandard properties or do not comply with registration requirements. However, it should be acknowledged that there are specific problems with a small minority of landlords engaged in criminal activities which need a multi-agency approach to tackle, for example through Glasgow Council's Hub.

19. The Scottish Government expects that further consideration by the PRS Strategy Group and the evaluation of landlord registration planned to complete in March 2011 may bring forward future measures aimed at removing rogue landlords and agents from the sector, making private renting more efficient, safeguarding the interests of both responsible landlords and tenants, and helping to develop the sector's role in meeting housing need, including homeless households. However, Ministers believe that it is appropriate to bring forward the measures in the Bill without further delay so that local authorities have these powers to deal with bad landlords.

CONSULTATION

20. A consultation on private sector housing issues for possible inclusion in the Housing (Scotland) Bill took place between 6 July and 27 September 2009. The consultation paper was published on the Scottish Government website, with links sent to more than 200 stakeholders, including local authorities, professional and representative bodies and voluntary organisations. The consultation paper included questions relating to landlord registration, licensing of houses in multiple occupation, and local authority powers to deal with disrepair in private houses. The Government received 117 responses from individuals as well as a range of organisations. There was a majority (on many questions large) in favour of all the proposals. A detailed report⁴ on the consultation responses has been published on the Scottish Government website.

21. A further consultation on the Strategy Group's recommendations for a proposed housing bill was carried out between 8 March and 19 April 2010. As well as proposals for legislation on

⁴Private Sector Housing Issues: Housing (Scotland) Bill: An Analysis of Consultation Responses December 2009 - <http://www.scotland.gov.uk/Publications/2009/12/02095414/0>

the private rented sector (covering landlord registration, HMO licensing, overcrowding and the tenancy regime), this consultation included issues relating to the 20 year rules on standard securities and residential leases, which the Scottish Government will seek to progress by introducing a Stage 2 amendment to the Housing (Scotland) Bill. The consultation also covered the licensing of mobile homes sites; however the consultation findings highlighted that it is necessary to consider the options for change in more detail before taking forward primary legislation. In the meantime, the Government will develop secondary legislation updating the implied terms in the written contractual agreements between site owners and residents. Seventy-two respondents answered all or some of the questions relating to the private rented sector. An analysis report has been published⁵, which shows that there was wide support for most of the proposals.

22. As explained above, following the conclusion of the latter consultation, Ministers decided that, in addition to the existing proposals, further measures were needed to address the serious problems caused by rogue landlords and unscrupulous agents, such as those identified during Stage 1 of the Housing (Scotland) Bill. Some of these proposals had been raised by stakeholders, such as encouraging better joint working within some local authorities. There was not sufficient time for a public consultation on the small number of new proposals, but the PRS Strategy Group was asked to consider and provide comments on them.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

23. Information on these issues is provided in relation to each Part of the Bill. The Bill as a whole is expected to have a positive effect on the wellbeing of communities generally, including island communities. Its provisions do not have any adverse effect on human rights or sustainable development.

BILL CONTENT

24. The Bill is structured in the following Parts:

- Part 1 – Amends the system of registration of private landlords by:
 - Expanding the list of offences to be declared by an applicant for landlord registration.
 - Strengthening guidance and procedures for the fit and proper person test.
 - Allowing a local authority to require a criminal record certificate to verify information.
 - Allowing a local authority to charge a fee when a registered landlord subsequently nominates an unregistered agent.
 - Increasing the information available to the public through the landlord register database.

⁵ Consultation on a Proposed Private Housing Bill: An Analysis of Consultation Responses June 2010 – <http://www.scotland.gov.uk/Resource/Doc/315633/0100380.pdf>

Requiring landlord registration numbers in advertisements of properties to let.

Increasing the maximum fine for landlord registration offences to £50,000.

Giving a court power to ban a landlord convicted of registration offences for up to five years.

Allowing a local authority to require a person associated with a house to provide information relating to landlord registration.

Allowing a local authority to require an agent to provide a list of properties managed.

Requiring a local authority to take account of guidance on its landlord registration functions issued by the Scottish Ministers.

Requiring the Private Rented Housing Panel to pass details of landlords to local authorities so their registration status can be checked.

- Part 2 – Amends the system of licensing of houses in multiple occupation (HMOs) by:

Giving Ministers power to designate by order additional categories of multi-occupancy accommodation as licensable HMOs.

Enabling a local authority to refuse to consider an application for an HMO licence if it considers any requisite planning permission has not been obtained.

Increasing the maximum fine for HMO licensing offences to £50,000.

Replacing a requirement for a local authority to issue a statement of reasons for every HMO licensing decision it makes so that the statement need only be issued in response to a request.

Requiring a local authority, in exercising its power to require persons associated with a property to provide information relating to HMO licensing, to take account of guidance issued by Scottish Ministers.

- Part 3 – Gives a local authority power to address problems of overcrowding in the private rented sector by serving an overcrowding statutory notice on the landlord of a privately rented house where overcrowding is linked to an adverse effect on the health or wellbeing of the occupants, neighbours or others or on the amenity of the locality.

- Part 4 – Amends the legislation relating to the private sector tenancy regime and related matters by:

Giving power to allow specified, reasonable pre-tenancy charges.

Requiring a private landlord to issue specified documents and information to a tenant at the start of the tenancy.

Clarifying the notices required to be issued to gain possession of a property subject to a short assured tenancy that has reached its normal end date.

Allowing a private landlord to apply to the Private Rented Housing Panel for assistance in exercising the right of access in relation to the Repairing Standard.

- Part 5 – Makes supplementary and final provisions.

PART 1 - REGISTRATION OF PRIVATE LANDLORDS

Policy objectives

25. The system of landlord registration was established by Part 8 of the Antisocial Behaviour etc. (Scotland) Act 2004. Registration is designed to protect tenants by ensuring that only people who are fit and proper to let out residential property can operate legally as private landlords. The operation of landlord registration is the responsibility of local authorities. In addition to increasing the penalties for landlords acting unlawfully, the measures in the Bill will support local authorities by enabling them to improve their functions and mechanisms in operating and managing enforcement of the regime effectively.

26. In 2008 the consultants Arneil Johnston carried out a review of the legislative framework of landlord registration for the Scottish Government, following an earlier review of good practice. This led to the identification of possible amendments to the 2004 Act to strengthen existing powers and clarify the legislation, which are included in this Bill. A full evaluation of the impact of the landlord registration system on standards in the private rented sector, planned to complete in March 2011, will amongst other things assess the impact of landlord registration on standards of service provided by landlords in the private rented sector.

27. The Review of the Private Rented Sector published in 2009 made suggestions for further legislative change including improvements to landlord registration. Ministers established the Scottish PRS Strategy Group to take forward the review's conclusions. The Group considered a range of proposals put forward by stakeholders and made recommendations on what the Scottish Government should consult on for the Bill. In addition to these proposals, further measures have been included in the Bill specifically to support activity aimed at tackling rogue landlords.

28. When a landlord or agent breaches the terms of the 2004 Act, authorities can apply sanctions which can lead to criminal prosecution or a cessation of the rent payable. These sanctions effectively act as a bar on a landlord's ability to be personally involved in the let of a house. The use of enforcement powers varies among local authorities.

29. There are a significant number of landlords whose applications or status under the landlord registration system are under review because of a local authority's concerns. However, some local authorities have stated that they are reluctant to use the powers they have to refuse applications for registration because they expect difficulty in achieving a successful prosecution should that step be necessary. There have as yet been no reports to the procurator fiscal as a result of landlord registration. Some local authorities have said that one reason for this is because of difficulties in gathering evidence to ensure that robust cases against landlords can be developed. The Bill contains provisions to make it easier for local authorities to gather this evidence, including powers to require information.

30. In order to improve protection for private tenants the Bill expands the list of offences to be declared by an applicant for landlord registration. Regulations require an applicant to declare spent or unspent convictions for a variety of offences, and court or tribunal judgements under discrimination legislation. The majority of applicants for registration use the on-line application form, although in some instances paper applications are also used. The application forms ask for declaration only of the categories of offence mentioned at section 85(2) of the 2004 Act, i.e.

spent or unspent convictions for offences involving fraud or dishonesty, violence, drugs, discrimination or contravention of housing law, and court or tribunal judgements under discrimination legislation. Although the local authority may have regard to other offences if it considers them relevant, it is not told about them in the application. It is proposed to add firearms and sexual offences to the list of offences that must be declared due to the serious nature of these offences. The addition of these offences to the categories at section 85(2) of the 2004 Act would ensure local authorities knew about convictions for these offences when considering whether a potential landlord is fit and proper. Applicants would be under a duty to declare them. Combined with the proposed ability for a local authority to require a disclosure check, as outlined below, this will significantly improve the ability of local authorities to consider whether a potential landlord is fit and proper.

31. In addition to the inclusion of firearms and sexual offences, which were originally consulted on, the Scottish Government is proposing to further enhance the consideration of whether a person is fit and proper to act as a private landlord to help address landlords who are damaging the reputation of the sector. In order to offer additional support to make it easier for local authorities to gather evidence and make an informed decision about someone being fit and proper, without imposing unnecessary additional duties on local authorities, the Bill gives specific examples of the information that should be considered as a matter of good practice. Drawing the following elements to local authorities' attention by including them on the face of the Bill will support stronger links between the fit and proper test and the quality and management of accommodation:

- Antisocial behaviour: whether an antisocial behaviour order has been served on the landlord or a tenant, or an antisocial behaviour notice has been served on the landlord, in relation to a house where the applicant is or was the landlord or agent. This will also be added to schedule 1 to the Private Landlord Registration (Information and Fees) (Scotland) Regulations 2005 which outlines the prescribed information required from a person making an application for landlord registration.
- Convictions and disqualifications relating to landlord registration and HMO licensing: including these on the face of the Bill highlights their relevance and supports information gathering.
- Breaches of the Repairing Standard, in relation to which the Private Rented Housing Panel has issued a Repairing Standard enforcement notice.
- Complaints and information from tenants, neighbours and others in relation to financial obligations, such as that the landlord has not paid his or her share of the cost of communal repairs, which have been properly agreed, or has not made payments due to property managers, all with regard to property let by the landlord.
- In order to encourage local authorities to give consideration to additional information which comes to their attention in the exercise of other local authority functions, for example health or the environment, in respect of the property included in the registration, the Private Rented Housing (Scotland) Bill gives Ministers power to issue statutory guidance on the discharge of these functions. Local authorities must have regard to the guidance issued, the development of which will benefit from the outcome of the review of landlord registration.

32. As touched on above, it is also the intention to re-cast schedule 1 to the Private Landlord Registration (Information and Fees) (Scotland) Regulations 2005. Within this the Scottish Government proposes to add a specific reference to an applicant making a declaration of any offences under the Gas Safety (Installation & Use) Regulations 1998. When progressing amendments to the 2005 Regulations the Scottish Government in conjunction with stakeholders will also give consideration to re-writing paragraph 3(b) of schedule 1 to clarify and specify particular convictions to be declared by applicants.

33. In offering additional protection for tenants the Bill gives the local authority the power to require a criminal record certificate. Currently a local authority cannot insist that an applicant for registration provides a disclosure check. The Bill adds a provision to the 2004 Act, so that if a local authority considers that a criminal record certificate in terms of Part 5 of the Police Act 1997 is required in order to verify information in relation to the fit and proper person test, the local authority may ask that person to provide a certificate. Refusal could be used as evidence that the person is not fit and proper. Therefore in the case of new applications (where the certificate is requested) the applicant cannot be registered until the certificate has been received by the local authority. In the case of a landlord already approved they will be deemed not fit and proper if the certificate is not provided within a timescale considered reasonable by the local authority. This will support the enforcement of the regime by significantly improving the ability of local authorities to consider whether a potential landlord is fit and proper, thus improving protection for private tenants.

34. Although the position of agents in the private rented sector is of great importance, as a significant proportion of landlords entrust the management of their properties to them, there is no requirement for agents to register in their own right (although an agent may do so voluntarily). However, a landlord must include any agent in an application for registration and a fee is paid for this. Where a landlord has been registered and then subsequently adds an agent, there is currently no power for the local authority to charge a fee for this addition. This does not matter if the agent is already registered, which many professional agents are. However, if the landlord nominates an unregistered agent (such as a friend or relative) the agent will have to be assessed as fit and proper, which will involve expense for the local authority.

35. The Bill therefore amends the 2004 Act to allow a local authority to charge a fee, to be prescribed by regulations, in this situation. This will be fairer for local authorities, who will be able to recover their costs, and for those landlords and agents who pay fees because they register at an earlier stage. In addition, and also to bring the situation in line with landlords at the point of registration, it will be an offence if a landlord appoints an agent during the registration period without notifying the local authority.

36. Local authorities are required to maintain a register of landlords (and their agents) who are considered fit and proper persons to let a house under a lease or occupancy arrangement. Information on registered persons and their residential properties is held on the register. The release of information to members of the public is restricted to ensure that the information is not used for malicious or commercial marketing purposes or does not result in an unacceptable intrusion into a registered person's private life.

37. Public access to the register in a local authority's area is in legal terms, by application to the local authority. In the great majority of cases this is done by accessing the landlord registration website. A member of the public can request information with respect to a particular residential property or a particular person.

38. Local authorities advise that there are circumstances where it would be helpful to give out additional information regarding an application for registration. This is supported by the Arneil Johnston review. Most stakeholders at the legislative focus groups established to support the review agreed that additional information on applications submitted but not yet decided would be useful. Information should however be limited to this and should not indicate whether, for example, the local authority had decided to investigate aspects of the application. Stakeholders also felt that it would help meet one of the principal aims of the scheme - removing the worst landlords from the sector - if members of the public were made aware that registration had been refused. The main landlord bodies, the local authorities represented and COSLA all supported these changes as long as the information is worded carefully.

39. The Bill therefore provides for two additional categories of information to be available to the public. The first is where an application has been received but has not yet been decided. This will be helpful if there are concerns that a landlord may be unregistered, since a landlord may legally rent a property if he or she has submitted an application for registration which has not yet been decided. It will also be useful for landlords in that position to have this information publicly available, as proof that they are operating legally despite not yet being registered.

40. The second type of additional information to be included in the register is where a landlord has been refused registration or has been de-registered because of failure to meet the legal requirements. This information will alert tenants and members of the public where someone has been found to be not fit and proper to be a landlord yet is attempting to let a property, thus increasing the protection provided by the registration system.

41. Local authorities constantly strive to identify unregistered landlords. One means of doing this is through checking advertisements for properties for let, but this is often impractical as full addresses are not given. The Bill will require all advertisements for properties to let to be accompanied by the landlord registration number of the owner of the property. There will be an exception for 'To Let' boards which are reused due to concerns raised over costs to landlords. If an application for landlord registration has still to be determined with no number having been allocated, the advertisements will be required to include the words "landlord registration pending."

42. This measure will support local authorities in the identification of landlords operating without being registered and enable them to progress enforcement activity as appropriate. If it is discovered that the landlord is not registered then they could be prosecuted for the existing offence of letting a property without being registered and on conviction could be subject under the new measure described below to a disqualification in any local authority area for up to five years. However, where an unregistered landlord is capable of meeting the fit and proper person test, the local authority will be expected to work with them to achieve registration in the first instance in order to prevent the loss of accommodation in the sector.

43. The sanction for registered landlords failing to include their registration number in advertisements is removal from the register. In such cases, local authorities can offer the landlord the opportunity to rectify the situation before applying the sanction.

44. Local authorities have suggested that the sanctions available to the sheriff on disposal of landlord registration cases are not sufficiently high. The current maximum fine for failing to register as a landlord or communicating with another person with a view to entering into a lease or occupancy arrangement without being registered is level 5 or £5,000. Taking local authorities' concerns into account, the Housing (Scotland) Bill set out proposals to increase this to £20,000. This would be in line with the maximum fine for operating an HMO without a licence, which is set to increase from £5,000 to £20,000 when Part 5 of the 2006 Act comes into effect in August 2011.

45. However, given increasing concern about unregistered landlords, and to reflect the seriousness of the behaviour of some of the landlords involved, Ministers have decided that the maximum fine for these offences should be raised to £50,000. Ministers consider that a maximum fine of this size is justified because some unregistered landlords, with large numbers of properties and tenants, are making large amounts of money from their illegal activities. Furthermore, unregistered landlords' properties are more likely to be substandard and therefore a threat to public health. In addition, unregistered landlords are more likely to have tenants who indulge in antisocial behaviour and may themselves be involved in other criminal activity, causing serious damage to their communities and therefore constituting a serious public nuisance.

46. A substantially higher maximum fine level for landlord registration offences (and also HMO licensing offences, as explained below) is significant in comparison with the income from letting and should act as a more effective deterrent. Emphasising the gravity of the offence may encourage courts to impose higher fines than they would otherwise have done.

47. It is important that appropriate sanctions are available to deal with the very worst criminal landlord element and to act as a deterrent against those operating as an unregistered landlord. Ministers consider that, in the most serious cases, a court that convicts a person of operating as an unregistered landlord should be allowed to make a disqualification order banning the person from acting as a registrable landlord in any local authority area for up to five years. A similar power is given to a court by the 2006 Act in relation to HMO licensing offences. The Bill contains such a provision in relation to landlord registration.

48. The Arneil Johnston review of landlord registration recommended that the Scottish Government should consider local authorities' ability to obtain information. One of the key issues for local authorities is proving that a tenancy is in place. It has been suggested that provisions similar to those in section 186 of the Housing (Scotland) Act 2006 ("the 2006 Act") could assist. These require persons associated with a property to provide information to a local authority to enable or assist it to exercise functions contained within the Act (including those relating to HMO licensing).

49. The Bill contains similar provisions for the purposes of landlord registration, in order to make it easier for local authorities to gather evidence. This covers persons who own, occupy or

have an interest in the house concerned or who act for the owner. On request, they must confirm to the local authority the nature of their interest in the house, provide details of others with an interest and also provide the local authority with any other information and documentation about the land, premises and nature of the tenancy that it may reasonably request. As with section 186 of the 2006 Act, failure to provide information without reasonable excuse or providing false information are criminal offences, subject to a fine not exceeding level 2.

50. This proposal is one of those included in the Housing (Scotland) Bill. During Stage 1 of that Bill, concerns were expressed that vulnerable tenants who declined to provide information due to fears of retaliation from abusive landlords could be fined. The Private Rented Housing (Scotland) Bill gives Ministers power to issue statutory guidance on the discharge of local authorities' landlord registration functions, to which local authorities must have regard. This will allow Ministers to take account of these concerns about local authorities requiring information from tenants when issuing guidance.

51. As mentioned above, the Bill will allow a local authority to require people associated with a property to provide information to enable or assist it to carry out its landlord registration functions. However, local authorities have said that they would find a further power to require an agent to provide details of all the properties they manage extremely useful. This could be of particular use in areas where unscrupulous agents act on behalf of rogue or unregistered landlords. Often in such circumstances – particularly where there are vulnerable tenants such as migrant workers – the tenant does not know who their landlord is. The Bill therefore contains a power for a local authority to require an agent or a prospective agent to provide a list of all properties they manage along with the owners' contact details, registration numbers, the numbers of tenants and nature of the tenancies. This will significantly assist local authorities in identifying landlords who have failed to register for landlord registration and provide another useful tool to support enforcement, increasing protection for tenants and improving management of the regime. Failure of an agent to provide the information requested under the new power would be an offence liable to a fine not exceeding level 2.

52. The management of non-compliance with landlord registration requirements varies immensely across local authority areas. This is due in part to the volumes of private rented properties and the high level of enforcement activity required in some larger authority areas. The location of landlord registration staff within a local authority can also be relevant, with areas of good practice developing for example where landlord registration and environmental health work in liaison. However this is not replicated across Scotland and local authorities have varying commitment to the landlord registration regime. The Bill therefore gives Ministers a general power to issue statutory guidance in relation to local authorities' functions under Part 8 of the 2004 Act which local authorities must have regard to. This could include guidance in relation to a local authority taking proactive enforcement action including steps to tackle non-registration while carrying out its functions in relation to private rented property. The advantage of introducing this as a statutory guidance power is that it will enable Ministers to take account of the landlord registration evaluation which it is anticipated will be completed by March 2011. In doing so it can be ensured that any guidance issued, to which local authorities must have regard, will be based on evidence and examples of good practice.

53. Whilst the Private Rented Housing Panel (PRHP) receives referrals from tenants and landlords it does not check whether a landlord is registered when it receives an application

relating to the Repairing Standard. The detection of unregistered landlords is one of the biggest challenges local authorities face in relation to enforcement. The Bill therefore requires the PRHP to pass on details of the landlord and property, any agent acting on their behalf, and the landlord registration number if available, to the relevant local authority. This will assist local authorities in identifying unregistered landlords (by allowing the local authority to search the register for the address and the landlord) and enable them to progress enforcement action if appropriate. If these landlords subsequently fail to register or are refused registration, they will have to cease operating or face prosecution. This proposal will benefit landlords who have already registered for landlord registration, by increasing the credibility of the system, and will increase protection for tenants. Increasing the coverage of landlord registration and removing bad landlords will improve management standards across the sector.

Alternative approaches

54. No effective alternative methods of dealing with these specific issues have been identified. The option of ‘doing nothing’ was rejected, because that would mean not addressing the problems identified by local authorities and other stakeholders with the operation of the registration system, particularly the possibility of improving enforcement and information. The provisions in the Bill will allow the registration system to operate more effectively.

55. In addition, there are increasing concerns around the impact that not tackling the rogue landlord element is having on the sector as a whole and on vulnerable tenants and communities. Ministers consider that the additional measures proposed in the Bill will offer local authorities additional tools to support their current enforcement activity and make the task of gathering necessary evidence easier. It is therefore better to introduce these additional provisions now rather than wait until after the review of landlord registration (which is not expected to be completed until March 2011). However, it is expected that the evaluation will make recommendations for continuous improvement which may include proposals for further legislative change.

Consultation

56. A clear majority (66% of those who responded on this question) was in favour of expanding the list of offences to be declared by an applicant for landlord registration to include firearms and sexual offences. Support often stemmed from public safety concerns. The consultation responses also demonstrated support for consideration of wider issues, such as antisocial behaviour and previous refusals of licences, to be part of the fit and proper person test.

57. The proposal to allow a local authority to require a criminal record certificate was very well supported, particularly by the local authority respondents. There was some concern from the lettings industry respondents that local authorities may take a blanket approach to this. The intention however is that local authorities would be required to have reasonable grounds for wanting to verify information.

58. A clear majority (62% of those responding) supported giving a local authority the power to charge a registered landlord a fee for subsequently nominating an unregistered agent. Some organisations were concerned that such a charge could discourage landlords from using agents;

however, this charge would relate only to unregistered agents, whereas professional agents are likely to be already registered.

59. The proposal to include in the landlord register information on applications that have not yet been processed and on landlords who have been refused registration or de-registered gained strong support. There was a feeling among a number of respondents that the additional information would be valuable to tenants. There were some concerns about how the information will be available online; such issues will be addressed when the database system is amended.

60. The proposal requiring landlord registration numbers in advertisements of properties to let had considerable support from the respondents as it would help raise public awareness that a potential landlord requires to be registered and guide tenants away from potentially rogue landlords who are flouting the law. There was some opposition, mainly from those in the industry itself, focussed around the cost of advertisements and the fact that landlords could be prevented from advertising their properties whilst awaiting determination of their application and issue of a registration number. This concern has been covered by advertisements being required to include the words 'landlord registration pending' where appropriate.

61. In the first consultation, a clear majority (73% of those who responded on this question) was in favour of increasing the maximum fine for landlord registration offences to £20,000. Most group respondents agreed that it was appropriate to bring the maximum fine in line with that for operating an HMO without a licence. Some respondents commented that the current level of fines may discourage local authorities from taking legal action.

62. A number of other respondents felt that, rather than increase the level of fine, local authorities should use their existing powers to take enforcement action. The Scottish Government encourages local authorities to use their powers, but believes that a higher fine will better reflect the seriousness of the offences and act as a deterrent. It also disagrees with the respondents (including some groups and the majority of individuals) who felt that a maximum of £20,000 is excessive and, as explained above, Ministers have decided to increase the maximum fine further to £50,000 which will act as a stronger deterrent. This will allow the courts to impose a more severe penalty in the worst cases, and means that average fine levels are less likely to be regarded as an acceptable business cost.

63. The proposal to empower local authorities to require persons associated with a property to provide information to help it to carry out its landlord registration functions gained strong support. Some respondents expressed concerns about requiring tenants to provide information, since the landlord might for example, threaten to end the tenancy. As with section 186 of the 2006 Act the intention is to protect tenants, in this case from landlords who are not fit and proper to let property. However, the Bill gives Ministers the power to issue guidance, to which local authorities must have regard, on their landlord registration functions, including the use of the power to require information in relation to tenants.

64. The proposal to allow local authorities to require an agent to provide a list of all properties they manage was generally strongly supported (88% of those responding). While the great majority of agents are keen to work with local authorities to ensure that their clients are operating within the law, there are exceptions including unprincipled agents who knowingly act

on behalf of unregistered landlords. It is important that local authorities are able to identify landlords who are avoiding their responsibilities.

65. Overall there was considerable support for the proposal requiring the PRHP to obtain and check landlord registration numbers, with a strong consensus that publicly funded bodies such as the PRHP have a clear role to play in ensuring that landlords who are reported to them are appropriately registered. Only three local authorities felt that requesting a number at the application stage to the PRHP was unnecessary. The Scottish Government believes that every opportunity should be taken to inform local authorities, at the earliest opportunity, to allow them to check that the landlord is registered and progress appropriate enforcement action if they are not.

66. Since the consultation, in order to make the PRHP's duty more practicable, the Bill has been worded to require the PRHP to pass landlord information to the local authority, with the authority then checking the landlord's registration status rather than the PRHP. The additional value in this is the ease with which local authorities can check the IT system for registration, since they have full administrative access. This will also avoid any difficulties the PRHP might have had in checking registration where the tenant does not have their landlord's registration number.

67. Following the second consultation and wider feedback from stakeholders, including concerns raised during Stage 1 of the preceding Housing (Scotland) Bill, Ministers considered that a more radical approach to tackling the problem of rogue landlords and unscrupulous agents was required. Although in the minority, landlords and agents who operate illegally are having a detrimental impact in some areas and damaging the overarching reputation of the private rented sector and the many good landlords who operate within the law. After further discussion with officials, additional measures were developed with a clear focus on an approach which would crack down on bad landlords. The Bill timetable did not allow enough time to go out to wider public consultation on these additional provisions; however stakeholders in the PRS Strategy Group were asked to consider the revised approach to the Bill and provided helpful feedback which helped shape the additional provisions.

68. In general terms the Group expressed some concern about the change in emphasis to the Bill on tackling rogue landlords and was unsupportive of some of the additional measures proposed. In particular, landlord representatives were resistant to some of the proposals which they saw as creating an additional burden for good landlords when the rogue element was in the minority. Concern was expressed that, even with the additional measures, dealing with the very worst criminal element of landlords who deliberately avoid registration would not be addressed. Local authority representatives were concerned that the additional measures may impose an increased burden on resource and have the effect of diverting resource from some enforcement activity.

69. The Group expressed the following views on the proposal to add to the list of factors a local authority should take into account when assessing whether a person is fit and proper:

- Breaches of repairing standard: This was generally accepted as a good way of strengthening communication between the PRHP and landlord registration teams

within local authorities. Whilst not ideal to link with the fit and proper test, it was felt that, as awareness of the PRHP is relatively low amongst tenants, linking to breaches of the repairing standard would act as a further check.

- Previous convictions or disqualifications relating to landlord registration or HMO licensing: This was generally agreed, but with concerns that discretion should be exercised by the local authority as to the reasons for any previous ban, particularly its seriousness and whether actions have since been taken by the landlord to remedy the situation.
- Outstanding environmental health reports: This was generally accepted; however, concerns were raised that caution should be taken if the report applies to communal repairs, where the lack of agreement by other owners or factors is the reason for the outstanding report. As this provision will be progressed under the power to issue guidance, concerns will be addressed as part of the required consultation.
- Non-payment of communal repairs: Support for this addition was also split; however most agreed that caution should be exercised and discretion applied as disagreements with regards to communal repairs and with factors are often not straightforward.
- Outstanding Antisocial Behaviour Orders or Antisocial Behaviour Notices in respect of the property or landlord: There were mixed reactions to this proposal with some members raising concerns that a landlord could be held to account for the actions of tenants despite good management practices. However, section 85(3) of the 2004 Act makes clear that it is the behaviour of the landlord or agent that is relevant.

70. Whilst some stakeholders saw the proposal to disqualify unregistered landlords for up to five years as disproportionate to the offence committed, there was agreement that the potential five year ban could act as an effective deterrent.

71. In considering the subsequent proposal to increase the maximum fine for landlord registration offences to £50,000, the majority of stakeholders in the Strategy Group were of the opinion that the proposed level was disproportionate to other criminal activities and would not be effective. There was however some support for the proposal as a deterrent.

72. Full consideration was given to the Strategy Group's feedback. This resulted in some amendments to the original proposals, as outlined in the detailed policy objectives. In particular the Scottish Government considers that both the disqualification provision and the maximum fine will act as a significant deterrent for rogue landlords. Both are maximum penalties which it is expected the courts would apply only to the most unscrupulous criminal landlords, with lower penalties an option as circumstances dictate.

73. While Ministers appreciate that the rogue landlord element is in the minority, the impact of not dealing with these landlords and the related implications is having a detrimental effect on housing and communities where the problems are prevalent. In wider terms it is still expected that local authorities will continue to work with landlords as appropriate. It remains the view of Ministers that, in most instances, it is better to work with landlords to encourage them to improve their practice and approach to letting so as to meet the fit and proper criteria with a view

to improving standards within the sector and retaining the property in the available stock for letting.

74. In addition, the inclusion of a power to allow Ministers to issue guidance which local authorities must have regard to in relation to taking proactive enforcement action will enable Ministers to help local authorities to use their powers effectively and capitalise on the outcome of the landlord registration evaluation by devising guidance which can build on good practice.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

75. The provisions on the private landlord registration system are not discriminatory on the basis of gender, race, age, disability, sexual orientation, marital status or religion. The amendments do not raise any human rights issues. They have no specific implications for island communities or sustainable development. Many local authorities have welcomed the changes to the system which they administer and COSLA has welcomed the intentions of the Bill and in particular provisions which provide local authorities with additional powers.

PART 2 – AMENDMENT OF PART 5 OF HOUSING (SCOTLAND) ACT 2006 (LICENSING OF HOUSES IN MULTIPLE OCCUPATION)

Policy objectives

76. Houses in multiple occupation (HMOs) are currently required to be licensed by the Civic Government (Scotland) Act 1982 (Licensing of Houses in Multiple Occupation) Order 2000, as amended. This legislation will be replaced by Part 5 of the Housing (Scotland) Act 2006 when it is brought into force on 31 August 2011. Licensing of HMOs was introduced to protect their occupants. It sets reasonable standards for physical conditions, safety and tenancy management.

77. An HMO is a house that is occupied by three or more people, who are members of more than two families. Under the 2006 Act, the house has to be the only or main residence of occupants for them to count towards the occupation level. A house that would otherwise be a licensable HMO is not one if a sufficient number of residents have a main residence elsewhere, possibly including people based outside Scotland who are working here for an extended period.

78. Some local authorities have expressed concern that some landlords are avoiding HMO licensing because – or because they are claiming – occupants are living in the premises for only a short time and have a principal residence elsewhere. There are particular concerns that this could be the case where migrant workers are living in substandard and overcrowded conditions, with landlords who may frequently move them about among different premises, each being described as a ‘short-term let’. The length of a let is however irrelevant to whether a property is a licensable HMO. For example, a homeless hostel could be licensable if the residents stay for a single night, given that they have no other residence.

79. The Scottish Government consulted on changing the definition of an HMO, removing the main residence requirement (with an exemption for holiday lets, which provide accommodation for tourists, rather than living accommodation). However, it became clear that this would widen

the scope of licensing too far. For example, since there is no requirement for rent to be charged in an HMO, if a householder had three unrelated friends to stay for a short time, the house would have become a licensable HMO.

80. The Bill therefore amends the 2006 Act to provide for an order-making power, allowing Ministers to designate specified additional categories of multi-occupancy accommodation as licensable HMOs. This could include, for example, portacabins and other premises used by seasonal workers. This will allow Ministers to extend the benefits of HMO licensing – which can set requirements for physical conditions, safety and tenancy management – to types of multi-occupancy property that fall outside the current definition of a licensable HMO, but which demonstrate problems in relation to these features. It will be possible to focus on situations that present a particular problem that can be addressed by licensing, including those that may arise in the future, without bringing types of accommodation that are not considered to require regulation within the scope of licensing. This power may only be used after consultation with stakeholders.

81. A planning authority may decide that some HMOs in its area require planning permission. Some local authorities have stated that some HMOs which meet licensing requirements and have licences do not have planning permission and are operating in breach of planning law. They have either been refused planning permission, or would have been refused planning permission had an application been made, because of their effect on the local amenity. It is clearly anomalous that a local authority has to grant a licence to premises that are operating in breach of planning control. HMOs operating without planning permission can adversely affect neighbours and their owners have an unfair advantage as compared to landlords who comply with planning requirements.

82. The Bill therefore amends the 2006 Act to empower a local authority to refuse to consider an application for an HMO licence if it considers that any requisite planning permission has not been obtained. This means that a local authority will be able to decide whether to adopt this approach, depending on whether it has a problem with HMOs operating without planning permission. The Scottish Government expects that, if a local authority decided to exercise this power, the licensing section of the local authority would liaise with planning colleagues before dealing with a licence application (which is already good practice followed by some local authorities). If there were no planning concerns, the application would be dealt with through the normal process. If there were planning concerns, the applicant would have to go through the planning process. Having obtained either planning permission or a certificate stating that planning permission is not needed, the applicant would reapply for an HMO licence and the application would then be dealt with in the normal way.

83. This process would filter out the significant proportion of cases where an HMO is not a matter of planning concern, without the additional cost and burden for landlords and planning authorities of a formal certification process to confirm that this is the case. This approach would allow a local authority to deal with cases where HMOs are operating in active breach of a planning decision and with the anomaly that a person can obtain an HMO licence without having gone through any form of planning process.

84. Local authorities have repeatedly raised concerns about their difficulties in enforcing HMO licensing. Although cases are successfully brought before the sheriff, the fines imposed are

frequently small, often less than a month's rent or the licence fee that has been evaded. Fines of a few hundred pounds fail to reflect the effort of the local authority in bringing a case and fail to offer a credible deterrent to landlords. The Scottish Government has therefore reviewed the maximum fine awarded in these cases.

85. Within the current regime the maximum fine is £5,000. Section 156(1)(a) of the 2006 Act would increase to £20,000 the maximum fine for the offences of owning an unlicensed HMO or acting as an agent in relation to an unlicensed HMO or in relation to a licensed HMO while not authorised. Given the increasing concerns about unlicensed HMOs, and to reflect the seriousness of the behaviour of some of the landlords involved, Ministers have decided that the 2006 Act should be amended to raise the maximum fine in these cases (as with landlord registration offences) to £50,000.

86. As with landlord registration offences, Ministers consider that a maximum fine of this size is justified because some owners of unlicensed HMOs are making large amounts of money from their illegal activities. Furthermore, such properties are more likely to be substandard and therefore a threat to public health. In addition, landlords of unlicensed HMOs are more likely to have tenants who indulge in antisocial behaviour and may themselves be involved in other criminal activity, causing serious damage to certain communities and therefore constituting a serious public nuisance.

87. A substantially higher maximum fine level for landlord registration and HMO licensing offences should act as more of a deterrent and, by emphasising the gravity of the offence, may encourage courts to impose higher fines than they would otherwise have done. It should also encourage local authorities to take enforcement action.

88. The Scottish Government is committed to strengthening the HMO licensing system, particularly local authority powers to take enforcement action against rogue HMO landlords. The Scottish Government has therefore worked closely with local authorities and agreed that the enhanced HMO licensing regime within Part 5 of the Housing (Scotland) Act 2006 will come into force on 31 August 2011.

89. Some local authorities raised concerns that section 158(12)(a) of the Act would require them to provide a detailed statement of reasons for a wide range of decisions on HMO licensing whether the applicant requests reasons or not. Producing such statements could require detailed input from a solicitor, with landlords of HMOs ultimately paying these costs through increased HMO licence fees. Under the current licensing regime, a local authority is only required to provide reasons for decisions within ten days of being requested to do so by an applicant or objector. Local authorities advise that as the bulk of decisions are straightforward they are seldom called upon to provide a statement of reasons. Where a licence is granted without any issues having been raised or identified, and with no request for reasons, the automatic provision of a statement of reasons seems unnecessary.

90. The Bill therefore amends section 158 of the 2006 Act so that, when a local authority makes a decision, it will not need automatically to provide the reasons. Instead it will advise recipients of the notice of decision that they can request reasons within 14 days of receiving that notice. If a request were made, reasons would then be issued to every recipient of the notice of

decision. It will also be open to a local authority to provide reasons for a decision without any request having been made where it considers this would be justified. In the case of an appeal, the sheriff will be able to require the local authority to provide reasons if it has not already done so.

91. This will allow more local authority resources to be used on enforcement action, rather than on an unnecessary and resource-intensive bureaucratic procedure. The interests of landlords and other recipients of a notice of decision are fully protected as they are able to request reasons for any decision, but local authorities and landlords will not bear the resource cost of these being prepared in every instance.

92. Section 186 of the 2006 Act empowers a local authority to require certain people associated with land or premises to provide information relating to the land or premises, in order to enable or assist the local authority to exercise its functions under the Act, including HMO licensing. Refusal or failure to provide the information, without reasonable excuse, is an offence subject to a fine not exceeding level 2 (currently £500).

93. Section 136 of the Housing (Scotland) Bill, which was based on section 186 of the 2006 Act (and is now included in the Private Rented Housing (Scotland) Bill), provides a similar power in relation to landlord registration functions. In Stage 1 evidence for the former Bill some stakeholders expressed concerns that vulnerable tenants who refused to provide information, particularly about their landlords, due to fears of retaliation such as eviction or violence, might be fined. These concerns were reflected in the Local Government and Communities Committee's Stage 1 report, which extended them to the operation of section 186 of the 2006 Act as it affects tenants in HMOs and recommended that protection should be provided for such tenants.

94. Although it is unlikely that a local authority would in such circumstances report a vulnerable tenant for prosecution and that he or she would then be prosecuted and convicted, Ministers appreciate the concerns expressed by stakeholders and the Committee. The Bill therefore provides for protection for tenants by amending section 163(1) of the 2006 Act, so that its requirement for a local authority to have regard to guidance issued by Ministers on the exercise of its functions under Part 5 is extended to include the application of section 186 in relation to HMO licensing. This will include the use of the section to obtain information from tenants in HMOs and guidance could set out how a local authority will be expected to take account of the circumstances of a tenant. The Scottish Ministers will consult local authorities and such other persons as they see fit prior to issuing such guidance.

95. Section 130(3) of the 2006 Act draws, for the purposes of HMO licensing, upon the definition of 'fit and proper' in the 2004 Act. However, the changes to the fit and proper test for landlord registration described above are unlikely to have much impact on the new HMO licensing regime as it will continue to rely on information provided by the police, who are statutory consultees. Many local authorities already take a wide range of issues into account in their application of HMO licensing.

Alternative approaches

96. The Scottish Government considered including all short-term lets apart from holiday lets in HMO licensing. This would, for example, bring houses occupied by people visiting an area for a short time to work or carry out research within the scope of licensing, whether or not they had a main residence elsewhere. However, in order to avoid an anomalous situation regarding properties on long-term lets occupied by people who have a main residence elsewhere, this option would have meant scrapping the main residence qualification altogether, not just for short-term lets. The result would have been that, for example, a house occupied by people on a long-term contract to work in the area, who returned to their main homes at weekends and during holidays, would become a licensable HMO.

97. Another option would have been to add the words 'in the UK' to the term 'only or main residence.' This would have meant that an HMO, whether on a short-term or long-term let, would count as the only or main residence of any occupant whose only or main residence was outside the UK (apart from people on holiday). It would thus have brought HMOs occupied by foreign migrant workers within the scope of licensing, but also those occupied by people from outside the UK who were visiting for short periods for purposes such as short-term study. However, people with a main residence within the UK would have continued not to count for HMO licensing purposes.

98. As explained above, it became clear that either of these changes would have unnecessarily brought a wide range of types of accommodation within the scope of HMO licensing. Other examples of situations that would have been affected include accommodation provided for people attending sporting or artistic events as participants or officials (such as a hotel accommodating an orchestra or a flat rented to a theatre group).

99. The Scottish Government considered making the obtaining of planning permission (where it is required), or formal confirmation that planning permission is not required, a requirement for the granting of an HMO licence, with the onus on all applicants to produce evidence in the form of planning permission or a certificate of lawful use. However, this would have placed an undue stress on local authority planning departments (including local authorities that do not have a problem with HMOs and planning), which would have had to process thousands of applications every year, and caused unnecessary delay and expense to the many HMO owners (evidently the majority) who do not require planning permission. The delays in opening HMOs could have reduced the supply available to people seeking this sort of accommodation, many of whom will have low incomes, with possible consequences for the level of homelessness.

100. The Scottish Government considered the possibility that, instead of increasing the maximum level of fine for HMO offences, local authorities could retain the fines to fund their enforcement work. Fines for criminal offences currently go to the Crown and any proposals to the contrary would require fundamental changes to the process of criminal law. If HMO offences were dealt with by civil penalties rather than fines, then the local authority would retain the money. However, civil penalties are used for issues that are straightforward and rarely contested such as parking tickets, whereas HMO offences are far less straightforward. If a civil penalty were levied for an HMO offence then the landlord would discharge their liability through payment of it and the matter might not be considered as relevant in relation to the fit and proper

person test. Furthermore, if the landlord disputed the penalty then the local authority would still need to seek a criminal law sanction.

101. There are also issues of equity where an authority both enforces penalties and benefits from payments from a landlord. This creates a clear conflict of interest for the local authority. Finally, local authorities already set their HMO fees to fully recover their costs for the HMO licensing regime. The HMO licensing regime is therefore fully funded.

Consultation

102. There was a majority in favour of expanding the definition of a licensable HMO in some way, particularly for removing the main residence qualification. However, a number of respondents expressed concerns about particular types of property being brought into HMO licensing, such as accommodation for participants in cultural and sporting events, and one local authority considered that legislation should address specific problems. As explained above, the Scottish Government recognises the force of these arguments and therefore considers that the best way to expand the scope of HMO licensing would be by the use of an order-making power that can specify the types of property that are presenting problems. This would also reduce the amount of resources required by local authorities to process additional licence applications, a concern expressed by some respondents.

103. Although the majority of respondents felt that there was a problem with licensed HMOs operating without planning permission, a small majority of local authorities (12 out of the 23 responding) considered that there was not. A clear majority, including 21 local authorities, considered that having planning permission, where it is required, should be a requirement for the granting of an HMO licence. Some respondents expressed concerns that such a requirement could restrict the supply of accommodation. The majority of respondents considered that any such requirement should relate to renewals as well as new applications.

104. A clear majority favoured a mandatory requirement. However, for the reasons explained above, and in view of the fact that the problem is not universal, the Bill gives local authorities a discretionary power to refuse to consider an application for an HMO licence if it considers that any requisite planning permission has not been obtained. This will prevent landlords and local authorities from being burdened unnecessarily and will allow local authorities to decide whether and how to use the power.

105. The views of the PRS Strategy Group and some local authorities on the proposed increase of the maximum fine to £50,000 were sought. Opinions were mixed, with some arguing that it was disproportionate and would not improve compliance as long as some local authorities failed to give this issue priority and courts failed to set appropriate fines. Others considered that the higher fine could be a useful deterrent and welcomed this proposal as sending a clear signal to courts and communities that the Scottish Government views these offences as serious ones that cause real harm to individual tenants and communities. The proposed increase is part of a package of measures.

106. Comments on lack of enforcement action mainly applied to landlord registration rather than HMO licensing, with, for example, Glasgow City Council obtaining 60 HMO prosecutions,

with fines imposed of up to £4,000. However, local authorities do consistently report that the fines imposed by courts are not proportionate to the seriousness of these offences and are often below the level of the HMO licence or monthly rentals. The Scottish Government believes that raising the maximum fine will improve compliance.

107. The amendment in relation to guidance on section 186 of the 2006 Act addresses a recommendation of the Local Government and Communities Committee's Stage 1 report on the Housing (Scotland) Bill, which reflects concerns expressed to the Committee by some stakeholders. Before issuing guidance under section 163 of the 2006 Act, the Scottish Ministers must consult local authorities and such other persons as they see fit.

108. There has not been a formal consultation on amending the requirement for provision of a statement of reasons within a local authority's notice of decision. However, this amendment arose from engagement with local authority stakeholders who pinpointed this as an area that would create considerable resource issues for them and entail needless expenditure which would ultimately be borne by landlords. Removing this unnecessary requirement allows local authorities to better focus their resources on rogue landlords while those affected by local authority decisions can still, as at present, request a statement of reasons.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

109. The provisions on HMO licensing are not discriminatory on the basis of gender, race, age, disability, sexual orientation, marital status or religion. The provisions do not raise any human rights issues or issues relating to island communities or sustainable development. All of the provisions relate to local authority powers and have largely been welcomed by local authorities.

PART 3 - OVERCROWDING STATUTORY NOTICES

Policy objectives

110. Overcrowding is a problem in some parts of the private rented sector. The Scottish Government's Review of the Private Rented Sector quoted studies showing that there are particular problems of overcrowding among migrant workers. In some cases there is exploitation by rogue landlords. The landlord focus groups who participated in the Review highlighted that, in other cases, the overcrowding is not due to the landlord, but to the tenants bringing in additional occupants, often to save money.

111. There are a number of problems associated with overcrowding. As well as deleterious effects on the health and wellbeing of the occupants, overcrowding can relate to adverse effects on neighbours and social problems in the wider community. Local authorities have pointed to the damage that overcrowding in the private rented sector can cause in some areas, such as Govanhill.

112. Local authorities have some powers and duties in relation to overcrowded houses and their occupants, including carrying out inspections to identify overcrowded houses and taking

levels of overcrowding into account in the preparation of local housing strategies. The HMO licensing system allows local authorities to address overcrowding by specifying the maximum number of occupants permitted in a licensed HMO. Breach of this or any other licensing condition is a criminal offence. One of the uses of HMO licensing is thus the prevention of overcrowding. However, it can be difficult for a local authority to identify that a dwelling is an HMO if the occupants claim to be members of the same family.

113. Overcrowding in private rented sector accommodation in general terms falls within the provisions of Part VII of the Housing (Scotland) Act 1987, which relate to overcrowding in all housing tenures. Part VII provides the legal definition of overcrowding (sections 135 to 137). A house is regarded as overcrowded if it fails either of two tests – the room standard and the space standard.

114. The room standard (section 136) is contravened when two people of opposite sexes, who are not living as husband and wife, have to sleep in the same room. This does not apply to children under 10. The rooms regarded as sleeping accommodation are defined as being ‘of a type normally used in the locality either as a bedroom or as a living room.’

115. The space standard (section 137) sets limits on the number of people who can occupy a house, relative to both the number and floor area of the rooms available as sleeping accommodation. For this purpose, children aged at least one but less than 10 count as half of a person, while children under the age of one do not count at all. Rooms of less than 50 square feet are not taken into account. The prescribed numbers are set out in tables. For example, four rooms may be occupied by no more than 7.5 persons, but that number could be lower depending on the size of the rooms.

116. However, the enforcement provisions in Part VII were only ever brought into effect in two localities and are now inoperable and archaic. The Review recognised that there are currently very limited means for local authorities to take action to address overcrowding in properties that are not HMOs and stated that the Scottish Government would consider ways of dealing with this. The Bill therefore gives a local authority a power to serve an overcrowding statutory notice in certain circumstances.

Overcrowding Statutory Notice

117. The intention of the overcrowding statutory notice is to enable a local authority to compel the landlord to take steps to reduce the occupancy of the house to the statutory level in a case where overcrowding in a privately rented house is causing harm – which could be affecting occupants, neighbours or other people in the locality. This will allow local authorities to address the worst effects of overcrowding. The power will be discretionary, with no obligation on a local authority to use it in any particular case.

118. A local authority will be able to serve an overcrowding statutory notice where a privately rented house in its area is overcrowded in terms of section 135 of the 1987 Act and the local authority considers that the overcrowding is contributing or connected to (or likely to contribute or be connected to) an adverse effect on the health or wellbeing of any person or on the amenity of the house or its locality.

119. The notice will be served on the landlord, setting out the steps to be taken to reduce occupancy and specifying the period within which this action must be taken. The ability of the local authority to specify a time period within which the statutory occupancy level is to be achieved would enable re-housing issues to be handled sensitively (for example, allowing occupants to obtain new tenancies). The notice will be in force for a period of between one and five years. During that period, after the overcrowding has been ended, the landlord must not cause the house to become overcrowded again and must take reasonable steps to prevent this happening.

120. The notice may not require the landlord to breach any statutory or contractual obligation (for example, where a tenant must be given a period of notice). Failure by a landlord to comply with a notice will be an offence subject to a fine not exceeding level 3 (currently £1,000). This is considered to be a suitable maximum penalty considering the effects that overcrowding may have. Reasonable excuse will be a defence. This could apply, for example, where the overcrowding is caused by the occupants and the landlord lacks legal powers to comply with the notice.

121. The local authority will be able to give such information and advice to the occupants as it considers appropriate. The local authority will have to have regard to guidance issued by Ministers on the use of the power to serve a notice. It is intended that such guidance will provide that local authorities should seek tenants' views before serving a notice and consider the wider implications of taking action, including potential homelessness.

122. Although local authorities have specific powers to deal with overcrowding in HMOs, it would be possible to use overcrowding statutory notices as another way of dealing with difficulties in HMO enforcement, where the HMOs are overcrowded.

123. It is possible that the mandatory tenant information pack (see paragraph 140) will include information on occupancy limits. This means that the landlord and occupants should be aware of how many occupants are permitted in the dwelling, which may lead to fewer cases of overcrowding.

Alternative approaches

124. No effective alternative methods of dealing with the specific issue of reducing the occupancy level of an overcrowded privately rented house have been identified. The option of 'doing nothing' was rejected, because that would mean not addressing the problems caused to occupants of some such houses and other local residents.

Consultation

125. There was relatively strong support among respondents to the consultation for giving a local authority the power to serve an overcrowding notice, although almost a quarter of the majority respondents qualified their support. Most respondents felt that an additional enforcement power is necessary to tackle the significant overcrowding issues in some areas, including the effect it has on the health and wellbeing of occupants and others and the nuisance

caused in the community. Some local authorities stressed the importance of the power being discretionary, so that it can be used only in the most severe cases.

126. Landlord representatives were concerned that a landlord could be penalised where overcrowding had occurred due to actions by the tenant of which the landlord has no knowledge. As mentioned previously, reasonable excuse will be a defence for the landlord where, as in this example, overcrowding is caused by the occupants and the landlord may lack legal powers to comply with the overcrowding notice.

127. A minority expressed concerns about a possible increase in homelessness arising from the use of overcrowding notices. There are particular difficulties when dealing with overcrowding in communities of migrant workers such as language and communication barriers, sensitive community relations and cultural differences. The statutory guidance that will be issued on the use of notices, including taking tenants' views and the effect of action into account, combined with the local authority's power to provide appropriate information and advice to occupants and sensitive setting of the time limit for compliance, will help counter these difficulties and reduce the risk of homelessness. The suggestion made in consultation responses that a comprehensive review of overcrowding is carried out before legislation is introduced was considered but the Scottish Government believes that, given the nature of the problem and the detrimental effect it can have on vulnerable tenants, it should not delay. Stakeholders' suggestions that additional requirements should be placed on local authorities prior to using the power were also considered but rejected as this can be picked up in statutory guidance.

128. There was relatively strong support for making failure by a landlord to comply with an overcrowding notice an offence. Respondents suggested a very wide range of penalties.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

129. The local authority power to deal with problems relating to overcrowding in privately rented houses is not discriminatory on the basis of gender, race, age, disability, sexual orientation, marital status or religion. The Review highlighted that overcrowding can be a particular issue amongst migrant workers, acknowledging that many migrant workers choose, initiate or accept overcrowding in the knowledge that it is temporary and saves them money. The Bill gives Ministers powers to issue guidance to which all local authorities must have regard when considering the issue of an overcrowding statutory notice and can ensure that guidance outlines that issues for certain ethnic groups are handled sensitively. The provisions do not raise any human rights issues or issues relating to island communities or sustainable development. The provisions relate to local authority powers and have been largely welcomed by local authorities although COSLA has highlighted some concern over the application of the overcrowding notice and its potential financial implications in terms of re-housing tenants made homeless as a consequence. However, as highlighted previously, the powers are discretionary and will enable local authorities to work with landlords to reduce overcrowding whilst minimising the impact on homelessness.

PART 4 – MISCELLANEOUS (PRIVATE SECTOR TENANCY REGIME AND RELATED MATTERS)

Policy objectives

130. The Scottish Government's Review of the Private Rented Sector in Scotland constitutes a very extensive study of the sector and includes major surveys of private tenants and landlords. One aspect of the private rented sector that was examined was the tenancy regime. The Review concluded that the regime seems to be operating satisfactorily as regards the short assured tenancy (by far the most common rental contract in the private rented sector). Findings that supported this view included:

- The great majority of tenants have a written tenancy agreement
- The flexibility of the short assured tenancy makes it popular with landlords and tenants
- A minority of tenants would prefer a longer minimum tenancy
- Most tenancies are ended by tenants and many tenants who want to stay beyond the initial six month tenancy are able to do so
- The survey found high levels of satisfaction among tenants as regards landlords, agents, accommodation and its location
- Landlords demonstrated a largely positive view of their experiences.

131. The main problems for tenants were getting repairs done and unfair retention of tenancy deposits (the latter issue is being addressed separately by the Scottish Government). Landlords were worried about rent arrears, gaining access to carry out repairs and the lack of clarity in the procedures allowing them to regain possession of their properties, including difficulties if tenants refuse to leave or may have abandoned the property. The Review recommended that policy development should focus on issues of tenancy sustainment, helping to prevent tenancies breaking down by addressing these problems rather than on the length of the tenancy offered.

132. The Review also found that there is a lack of knowledge of rights and responsibilities among many tenants and landlords. It identified this as a major problem which reduces the benefits of legislative and other improvements in the sector and which could be addressed in primary legislation, as well as in other ways.

133. The measures in the Bill dealt with below are intended by Ministers to address some of these issues. It should be remembered that a short assured tenancy can be for more than six months. Landlords are more likely to offer longer tenancies to those who want them if they are reassured that they can regain possession of their property if necessary. Improving the ability to exercise rights of access could also assist landlords to address problems with repairs. Clarification of processes and more information for tenants will help the sector to operate more effectively. In the longer term, the Private Rented Sector Strategy Group will consider other possible changes to the tenancy regime.

134. There are concerns about a lack of clarity regarding charges made to tenants for setting up a tenancy by agents or landlords. Currently, the law prohibits charges for drawing up a tenancy agreement or placing a name on an accommodation list. Furthermore, under section 82 of the Rent (Scotland) Act 1984 (imported into the Housing (Scotland) Act 1988 in respect of assured tenancies by section 27 of that Act) it is an offence to require any premium as a condition of the grant or continuance of a tenancy. According to section 90, a premium includes any fine or other like sum and ‘any other pecuniary consideration’ in addition to rent.

135. Although it should be clear that this legislation prevents the making of any charge apart from rent and a refundable tenancy deposit (not exceeding two months’ rent), there appears to be considerable confusion. Some agents interpret the law as meaning that it is illegal only for a letting agent to charge a fee specifically to grant the tenancy, whereas others take the view that any fee (other than rent or a refundable tenancy deposit) charged by an agent is illegal. Many agents charge an administration fee to cover overheads, costs of background checks and references, etc. Good practice sets out that other administration charges must reflect actual costs incurred. However, it seems that some agents are charging tenants unjustifiably large administration fees. Other charges may be to cover the cost of carrying out credit checks or obtaining references. Tenants have very little awareness of what is legal or reasonable to pay. Some local authorities consider that rogue agents are exploiting vulnerable tenants, and the Review suggests that persons born outside the UK experience greater problems in accessing housing and are more likely to be charged fees to do so. The confusion about the legal position results in a lack of enforcement.

136. Various stakeholders, including members of the Private Rented Sector Strategy Group, have called for the position to be regularised and clarified. There is a widespread feeling that it is legitimate for agents and landlords to make certain reasonable charges to tenants, although views on what these should be vary. Suggestions have included charges for credit checks and reasonable administrative charges.

137. In order to clarify the situation, and to take account of the possibility that some charges may be reasonable, the Bill gives Ministers power to make provision by regulations about charges connected with the grant, renewal or continuance of a tenancy. Such regulations would set out types of charges that are permitted and could set maximum levels for such charges. Regulations would be made following consultation with stakeholders in the sector. This consultation will allow an informed view to be taken of which charges should be allowed and maximum limits. The change will enable greater clarity and better regulation, by making clear the reasonable charges that agents and landlords could apply. It will make it easier to take action against rogue agents and landlords.

138. Regulations will apply to protected tenancies under the 1984 Act and also assured tenancies (including short assured tenancies) because new section 89A will constitute part of the sequence of sections 86 to 90 of the 1984 Act referred to in section 27 of the 1988 Act.

139. The Review found that there is a low level of tenant awareness of the law governing the private rented sector and of the key initiatives to improve the sector. About 20% of private tenants said that they did not understand their rights. Only about 10% had heard of the Repairing Standard and the PRHP, 30% were aware of landlord registration (but many of these tenants did

not know whether their landlord was registered) and more than a third of tenants in HMOs did not know whether the premises were licensed. Consumer awareness among tenants is a key element of the new regulatory regime and the Repairing Standard provisions, which rely on tenants to pursue their right to have repairs done with the PRHP and to report poor management to their local authority. It is also important that tenants are aware of their own responsibilities. Pre-tenancy arrangements have been identified as a key area in which tenants' knowledge of their rights and responsibilities could be promoted.

140. The Bill places a statutory duty on a landlord to provide specified documents and information (a tenant information pack) to a tenant at the beginning of an assured tenancy. Failure to do so will be an offence with a maximum fine of level 2 (currently £500). Ministers are given a power to prescribe the information and documents to be provided in the pack by order. The documents and information will help to inform tenants of their rights and responsibilities.

141. This requirement might pull together all the mandatory documents, as well as details of legal provisions relating to the sector. It could, for example, include documents containing information about the tenancy (such as a tenancy agreement), about the house (such as the permitted level of occupancy), about the landlord (such as his or her landlord registration number) and about the rights and responsibilities of tenants, landlords and agents (including the Repairing Standard and protection of deposits). An order may make provision about the form of the documents and the information to be included in them. It may provide for documents to be provided separately or at the same time.

142. Before using the order-making power, Ministers will be required to consult representatives of tenants, private landlords and landlords' agents, as well as such other persons as they consider appropriate. This will ensure that leading stakeholders in the sector have a say in the documents and information considered necessary. The Scottish Government may make some of the documents available online.

143. Giving more information to tenants will help them to distinguish responsible landlords from rogue landlords, so that they can seek tenancies from the former and take action against the latter, for example by applying to the PRHP or making complaints to local authorities. The information pack could also increase knowledge of rights and responsibilities among landlords, which the Review found to be lacking among a large minority.

144. The tenant survey shows that a significant proportion of tenants (20%) said they did not understand the legal processes that a landlord would have to go through to end their tenancy. The landlord survey showed that many landlords have concerns about regaining possession of their properties. A particular problem in this connection is that some doubts have been raised about the circumstances in which Notices of Proceedings are required to be issued to tenants with a short assured tenancy.

145. The specific issue is that section 19 of the Housing (Scotland) Act 1988 states that the sheriff will not consider proceedings to gain possession of a house let on an assured tenancy (which includes a house let on a short assured tenancy) unless the landlord has served a Notice of

Proceedings on the tenant. However, section 33 of the Act states that the sheriff will grant possession of a house let on a short assured tenancy if certain conditions are met:

- The short assured tenancy has reached its end (i.e., the end date of the tenancy agreement)
- Tacit relocation is not operating (i.e., the tenancy is not renewing on the same conditions as before because notice of termination has not been given)
- No further contractual tenancy is in existence, and
- The landlord has given the tenant notice that possession is required.

146. Some people consider that the section 19 requirement also applies to section 33 proceedings, despite the apparently clear wording of the latter section. Nonetheless, most legal opinion considers that section 19 only applies to a short assured tenancy when possession is being sought on any of the grounds in schedule 5 to the Act, which does not apply in the case of section 33 proceedings.

147. It is evident that section 33 was deliberately designed to apply only to short assured tenancies that had come to their normal contractual end. Seeking possession in such cases was intended to be – and should be – easier for landlords than when other grounds of possession are involved. Furthermore, the wording of the Notice of Proceedings is explicitly linked to schedule 5 as requiring the form in relation to section 33 proceedings could cause further confusion.

148. The Bill therefore makes the situation absolutely clear by stating that sections 18 and 19 do not apply to proceedings under section 33. It is explicitly stated that this amendment is for the avoidance of doubt, since it does not change the current legal position.

149. Responsible landlords ensure that their properties are kept in good condition, in accordance with the statutory Repairing Standard and contractual obligations. However, landlords often express concern about their inability to gain access to their property in certain circumstances, particularly to carry out repairs or inspections to check whether repairs are necessary. Results from the landlord survey suggest that 7% of landlords (or those working for them, such as an agent or a builder doing repairs) had been refused access to a property by a tenant in the previous two years (affecting approximately 16,000 households).

150. Although landlords usually have a contractual right of access included in leases and they can take legal action to force a tenant to implement the terms of the lease, one of the main issues is the length of time it takes to get a court order to enforce the right of access.

151. The Housing (Scotland) Act 2006 gives a landlord a statutory right of entry to check whether the property meets the requirements of the Repairing Standard and to carry out work to meet these requirements. Again, if the tenant refuses to grant access, the landlord may seek a court order requiring the tenant to permit access, but some landlords advise that this can take months to obtain. Many landlords consider it unfair that a tenant can apply to the Private Rented Housing Panel to enforce the landlord's duty to ensure that the house meets the Repairing Standard and that a Private Rented Housing Committee has the ability to obtain and enforce a

warrant authorising entry to a house to which such an application relates, but that a landlord who is seeking to comply with the Repairing Standard duty, but is unable to obtain access, has no such rights.

152. The 2006 Act gives landlords a defence as to why they have not carried out necessary repairs on the grounds that access was unreasonably denied. However, this does not help in getting repairs done. While repairs go undone, the damage to the property may be worsening. Strengthening a landlord's ability to gain access in relation to the Repairing Standard could help to improve physical standards in the private rented sector, one of the 2006 Act's aims, as well as increasing landlords' confidence in the system.

153. The Bill therefore gives a landlord the right to apply to the PRHP for assistance in exercising the right of entry in relation to the Repairing Standard when they are unable to gain access to the property and gives the PRHP powers to help landlords to gain access. There does not necessarily have to be a dispute with the tenant for an application to be made. It may be, for example, that the tenant is not responding to requests for access.

154. In order to deal with such applications efficiently, economically and relatively informally, consideration of them will not involve a full hearing by a Private Rented Housing Committee. One member of the PRHP will consider an application from a landlord. If the panel member accepts the application, he or she would contact the tenant and landlord and try to arrange a suitable date for access. It is expected that access could be arranged at this point in most cases, but the tenant would have the opportunity to make representations as to why the right of access should not be exercised. The panel member would then make appropriate enquiries of both parties, before deciding whether to continue assisting the landlord.

155. If the tenant fails, without reasonable excuse, to respond to the panel member or to agree a suitable date or time for entry, the member may fix these. When access is arranged, the panel member (or a person authorised by him or her) may, at the request of the landlord or tenant, accompany the landlord to the property to ensure that the necessary work or inspection is carried out. If the tenant still refused access or did not respond, the panel member would be able to obtain a warrant to enforce entry. The panel member may stop assisting the landlord at any time if this is considered appropriate in the circumstances.

156. Ministers will have power to make regulations about the making or deciding of applications. These could, for example, require that an application includes evidence that access has not been granted despite requests to the tenant. Ministers will also have power to make regulations dealing with the action to be taken by a panel member.

157. Given the present economic situation, Ministers may consider it appropriate that landlords, who will be saved the time and cost involved in court action, should pay a fee for access to the PRHP. Ministers are given a power to prescribe a fee to accompany an application. It is likely that any such fee would be set at the average additional cost to the PRHP of dealing with applications from landlords.

158. This change to the law will encourage and assist good landlords to maintain and repair the houses they let out.

Alternative approaches

159. The Scottish Government considered giving local authorities a power to activate section 144 of the Housing (Scotland) Act 1987 in specified localities, and included this in the consultation. This would have required a private landlord in such a locality to give a tenant a statement of the statutorily permitted occupancy level of the house, obtain a written acknowledgement from the tenant and produce the acknowledgement to the local authority on request. This would ensure that the landlord and tenant knew the maximum number of people allowed to live in the house, but would not allow overcrowding to be addressed directly. It would also have placed an administrative burden on local authorities. The Scottish Government therefore decided that, since the Bill includes provision to require a landlord to provide a tenant with prescribed documents, it was unnecessary to proceed with the proposal on section 144 since a statement of occupancy could be included, if appropriate, among the prescribed documents.

160. The Scottish Government considered the possibility of merging the forms and other documents issued to a tenant at the beginning of a short assured tenancy as a method of simplifying the process of entering into a tenancy. Questions on this were included in the consultation. However, there are limits to the extent to which it would be legally possible or practicable to merge forms and documents, and Ministers consider that the introduction of the prescribed documents and information for new tenants, which could include these forms and documents, makes it unnecessary to merge any forms. However, this issue could be revisited in the future, after it has been seen how the prescribed information requirement works in practice.

Consultation

161. There was very strong support for making it clear that all pre-tenancy charges by agents and landlords are illegal apart from reasonable charges, which would be specified in secondary legislation. Some respondents gave examples of excessive charges that have been made to tenants.

162. There was a wide range of suggestions on how the making of illegal pre-tenancy charges should be dealt with, including the use of fixed penalty notices and inclusion in the fit and proper person test for landlord registration (which, in fact, already includes breaches of housing law and landlord and tenant law). Seven respondents suggested that the offence should be reported to the Procurator Fiscal for prosecution and nine suggested that a repayment should be made to the tenant. Ministers decided that the present penalty for requiring or receiving an illegal premium – a fine not exceeding level 3, with the court having the option of ordering the repayment of the premium to the person by whom it was paid – should be retained.

163. 85% of respondents supported the introduction of pre-tenancy information packs, which are to be supplied to tenants by landlords and agents. There was a general consensus that the Scottish Government should take the lead in developing the pack, in conjunction with other stakeholders. There was also a general feeling that there should be some standard content available online.

164. Making it an offence to fail to comply with the requirement to issue the pack was supported by 63% of respondents. A wide range of penalties was proposed.

165. The consultation asked whether it should be made clear in legislation that a Notice of Proceedings is required to be issued to a tenant in a short assured tenancy. A large majority said yes to this. However, the question may have caused some confusion, since a Notice of Proceedings is already required to be issued to a tenant in a short assured tenancy when possession is being sought on any of the grounds in schedule 5 to the 1988 Act. The point at issue related to possession being sought under section 33 of the Act.

166. The basis for the support for change was a widespread feeling among respondents that there is a lack of clarity over the situation. The consultation did not give the option of disapplying sections 18 and 19 in relation to section 33 but, having considered the minority view in the consultation (which actually represents the majority of legal opinion) Ministers consider that taking this course would clarify the matter, while not altering the current legal position.

167. There was strong support for giving a landlord a right to apply to the PRHP when in dispute with a tenant about gaining access to the property in relation to the Repairing Standard, with the PRHP having powers to enforce access. A number of respondents said that landlords should be required to take steps to try to get access before applying to the PRHP. The power to make regulations will be able to cover this. Some who opposed the proposals considered that an alternative to the courts is unnecessary, but the experience of landlords suggests that a quicker route is required.

168. Among those who replied on the issue, there was majority support for the PRHP to be able to enforce the right of entry by means of a warrant. There was broad support for the tenant being able to request that a member of the PRHP accompany the landlord or a person authorised by the landlord when entering the property. There was fragmentation of opinion on how the additional work for the PRHP should be funded, with the largest group – eight respondents – suggesting that the landlord should pay a fee. Landlord representatives do not support that view on the basis that the intervention is required because the tenant has been uncooperative; however the fee payable is expected to be lower than full court action and the process is likely to be speedier thus preventing further material damage to the property which could be costly in the long run.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

169. The provisions on the private sector tenancy regime and related matters are not discriminatory on the basis of gender, race, age, disability, sexual orientation, marital status or religion. The amendments do not raise any human rights issues. They have no specific implications for island communities or sustainable development. Local authorities and COSLA have welcomed the proposed changes to the system.

*This document relates to the Private Rented Housing (Scotland) Bill (SP Bill 54) as introduced
in the Scottish Parliament on 4 October 2010*

PRIVATE RENTED HOUSING (SCOTLAND) BILL

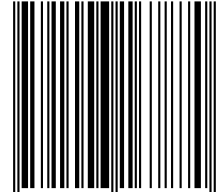
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